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International Law Practicum

A publication of the International Section of the New York State Bar Association

www.nysba.org/ILP

Message from the New Section Chair

Welcome to the *International Law Practicum* and *Chapter News*!

We encourage all of our chapters to provide news of the latest legal developments in your home jurisdictions, whether they are cases, new legislation, programs or practice tips. Please feel free to make your submissions directly to our editor, Torsten Kracht, at tkracht@hunton.com.

In 2018, the Section held its Seasonal Meeting in Montreal, Quebec, Canada. Many thanks to the Conference Co-Chairs, Mark Rosenberg of Sullivan & Cromwell and Stephanie Lapierre of Strikeman Elliott, for an amazing conference with an impressive line-up of speakers (including Sophia the Robot) and a dazzling array of social activities, resulting in an extremely well-attended and financially successful conference. Mark and Stephanie were ably assisted by members of the Steering Committee, including Andre Durocher of Fasken (our new Chair of the Quebec Chapter) and others on the Montreal Steering Committee, as well as Corey Omer of Sullivan & Cromwell, Jay Himes of Labaton Sucharow, Jay Safer of Wollmuth, Maher & Deutsch, Neil Quartaro of Watson Farley & Williams, Diane O'Connell of PriceWaterhouse Coopers, Nancy Thevenin of Thevenin Arbitration & ADR and others on the New York Steering Committee.

Thank you also to everyone who was able to make it to the Montreal Seasonal Meeting and to those who sent delegates. It was a wonderful meeting, as reflected in the wonderful pictures found elsewhere in the *Practicum*.

Below is information about some upcoming events:

- Monday, January 14, 2019—Annual Meeting, including special presentations to Ruby Asturias and the late Lauren Rachlin for their work on behalf of the LAC Ethical Guidelines, which have been endorsed by the entire NYSBA, as well as to Justice Charles Ramos for his lifetime achievements as a Justice of the New York Supreme Court, including the special role he has played in its Commercial Division. Also, the winner of this year's Albert S. Pergram International Law Writing Competition will be announced. There will be two outstanding CLE programs on data privacy and diversity in the profession, as well as a pre-meeting dinner on Sunday, January 13, 2019 for members of the EC. The annual meeting is being ably chaired by Jay Himes, who has assembled a team of outstanding speakers for the CLE programs.
- Wednesday, February 13, 2019—Florida Chapter Event in Miami co-chaired by Constantine Economides, Esperanza Segarra, Thomas Verhoeven, Jay Himes of Labaton Sucharow and Mark Bloom of Greenberg Traurig. The program will feature five law clerks from New York and Miami on a panel called "Try Your Case, Not Your Judge's Patience," offering invaluable practice tips from those in the know. Afterwards, Greenberg Traurig will be hosting a cocktail reception in its Miami office.
- Thursday, March 21, 2019—Inaugural meeting of the newly-formed Texas Chapter in the Houston office of Locke Lord under the able leadership of Texas Chapter Chair David Harrell. David is lining up a fascinating program on the latest NAFTA agreement. Stay tuned for further details.
- Monday and Tuesday, May 5-6, 2019—Regional Meeting in Stockholm, Sweden, being organized by Conference Co-Chairs Carl-Olof Bouveng of Cirio Advokatbyra and Peter Utterström of Stockholm and Gonzalo Zeballos of Baker Hostetler in New York. The meeting will focus on the life cycle of a start-up company and will feature educational programs in one of Stockholm's unique incubators, as well as a gala dinner in the recently renovated and reopened National Museum.

Of course, many more exciting programs are being planned, including our NYCIR Symposium in April, Global Law Week in June and our seasonal meeting in Tokyo next November. Further details will appear in the next edition of the *Practicum*.

Our Rapid Response Committee, under the stewardship of Jonathan Armstrong and David Miranda, has assisted NYSBA President Michael Miller send letters of solidarity and support to members of the Philippines Bar Association and Polish Bar Association after crackdowns and threats to the rule of law in each of those countries.

As noted last year, we have separated the *Practicum* from the *Chapter News;* and we are now experimenting with their dissemination electronically every few months. Our editor, Torsten Kracht, seeks submissions of interest to our members and continues to seek additional volun-

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Message from the Editor

By Torsten Kracht

Dear Friends and Readers:

Welcome to Vol. 31, No. 2 of the *International Law Practicum* and thank you for all of the support and feedback we received for the last edition that focused on blockchain technology and cryptocurrency regulation in various jurisdictions. Keeping with our strategy of dedicating each issue of our publication to a particular theme of interest to our New York and international readership, this edition focuses on the enforceability of foreign judgments in jurisdictions around the world. We hope you enjoy it! Also, please see the great photos of the Section's recent Montreal meeting beginning at page 87.

Our next edition, scheduled to be released during the summer of 2019 will focus on how New York and other jurisdictions around the world regulate the protection of trade secrets. Please contact me at your earliest convenience at tkracht@huntonak.com if you are interested in submitting an article on this topic.

Many hours of hard work have gone into producing this exciting new issue. In addition to our contributing authors, I would like to thank Simone Smith and Kate Mostaccio at NYSBA for their tireless efforts to bring this edition to print, and our Executive Editors Andria Adigwe and Gabe Bluestone for soliciting articles and assembling and leading our team of talented student editors, including Allison Gabrielli of Albany Law School, Fayyaz Ahmed of Albany Law School, Jennifer Wlodarczyk of Albany Law School, Rhiannon Snide of Albany Law School, and Vincent Rotondo of New York Law School.

I hope this issue provokes further thought and discussion. Feedback and suggestions about this edition or the *Practicum* in general are highly encourage and I hope that together, as a community, we can continue to develop our publication as a practical forum for the exchange of useful information for our members.

Best,
Torsten M. Kracht
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Message from the Chair

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teers to help review and edit submissions for both the *Practicum* and *Chapter News*. If you are interested, please don't hesitate to contact Torsten. Many thanks to Dunniela Kaufman, Beatriz Marque, Peggy McGuinness and Jennifer Ismat for their continuing assistance with *Chapter News*, NYILR and the *Practicum*.

To close, we encourage you to make the most of your membership by participating in Section events, activities and meetings, which aim to help you keep abreast of the latest developments in your field as well as provide invaluable opportunities to network, develop and grow your business. Feel free to contact our Section Liaison and Meetings Coordinator, Tiffany Bardwell at tbardwell@nysba.org or me at william.schrag@thompsonhine.com if you have any questions about the Section.

As always, thank you for your membership in our wonderful Section. We look forward to seeing you at our upcoming events!

With best regards,
William H. Schrag
Chair, NYSBA International Section

PRACTICUM: FORM AND POLICY

The *International Law Practicum* is a semi-annual publication of the International Section of the New York State Bar Association. The *Practicum* welcomes the submission of articles prepared by practicing attorneys. The length of an article, as a general rule, should not exceed 10,000 words, footnotes included. Shorter pieces, notes, reports on current or regional developments, and bibliographies are also welcomed. All manuscripts must be sent via e-mail in Microsoft Word or WordPerfect format to ILPArticles@nysba.org. Both text and endnotes must be double-spaced. Endnotes must appear at the end of the manuscript and should conform to *A Uniform System of Citation* (the Harvard Bluebook). Authors are responsible for the correctness of all citations and quotations. Manuscripts that have been accepted or published elsewhere will not be considered. The *Practicum* is primarily interested in practical issues facing lawyers engaged in international practice in New York. Topics such as international trade, licensing, direct investment, finance, taxation, and litigation and dispute resolution are preferred. Public international topics will be considered to the extent that they involve private international transactions or are of general interest to our readership.

Manuscripts are submitted at the sender's risk, and the New York State Bar Association, International Section, assumes no responsibility for the return of material. Material accepted for publication becomes the property of the New York State Bar Association, International Section. No compensation is paid for any manuscript. The *Practicum* reserves the right (for space, budgetary, or other reasons) to move an accepted manuscript from an earlier issue to a later issue. Articles, reports and other materials reflect the views of the authors or committees that prepared them and do not necessarily represent the position of the New York State Bar Association, International Section, or the Editorial Board of the *Practicum*.

Deadlines

Manuscripts intended for publication in the semi-annual issues must be received by the Editor-in-Chief by the preceding 1 December and 1 June, respectively.

Reprints

Each author will receive three complimentary copies of the *Practicum* issue in which the author's material is published. Additional copies may be ordered at cost before an issue goes to press by communicating with at the Newsletter Dept., New York State Bar Association, One Elk Street, Albany, N.Y. 12207-1096 (telephone (518) 487-5671 or 487-5672) or via e-mail at newsletters@nysba.org.

Past Issues and Advertising

Requests for back issues, advertising and subscription information and general correspondence should be sent to the Newsletter Dept., New York State Bar Association, One Elk Street, Albany, N.Y. 12207-1096 or via e-mail at newsletters@nysba.org.

Back issues (2000 to present) of the *International Law Practicum* are available, in pdf format, online to Section members on the New York State Bar Association's Web site at www.nysba.org/IntlPracticum. A searchable index is also available.

Practicum

Common Law Enforcement of Foreign Judgments in England and Wales

By Emma Ruane

I. Introduction

Emma Ruane

In 2016, Transparency International reported that some 44,022 London land titles are owned by overseas companies;[1] and in July this year it was reported that there had been a 46 percent increase in the number of people prepared to invest at least £2 million to live and work in the U.K. pursuant to an investor visa.[2] With regular inflows of foreign assets, capital and nationals, it is therefore no surprise that the courts of England and Wales are familiar with actions to enforce overseas judgments.

The choice of mechanism by which a foreign judgment can be enforced in England and Wales is limited according to: (1) the jurisdiction of origin; (2) the subject matter of the proceedings; and the (3) date that judgment was issued. Statutory routes of registration may be used for judgments originating in other parts of the United Kingdom[3] and the Commonwealth,[4] whereas simplified mechanisms of recognition and enforcement (at least currently) exist for judgments emanating from European states,[5] Singapore and Mexico.[6] This article provides a whistlestop tour of the requirements for and process by which judgments from countries falling outside of those regimes, including the U.S., Russia and China, may be recognised and enforced under common law rules.

II. Requirements

The general common law rule is that *in personam* foreign judgments, given by the court of a foreign country with jurisdiction to give that judgment, may be enforceable by the courts of England and Wales provided they are judgments for a debt or definite sum of money, and they are final and conclusive on the merits and cannot be impeached for fact or law. Grounds of potential impeachment include fraud, when recognition or enforcement would be contrary to public policy, or when the proceedings in which the judgment was given were opposed to natural justice. The requirements for recognition and enforcement are discussed in brief below, by reference to recent case law.

Emma Ruane is of Counsel at Peters & Peters Solicitors LLP. Emma specialises in civil fraud litigation, in particular obtaining and defending worldwide freezing injunctions. She also has experience litigating private damages actions in competition cases.

A. *In Personam*

The difference between *in personam* and *in rem* judgments is that the former is conclusive only between the parties and their representatives, whereas the latter determines the status of property on a basis which is valid against the whole world. Even if an order is expressed to be *in rem*, this is not necessarily dispositive. For instance, an order of a Canadian court expressly stated that it was to be considered as a judgment *in rem* in relation to certain shares, the proceeds of sale of which were claimed by the Serious Fraud Office to be the criminal property.[7] The English court considered the circumstances in which the terms of the order were arrived at, including that no evidence had been presented upon which any such finding could have been made. In the circumstances, the English court found that the Canadian court could not have intended the order to have the effect contended for, and the ownership of the shares (as well as the proceeds of their sale) could be challenged.

B. Jurisdiction

In order for the foreign judgment to be recognized, it must have been delivered by a court having jurisdiction according to English private international law. Hence the defendant must either have (i) been present in the foreign jurisdiction when proceedings were commenced; (ii) brought a claim or counterclaim in those proceedings; (iii) previously agreed to submit to the jurisdiction, or (iv) voluntarily have submitted himself to the overseas court's jurisdiction. A person will not be taken to have submitted to the jurisdiction of the foreign court simply because they appeared before it to seek a stay or dismissal of the proceedings on the basis that it should be determined in another country or by arbitration. However, if pre-trial

steps are taken without the position on jurisdiction having been expressly reserved, any judgment delivered thereafter is likely to bind the defendant. For example, certain underwriters obtained judgment against the state of Syria in the U.S.[8] After entry of the judgment, a Notice of Appeal was filed by attorneys acting for Syria. The Notice of Appeal objected to the judgment on the basis of the allocation of the judge within the federal judicial system. However, no objection was raised on the grounds of sovereign immunity and there was no reservation of rights in this regard (in contrast to other cases in which the same attorneys had appeared). As a result, the judgment was deemed to be enforceable against Syria.

C. Definite Sum of Money

Although the English court recognized an award of damages which represents a loss beyond mere interest on capital by, a penalty will not. Whether all or part of an award represented by an unusually high rate of interest is enforceable, enforceability will ultimately be decided upon whether the approach of the foreign court runs contrary to domestic public policy. The English court recently considered this to be the case in respect of just over 20 percent of the awards made by the Russian courts, which was not representative of the actual loss and over and above the interest rate in the loan agreements.[9] This part of the award was therefore severed from the judgment. The remainder of the award was, however, found to be enforceable.

D. Final and Conclusive and on the Merits

In New York, the Civil Practice Law and Rules provide a mechanism by which judgment without an action may be entered by way of an affidavit of confession. The affidavit must state the sum for which judgment may be entered, the facts out of which the debt arose and that the sum confessed is justly due. A form of "judgment by confession" was known to English law, but the procedure was repealed some time ago. In *Midtown Acquisitions LP v. Essar Global Fund* [2017] (Comm) EWHC 519 the enforcement of a judgment by confession was challenged on the basis that, amongst other things, it was not on the merits. It was submitted to the Court that this was because, in order for there to be a judgment on the merits, there had to be a decision which established certain facts, stated the relevant principles of law and expressed a conclusion with regard to the effect of applying those principles to the facts as proved. The English court had real difficulty with this proposition, and ultimately found against it because the judgment by confession had been entered on the basis of the best possible evidence of liability, namely that the defendant had confessed to the same.

The defendant in *Midtown* lodged a motion to vacate, which was shortly to be heard, and so the defendant also challenged enforcement of the judgment by confession in England and Wales on the ground that it was not final and conclusive. The court held that the judgment was final and conclusive for the purposes of enforcement in circumstances where (i) the New York rules of court provided that a judgment by confession was enforceable to the same extent as a judgment in action; (ii) it was common ground that the New York judgment was enforceable; and (iii) there was no challenge to the proposition that the judgment continued to be final and conclusive in New York notwithstanding the motion to vacate. However, with an eye on practicality, the English court stayed the execution until the motion to vacate had been dealt with.

E. Public Policy, Fraud and Natural Justice

Impeachment of a foreign judgment on the public policy ground is not easy to separate from the grounds that the judgment should be impeached because of fraud or due to the demands of natural justice. However, the principle of comity means that the English court will approach all of these grounds with caution and cogent evidence will be required if a foreign judgment is said to be affected in this way.[10]

As to natural justice, a defendant must be given the opportunity to put their case, but what is required is a substantial denial of justice. A mere procedural defect will not be sufficient. In addition, the English court expects a defendant to use the options made available to him or her by the foreign court and, if he or she has not done so, he or she cannot then seek to impeach the foreign judgment. This does, however, mean that the defendant must be given notice of the hearing, but this does not have to be actual notice. In *OJSC Bank of Moscow v. Chernyakov and others* [2016] EWHC 2583, the defendant was described in guarantees as being resident at an address in Moscow. The guarantee contained a clause to the effect that the defendant was obliged to provide notification if he changed his address. The fact that the defendant did not provide such notification was one reason the English court used to dismiss his allegation that he had not been properly served with the proceedings in accordance with Russian law.

In *Midtown*, the defendant argued that it had only agreed to the entry of a judgment by confession in the event that it defaulted in making payments set out in a settlement agreement. It had not defaulted. Consequently, the defendant argued that the claimant had falsely represented to the New York court that entry of the judgment was appropriate and therefore the judgment should not be recognised as it was impeachable for fraud. The English court found that, in seeking to impeach an English judgment, conscious and deliberate dishonesty was required. As a result, nothing less would suffice when seeking to impeach a foreign judgment. There was no suggestion that, if the claimant had misrepresented the position to the New York court, this had been anything other than innocent and so the judgment could not be

impeached on this basis. The English court also noted that it would be a "bold step"[11] to conclude that the procedure for entry of judgments by confession was contrary to natural justice, particularly in circumstances where judgment had been obtained pursuant to a long-standing procedure in a sophisticated jurisdiction such as New York.

III. Procedure

Foreign judgments falling to be dealt with under the common law rules are not by themselves enforceable in England and Wales and are treated as a contractual debt between the parties. The creditor must therefore bring a separate action to have the judgment recognised. This will require issuing a claim form and, most likely, seeking the permission of the court to serve the proceedings out of the jurisdiction.

In respect of service in the U.S., Russia and China, the Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters ("Hague Convention") will apply. If postal service under the Hague Convention is not viable (either because the relevant state has objected to the same or because the law of the forum does not permit it), this may take some time. In response to a 2013 questionnaire disseminated by the Hague Conference on Private International Law, the U.K. reported that the average length of time to receive any confirmation of service was around four months. In respect of Russia, it took up to a year to receive confirmation and that was usually of non-service. However, mere delay or expense in serving in accordance with the Hague Convention, without more, are not sufficient reasons for the English court to make an order permitting service by an alternative method.[12]

This is not to say that delay cannot become a sufficient reason to justify service by an alternative method. For instance, the passage of time may cause some other form of litigation prejudice or be of such exceptional length as to be incompatible with the due administration of justice.[13] In addition, service by alternative means may be justified by facts specific to the defendant, such as where there are grounds to believe that he has or will seek to evade service, or where urgent relief is required.[14] In such circumstances, the court will proactively consider different forms of alternative service where these can be justified, including by e-mail, Facebook, WhatsApp messenger and by access to a data room.[15]

Once service has been effected, if the defendant does not acknowledge the claim, or does not file a defence, the claimant can apply for default judgment. If the claim is defended, the claimant may apply for summary judgment on the basis that the defendant has no real prospect of successfully defending the claim and there is no other compelling reason why the case should not be disposed of at trial.[16] A defendant must have a realistic, as opposed to a fanciful, prospect of success[17] and this must be more than just arguable.[18] The English court will steer clear of conducting a mini-trial,[19] but this does not mean that the Court will take everything a party says at face value and without analysis.[20] Where the enforcement of a foreign judgment is disputed, it is common for the parties to seek to adduce expert evidence on foreign law. For example, in *Midtown*, an expert on New York practice and procedure gave evidence on the effect of judgments by confession and applications to vacate. Additionally, in *Chernyakov*, Russian lawyers gave evidence on the interpretation of rules governing service in that jurisdiction.

IV. Enforcement

Before starting enforcement procedures, a judgment creditor may want to gather further information on the location of the judgment debtor's assets. A useful means of gaining such information is to seek an order requiring the judgment debtor or officer of the judgment debtor to attend the English Court for questioning on any matter about which the information that's required to enforce the judgment.[21] Most commonly, questions will relate to the location of assets which can be seized, including those based overseas.[22] The jurisdiction to make this order extends to individuals who are within the country at the time the application and order is made.[23] Consequently, an order may be effective even if the respondent to the application is within the jurisdiction only fleetingly. The benefit of gaining such an order is that it bears a penal notice and, therefore, if the respondent fails to attend for-questioning, proceedings alleging contempt of court may be initiated. The English court has held that if it had jurisdiction over the respondent at the time it executed an order to question him, and the respondent left the country, jurisdiction does not need to be established again.[24]

Once the investigation as to the judgment debtor's assets is complete, outside of the realm of insolvency, there are a number of enforcement methods available, including: (a) seeking charging orders over the debtor's interest in land (securities or other assets); (b) seeking a third-party debt order requiring sums owed to the debtor be paid to the creditor; and (c) taking control of the debtor's property by means of writs and warrants of control. Another less commonly used method of enforcement is to appoint a receiver by way of equitable execution.[25] The jurisdiction can apply old principles to new situations, which is not usually exercised unless there is some difficulty in using the normal processes of execution.[26] One of the best examples of this is *JSC VTB Bank v. Skurikhin and others* [2015] (Comm) EWHC 2131. Due to a combination of factors, the English court found that the membership interests in a partnership incorporated in England and Wales, held by nominees for a Liechtenstein Foundation, should be considered in equity as the judgment debtor's assets. Consequently, it followed that it was open to the court to appoint a receiver over those interests.

V. Conclusion

The English judicial system is firm in the belief that if foreign judgements are not enforced in its own English jurisdiction, it is less likely that English judgments will not be enforced abroad. As a consequence, challenges to the enforcement of foreign judgments in England and Wales are subject to careful scrutiny; and, even if part of a judgment can be impeached, the court will be loath to permit the remainder of the judgment to be infected. Perhaps the most obvious manifestation of the English court's adherence to principles of comity is its insistence on requiring claimants to serve defendants pursuant to the Hague Convention, where this applies. The English court has shown a willingness to assist claimants in successfully enforcing foreign judgments by both applying old principles to new situations and new technology to developing problems. However, delays in the service of these proceedings have the potential to undermine this process, frustrating both domestic and international judgment creditors.

Endnotes

1. Transparency International UK, *London Property: A top destination for money launderers* (2016), https://www.transparency.org.uk/wp-content/plugins/download-attachments/includes/download.php?id=6037 (last visited Oct. 2, 2018).
2. Rupert Neate, *Sharp rise in number of super-rich prepared to invest £2m for UK visa*, The Guardian (July 15, 2018, 19.01 EDT), https://www.theguardian.com/uk-news/2018/jul/16/sharp-rise-number-super-rich-prepared-invest-two-million-pounds-uk-golden-visa. ~~(last visited October 2, 2018)~~
3. Civil Jurisdiction and Judgments Act 1982.
4. Administration of Justice Act 1920; Foreign Judgments (Reciprocal Enforcement) Act 1933.
5. Council Regulation (EU) 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters; Council Regulation (EC) 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters; Brussels Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters; 2007 Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.
6. Hague Convention of 30 June 2005 on Choice of Court Agreements, June 30, 2005.
7. *Saleh v Director of the Serious Fraud Office* [2017] EWCA (Civ) 18, [2017] WLR(D) 36.
8. *Certain Underwriters at Lloyds London and others v. Syrian Arab Republic and others* [2018] EWHC (Comm) 385.
9. *JSC VTB Bank v Skurikhin and others* [2014] (Comm) EWHC 271. (Comm)
10. *OJSC Bank of Moscow v Chernyakov and others* [2016] EWHC (Comm) 2583.
11. *Midtown Acquisitions LP v Essar Global Fund Ltd*. [2017] EWHC (Comm) 519, [2017] 1 WLR 3083.
12. *Bayat and others v Cecil and others* [2011] EWCA (Civ) 135, [2011] 1 WLR 3086.
13. *Marashen Ltd v Kenvett* [2017] EWHC (Ch) 1706, [2018] 1 WLR 288.
14. *Midtown Acquisitions LP* [2017] EWHC (Comm) 519 at para.61.
15. *CMOC Sales & Marketing Limited v Person Unknown and others* [2018] EWHC (Comm) 2230.
16. The Civil Procedure Rules 1998 (CPR), 24.2.
17. *Swain v Hillman* [1999] EWCA (Civ) 3053, [2001] 1 All ER 91.
18. *ED&F Man Liquid Products v Patel* [2003] EWCA (Civ) 472, [2003] CP Rep 51.
19. *CMOC Sales* [2018] EWHC 2230 at para.95.
20. *Bayat and others v Cecil and others* [2011] EWCA (Civ) 135, [para. 10], [2011] 1 WLR 3086.
21. The Civil Procedure Rules 1998, CPR 71.2.
22. *Interpool Ltd v Galani* [1988] (QB) 738, [1987] 3 WLR 1042.
23. *CIMC Raffles Offshore (Singapore) PTE Ltd and another v Yantai CIMC Raffles Offshore Ltd* [2014] EWHC. (Comm) 1742, [para. at 22].
24. *Deutsche Bank AG v Sebastian Holdings Inc and another* [2017] EWHC (Comm) 459, [2017] 1 WLR 3056.
25. Senior Courts Act 1981 s.37; The Civil Procedure Rules 1998, CPR 69.
26. *Cruz City 1 Mauritius Holdings v Unitech Ltd* [2014] EWHC (Comm) 3131, [2015] 1 All ER 336.

An End to the Free Movement of Judgments?

The Recognition and Enforcement of Judgments From EU Member States in England and Wales Before and After Brexit

By Thomas Corby

Introduction

One of the stated objectives of the European Union (EU) is "*maintaining and developing an area of freedom, security and justice.*"[1] This is a necessary part of its much famed internal market. In the field of civil jurisdiction, this has meant unifying the conflict of law rules of Member States[2] and simplifying the formalities for the cross-border recognition and enforcement of judgments given by their courts. As the Council of the EU declared, "*Certain differences between national rules governing jurisdiction and recognition of judgments hamper the sound operation of the internal market*."[3] This was, for the EU, a problem. The solution was 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 Brussels I Regulation").[4] As far as the recognition and enforcement of judgments was concerned, the basic principle of the Brussels I Regulation was simple: "*judgments given in a Member State…should be recognised and enforced in another Member State*."[5] This is what was termed, for short, the "*free movement of judgments*."[6]

The Brussels I Regulation has now been replaced by Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and enforcement of judgments in civil and commercial matters (recast) ("the Recast Regulation"). The Recast Regulation is currently in force and applies to legal proceedings (and judgments issued therefrom) instituted after January 10, 2015 (Article 66). Its purpose was to go even "*further to facilitate the free circulation of judgments*"[7] within the EU. This article will examine the ways in which the Recast Regulation seeks to achieve that purpose and, in doing so, discuss the manner in which judgments from the courts of other EU member states are now enforced in England and Wales (as part of the United Kingdom). It will then consider how, if at all, foreign judgements between EU states may change when the United Kingdom leaves the EU on 29 March 2019.

The Recast Regulation

(1) Scope

The Recast Regulation is limited to civil and commercial matters but its scope is nevertheless wide (Article 1). Unlike the position at common law, and under statutes such as the Foreign Judgments (Reciprocal Enforcement) Act 1933, the Recast Regulation (like the Brussels I Regulation before it) is not limited to money judgments or final judgments. For the purposes of what constitutes a "judgment" under the Recast Regulation, the net is cast much wider. As Article (2) provides, "'*judgment' includes any judgment given by a court or tribunal of a Member State*." It even extends to "*provisional, including protective, measures ordered by a court or tribunal*" provided that the court or tribunal otherwise has jurisdiction over the substance of the matter (Article 2(a)) under the Recast Regulation.[8] However, arbitration, and judgments ancillary thereto (for example, judgments arising from proceedings relating to the establishment of an arbitral tribunal or the enforcement of an award, as well as decisions on the validity of an arbitration agreement) are outside the scope of the Recast Regulation.[9]

(2) Recognition

In terms of recognition, the starting point under the Recast Regulation (as it was under the Brussels I Regulation) is that a "*judgment given in a Member State shall be recognised in the other Member States without any special procedure being required*" (Article 36(1)). This requirement was intended to abolish special procedures for recognition that existed in some countries, such as Italy.[10] Accordingly, a party who wishes to invoke in one Member State (for example, the United Kingdom) a judgment given in another Member State (for example, France) need only produce a copy of the judgment satisfying conditions necessary to establish its authenticity and a "*Certificate Concerning a Judgment in Civil and Commercial Matters*" (in the form set out in Annex I to the Recast Regulation) from the court of origin (Articles 37 and 53).

(3) Enforcement

In terms of enforcement, whereas the Brussels I Regulation required a party seeking to enforce a judgement in a member state first to register that judgment in the courts of the place of enforcement,[11] this requirement was abolished in the Recast Regulation. Instead, the Recast Regulation provides that a judgment given "*in a Member State which is enforceable in that Member State shall be enforceable in the other Member States without any declaration of enforceability being required*" (Article 39). In other words, the Recast Regulation now provides "*for direct enforcement of judgments of member states without the need for registration*."[12]

As for the manner and powers of enforcement, these are matters for the laws of the Member State in which enforcement is sought. The overriding principle is, however, that judgements from another Member State should be treated in the same manner as judgments from the Mem-

ber State in which enforcement is sought. As the Recast Regulation emphasises, a "*judgment given in a Member State which is enforceable in the Member State addressed shall be enforced there under the same conditions as a judgment given in the Member State addressed.*"[13] An enforceable judgment will also carry with it "*by operation of law the power to proceed to any protective measures which exist under the law of the Member State.*"[14]

As far as England and Wales are concerned, the provisions of the Recast Regulation are given effect by the Civil Jurisdiction and Judgments (Amendment) Regulations 2014/2947 as amended by Schedule 2, providing:

> *A judgment to be enforced under the* [Recast] *Regulation shall for the purposes of its enforcement be of the same force and effect, the enforcing court shall have in relation to is enforcement the same powers, and proceedings for or with respect to its enforcement may be taken, as if the judgment had been originally given by the enforcing court*.

Furthermore, if a judgment contains measures or an order which is not known in the law of the Member State where enforcement is sought, that measure or order "*shall, to the extent possible, be adapted to a measure or an order known in the law of that Member State which has equivalent effects attached to it and which pursues similar aims and interests.*"[15] Such an order is known as an "*adaptation order*" and may be made by the courts of England and Wales of their own initiative or on the application of a party. However, where granted, such an order "*may only result in a remedy whose legal effects are equivalent to those contained in the judgment and which does not produce such effects extending beyond those provided for under the law of England and Wales*."[16]

In terms of procedure for enforcement, this is similar to the procedure for recognition. A party wishing to enforce in a Member State a judgment given in another Member State shall provide the "*competent enforcement authority*" (in the case of England and Wales, the High Court of Justice[17]) with a copy of the judgment which satisfies conditions necessary to establish its authenticity and a certificate from the court of origin "*certifying that the judgment is enforceable and containing an extract of the judgment*" (i.e., the certificate in the form set out in Annex I to the Recast Regulation also required where a party is invoking (rather than enforcing) a judgment).[18]

(4) Refusal of recognition and enforcement

Recognition and enforcement of a judgment in one Member State of a judgment given in another member state, although simplified by the Recast Regulation, is not, however, guaranteed. Recognition or enforcement may be refused on the following grounds (Articles 45 and 46):

a) if such recognition is manifestly contrary to public policy (*ordre public*) in the Member State addressed;

b) where the judgment was given in default of appearance, if the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so;

c) if the judgment is irreconcilable with a judgment given between the same parties in the Member State addressed;

d) if the judgment is irreconcilable with an earlier judgment given in another Member State or in a third State involving the same cause of action between the same parties, provided that the earlier judgment fulfils the conditions necessary for its recognition in the Member State addressed; or

e) if the judgment conflicts with: (1) Sections 3, 4 or 5 of Chapter II of the Recast Regulation (which contain special rules on jurisdiction in matters relating to insurance, consumer contracts and contracts of employment); or (2) section 6 of Chapter II (which contains provisions governing when courts of one Member State has exclusive jurisdiction, for example, over rights *in rem* to immovable property or the validity of entries in public registers).

The onus is on the party against whom recognition or enforcement is sought to make an application for refusal to the court of the Member State concerned.[19] Recognition or enforcement will be refused where "*one of the grounds…is found to exist.*"[20] In England and Wales, the application should be made to the court in which the judgment is being enforced or, if the judgment debtor is not aware of any such enforcement proceedings, the High Court.[21] The standard procedure for applications to the High Court (Civil Procedure Rules, Part 23) is to be used.[22] An appeal against a decision granting or refusing an application for refusal of recognition or enforcement can be brought without the usual requirement for permission.[23]

As set out above, the grounds for resisting recognition and enforcement of a judgement otherwise enforceable under the Recast Regulation are limited. The public policy exception, for example, is "*to operate only in exceptional circumstances, a fact which is reinforced by the incorporation of the word "manifestly"*" into Article 45.[24] This is not surprising. As the European Commission noted prior to the Recast Regulation, one of its ambitions was "*to further develop the European area of justice by removing the remaining obstacles to the free movement of judicial decisions in line with the principle of mutual recognition.*"[25] The limited and

narrowly defined grounds on which a party can resist recognition and enforcement are a key component in achieving that ambition.

Furthermore, the freedom of a court to consider such an application is further restricted by the fact that it will "*be bound by the findings of fact on which the court of origin based its jurisdiction*."[26] It is not permitted to review the jurisdiction of the court of origin (and neither is it permitted to apply the test of public policy to the rules by which that court has asserted jurisdiction).[27] Finally, if it had been in any doubt, the Recast Regulation also made it clear that "*Under no circumstances may a judgment given in a Member State be reviewed as to is substance in the Member State addressed.*"[28]

The Position After Brexit

As set out above, the Recast Regulation (like the Brussels I Regulation before it) went a long way toward facilitating the free movement of judgments around the EU. In short, it has created a regime where – save for a few exceptions – judgments in Member States are to be put on an equal footing when it comes to enforcement. Put another way – the Recast Regulation aspires to a system where courts will show the same standards enforcing judgments from other Member States as they would their own. The foundation of such a system is, and can only be, reciprocity. It would make no sense for any country to apply its rules unilaterally. This presents a particular dilemma for the United Kingdom as Brexit approaches.

(1) A new bi-lateral agreement

After Brexit, the main difficulty with predicting the rules that will apply to the recognition and enforcement of judgments from Member States in the United Kingdom (and vice versa) is that it will all depend on the outcome of the Brexit negotiations. In this regard, the government's intentions were set out in a White Paper published in July 2018 entitled *The Future Relationship Between the United Kingdom and the European Union*. The White Paper emphasised the benefits that have come from "*the long history of cooperation*" in recognition, and enforcement matters to date and the "*mutual trust in each other's legal systems*"[29] that has underpinned that. Accordingly, it set out the government's primary aim to reach "*a new bilateral agreement with the EU on civil judicial cooperation*" covering, *inter alia*, jurisdiction, applicable law, and recognition and enforcement of judgments.[30] If any such agreement can be reached, it seems likely that it would be similar in content to the Recast Regulation (or, at least, that is the aim of the government of the United Kingdom).

(2) The "no deal" options

However, if the government is unable to reach an agreement with the EU on a new bilateral agreement (whether similar in content to the Recast Regulation or not), it has set out its "no deal" plans in a guidance notice published on September 13, 2018.[31] In this scenario, the government would repeal the Recast Regulation and a number of other pieces of EU law requiring reciprocity. In its place, the United Kingdom "*would instead revert to the existing domestic common law and statutory rules, which currently apply in cross border cases concerning the rest of the world, to govern our relationship with the remaining EU countries*."[32] This would end the free movement of EU judgments at least as far as England and Wales (and the other parts of the United Kingdom) were concerned.

In addition, the United Kingdom would also take the necessary steps to re-join the 2005 Hague Convention on Choice of Court Agreements ("the Hague Convention") in its own right (the United Kingdom currently participates in this convention as a result of its EU membership. As far as recognition and enforcement are concerned, the basic rule of the Hague Convention is that "*Any judgment rendered by the chosen court must be recognised and enforced in other Contracting States, except where a ground for refusal applies*."[33] However, the contracting states are limited (at present only the EU, Singapore, Mexico, and Montenegro have acceded to it) and, in any event, the Hague Convention only applies to exclusive choice of court agreements in civil or commercial matters.[34] Accordingly, acceding to the Hague Convention in the event of a "no deal," Brexit will not be a substitute for the broad and comprehensive regime laid down by the Recast Regulation.

Conclusion

As much as the Recast Regulation has successfully enabled the free movement of judgments throughout the EU, this may be coming to an end as far as the United Kingdom and the courts of its constituent parts are concerned. If no agreement is reached to replicate the Recast Regulation in some other bi-lateral form by 29 March 2019, the precedence that is given to judgments from the courts of EU Member States may be abruptly stopped. Those judgments will no longer be treated as if they had been made by the courts of England and Wales; instead they will be treated like judgments from any other part of the world.

Endnotes

1. Council Regulation No 44/2001 of Dec. 22, 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, the Brussels I Regulation, art. 76, 2001 O.J. (L 012) (EC) Recital (1).
2. A list of Member States can be found at https://europa.eu/european-union/about-eu/countries/member-countries_en.

3. Council Regulation (EC) No 44/2001 of Dec. 22, 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, *Supra* note 1 at Recital (2).
4. *Id*.
5. *Id* at Recital (10).
6. *Id* at Recital (6).
7. Regulation (EU) No 1215/2012 of Dec. 12, 2012 the European Parliament and of the Council on jurisdiction and enforcement of judgments in civil and commercial matters, (recast), 2012 J.O. (L 351), ("the Recast Regulation"), Recital (1) (EU).
8. However, this will not be so if the protective measures were ordered by a court or tribunal *without* the defendant being summoned to appear, unless the judgment containing the measure is served on the defendant prior to enforcement.
9. The Recast Regulation, Recital (12). The recognition and enforcement of foreign arbitral awards in England and Wales are governed by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York on 10 June 1958.
10. *See* Dicey, Morris and Collins on the Conflict of Laws, 15th Ed. (2017) at 14-241.
11. Council Regulation (EC) No 44/2001 of Dec. 22, 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, *supra* note 1 at. 38.
12. *See* The Civil Procedure Rules, The White Book, Vol. 1 (2018), 74.3A.1.
13. The Recast Regulation, *supra* note 9, Article 41.
14. *Id.* at Article 40.
15. *Id.* at Article 54.
16. Civil Procedure Rules (2014) 74.11, 2014, Vol. 1, The White Book.
17. Civil Procedure Rules (2014) 74A, 2014, Vol. 1, The White Book, ¶6.4.
18. Recast Regulation, *supra* note 9, Article 42; Civil Procedure Rules Rule 74.4A, *supra* note 14.
19. Recast Regulation, *supra* note 9, Article 47
20. *Id.* at Article 46.
21. Civil Procedure Rules, 74.7A*: see The White Book, Vol. 1 (2018)*
22. Civil Procedure Rules (2014) 23, 2014, Vol. 1, The White Book.
23. Recast Regulation, *supra* note 9, Article 49; Civil Procedure Rules (2014) 49, 2014, Vol. 1, The White Book.
24. Dicey, Morris and Collins on the Conflict of Laws, 15th Ed. (2017) at 14-225.
25. Commission Proposal on the Brussels I Regulation, at 4, COM (2010) 748 final (December 14, 2010).
26. Recast Regulation, *supra* note 9, Article 45(2).
27. *Id.* at Article 45(3).
28. *Id.* at Article 52.
29. *The Future Relationship Between the United Kingdom and the European Union*, White Paper, at 148, COM final (July 2018).
30. *Id.* at 128.
31. Commission report on Handling civil legal cases that involved EU countries if there's no Brexit deal, 13 September 2018.
32. For a discussion of the common law rules see [reference to article written by Emma Ruane].
33. The Hague Convention of 30 June 2005 on Choice of Court Agreements, Outline of the Convention, May 2013.
34. *Id.* at Article 1.

Recognition and Enforcement of Foreign Judgments in Ireland

By Peter Bredin

I. Introduction

Peter Bredin

In most cases, recognition and enforcement of a foreign judgment in Ireland is a straightforward exercise, due to Ireland's status as an EU Member State and its common law jurisdiction.[1]

The starting point in recognizing and enforcing a foreign judgment in Ireland is to first look at the jurisdiction in which the judgment has been made and what the position is between Ireland and this jurisdiction. In this regard and broadly speaking, there are three categories of jurisdiction: (i) states within the EU; (ii) states which are party to the Lugano convention; and (iii) states not within the EU or not a party to the Lugano Convention. This article gives a high-level overview of the position with each category.[2]

II. EU Judgments

A. Brussels I Recast Regulation[3]

This regulation came in to force on 10 January 2015. It provides that a judgment in any EU Member State is to be enforceable in any other EU Member State without any declaration of enforceability being required. The regulation applies to legal proceedings and judgments commenced after January 10, 2015.[4] This has significantly reduced the cost to judgment holders as they no longer have to incur the cost of initially making an application to the Irish courts to have the judgment recognized. Judgments in EU Member States are now effectively treated like a judgment made by a court in Ireland and, as a result, there are very limited instances in which recognition of the judgment can be challenged in the Irish courts.

B. European Enforcement Orders

A European Enforcement Order (EEO) is a certification of a judgment made in an EU Member State which allows the judgment to be enforced in any other EU Member State without the need to obtain a declaration of enforceability. The certification of a judgment as an EEO is limited to judgments arising from an uncontested claim for a specific sum of money that has fallen due, or in which the due date is indicated in the judgment. The definition of uncontested claims is quite broad and includes cases where a settlement has been made which has been approved by a court and cases where the defendant has appeared but not objected or contested to the proceedings. Following the direct enforceability of EU Member State judgments pursuant to the Brussels I Recast Regulation, EEOs are not as relevant as they once were, but are used for applicable court proceedings commenced, and also include judgments delivered prior to 10 January 2015. Once an EEO is applicable to the judgment, obtaining an EEO is a rather simple procedure whereby an application is submitted to the jurisdiction that made the judgment (and usually to the court that granted judgment in the first instance) to have the judgment certified as an EEO.

C. European Orders for Payment

Again, the applicability of this regulation is less relevant following the implementation of the Brussels I Recast Regulation and it is not proposed to go into any detail in relation to European Orders for Payment. Instead an application can only be made for such an order where the judgment is made in cases involving cross borders claims or an uncontested fixed amount of money.

III. Judgments from Lugano Convention States

This is a treaty between the EU Member States and certain members of the European Free Trade Association which as of the date of this article are: Iceland, Norway, and Switzerland. The Lugano Convention is broadly similar to the position between EU Member States prior to the implementation of the Brussels I Recast Regulation. In judgments to which the Lugano Convention applies, an application has to be made in Ireland to have the foreign judgment declared enforceable before it can be enforced. This application is made on an *ex parte* basis to the Master of the High Court (i.e., without the party against whom the foreign judgment has been obtained (the "judgment debtor") being put on notice of the application). This avoids the practical difficulties of serving the judgment debtor. Furthermore, once the application papers are in

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order, the application should be straightforward as the judgment debtor should not be in attendance to challenge the application to have the judgment declared enforceable in Ireland.

IV. Judgments Made Elsewhere

Where there is no convention or treaty, common law applies. Therefore, a holder of a foreign judgment has two options in terms of having the foreign judgment recognized in Ireland. Firstly, the judgment holder can issue fresh proceedings seeking judgments in Ireland on foot of the same cause of action which has already been determined in the foreign jurisdiction (i.e., it can re-litigate the same matter in Ireland). However, the taking of this course of action would be very expensive and an Irish court may not be prepared to hear the action if it does not believe it has jurisdiction. Alternatively and generally more preferably, the foreign judgment holder can make an application to have the foreign judgment recognized in Ireland. In order for the judgment to be recognized and deemed enforceable in Ireland, the Irish courts will have to determine, amongst others, that (i) the court in which the judgment is made had competent jurisdiction; (ii) the judgment is for a definite sum of money; (iii) the judgment is final and conclusive; and (iv) it is not contrary to public policy in Ireland.[5] The judgment holder can rely on the judgment made in the foreign jurisdiction as evidence in the Irish case if they so wish.

"In order for the judgment to be recognized and deemed enforceable in Ireland, the Irish courts will have to determine, amongst others, that (i) the court in which the judgment is made had competent jurisdiction; (ii) the judgment is for a definite sum of money; (iii) the judgment is final and conclusive; and (iv) it is not contrary to public policy in Ireland."

The application to have the foreign judgment recognized is brought through the summary judgment procedure whereby a summary summons is issued. Then a motion is brought before the courts to have the judgment recognized. The motion is then brought on notice to the judgment debtor where the judgment debtor may attend court and challenge the application. As a result, depending on the level of challenge, there could be significant delay and costs involved in having the judgment recognized.

In addition to the courts' discretion, Irish public policy and precedential case law can affect the determination of whether a foreign judgement will be recognized.

V. Foreign Arbitral Awards

Foreign arbitral awards are not governed by the above mentioned regulations and conventions. In 2010, Ireland adopted the UNCITRAL Model Law on International Commercial Arbitration (Model Law) and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention). These were given force of law in Ireland. Pursuant to the New York Convention, foreign arbitral awards of contracting states to the New York Convention are recognized as binding and enforced in accordance with the rules of procedure in Ireland under the conditions laid down in the articles of the New York Convention. The procedure for such recognition and enforcement is straightforward whereby an application is made to the High Court.

VI. Implications of Brexit

It remains to be seen what impact Brexit will have on the recognition of UK judgments in Ireland. Unless a convention and/or treaty is put in place, UK judgments will likely have to be recognized and enforced pursuant to common law, as set out above. This in turn may be an impediment to trade between the UK and Ireland given the cost and time in having judgments recognized pursuant to common law.

VII. Enforcing a Foreign Judgment in Ireland

Once a judgment has been recognised and/or declared enforceable (as set out above), it can essentially be enforced in the same way that a judgment made by an Irish court can be enforced. Once a judgement is recognized, there are a number of enforcement mechanisms available to the foreign judgment holder:

- The judgment holder can register the judgment as a judgment mortgage against immoveable property/land owned by the judgment debtor.
- An application can be made for an execution order of which, once obtained, a bailiff can be engaged to seize moveable assets belonging to the judgment debtor.
- Where money is due to the judgment debtor by a third party, the judgment holder can seek to have

the debt paid to the judgment holder instead of the judgment debtor to satisfy all or a portion of the judgment.

- A judgment holder can seek a court order to create a charge over any shares/stock owned by the judgment debtor.
- In certain circumstances, an application can be made to commit the judgment debtor to prison for failure to satisfy a judgment.
- Where the judgment debtor is an Irish company and it is believed that the company is insolvent, a petition can be brought to have the company wound up.
- Where the judgment debtor is an individual an application can be made to declare the judgment debtor bankrupt.
- An application can be made to have the judgment debtor orally examined before the Irish courts as to what assets the judgment debtor has to satisfy the judgment. To assist with such an oral examination, an application can also be made to require the judgment debtor to produce a sworn statement of assets and liabilities along with supporting documentation in advance of the oral examination.

VIII. Recent Example

The case of *Albaniabeg Ambient Sh.p.k. v. Enel S.p.A. and Enelpower S.p.A*[6] concerned an effort by an Albanian company to have a judgment of an Albanian court enforced in Ireland. Albania is not an EU Member State or a party to the Lugano convention. The judgment creditor sought to serve proceedings on defendants outside Ireland. The plaintiff was seeking to enforce a judgment of an Albanian court in Ireland against the two defendants. The court clarified a number of issues:

- There is no *ex ante* rule that requires the presence of assets within the jurisdiction before permission to commence enforcement proceedings can be granted. Any other conclusion would fly in the face of modern realities in terms of globalization, communications and the speed of banking transactions.
- The judgment creditor must demonstrate the existence of a good arguable case prior to obtaining permission.
- The judgment creditor must generally show some prospect of securing a material benefit, even if that benefit is indirect and prospective only.
- While the court may well have a jurisdiction to grant permission where the *sole* purpose of the application is to ensure the *imprimatur* of the foreign judgment by an Irish court, even if there is no actual material benefit, cases of this kind are likely to remain unusual and exceptional. Permission should not normally be granted in such cases where enforcement proceedings have already been determined or are pending in other third country jurisdictions.
- Regard must be had to the issues of comparative cost and convenience.
- The judgment creditor must show that enforcement proceedings in this State would be suitable or appropriate for this jurisdiction to determine.

On the basis that the Albanian company failed to show that it benefit practically from the proceedings, the court refused the application.

IX. Reform

The European Commission has proposed modernization of EU civil procedures for cross-border civil and commercial cases throughout the EU. It aims to make access to civil justice less expensive, more efficient and more accessible to citizens and businesses.[7] The focus of this reform is on procedures relating to service of documents and on taking of evidence. This bodes well for an integrated approach with technological advancements for inter-European civil procedures and co-operation.

X. Conclusion

There is very little recent case law in relation to the recognition of foreign judgments. This illustrates that in the majority of cases recognition is little more than a formality. Enforcement can prove to be more challenging depending on the nature of the debtor's assets, and if efforts are made to hide assets.

Endnotes

1. Generally, the recognition and enforcement of foreign judgments in Ireland is determined by international conventions and treaties. Order 42A of the Irish Rules of the Superior Courts incorporates the Brussels regime and the Lugano Convention (and the Brussels Convention) into the Irish court rules, which detail how the necessary application should be brought before the Irish courts.
2. Please note that this article is limited to judgments made in civil and commercial matters where the judgment is made against a person or entity for a liquidated amount.
3. Directive ~~Regulation (EU) No.~~ 1215/2012 of the European Parliament and of the Council of Dec. 12, 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, 2012 O.J. (L 351).
4. For judgments and proceedings commenced before January 10 2015, the Brussels I Regulation (44/2001) applies. The Brussels I Regulation was implemented into Irish law by the European Communities (Civil and Commercial Judgment) Regulations 2002 (SI 52/2002).
5. *Sporting Index v O'Shea* [2015] IEHC 407, IR 1 (2015).
6. *Albaniabeg Ambient Sh.p.k. v Enel S.p.A. and Enelpower S.p.A* [2018] IECA 46, IR 1 (2018).
7. Commission Press Release, IP/18/3991 (May 21, 2018) http://europa.eu/rapid/press-release_IP-18-3991_en.htm.

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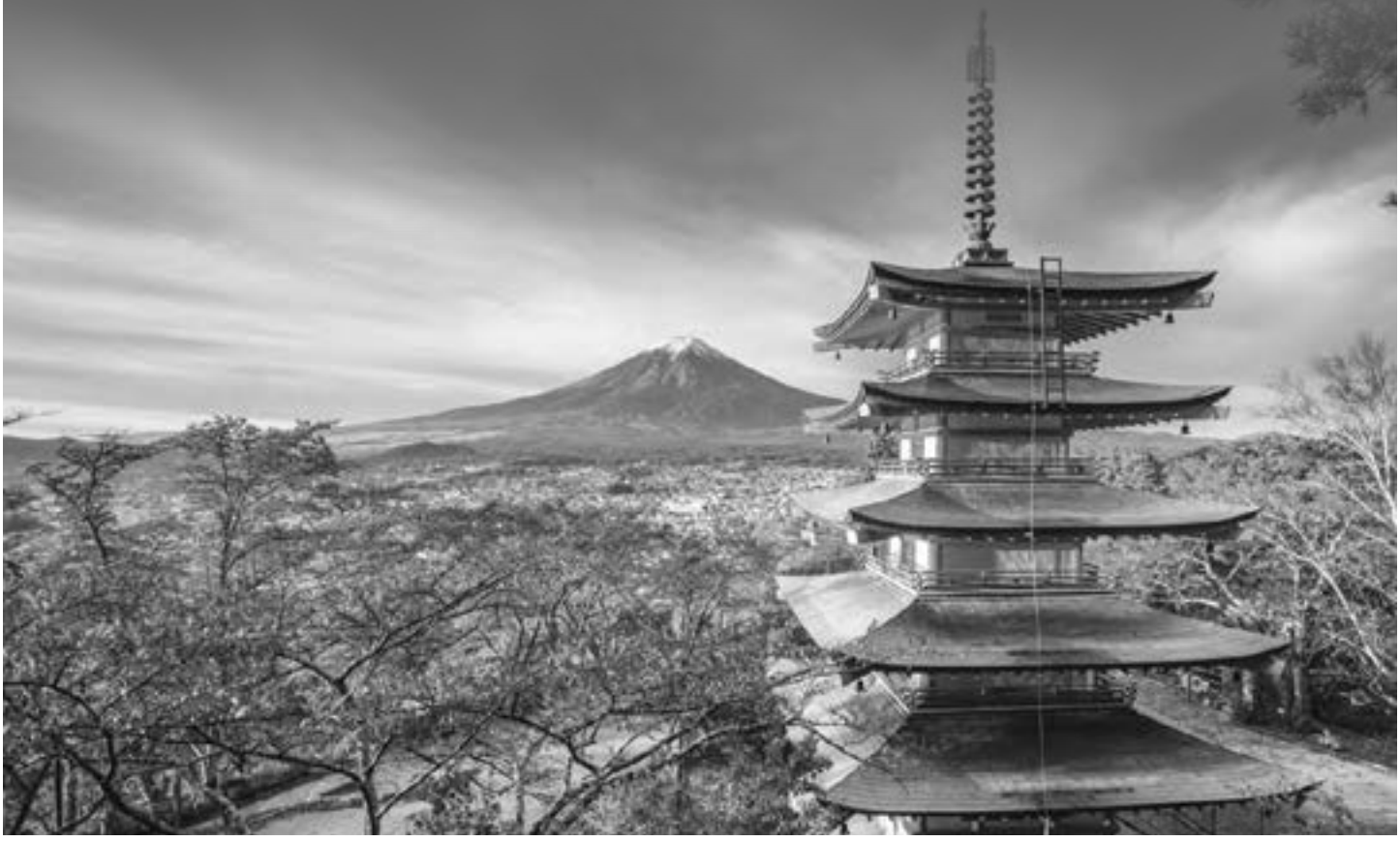

Analysis on the Enforcement of Arbitration Awards and the Enforcement of Judgments in Ecuador

By Roberto Bilbao Rosati

Roberto Bilbao Rosati

With the enactment and entering into force of the Organic General Proceedings Code in Ecuador (May 2016), which replaced the Civil Procedure Code, a new procedural figure was incorporated into the Ecuadorian legislation called, "Enforcement Titles or Instruments" within the Chapter, "Enforcement Procedure." The Code categorized the following instruments:

- Final and enforceable judgment.
- Arbitration Award.
- Mediation Settlement Agreement.
- Pledge and title retention agreement.
- Judgment, arbitration award or mediation settlement agreement issued abroad, recognized or homologated in accordance with the rules of the Organic General Proceedings Code.
- Minutes of Settlement.
- Others determined by Law.[1]

In this article, I will refer specifically to arbitration awards, as well as to enforceable judgments, and the way to enforce them, in the event that the obligations set out (either by arbitration tribunals or court decisions respectively) are breached.

As mentioned in the beginning, with the enactment of the Organic General Proceedings Code, great progress is made in Ecuadorian procedural law in relation to enforcement of arbitration awards and final and enforceable judgments. Therefore, said normative body is innovative in light of the fact that once an order set out—either by Arbitration Tribunal or by a ruling of a judge (as appropriate)—is breached, the affected party is entitled to set in motion a procedure called "enforcement," which is defined as such in article 362 of the Organic General Proceedings Code:

> Art. 362—Enforcement. It is the set of steps to enforce the obligations contained in an enforcement title or instrument.[2]

The advantage of an arbitration award or a mediation settlement agreement, because they are now characterized as an "enforcement title or instrument," is that it allows its beneficiary(ies) an agile judicial mechanism to demand its compliance, even—as it is called—in a compulsory manner. Unlike a bill of exchange, a promissory note, or public deed (categorized as "enforceable titles or instruments"), arbitration awards and mediation settlement agreements (by requiring their enforcement through court proceedings) do not allow the counterparty to continue debating the merits of the case, since the right recognized in the corresponding title is not subject to any legal debate. This way, the current procedural legislation guarantees that what was ordered will be complied with by the obligated party, even at the risk that the judge (who hears the enforcement claim) orders measure such as: seizure of property (movable and immovable), seizure of money, seizure of credits, seizure of fees or rights and shares or seizure of a production unit.

Said advantage for the (agile) enforcement of an arbitration award or mediation settlement agreement in the Ecuadorian legislation is notable, for example, when compared to the Spanish legislation, where notarization of the document is required and only afterwards it legally becomes an "enforceable title." In other words, if the matter is brought before a judge for execution, the process will be subject to a notary proceeding, and later subject to certain types of exceptions. Meanwhile, in Ecuador, the arbitration award or the mediation settlement agreement does not require any additional legal formality, mainly in light of one of the current procedural principles: procedural celerity.

The proceeding, in itself, requires that the affected party file a claim before the appropriate Civil Judicial Unit, against the obligated or enforced party (that is, the party that failed to comply with the order set out in an arbitration award or final and enforceable judgment). Through a draw, it will be brought before a civil judge, who will review the claim and order the appointment of an accredited expert, so that the expert can prepare a report that calculates de amount of the principal plus interest owed (provided that it is an obligation know as "payment obligations") and the procedural costs incurred.

Once the judge has received the settlement by the expert (in non-labor matters), the judge will proceed to issue the corresponding enforcement order, and if it is within a proceeding, the judge must perform the settlement and order the payment. In this regard, the judge must take into account the provisions of Art. 372 of the Organic General Proceedings Code that states:

> Art. 372—Enforcement order. Having received the settlement, the judge will issue the enforcement order that must contain:

1. Precise identification of the obligated or enforced party that must fulfill the obligations.
2. The determination of the obligation, whose compliance is intended, attaching a copy of the settlement, where applicable.
3. The order to the obligated or enforced party to pay or fulfill the obligation within a five-day term, with the warning that if he or she fails to do so, compulsory enforcement shall proceed.
4. When it refers to an enforcement of titles that are not a final and enforceable judgment, the notice of the enforcement order to the obligated or enforced party must be made in person or through three notices.
5. If the obligation is fulfilled, it shall be declared extinguished and the closing of the case ordered.

On the other hand, in the case of obligations known as "performance obligations" or "obligations not to perform," the Organic General Proceedings Code in this regard establishes:

> **Art. 368**—Performance Obligations. In performance obligations, if the creditor asks its fulfillment and its fulfillment is possible, the judge shall set out the term within which the debtor must fulfill it, with the warning that if it fails to comply with the order, the obligation shall be fulfilled through a third party designated by the creditor at the expense of the obligated or enforced party, if so asked.
>
> If for any reason the obligation is not fulfilled, the enforcement judge shall determine in a hearing convened for that purpose and based on the evidence presented by the parties, the amount of the compensation that the debtor must pay for the breach and shall order the corresponding collection following the procedure set out for the enforcement of a payment obligation.
>
> The enforcement order must contain the order to the debtor to pay the values that correspond to the compensation of damages sentenced.
>
> The enforcement order shall set out the amount of money that the debtor must pay, when he or she has refused the compliance of the obligation ordered to be fulfilled by a third party, to compensate this last party for what was performed.
>
> If the term granted by the judge for the compliance of the obligation has expired, and the debtor has not fulfilled it, the judge shall order the seizure of property subject to the terms of this Code, in a sufficient value to cover the costs of the compliance of the obligation by the third party designated by the creditor.
>
> If the event consists in the granting and signing of an instrument, the judge shall do so in representation of the one that must perform it, a record of this act must be made in the proceeding.
>
> **Art. 369—**Obligation to not perform. If the enforcement refers to an obligation to not do something and it has been performed, the judge shall order it be returned to the original condition and that the debtor undue what has been done, granting him or her a term to that end, with the warning that if it fails to do so, the creditor will be authorized to undue what was done at the expense of the debtor and shall set out the sum of money that the debtor must pay in relation to that.
>
> Furthermore, the judge shall order the debtor to pay the values that correspond to the compensation of damages to which debtor was sentenced.
>
> If it is not possible to undue what has been done, it shall be ordered that the respondent deposit the quantity corresponding to the amount of the compensation, which shall be determined in a hearing, in accordance with the procedure provided for in the preceding article.[3]

In the words of the Ecuadorian author, judge and professor, Dr. Richard Iván Buenaño, the enforcement procedure is defined as follows:

> The enforcement procedure consists in the judge mandating through an enforcement order that the debtor deliver, within a term of five days, the required object or good, and if necessary it shall be enforced with the use the public force; in other words, the judge has the obligation to order its compliance.[4]

Meanwhile, the Ecuadorian Arbitration and Mediation Law (in force since1997) establishes that arbitration awards have the same effect as a final and enforceable judgment—of last resort—and *res judicata*, specifically:

> **Art. 32**—Once declared enforceable an arbitration award, the parties must comply with it immediately.

Any of the parties can request the ordinary judges the enforcement of the award or transactions entered into, filing a certified copy of the arbitration award or minutes of settlement, granted by the secretary of the tribunal, the director of the center or the arbitrator, respectively, with the certification that it is enforceable.

Arbitration awards have the effect of a final and enforceable judgment and *res judicata* and shall be enforced in the same manner as last resort judgments, through enforced recovery, without the enforcement judge accepting any exception, expect those that arise following the issuing of the award.

Thus, the great advantage of an arbitration award is the fact that if the obligated party does not comply, and the creditor party (beneficiary of said award) decides to enforce the award before a judge, the latter shall not analyze the merits of the dispute, and as such, will not accept—as in other judicial proceedings—exceptions in the statement of defense intended to delay the compliance of the obligation. In other words, the judge must limit him or herself to ordering the compliance of the arbitration award.

For its part, the only action against an arbitration award authorized by the Arbitration and Mediation Law is the one called a nullity action, which only allows contesting formal errors of the arbitration award, but not the merits of the case, which were already resolved. Thus, the nullity action can only be filed before a competent civil judge if one of the following grounds is met–namely:

Art. 31—Any of the parties can file a nullity action of the arbitration award, when:

a) Not being legally served with a summons of the lawsuit and that the trial proceeded and concluded *in absentia.* It shall be necessary that the lack of summons prevented the respondent from presenting his or hers exceptions and asserting his or her rights, and furthermore, that the respondent claims said omission at the moment of his or her intervention;

b) That one of the parties was not notified with the decisions of the tribunal and that this fact hinders or limits the right to a defense of the party;

c) When it has not been called, it has not been notified with the call, or after been called the evidence has not been collected and appraised despite the existence of facts that must be justified;

d) The award refers to matters not covered by the arbitration or grants more than what was claimed; or,

e) When there is a violation of the proceedings set out by this law or by the parties to appoint the arbitrators or form the arbitration tribunal.

A nullity action of the arbitration award can be filed before the arbitrator or arbitration tribunal, to be heard by the corresponding president of the superior court of justice, within a term of ten days counted from the date the award was enforceable.

Once the nullity action has been filed, the arbitrator or arbitration tribunal, within a three-day term, must submit the proceeding to the president of the superior court of justice, who will decide on the nullity action within a term of thirty days counted from the date the judge took cognizance of the case. The nullity action filed outside the term established shall be understood as not filed and shall not be admitted.

Returning to the concept of the enforcement order, when an (enforcement) judge issues an arbitration award or final enforceable judgment, and after expiring the legal terms, the debtor is obliged to pay for his or her obligation, or risk the previously mentioned seizure.

Likewise, another great advantage of the enactment of the abovementioned Organic General Proceedings Code is the "oral" system through hearings, with certain similarities to the system in the United States, which includes the process of "objections" to testimony, and so on. Given that the Ecuadorian legislation is grounded on written positive law, the implementation of oral hearings has meant a great transformation and evolution for the current litigation attorney, who, basically, was formed in law schools with a purely written mechanism. Today, by implementing proceedings under a system of oral hearings, it has driven local attorneys to train in this new procedural methodology, and has also meant a reduction in the length of legal proceedings unlike previous years, and especially in the enforcement proceedings I have mentioned.

On the other hand, relative to enforceable arbitration awards and judgments that come from abroad and that must complied with in Ecuador, these are likewise considered "enforcement titles or instruments," thus providing a mechanism of legal certainty and protection for foreign investors, because (through a process known as recognition or homologation) they can be enforced by a judge, in Ecuador, in order to, ultimately, demand the compliance of an obligation.

Endnotes

1. Organic General Proceedings Code (R.O. 2015, Supp. 506) (Ecuador).
2. Organic General Proceedings Code, Supp. 506.
3. Richard Iván Buenaño Loja, Practice of the Civil and Labor Procedure with the Organic General Proceedings Code at 210-216 (Editorial Jurídica L y L, 2nd ed. 2016).
4. Arbitration and Mediation Law (R.O. 2006, Supp. 417) (Ecuador).

Enforcement of Foreign Punitive Judgments in South Africa

By Roger Wakefield

Roger Wakefield

Punitive damages awards were long regarded as alien, and contrary to South African Public Policy. The policy had its roots in Roman Dutch law, on which the South African common law has its foundation, and which allowed an injured party in contract or tort to claim no more than compensation for damages actually suffered by him or her. The quantum was not influenced in any way by the reprehensible behaviour of the wrongdoer or the flagrancy of the breach.

The policy was confirmed in 1886 in the case of *Taylor v. Hollard*,[1] where the plaintiff sought to enforce an English judgment in South Africa against the defendant for repayment of a loan of which the defendant had agreed to pay the capital sum advanced, a bonus equal to the capital sum plus interest on both the capital sum and the bonus. The defendant opposed enforcement on the basis that the judgment amount was excessive, exorbitant, unconscionable and contrary to the principles of Roman Dutch law.

The court endorsed the Roman Dutch principle that excessive and exorbitant awards were prohibited and noted that agreements such as the one on which the English judgment was based were also a crime under the Roman Dutch law. The court held that although criminal proceedings under South African law were unlikely at the time, South African courts would not countenance such excessive agreements or awards. The courts enforced only the capital portion of the English judgment, plus interest on the capital sum.

There was no further reported judicial pronouncement on the enforcement of foreign punitive awards in South Africa until the 1990s, but in 1978 the South African parliament passed the Protection of Businesses Act[2] which, in Section 1(A)(1), prohibits the enforcement of foreign judgments directing the payment of multiple or punitive damages in South Africa if the judgment arose from acts or transactions relating to raw materials.[3] The act defines multiple or punitive damages as the amount that exceeds compensation for the damage or loss actually sustained by the person to whom the damages have been awarded. Section 1(A)1 of the Act is effectively a codification of the Roman Dutch policy applying only to foreign punitive judgments arising from any act or transaction concerning raw materials. The South African common law applies to the enforcement of foreign money judgments arising from all other acts or transactions.

In 1996 the Transvaal Provincial Division of the High Court of South Africa addressed the enforcement of a final judgment by a California appellate court in the case of *Jones v. Krok*.[4] In the final judgment, a South African defendant was directed to pay an American plaintiff compensatory damages in the sum of $14,000,000, and punitive or exemplary damages in the sum of $12,000,000 based on the defendant's fraud and conversion of assets in the United States.

In opposing enforcement, the defendant argued that the California judgment arose from an act or transaction contemplated in the Protection of Businesses Act and that therefore the punitive damages awarded by the California court could not be recognized in South Africa. The defendant argued further that the award for punitive damages was part of the California judgment and that the purpose and intent of Section 1A(1) was to prohibit enforcement of the entire judgment, including the compensatory portion.

The High Court found that the California judgment did not arise from an act or transaction contemplated in the Act, and that therefore Section 1(A)(1) did not apply. Moreover, the court held that it was not the purpose and intent of Section 1(A)(1) to treat an entire judgment, of which punitive damages formed only a part, as a punitive judgment.

The court then considered whether the punitive damages were enforceable in South Africa at common law, and held that the mere fact that an award is made on a basis not recognized in South Africa did not entail that it is necessarily contrary to public policy. In addition, the court held that whether a judgment is contrary to

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public policy depends largely on the facts of each case. The court held it would therefore be wrong to refuse to enforce a foreign judgment for punitive damages merely because they are unknown in South Africa. The court, however, refused to enforce the punitive award because it was of the view that it was so excessive and exorbitant that it would have been contrary to South African public policy to do so.

The court in *Jones v. Krok*[4] enforced the compensatory damages part of the judgment, but granted the plaintiff leave to appeal to the Supreme Court of Appeal on the court's refusal to enforce the punitive damages, believing that there was a reasonable prospect of the higher court coming to a different conclusion. However, the matter was settled before the Supreme Court of Appeal could make a pronouncement on the issue.

"What emerges from the two reported decisions since Taylor v. Hollard *is a willingness by South African Courts to depart from the Roman Dutch principle that no more than strict compensation for the damages actually suffered may be awarded."*

The question of enforcement of foreign punitive awards was only raised again subsequently in a reported judgment in 2017, in the case of *Danielson v. Human and Another.*[5] In that case, the court addressed the enforcement of a judgment of the United States District Court, Western District of North Carolina (Charlotte Division) for $859,595 trebled to $2,578,786 under the United States Racketeer Influenced and Corrupt Organisations Act (RICO),[6] more particularly the provisions the United States District Court termed "Civil RICO."

The defendants opposed enforcement by arguing that the trebling component of the judgment was evidence of a punitive element, and the enforcement of which would be contrary to South African public policy.

The South African Court referred to the dictum of the Judge of the U.S. District Court to the effect that damages violations of Civil RICO include treble damages, costs and attorney's fees, and that "(p)unitive damages are not available because '(s)tatutory damages under RICO already contain a punitive component in the form of the trebling provision.'"

The South African Court enforced the treble damages relying on *Jones v. Krok* and the dictum of the judge of the District Court stating that treble damages are designed to fully compensate a plaintiff for intangible injuries where actual damages are often speculative or difficult to prove. The South African Court held that the proper inquiry was whether the damages awarded are in fact compensatory as opposed to "strictly punitive" in nature. The court held that there is often a fine line between (1) an award of aggravated but still basically compensatory damages, and (2) punitive damages in the strict narrow sense of the word, particularly where circumstances surrounding the wrong have justified a substantial award.[7] Therefore, at most, the trebling provision of RICO would be placed in the category of aggravated compensatory damages and not "strictly punitive."

Conclusion

What emerges from the two reported decisions since *Taylor v. Hollard* is a willingness by South African Courts to depart from the Roman Dutch principle that no more than strict compensation for the damages actually suffered may be awarded. In the case of *Danielson v Human* the court was prepared to enforce the treble damages (as a form of permissible "aggravated" damages) in the face of the District Court's finding that RICO contains a punitive component in the form of a trebling provision. Following the judgment in *Jones v. Krok* it may be possible, depending on the circumstances of the case, to enforce a punitive award which the court deems to be reasonable in quantum. South African courts have yet to decide the issue definitively but there is a distinct possibility that the proposition will be confirmed by the highest South African court when an appropriate application is brought before it which entails the enforcement of a reasonable punitive award.

Endnotes

1. 2 SAR 78 (1886).
2. Act 99 of 1978.
3. The affected act or transaction in Section 1 (3) of the Act is one "which took place at any time, whether before or after the commencement of the Act, and [is] connected with the mining, production, importation, exportation, refinement, possession, use or sale of or ownership [of] any matter or material, of whatever nature, whether within, outside, into or from the Republic." The Supreme Court of Appeal in *Richman v. Ben- Tovim* limited the application of section 1(3) to raw materials or substances from which physical things are made. *Richman v. Ben-Tovim* 2007(2) SA 234 (SCA).
4. 1996 (1) SA 504 (T).
5. 2017 (1) SA 141 (WCC).
6. Stat 922 codified at 18 US vols 1961-1968.
7. The South African Court relied on the authority of *Fose v. The Minster of Safety and Security* 1997 (3) SA 786 (CC).

Enforcement of Arbitral Awards in Egypt: Between Theory and Practice

By Ashraf Ali and Nisreen Al Karyouti

I. Introduction

Dispute resolution in Egypt remained for a long time primarily reliant on the judiciary. Arbitration seated in Egypt was solely governed by the unfavourable rules of the Egyptian Code of Civil Procedure (ECCCP). The enactment of Law No. 27 of 1994 on Arbitration in Civil and Commercial Matters ("Arbitration Law")[1] was viewed as a quantum leap into a new era of arbitration practice in Egypt, one that has positioned the country as one of the main arbitration hubs in the Middle East.

II. Legal Framework

A. The Arbitration Law

The Arbitration Law, modeled on the UNCITRAL Model Law on International Commercial Arbitration ("UNCITRAL Model Law"), governs all arbitrations seated in Egypt or seated abroad, which arbitration the parties have subjected to Egyptian procedural law. It makes no distinction between domestic and international arbitration and is applicable to disputes arising from civil, commercial or even administrative contracts.

Pursuant to the Arbitration Law, legal relationships are arbitrable if Egyptian law allows that they be the subject of settlement.[2] Non-arbitrable matters in Egypt are strictly related to public order. Under Egyptian law,[3] matters pertaining to social status, capacity, criminal law and antitrust law are considered non-arbitrable. From this, it follows that an arbitration clause obligating actions in contravention with public order would be considered null and void.[4]

The Arbitration Law regulates, *inter alia*, the role of national courts in relation to arbitration. According to Article 14 of the Arbitration Law, national courts may issue interim and conservatory measures in support of ongoing arbitration proceedings.[5]

They may also play a role in cases relating to a challenge of arbitrators, extension of time limits and termination of arbitral proceedings. After an arbitral award is rendered, Egyptian courts have exclusive jurisdiction over challenges to the award as parties can bring an action to set aside the award. Said courts also rule on requests to enforce and objections to the enforcement of arbitration awards, whether these awards are domestic, international or foreign.

B. The New York Convention and Other International and Regional Instruments

Egypt was one of the first countries to ratify the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention") in 1959. It was ratified[6] and came into force via Article 151 of the Egyptian Constitution as amended in 2014. A later decision by the Egyptian Court of Cassation confirmed the binding effect of the New York Convention as part of the Egyptian legal system and shall prevail over any contradicting provision in the national laws.[7] Accordingly, the New York Convention is considered the legal framework that directly governs the recognition of foreign arbitral awards to be enforced in Egypt.

According to Article 1.3 of the New York Convention, states may declare, on the basis of reciprocity, that it will apply the convention to the awards made in the territory of a Contracting State. Egypt has not made any reservation under said Article. Hence, Egypt applies the New York Convention to the recognition and enforcement of any foreign award issued outside Egypt even in a territory that is not a member state to the New York Convention.[8]

In November 1971,[9] Egypt also ratified the Convention establishing the International Centre for Settlement of Investment Disputes (ICSID) within the World Bank Group as the main venue for the settlement of investment disputes with a member state and a national of another member state. Egypt has followed the common trend of accepting the jurisdiction of ICSID disputes arising from the Bilateral Investment Agreement (BIT) it signs with other member states.

As of May 2017, Egypt ranked first among African countries to be involved in investment disputes before ICSID.[10] Currently, Egypt has been involved in 32 cases as respondent (25 concluded and seven pending[11]). For example, on June 25, 2012, Veolia Propreté brought ICSID proceedings against Egypt pursuant to the France-Egypt BIT of 1974,[12] demanding damages amounting to $110,000,000 over a dispute pertaining to a waste management contract in the city of Alexandria, Egypt. It claimed that having to comply with changes to Egyptian laws of general application violated the government's contractual commitments to keep payments to Veolia aligned with cost increases.[13] The tribunal rendered its award on 25 May 2018 in favor of Egypt and rejected the claim.

On the other hand, a very recent award under ICSID was issued against Egypt in a claim by Unión Fenosa Gas based on the Spain-Egypt BIT of 1992. On 27 February 2014, the Spanish company brought the claim, for the stoppage of gas supply to Damietta LNG plant.[14] On 31 August 2018, the tribunal found that such stoppage was considered a failure by Egypt to grant Unión Fenosa Gas

a "fair and equitable treatment," thus contravening the Spain-Egypt BIT. The tribunal decided that Egypt should pay damages amounting to $2,000,000,000.[15]

Egypt also acceded to the Arab Convention on Judicial Cooperation of 1983[16] ("Riyadh Convention"). The Riyadh Convention provides for reciprocal recognition of judgments among most members of the Arab League. As a member state, Egypt may be requested to recognize an arbitration award rendered in any other member of the state under said convention. Under the Riyadh Convention,[17] courts may not review a foreign arbitration award on its merits, nor could they deny the enforcement thereof, except in certain cases. Some exceptions include matters non-arbitrable matters under the laws of the requesting state, or matters with an arbitration award that is not yet final or matters involving an arbitration award in contravention with Islamic Shari'a or public order in the requesting party's jurisdiction.

A. Enforceability of Awards Under Egyptian Law

As a general rule, Egyptian courts would refuse the enforcement of arbitral awards if the award violates public policy, as understood and applied in Egypt. According to Article 58 of the Arbitration Law, the competent court shall not accept enforcement of an arbitral award except after verifying that the award (a) does not contravene a previous judgment rendered by Egyptian courts in the subject-matter of the dispute, (b) does not contravene Egyptian public policy and (c) has been duly notified to the debtor in a correct manner.

In certain fields of economic activity, Egyptian law provides for special rules in relation to arbitration. In its regulation of contracts on the transfer of technology, the Commercial Code permits the use of arbitration as an exception to the national courts' jurisdiction,[20] but regulates the process in a manner that is protective of the public interest. Arbitration agreements are only valid if they provide for arbitration seated in Egypt and are subject to the Egyptian Arbitration Law.[21]

"The revisions aimed at enhancing the efficiency of arbitration proceedings, the powers of arbitral tribunal relating to interim measures, and involved a major revision concerning the schedules of fees, thus unifying the costs of international and domestic arbitration."

C. Institutional Arbitration in Egypt

Egypt hosts one of the most significant regional arbitration centers in the Middle East. The Cairo Regional Centre for International Commercial Arbitration (the "CRCICA" or the "Cairo Centre") was established by agreement between the Asian African Legal Consultative Organization (AALCO) and the Egyptian Government in 1979. According to an assessment report issued by the African Development Bank (AFDB) on April 10, 2014,[18] CRCICA was recognized as one of the best arbitration centers across the African continent.

CRCICA rules, which were revised in 2011, are adapted from the revised 2010 version of the UNCITRAL Rules. The revisions aimed at enhancing the efficiency of arbitration proceedings, the powers of arbitral tribunal relating to interim measures, and involved a major revision concerning the schedules of fees, thus unifying the costs of international and domestic arbitration. This amendment is intended to attract greater caseloads of all sizes since the center remains a less expensive institution for small arbitration claims.[19]

III. Control of Arbitral Awards by National Courts

Based on Egyptian laws, national courts exercise some control in relation to arbitration, namely the enforceability and challenge of arbitral awards.

B. Challenge of Arbitral Awards

Article 53 (1) of the Arbitration Law regulates the grounds for the challenge and annulment of arbitral awards. These grounds are limited to the following:

a. The award was based on an invalid arbitration agreement;

b. Either party to the arbitration agreement was at the time of the conclusion of the arbitration agreement fully or partially incapacitated according to the law governing its legal capacity;

c. Either party was denied the opportunity to properly present its case before the tribunal;

d. The arbitral award failed to apply the law agreed upon by the parties;

e. The composition of the arbitral tribunal or the appointment of the arbitrators conflicted with the Arbitration Law or the parties' agreement;

f. The arbitral award dealt with matters not falling within the scope of the arbitration agreement or exceeded the limits of this agreement; or

g. The arbitral award or award-related procedures contain a legal violation causing nullity.

This provision goes beyond the UNCITRAL Model Law. Article 53(1)(d) provides for annulment "if the award fails to apply the law agreed by the parties." This ground for annulment has given rise to a number of divergent interpretations by Egyptian courts and to some of the most famous Egyptian cases on arbitration. On its face, Article 53(1)(d) would simply reflect the general principle of excess of power—the tribunal would have applied a law other than the law chosen by the parties. Egyptian courts have, however, at times, interpreted this ground in a manner to manifest disregard of the law in order to exercise a measure of control on the application of Egyptian law. In a well-known arbitration claim under the rules of the International Chamber of Commerce (ICC) against an Egyptian company,[22] the respondent managed, during the arbitration proceedings, to issue an anti-arbitration injunction by the Egyptian Court of First Instance. The court issued such injunction on 25 June 2012 on the ground that the arbitral tribunal had not issued its final award within 12 months of the initiation of arbitration proceedings, thus contravening Article 45 of the Arbitration Law. Nevertheless, the tribunal continued its proceeding and issued a final award on 15 April 2013. A decision by Egyptian Court of Appeal was issued rendering the arbitral award null and void.[23] The final arbitral award remained unenforceable in Egypt until a Court of Cassation decision was issued in 2015 abolishing the nullification decision of the award based on the fact that the ICC rules are applicable to the proceedings being the rules of choice.[24]

It is worth noting that if the party claiming the annulment fails to object to the arbitral tribunal's ruling on matters outside the scope of the arbitration clause on a date not later than that of the submission of its statement of defense, this failure will be deemed as an implied acceptance of the tribunal's jurisdiction to rule on those matters. Thus, the party will not be allowed to subsequently request the setting aside of the award on that basis.[25]

In any case, the initiation of the annulment proceedings does not preclude the application for or the issuance of an execution order. Further, if the enforcement order was issued, the initiation of annulment proceedings will not cause the stay of execution. A stay of execution must be explicitly requested by the claimant in the annulment proceedings.[26] On the other hand, according to Article 53(2) of the Arbitration Law, a court adjudicating the action for annulment must *ipso jure* annul an arbitral award if it conflicts with Egyptian public policy.

It should be noted that the Egyptian courts have jurisdiction over the annulment of awards issued in Egypt or international arbitration awards where parties have agreed to apply the Egyptian Arbitration Law. For other foreign arbitration awards, Article 5 of the New York Convention applies.

IV. Enforcement of Arbitral Awards

The Arbitration Law addresses the enforcement of arbitral awards in Articles 55 to 58. The Law applies to the enforcement of arbitral awards rendered in proceedings seated in Egypt, or in proceedings of international commercial arbitration seated abroad, to the extent that the parties have agreed to apply Egyptian law to these proceedings.[27] A definition and criteria as to when an arbitration would be international and commercial are provided in Articles 2 and 3 of the Law.[28] The Egyptian Code of Civil and Commercial Procedure (ECCCP) also regulates the enforcement of foreign arbitral awards, namely in Articles 296 to 299.

"Under the ECCCP, the enforcement of the award requires filing a lawsuit before the court of first instance to render the award enforceable. By contrast, recognition and enforcement under Article 56 of the Arbitration Law is obtained through ex parte proceedings by a judge order immediately enforceable under the condition that the award meets the criteria of Article 58 mentioned earlier."

The rules applied to enforcement of the foreign arbitral award differ between the ECCCP and the Arbitration Law. Under the ECCCP, the enforcement of the award requires filing a lawsuit before the court of first instance to render the award enforceable. By contrast, recognition and enforcement under Article 56 of the Arbitration Law is obtained through *ex parte* proceedings by a judge order immediately enforceable under the condition that the award meets the criteria of Article 58 mentioned earlier.[29]

A. Differences According to Jurisdiction

In the enforcement of foreign arbitral awards, procedures of enforcement would differ pursuant to the parties' choice of the law applicable to the arbitration proceedings.

1. The Egyptian Arbitration Law is the applicable law

If the parties agree to apply the Arbitration Law, the request for enforcement would be submitted to the competent judge together with the documents listed in article 56 of the Arbitration law, and the supporting evidence as per Articles 194 ECCCP. The court will issue its order without any hearings or reasoning.[30] Such court order shall not have a *res judicata* effect,[31] and may be challenged before the courts of appeal and cassation.[32]

2. If the Egyptian Arbitration Law is not chosen as applicable law

If the Arbitration Law is not chosen, the rules of the ECCCP shall apply to the enforcement. Since the Arbitration Law contains fewer rigid rules in terms of enforcement requirements and costs, the Egyptian courts in 2005 started to apply the Arbitration Law to the enforcement of foreign awards. The courts based the new trend on Article III of the New York Convention.[33] Accordingly, the request for enforcement may be done through an application submitted to the Cairo Court of Appeal rather than through filing a lawsuit for enforcement according to the ECCCP. In this case, the rules chosen by the parties should be directly applied by the court to the recognition and enforcement of the foreign arbitral award.[34]

Nevertheless, the Egyptian courts allowed the enforcement of foreign awards based on the ECCP in other cases[35] according to a lawsuit filed based on Article 296 of the ECCCP, should the requesting party have chosen this path.[36]

B. Enforcement Procedures

The enforcement procedures according to the Egyptian Law[37] require the service of a notice of the final award to the other party, the deposit of the award at the competent courts and the issuance of the exequatur. In many cases, the debtor refrains to voluntarily comply, which leads the creditor to resort to obligatory enforcement measures including the seizure and sale of properties equal to the value of the debt.

1. Service of Notice

The first step, according to the Arbitration Law, is to serve the award on the debtor through a court bailiff. The served award must be first translated into Arabic through a Ministry of Justice certified translation office. The notice is served to give an opportunity to the award debtor to comply voluntarily.

The expected time frame for this step is usually one week. Since the ECCCP does not permit service through modern and advanced means of correspondence; however, the service of notice sometimes takes much longer. This is in addition to common practices used by debtors to impede or delay the service of notice, such as providing wrong or ambiguous addresses.

2. Application

After the notice is served, the award must be deposited with the competent court to be recognized. In case of international commercial arbitration, this would be the Cairo Court of Appeal. Otherwise, the court to recognize the award would be the court originally appropriate to decide on the dispute. The arbitration law does not provide for a time frame for depositing the award for recognition. Accordingly, the general prescription period shall apply, and awards related to commercial matters must be deposited within 10 years of issuance.[38]

3. Proceedings

The Minister of Justice Decree No. 8310 of 2008, as amended, provides for specific steps in relation to depositing the award for recognition by Egyptian courts. These procedures are the following:

a. Filing an application to deposit the award with the court, enclosing the award and the Arabic translation;

b. The court registers the application to deposit the Award;

c. The court dispatches the application to the Technical Bureau for Arbitration Matters of the Ministry of Justice ("Technical Bureau") for rendering its opinion thereon;

d) The Technical Bureau renders its opinion on the application after examining the requirements for depositing the award, namely that (a) the award does not violate *ordre public* in Egypt, (b) that it is not rendered in a non-arbitrable matter and (c) that the application to deposit the award was filed with the competent court; and

e) The court deposits the award, subject to the approval of the Technical Bureau, and issues a report to this effect including the names and contact details of the arbitrators, the names and contact details of the parties, the relief awarded and the name and contact details of the applicant.

4. Enforcement Decision ("Exequatur")

After the Award is deposited according to the foregoing, the creditor must submit a petition for enforcement ("Petition"). The Petition shall include a description of the circumstances and grounds for the application. The petition shall also be submitted to the presiding judge or any judge authorized to issue the order of execution.

Pursuant to Article 56 of the Arbitration Law, the Petition must be submitted in two copies together with the (a) signed award and a certified Arabic translation thereof, (b) a copy of the arbitration agreement and (c) evidence documents that the award was duly served to the debtor.

For the purpose of granting the exequatur, the competent court must verify that the award has been duly notified to the debtor, the deadline to bring an annulment action (90 days from award notification) has expired, and that the award does not contravene Egyptian public order or a previous judgement rendered by Egyptian courts in the subject-matter of the dispute.

Generally speaking, if the foregoing requirements are fulfilled, an order of execution is issued in the form of an annotation on one of the two Petition copies. The court is required by law to decide, at its discretion, on the Petition within one day of its filing. In practice, the order of execution is issued within a longer period to allow the debtor to submit evidence that the award contradicts a previous decision of the Egyptian courts in the same matter.

After the enforcement order is issued, a writ of execution ("Exequatur") is granted within 30 days from the date thereof. This is a formal requirement for enforcing the award. The Exequatur will be granted in the form of an annotation on the award, and a copy of the award with the annotation to this effect will be provided to the award creditor.

5. Interim Relief

Under Egyptian law, the creditor of a foreign arbitral award is entitled to obtain interim relief. Interim relief may take the form of protective seizure of assets in the possession of the award debtor or a third party.

The interim relief is requested through summary proceedings until the award is recognized for enforcement. According to some scholars, an interim relief may also be obtained according to an arbitration award even if the court rejected its enforcement.[39] To maintain the awarded interim relief, the creditor shall request its validation within eight days of its issuance.[40]

In urgent matters, a request of interim relief may be submitted to the court based on the arbitration agreement during the arbitration proceedings. In this regard, Article 24 of the Arbitration Law also allows the arbitral tribunal to order interim relief if the parties to the dispute have given the tribunal such authority. However, interim relief issued by the arbitral tribunal may not take the form of a protective seizure of assets. Such protective seizure on movable and immovable assets should fall within the jurisdiction of the competent court stated in Article 4 of the Arbitration Law. This is because only courts may issue such protective seizures that can be enforceable in the future without any hearings.[41]

For an arbitral tribunal to issue an interim relief according to Article 24, the following conditions should exist:

a. The dispute is within the competence of arbitration tribunal, and the parties have expressly given the arbitrators the powers to issue interim relief orders;

b. The proceedings should have started, and one of the parties has requested the relief;

c. The requested relief should be of temporary nature, and required pursuant to the nature of dispute; and

d. The general conditions of any interim relief should exist. These are namely that the underlying right of the requested relief likely exists, and the matter is of an urgent nature that it might be a risk of irremediable damage to the underlying rights if the relief is not granted.

Such interim relief decision issued by the arbitral tribunal does not need reasoning and may not be challenged by any means.[42]

V. Practical Considerations

A. Debt Collection

Generally speaking, enforcement proceedings in Egypt are tedious. Even if exequatur is obtained on an arbitral award, it may be difficult to actually collect any money. A defaulting debtor has many possibilities to evade enforcement in Egypt. In practice, Egyptian businesses usually use certain tactics leading to evasion of enforcement. This can be by filing for bankruptcy, transferring assets out of the company or moving the company seat to obscure the registered office once a final judgement has been obtained. In the event the debtor uses these methods, it may be difficult for the creditor to enforce the award, if possible at all.

Another common tactic used by debtors is filing a contestation claim after being notified of enforcement. Some debtors also agree with third parties to file recovery claims in relation to the attached assets. Such types of claims, until being eventually dismissed, will result in stopping the execution for few months.

Nevertheless, there are cases where claimants are able to collect debts despite the attempts of the debtor using some of the foregoing methods.

B. Identification of Assets

A major challenge in the enforcement of arbitration awards is the identification of debtor assets.

Under Egyptian law, unsecured debts are required to first obtain a judgement or award against the debtor. Then, if the debtor does not consensually discharge the financial obligations identified by the court or arbitral tribunal, the creditor would have to attach the debtor's property, such as funds, assets, shares and real estate.

The actual execution of the debtor's assets require an execution title, after which the asset will be subject to

attachment and sale at a public auction. Attachment of movables would usually start with a notice served on the debtor followed by a court order to sell the property at a public sale. Attachment of funds or shares is effectuated through the seizure of funds possessed by third parties. Third parties also start the process by serving notice on the bank (in the case of funds), and to the Egyptian Stock Exchange (EGX) or Misr for Central Clearing Depository and Registry (MCDR). (In the case of shares, the party must) request the attachment of accounts or seizure of the shares up to the total amount due according to the execution title.

The real challenge lies in the enforcement of real estate. In Egypt, there is no efficient mechanism for tracing or identifying the real estate of the debtor. A process of tracing such property will require going through a long process of sending requests to all real estate registration departments all over Egypt. Beside the difficulty and lengthiness of such process, it is not uncommon in Egypt that people do not register their properties with the real estate registration department and rely on informal deeds of purchase, which do not show in any public records. Another common evasion method in Egypt is transferring the ownership of real estate to relatives to hinder enforcement once the exequatur is issued. Therefore, the attachment on real estate requires much longer judicial proceedings that might take several years, which leaves ample room for procedural incompliance claims, thus defeating any attempt for enforcement.

C. Cost

The fees for the enforcement of awards and judgments in Egypt is relatively high. Enforcement of foreign awards in Egypt is subject to a fee amounting to one third of the proportional fees (set at 5 percent of any award with a value higher than four thousand Egyptian pounds[43]) and such a fee is known as the "Enforcement Fee." An additional 50 percent of the fee should be paid as a contribution to a judiciary fund.[44] In applying the foregoing to an award of one million Euros, an enforcement fee of 25,000 Euros should be paid by the award creditor. This is in addition to any special fees due for the sale in public auction (2.5 percent for real estate and 0.5 percent for movables).

VI. Conclusion

When it comes to enforcement of foreign arbitral awards, Egypt is no exception from other member states of the New York Convention in complying with its rules. Any delays throughout the process until an exequatur is obtained are usually insignificant and can be faced in many other member states.

The main challenges, however, are related to the actual enforcement based on the exequatur obtained for that purpose. As explained earlier, the Egyptian system in relation to debt collection and asset identification falls short of ensuring that an award creditor will be able to collect his debt without significant delays and incurring additional substantial costs. With a rapidly developing borderless business practices, it has become crucial for the Egyptian legislature to issue clear and efficient mechanisms for the protection of award creditors rights.

Such mechanisms may include imposing a guarantee on the party challenging enforcement procedures. Such monetary guarantee should be equal to the amount decided in the award or judgement. This will undoubtedly contribute to limiting the oppositions filed with the sole purpose of hindering or delaying the enforcement of the award on one hand and expedite the enforcement process on the other hand.

Moreover, it is worth considering a new legal provision to expressly provide for the liability of the debtor in a judgement or arbitral award for hindrance or noncompliance with enforceable awards or judgements in commercial matters.[45]

Endnotes

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22. *Movenpick Hotels & Resorts Management Egypt—v. Cleopatra Group Integrated Development & Touristic Investment*, ICC case No. 17185/FM/JHN/GFG.
23. Cairo Court of Appeal , Decision No. 18, judicial year 131, issued on 24 August 2014 (Egypt).
24. Court of Cassation Decision No.1491, judicial year 83, issued on 25 December 2015.
25. Article 22 in Arbitration Law; Law No. 27 of 1994 on Arbitration in Civil and Commercial Matters, Official Gazette Vol. 16, 21 April 1994, amended by Law No. 8 of 2000, Official Gazette Vol. 13 bis, 4 April 2000 (Egypt).
26. Dr. Ahmed El Meligy, *op. cit* 4, p. 1089
27. Article 1 in Arbitration Law; Law No. 27 of 1994 on Arbitration in Civil and Commercial Matters, Official Gazette Vol. 16, 21 April 1994, amended by Law No. 8 of 2000, Official Gazette Vol. 13 bis, 4 April 2000 (Egypt).
28. Articles 2 and 3 of the Law. defined the commercial arbitration as relevant to a legal or contractual relationship of a commercial nature. Such arbitration shall be considered international if (*i) the headquarters of each party at time of arbitration agreement was seated in a different countries; (ii) if the parties agreed to resort to a tribunal or arbitration center located in Egypt, (iii) if the dispute relates to more than one country; or (vi) if the parties headquarters are located in the same country at time of arbitration agreement but one of the following is located abroad: (a) the seat of arbitration; (ii) location of implementing an essential part of the obligations arising from the commercial relation; (iii) the location more relevant to the dispute.*
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31. Article 58(3) Arbitration Law that prohibited the challenge of enforcement orders was rendered unconstitutional according to Constitutional Court, Appeal No. 92, Judicial Year 21, issue on 6 January 2001.
32. Appeal of an enforcement order issued in the ex parte proceedings is generally done pursuant to articles 197 to 199 of the ECCP.
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44. Article 1 of Law No. 36 of 1975 on The Establishment of a Fund for Health and Social Services of the judiciary, Official Gazette Vol. 26 June 26, 1975 (Egypt).
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The English Courts' Approach to Enforcing Foreign Arbitral Awards and Judgments in the Context of Fraud

By Rachel Turner and Natalie Todd

Fraud Claims and Freight Trains: Impossible to Stop Once Started?

The recent case of *Stati v. Kazakhstan*[1] is novel for being the first known occasion on which award creditors have sought to enforce a foreign arbitration award in England that has been upheld by the court of the seat, only to seek to resile from this enforcement in the face of opposition (notably, allegations of fraud) from the award debtor. The case raised a number of questions, including whether fraud allegations against the award creditor, once made, could survive a discontinuance of the main action.

In these proceedings the English courts grappled with the interplay between (i) the presumption that an award issued in a country that is a party to the New York Convention will be enforceable; (ii) the maxim under English law that "fraud unravels everything"; and (iii) the court's own obligations where fraud is raised during proceedings.

The English Approach

The English courts' approach to enforcing foreign arbitral awards in the context of fraud has been generally to uphold the principle that the public interest in the finality of arbitration awards, particularly an international arbitration award determined as a matter of a foreign law, outweighs any broad objection on the grounds that the award is somehow "tainted" by fraud.

Challenges to permission to enforce an award can be made under Section 103(3) of the New York Convention 1958[2] which provides that recognition or enforcement of an award may be refused if such recognition or enforcement would be contrary to public policy on the basis that enforcement of the award would contradict the English courts' policy of not allowing the courts to be used to give effect to a fraud. However, there will be a strong presumption that an award issued in a country that is a party to the New York Convention will be enforceable and that public policy defences will be "treated with extreme caution."[3] Whilst the court will consider refusing to enforce awards which give effect to fraudulent or illegal enterprises or claims, it will not refuse to enforce a lawful claim under a lawful transaction, even if voidable, on the basis that the transaction is tainted.

As cases have shown,[4] English courts remain reluctant to restrict enforcement of an arbitration award on the basis that the underlying transaction was tainted and therefore contrary to public policy.

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As to the English courts' approach to enforcing foreign judgments in the context of fraud, this will depend on the relevant enforcement regime. The grounds for resisting enforcement under the Recast Brussels Regulation,[5] the 2001 Brussels Regulation[6] and the 2007 Lugano Convention[7] include public policy. The Hague Convention,[8] the Administration of Justice Act of 1920 and the Foreign Judgments (Reciprocal Enforcement) Act of 1933 also specifically include fraud.

A life of Its Own?

In Stati v Kazakhstan, after statements of case were exchanged and days before the parties were due to give standard disclosure, the Statis attempted to discontinue their enforcement proceedings by serving a notice of discontinuance under CPR 38.3. The court felt that this was "an extraordinary development." The state of Kazakhstan opposed discontinuance, since (as recorded in the judgment) "it wish[ed] to complete the opportunity to prove that the Award was obtained by fraud."

In May 2018 the High Court decided that it was inappropriate for the Statis to be allowed to avoid the scrutiny of the court which they had charged with enforcement,

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and it set aside their notice of discontinuance. It ruled that a claimant did not have an unfettered right under the Civil Procedure Rules to discontinue proceedings it has commenced.

Reversal

In August 2018, in a judgment which provides welcome clarity and reassurance to parties enforcing awards under the New York Convention, the Court of Appeal overturned the judgment of the High Court. The judgment provides helpful guidance on the extent to which a claimant is able to exercise control over the litigation it instigates.

Background

On 19 December 2013, the claimant Statis had obtained a New York Convention arbitral award against the state of Kazakhstan (the "State"), ordering the State to pay damages in excess of US$500 million to the claimants. The arbitration had been instituted pursuant to the Energy Charter Treaty with Swedish seat and the tribunal found that the claimants' companies had been subject to "a string of measure of co-ordinated harassment by various institutions" including the State, which ultimately led to the seizure of the claimants' investments. The tribunal held that this amounted to a breach of the obligation to treat investors fairly, as required by the Treaty. The damages awarded to the claimants included US$199 million relating to the loss of a nearly-completed liquified petroleum gas plant near Borankol in Kazakhstan. The State's allegations of fraud relate to the evidence of the value of this plant adduced before the tribunal by the claimants.

The State attempted to set aside the award on a variety of grounds in Sweden, the seat of the arbitration. This application was subsequently amended to include allegations of fraud based on new documents obtained in separate proceedings. The Svea Court of Appeal heard the application over 13 days in September and October 2016, and ultimately refused to set aside the award.

It is important to note that the Swedish court did not determine the truth or otherwise of the fraud allegations. It found that the allegations did not provide a ground, under Swedish law, for setting aside the award (it is not that under Swedish law fraud can *never* provide grounds for setting aside an award, but that the allegedly false evidence must either have been directly determinative of the outcome of the arbitration or; if it had an indirect influence, it must be obvious that it had been of decisive importance for the outcome.). In October 2017, the Swedish Supreme Court rejected the State's application to quash the Swedish court's decision, meaning that no further appeal was possible.

The English High Court took the view that as the Svea Court had not made any findings of fact, there was no issue of estoppel and so if the facts were established before the English court, it was for the enforcing English court to decide the application of public policy.

Against that background, the English Court of Appeal addressed the following issues:

1. If a party resisting enforcement alleges that the underlying award was obtained by fraud, can that party continue to pursue a declaration of fraud if the recognition proceedings are discontinued?

The State wanted to proceed to a full trial of the fraud allegations and argued that its claims were independent and freestanding of the claimants' enforcement action, and should survive the claimants' discontinuance. The Court of Appeal rejected this argument, finding that the application for declarations that the award was obtained by fraud were nothing more than a defence to enforcement, and formed part of the application to set aside the notice of discontinuance. The use of the language in the Court's order "*as if commenced under CPR Part 7*" was doing no more than applying to the trial of that issue the procedural framework applicable to Part 7 proceedings. It did not cause the application to become an independent Part 7 claim.

The court also noted that in the absence of the enforcement action, England had "no material connection" to the dispute and without enforcement, it was hard to see England as an appropriate forum in any respect.

2. What is the proper approach to the exercise of the court's power to set aside a notice of discontinuance?

The Court of Appeal confirmed that a claimant is entitled to serve a notice of discontinuance which has the effect of discontinuing the claim without further order, unless the defendant applies to set it aside (in which case the burden is on the defendant to satisfy the court that it should be set aside).

It further confirmed that the court's discretion to set aside such a notice is not confined to cases of abuse of process or collateral tactical advantage, but that the discretion would be exercised judiciously by reference to the particular facts and to "consistent principles."

3. Does a party have a legitimate interest in pursuing a declaration of fraud, in circumstances where the relevant award could never actually be enforced in the jurisdiction?

(i) Conduct and expenditure

The State argued that the claimants had initiated the proceedings (which were by now at an advanced stage), and had put them to significant expense in proving their fraud allegations. They felt that once a prima facie case

of fraud had been established against an award creditor, that creditor should not be allowed simply to disengage.

(ii) Does fraud elevate the proceedings to a wider importance?

The State also argued that the importance of the fraud was wider than these proceedings: that because the Claimants were pursuing enforcement action in other jurisdictions, a judgment of the English court "with detailed findings, after disclosure and full evidence at trial, would assist the courts in other countries where the claimants seek to enforce the award." On the evidence before it, the High Court agreed that it was possible that it would be of assistance and that some weight or evidential value will be given in Belgium, Luxembourg and The Netherlands, and also before U.S. courts.

Although it did not accept that the real reason for the discontinuance was an inability to answer the fraud allegations, the High Court did not accept the claimants' purported reasons for discontinuing, namely a lack of resources and the fact that enforcement proceedings elsewhere would satisfy the award. The High Court determined that the Statis did not want to take the risk of adverse findings against it (including on the issue of fraud). The court recognised that its judgment would not have the status of a judgment of the curial court, but felt that there would be value in a judgment of a court "to which all parties have submitted."

(iii) The parameters of the enforcing court's role under the Convention

In overturning the High Court's decision, the Court of Appeal took the opportunity to emphasise that under the Convention the validity of the award is primarily a matter for the country of the arbitration's seat (the curial law).

It reiterated that the role of the courts in other countries is limited to enforcement, including what it termed the "safety valve" provisions at Article V(2)(b) of the New York Convention and Section 103(3) of the Arbitration Act 1996. These provide that enforcement may be refused if the Court or other competent authority finds that enforcement of the award would be "contrary to public policy." The Court of Appeal, in keeping with the train of recent English court decisions, emphasized that this safety mechanism is to be used only with "extreme caution." There is of course a well-established principle, identified in *Soleimany v. Soleimany* and *Westacre Investments Inc v. Jugoimport-SPDR Holding Co. Ltd.*, that it is not open to a court charged with enforcement to go behind a foreign award and apply English law to an issue which has already been determined by a tribunal.

Faced with the State's arguments that English court's duty went beyond these proceedings, the Court of Appeal disagreed, re-emphasizing that on these facts, its role remained restricted to enforcement of the award, and that once proceedings were discontinued "that purpose [had] ceased." It cautioned generally against the English court giving 'advisory' judgments to foreign courts.

It was mentioned—obiter—that there may be exceptional circumstances where it *could* be appropriate for the court to order the proceedings to continue. The example given was where it could be shown that a finding of fraud in the English court would create an issue estoppel in pending overseas proceedings.

4. Is there a public interest in determining at trial whether a party has sought to commit "a fraud on the English courts" by seeking permission to enforce an award which (the respondent says) was obtained by fraud?

The Court of Appeal was clear in stating that it does have the power to require the continuation of proceedings in order to determine whether its processes have been knowingly abused. This is a function of its control.

However, in this case the Court of Appeal dismissed the State's arguments with very little hesitation. It held that the claimants had an award which (i) was valid under its curial law and (ii) which they were entitled to seek to enforce, including in England, and (iii) that the State's allegations of fraud were insufficient to invalidate the award. The State was therefore incapable of establishing that the claimants' application to enforce the award was a "fraud on the English court."

In circumstances where the Swedish court has ruled that the State's allegations did not invalidate the award, enforcement in Sweden is not a fraud on the court, and "it is difficult to see how it could nonetheless be so in England."

Conclusion

The Court of Appeal's judgment confirms that, in ordinary circumstances, where a dispute has no connection to the jurisdiction the English court's role is limited to enforcement of the award.

Nonetheless, a party contemplating enforcement action in England would be well-advised to consider whether the award debtor could establish a connection to the jurisdiction (and be able to frame an allegation as a free-standing claim), or could demonstrate that a finding of fraud in the English court would create an issue estoppel in pending overseas proceedings. There is also the possibility that a defendant might bring a counterclaim for fraud, which may have an independent life even if the claim for enforcement is discontinued. In any of these cases, the enforcing party may find that enforcement proceedings have the potential to take on a momentum of their own.

Endnotes

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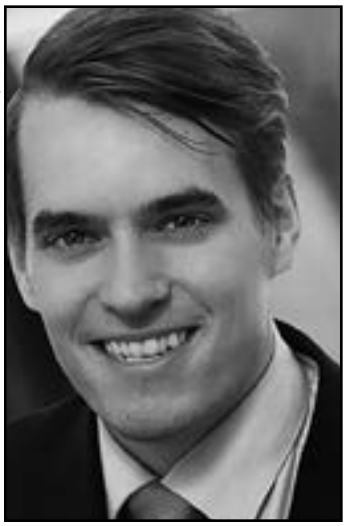
2. The Convention on the Recognition and Enforcement of Foreign Arbitral Awards.
3. *IPCO v Nigerian National Petroleum* [2005] EWHC (Comm) 726, 2 Lloyd's Rep 326.
4. *Sinocore International Co Ltd v RBRG Trading (UK)* [2017] EWHC (Comm) 251, *Westacre Investments Inc v Jugoimport-SPDR Holding Co Ltd* [1999] EWCA (Civ) QB 288, [1999] 3 WLR 811.
5. Regulation (EU) No 1215/2012 of Dec. 12, 2012 on jurisdiction and the recognition and **enforcement** of **judgments** in civil and commercial matters.
6. Regulation (EC) No 44/2001 of December 22, 2001 on jurisdiction and the recognition and **enforcement** of **judgments** in civil and commercial matters.
7. Convention on jurisdiction and the recognition and **enforcement** of **judgments** in civil and commercial matters, signed in Lugano on 30 October 2007.
8. The Hague Convention of 30 June 2005 on Choice of Court Agreements.

The Enforcement of Judgments by Default in Finland—Prepare for an Appeal

By Mikko Junno, LL.M.

I. Introduction



Mikko Junno

The recognition and enforcement of foreign judgments are an essential part of the European Union's (EU) efforts to harmonize legislation. Even though the intention of the conventions and the regulations regarding the recognition and enforcement of foreign judgments are to provide a streamlined process for automatic recognition and enforcement, the process is not without limitations. The party against whom enforcement of a foreign judgment is attempted has certain safeguards to prevent the recognition and enforcement of the foreign judgment. These remedies are most commonly triggered due to lack of proper execution of the parties' right to a fair trial, specifically due to improper service of court documents. This is a specific ground for refusal in international conventions and regulations governing the recognition and enforcement of foreign judgments. As the right to fair trial is observed as a foundational right both on the international and European level, e.g., in human rights conventions, as well as in national constitutional legislations, the ground for refusal due to a lack of a fair trial can also be triggered through the more general principle of *ordre public*. The argument of *ordre public* means that enforcing the foreign judgment is against the public policy of the country where recognition is sought.

Presenting a claim of refusal against the recognition of a foreign judgment may result in a new litigation in the jurisdiction where recognition is sought. Such a claim can transpire when both the issuing and recognizing countries are parties to an international convention on the recognition of foreign judgments. This commonly happens in cases where a judgment has been given in default of appearance (a "default judgment"). The laws of Finland also allow for a claim of *ordre public* in such instances, as appealing default judgments is commonplace in Finnish legal practice. This is true even for cases where the defendant has been appropriately served with the summons for the case. A Finnish default judgment can, therefore, prove to be surprisingly difficult to enforce abroad.

II. The Legislative Framework on Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters

The underlying principle of recognition and enforcement of foreign judgments in Finland is presented in one Section of the law: judgments on civil or commercial matters of a foreign court will be recognized and enforced in Finland if it has separately been agreed upon or if the law so prescribes. The act providing regulations on the enforcement of judgments in Finland prescribes that the act will be applied to a foreign judgment, arbitral award or other ground for enforcement if it is prescribed by another act, EU legislation or international convention to which Finland is signatory. In the absence of support from international conventions or legislative measures in Finland or the EU, foreign judgments will therefore not be recognized, nor enforced, in Finland without a separate court proceeding, where the foreign judgment is only used as evidence.

The current, most significant and applicable internal conventions and regulations related to the recognition and enforcement of judgments given by foreign courts in Finland are the following:

- Regulation (EU) No: 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the Brussels I Regulation);
- The revised Lugano Convention 2007/712/EC between the EU, Denmark, Island, Norway and Switzerland, signed on 30 October 2007 entering into force in the EU on 1 January 2010 (the Lugano Convention); and
- The Nordic Convention of 11 October 1977 between Finland, Iceland, Norway, Sweden, and Denmark on the Recognition and Enforcement of Judgments in Civil and Commercial Matters (the Nordic Convention).

All of the above conventions and regulations apply to civil and commercial matters. However, some conventions have a scope beyond just recognizing judgments in civil and commercial matters, such as the conventions between the Nordic countries, which also covers judgments in criminal cases. When two EU members are concerned, the Brussels I Regulation, along with any other EU regulation, supersedes any of the international conventions.

When applicable, the Nordic Convention supersedes the Lugano Convention in the Nordic Countries.

The Lugano Convention was originally drafted with the intent to broaden the applicability of the original Brussels Convention to other countries in Europe. As a result, the content of the Lugano Convention and Brussels I Regulation are highly uniform. According to both the Lugano Convention and the Brussels I Regulation, an enforceable judgment in a member state is also enforceable in another member state without a separate recognition procedure. The same principle is also stated in the Nordic Convention. These provisions also apply to default judgments.

When a foreign judgment is not subject to EU regulations or international conventions and, therefore, is not directly enforceable in Finland, the only way to enforce the foreign judgment is by filing a new lawsuit in Finland and using the foreign judgment as evidence. This also applies when a judgment was obtained in a foreign court in accordance with the parties' agreement on jurisdiction. Finnish courts apply free consideration of evidence, meaning that the court has freedom to decide what impact certain evidence has. Therefore, the evidentiary weight of a foreign judgment varies from case to case, and even though foreign judgments can carry significant evidentiary weight, recognition is not an automatic process in the same way that the EU regulations and international conventions prescribe. In general, it can be stated that the burden of proof regarding the recognition and enforceability of a judgment is reversed from the applicant to the defendant when the following requirements are fulfilled:

- The judgment is based on the legislation of the issuing country;
- The judgment is legally valid; and
- The process has been fair for the parties and the losing party has had an appropriate opportunity to defend themselves.

Under the above conditions the judgment is presumed enforceable and the defendant must prove that the judgment cannot be enforced. The precondition of legal validity can especially prove to be an issue in the enforcement of a foreign judgment. A default judgment can be appealed in the country it was rendered, so the plaintiff attempting to enforce the judgment must prove that the judgment has obtained legal validity. The fair process requirement can also be questioned if the judgment was by default. The court tasked with enforcing the foreign judgment must be persuaded that the defendant was appropriately summoned to the court proceedings. As we will observe later, Finnish default judgments grant the defendant extensive rights to appeal the judgment after it is given.

The number of cases where a foreign judgment is sought to be enforced to which the EU regulations or international conventions do not apply is not insignificant. This is especially true in Finland due to the country's shared border and historically close trade relations with Russia.

III. Remedies Against Default Judgments Due to Improper Service of Documents Initiating the Proceedings

According to both Article 34(2) of the Lugano Convention and Article 45(2) of the Brussels I Regulation, the recognition of a foreign judgment may be refused if the judgment was obtained by default. Refusal of a foreign default judgment can be based on the defendant not being served with the document instituting the proceedings or with an equivalent document within sufficient time and in such a way as to enable him to arrange for his defense. A foreign default judgment can be granted when the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so. This remedy regarding foreign default judgments is, therefore, is only available when the defendant has not been served with the lawsuit in an appropriate manner. Differences in national procedural law can therefore affect the recognition of a foreign judgment.

Finnish courts have examined the requirement of serving the defendant with the summons for proceedings on multiple occasions. In one of the more recent cases, the Eastern Finland Court of Appeal concluded that a Lithuanian court had failed to serve the documents to a Finnish defendant as required by the Brussels I Convention. In that case, the court had attempted service via mail on multiple occasions and afterwards decided to conduct the service via public notice. The service should primarily be conducted in accordance of the laws of the member state addressed, and according to Finnish law documents can be served via public notice only when there is no information available regarding the whereabouts of the recipient. The Lithuanian court had not, according to the Eastern Finland Court of Appeals, presented evidence that it had in fact exhausted the means of serving the documents that are available under Finnish law.

In a case decided by the Vaasa Court of Appeals, the court took a stance on what constitutes documents initiating proceedings as intended by Article 34 (2) of the Brussels Convention. In that case, a default judgment rendered by the *Viru Maakohus* court of Estonia was enforceable in Finland despite the defendant claiming that it had not been served with the invitation to court hearings. The defendant had, however, been served with the summons to the case and the defendant had filed a response to the plaintiff's claim. This proved to the Vaasa Court of Appeals that the defendant had been served appropriately with the documents initiating the proceedings and that Article 34 (2) could not be invoked in the matter.

The Supreme Court of Finland has also been involved in evaluating whether the defendant has been properly summoned to the court proceedings. The case related to the application of the Lugano Convention to a judgment by default rendered by the Northern Tromssa District Court of Norway and sought to be recognized in Finland. In that case, the documents initiating the proceedings were served to the registered address of a business owned by the Finnish defendant. Since the service was conducted in Norway, the service was subject to the laws of Norway. The Supreme Court concluded that there were no obvious reasons to suspect that the service would not have been conducted in accordance with the laws of Norway and rejected the request to refuse the recognition of the foreign judgment.

IV. Remedies Against Default Judgments Due to Breach of *Ordre Public*

At times, enforcement of a foreign judgment can be refused even when the service of the documents initiating proceedings has been conducted properly. Under both the Lugano Convention and the Brussels I regulation, recognition of a foreign judgment may be refused if such recognition is manifestly contrary to the *ordre public* in the Member State addressed. The inclusion of the qualifier "manifestly" indicates that minor discrepancies of the *ordre public* should be tolerated. Under the 1977 Nordic Convention, the recognition or enforcement of a judgment can also be refused under the *ordre public* principle; however, the wording requires that the recognition is "obviously" against the *ordre public*. The difference between the two wordings is more or less a matter of semantics.

The EU has concluded that the *ordre public* defense should be applied only when the other grounds for refusal to enforce the foreign judgment do not apply, and even then only under exceptional circumstances. The other grounds for refusal are manifestations of the *ordre public* principle and they should be applied whenever possible. The *ordre public* defense is intended to be the final remedy against the recognition of foreign judgments. In case of service of documents initiating proceedings, this claim should be investigated under Article 45(2) of the Brussels I Regulation. The *ordre public* clause, however, can be applied to cases where other court documents have been served incorrectly so that this act breaches a party's right to a fair trial. Even here, however, the *ordre public* principle should be applied very carefully. Regarding default judgments, the most common reason for attempts to refuse the judgment is failure to appropriately serve the documents related to the court proceedings. Since Article 45(2) already concerns the service of the documents initiating the proceedings and this article should be primarily applied to such instances, the secondary claim of *ordre public* has indeed a very limited applicability.

There are some procedural rules that Finland does not recognize that could constitute a breach of *ordre public*. For instance, Finland has made a reservation to the Hague Convention of 18 March, 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters, according to which Finland will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries. If a Finnish court were tasked with recognizing a foreign judgment where such a process of discovering evidence was utilized, the judgment could be refused based on the *ordre public* principle.

When tasked with the recognition of a foreign judgment given by a court outside the members of the EU or the convening countries of the Lugano convention, there is a larger possibility of claiming that a decision would be against the *ordre public*. Even here, however, the *ordre public* defense should be interpreted narrowly so that minor differences do not unreasonably prevent the recognition of foreign judgments.

V. Remedies Against Judgments by Default When Court Documents Have Been Served Appropriately

Since the *ordre public* defense is applicable in very rare instances, a successful service of the documents initiating proceedings should lead to a more certain recognition of the default judgment. There are, however, still remedies to consider before the judgment could be enforced. To be enforced, the court whose judgment is sought to be recognized in another EU member state must confirm the judgment as a European Enforcement Order. EU's regulation (EC) No 805/2004 on procedure with uncontested claims specifies which kinds of default judgments by default can be certified enforceable as a European Enforcement Order. The regulation dictates certain procedural requirements for the court proceedings in cases where the defendant has remained idle and the plaintiff has been awarded a default judgment. The most important one is that the defendant should be served with the lawsuit and be provided an opportunity to arrange their defense. Further, the defendant must be provided with the possibility to apply for a review of the judgment where the document instituting the proceedings was not verifiably served and sufficient time to enable him to arrange for his defense was not affected without any fault on his part. Under this regulation, the possibility to refuse the enforcement of a foreign judgment also relies on the summons not being served verifiably and in an appropriate manner.

Even though the documents initiating proceedings were served properly to the defendant and a court has given a judgment by default against the defendant this does not mean that the pool of available remedies is depleted. In Finland, judgments given in default of appearance are directly enforceable, which also allows immediate enforcement in other member states. The judgment is

not served to the defendant by the court, however, but instead it is up to the plaintiff to ensure that the defendant will be served with the judgment. It is customary that the defendant will not be served with the judgment separately, but rather served as the judgment is enforced so the defendant cannot appeal the judgment before enforcement. The defendant has the right to appeal a default judgment within 30 days from the date receiving verifiable notice of the judgment. This applies whether or not the defendant was appropriately served with the documents initiating the proceedings or not. The case will be re-opened if the defendant presents the court with grounds for the amendment of the judgment that could have been relevant when the case was decided. This results in a situation where an appeal against a default judgment *de facto* always leads to the court reopening the case if the appeal was filed in time. This is a more generous system for review of a default judgment than what is required under the EU regulation No 805/2004 and makes default judgments very uncertain to enforce.

A default judgment is always subject to appeal under the laws of Finland. This is important to keep in mind when enforcing a default judgment from a Finnish court abroad: only once the enforcement proceedings begin does the time reserved for an appeal from the defendant start to run, unless the plaintiff arranges the service of the judgment in another way before the enforcement. Receiving a default judgment, therefore, does not necessarily mean the end to the proceedings in Finland.

Conclusion

The enforcement of a default judgment is strongly dependent on whether the court has served the documents initiating the proceedings properly. When the service of documents has been appropriate, the defendant cannot invoke Article 45(2) of the Brussels I Regulation or Article 34(2) of the Lugano Convention. The defendant can, however, attempt refusal of recognition of the judgment based on the *ordre public* principle under Articles 45(1) of the Brussels I Regulation and Article 34(1) of the Lugano Convention. This defense can also be used against judgments from outside the member states of these regulations, and in such a case the defense is also available for failure to serve documents initiating proceedings. At least in the member states of the EU and the Lugano Convention, the applicability of the *ordre public* defense is rather narrow, meaning that succeeding in refusing a foreign judgment under this defense can prove to be difficult.

In the case of Finnish default judgments, however, due to the peculiarities in serving judgments by default, the defendant usually can appeal the judgment by default in the Finnish court even after it is being enforced in another country. This leads to the dispute being transferred back to the Finnish court in full. When attempting the enforcement of a Finnish judgment by default abroad, it is recommended to prepare yourself for an appeal on the judgment by the defendant.

Foreign Judgments Enforcement in Israel

By Eddy Meiri

I. The Basics

Eddy Meiri

The statutory source for the enforcement of foreign judgments in Israel is the Foreign Judgments Enforcement Law 5718-1958 (Enforcement Law).[1]

In addition, Israel has adopted, although not completely, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (N.Y. Convention) as promulgated under the Regulation for the Execution of the N.Y. Convention (Foreign Arbitration) 5738-1978 (N.Y. Convention Regulations).

A foreign judgment is not awarded automatic recognition, and for it to be executable, it needs to be "converted" into an Israeli judgment, either by "enforcement" or "recognition" by an Israeli court. "A foreign judgment per se is not recognized."[2, 3]

> In order for a finding in a foreign judgment to be used as Res Judicata in litigation in an Israeli court, the foreign judgment must go through an adoption process—the Israeli court has to recognize the foreign judgment. As long as it hadn't gone through such a process, it has no standing in Israel whatsoever, neither for the purpose of enforcement thereof in Israel nor for the purpose of recognition thereof as res judicata… There is no disputing that a foreign judgment which was not afforded enforcement or at least recognition, lacks any force and effect.[4]

A basic principle, probably the most basic principle, is that in considering an action for the enforcement or recognition of a foreign judgment, the Israeli courts do not hear the case as an appellate court or de novo, and they do not re-examine either the factual or legal correctness of the underlying judgment. Even a judgment erroneous on its face will be granted recognition and enforcement.[5] The court is restricted to reviewing "the judgment's shell; not its content."[6] The defendant objecting to the action to enforce the foreign judgment may not re-open the hearing, and he or she does not have a "second chance" of litigating the case and presenting defenses.[7]

A key condition is that the foreign judgment must be clear, and no extrinsic evidence is admissible in order to construe such judgment:[8] "The judgment must have its content clear on its face and out of its stipulations, even per se and without reviewing the hearings' minutes and the other evidence."[9] Courts will refuse to enforce unclear judgments.

What Can Be Enforced?

The Enforcement Law § 1 defines a "judgment" as "a judgment issued by a court in a foreign country in a civil matter, including a judgment for payment of compensation or damages to an aggrieved party, even when not issued in a civil matter." In *Gerber Finance Inc. v. Ovad et al.*,[10] the court discussed the meaning of "judgment" in length and in particular whether a "judgment" may include a "decision," i.e., an interim decision, as opposed to a final conclusive judgment. Following some precedents, the court ruled that it is the lack of appealability of a decision, including an interim decision, that makes it enforceable under the Enforcement Law, as shall be more thoroughly discussed below.

Enforcement v. Recognition; Direct v. Incidental

There are three routes offered for enforcing or recognizing foreign judgments under the Enforcement Law: the enforcement route (Enforcement Law § 3); the direct recognition route (§ 11(a)), and the incidental recognition route (§ 11(b)). In a nutshell, direct recognition requires a treaty between Israel and the other jurisdiction, and it shall not be discussed here.

The basic distinction between enforcement and recognition has to do with the purpose of the procedure. Enforcement is required where one wishes to execute the judgment. In order to have a judgment executed, i.e. collected de facto, an Israeli judgment has to be presented to the Israeli Civil Execution Authority. If one holds a foreign judgment, one has to "convert" such judgment into an Israeli judgment, and only then address the Civil Execution Authority, which shall treat such judgment, once declared enforced, as if it were an Israeli judgment.[11] This will usually be the procedure when judgments of in personam nature are involved, i.e., judgments which impose some obligation—usually a monetary one—on the losing party.

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In contrast, if one only wishes to use the foreign judgment for purposes of another legal proceeding, but not to enforce such judgment per se, recognition shall suffice. The typical situations where recognition rather than enforcement is sought, occur when a defendant wishes to use the foreign judgment as a defense, e.g., arguing res judicata, or as an underlying fact of his or her current cause of action.

Stern v. Verifone Holdings, Inc.[12] was the "Israeli chapter" of *In re Verifone Holdings, Inc. Securities Litigation*, Civil Action C 07-6140 MHP, which was litigated in the United States District Court in California. A class action was filed in Israel against Verifone, but all proceedings were stayed, pending a resolution of the California case. The California court approved a settlement, which applied to stockholders worldwide (despite the Morrison ruling).[13] The Israeli class plaintiff moved against the application of the settlement on the Israeli investors, and Verifone raised a res judicata argument based on the class action approved settlement. The Israeli Supreme Court ruled that incidental recognition pursuant to the Enforcement Law § 11(b) may be granted to a foreign class action judgment, while taking the appropriate measures ensuring that the class's rights are not compromised.

The Israeli court emphasized that incidental recognition should be just that—incidental, i.e., it must be raised under a litigation, which is in the court's jurisdiction, and only as an incidental matter required for ruling in the principal matter. In contrast, where recognizing the foreign judgment is the sole relief sought in the action, the incidental—or even direct—recognition is not the proper proceeding, but rather an action for enforcement.[14]

Indirect recognition requires, *inter alia*, that "law and justice so require" to recognize the foreign judgment, which naturally remains a vague term, leaving it to courts to construe its relevant meaning on a case-by-case practice.[15]

Also, where the recognition is essential in order to establish the court's jurisdiction to hear the principal cause of action, the action shall not be deemed one for "incidental recognition."[16]

In *Levine v. Aharon Zohar, CPA*[17] it was ruled that a bankruptcy order issued in the UK may not be recognized in order to act against the debtor's assets located in Israel, because the court considered such an action as "a motion for direct recognition under the disguise of an incidental recognition."

As a rule, incidental recognition should be used solely as a shield, not a sword.[18]

Lately, a few attempts have been made to acquire incidental recognition of foreign judgments in cases of class actions in matters of worldwide cartels. The representative plaintiffs have argued that the defendants, major global conglomerates convicted in several jurisdictions worldwide for cartel violations, are estopped from denying the factual allegations made in the Israeli class actions. Should such an argument be accepted by the court, not only will the motion to certify the actions as class actions probably be granted, but in fact the entire liability stage of the case will be determined, leaving only damages to be litigated. To the best of my knowledge, none of the courts presented with the argument have yet rendered any decisions on the matter.

II. Preliminary Considerations

Subject Matter Jurisdiction

Israel has a different judiciary system than that of New York or the U.S. in general, one that is more complex when it comes to subject matter jurisdiction. The magistrate court is a trial court, which hears civil cases of up to NIS 2.5 million[19] in value; criminal cases where the felony is punishable by up to seven years of imprisonment, and real estate cases involving possession or use (but not ownership disputes). Then there is the district court, which acts as both an appellate court and as a trial court in civil matters exceeding the magistrate court's subject matter jurisdiction, and real estate cases involving ownership disputes. The district court also has residuary subject matter jurisdiction as well as a few additional areas of subject matter jurisdiction, irrelevant to our discussion (e.g., as a "court of chancery").

When the Enforcement Law was enacted in 1958, and until 1987, the Jerusalem District Court had exclusive subject matter and venue jurisdiction over all enforcement and recognition of foreign judgments (former Enforcement Law § 9). In 1987, Enforcement Law § 9 was revoked, but no amendment was made setting forth the subject matter or the venue jurisdictional questions.

When faced with the issue, the Israeli Supreme Court ruled that an action for the enforcement of a foreign judgment is in fact an action for execution, which is equal to the sum of the foreign judgment. Note, that is the case notwithstanding the fact that the action is to "declare the foreign judgment enforceable." In light of said construction, it was ruled that the subject matter should follow the relief granted in the foreign judgment, i.e., magistrate court or district court subject matter jurisdiction are determined pursuant to the above-mentioned partition.[20] Venue shall follow the usual venue ruled under Israeli law (usually the defendant's residence).

That remains the rule even where bi-lateral conventions vest exclusive subject matter and venue jurisdiction with the Jerusalem District Court prior to revocation of

said Enforcement Law § 9.[21] The Israeli court (magistrate level) ruled, that where the convention between Israel and the UK regarding the mutual enforcement of judgments vested exclusive jurisdiction with the Jerusalem District Court, but that was done when Enforcement Law § 9 was in effect. Once said section was revoked, subject matter jurisdiction must follow the regular rules.

III. Action for Enforcement—The Overall Scheme

An action for enforcement of a foreign judgment is an independent action, the cause of action thereof being the foreign judgment itself. The plaintiff asks the court to enforce the foreign judgment, and bears the burden[22] of proving four aggregate conditions: (1) the judgment was issued in a country, pursuant to the laws of which its courts were competent to issue such judgment; (2) the judgment is no longer appealable; (3) the obligation of the judgment is enforceable under the law of judgment enforcement in Israel, and its content is not in contrast to public policy; and (4) the judgment is enforceable in the country in which it was issued.

ment under the rules of private international law applicable in Israel (§ 6(a)(3)); the judgment is in contradiction with another valid judgment between the same parties (§ 6(a)(4)); at the time of filing the action in the foreign country a legal proceeding was pending in Israeli between the same parties (§ 6(a)(5)); or

- § 7–the foreign judgment might be detrimental to Israel's sovereignty or security.

IV. The Plaintiff's Burden

Lack of Appealability

Under Israeli law it is the lack of appealability of a judgment, including an interim decision, that makes it enforceable under the Enforcement Law.

If a decision or judgment may no longer be appealed, it qualifies as a "judgment" for the purposes of the Enforcement Law. That is the case even if such decision or judgment may later be revoked or modified by the court issuing such judgment or decision. The exclusive emphasis is on one issue: may the objecting party still appeal the judgment or decision under the foreign law? If the answer is in the negative, the judgment or decision is enforceable under the Enforcement Law.

"Foreign law is considered a matter of fact; a legal expert familiar with the relevant foreign law will have to opine as to the fulfillment of such terms with respect to each case."

Foreign law is considered a matter of fact; a legal expert familiar with the relevant foreign law will have to opine as to the fulfillment of such terms with respect to each case.[23]

Once the plaintiff establishes the abovementioned conditions have been met, thus meeting plaintiff's burden, it is the defendant's turn to try and establish one of the defenses offered by the Enforcement Law, which, if proven, shall cause denial of the action, and hence prevent the judgment from being executed in Israel. Possible defenses include the following Enforcement Law sections:

- § 4(a)–lack of reciprocity by the foreign country in enforcing judgments issued by the Israeli courts;
- § 5–statute of limitation: the motion to enforce the judgment was filed more than five years since the issue of the foreign judgment;
- § 6–equitable or justice reasons justifying not enforcing such foreign judgment. Among such reasons are the following: the foreign judgment was received due to fraud (§ 6(a)(1)); the losing party was not given a reasonable opportunity to present its case—a due process argument—(§ 6(a)(2)); the foreign court lacked jurisdiction to issue such judg-

Just a few months after *In re Gerber*, another decision was issued in Israel contradicting in some points. In *Transfield Er Futures Limited v. Deiulemar Shipping Spa et al.*[24] (hereinafter *In re Transfield*), the plaintiff moved for temporary injunctive relief under an action for the enforcement of a judgment issued in the UK against respondent. Pursuant to a convention for the mutual enforcement of judgments between Israel and the UK, the movant produced a confirmation from the English court which issued the judgment, stating that respondent had moved for leave to appeal and was denied, and therefore, under the law of the UK, the judgment is final and enforceable, notwithstanding a motion to a higher court for grant of leave to appeal, which was pending at the time.

The Haifa District Court ruled in *In re Transfield* that the finality of a judgment shall be determined under Israeli law, in contrast to the ruling in *In re Ovad*, which ruled that the appealability of a judgment shall be determined pursuant to the law of the issuing jurisdiction. Moreover, the *Transfield* court ruled as it did despite the definition in the Israel-UK mutual enforcement convention of a "judgment" as including one under pending ap-

peal or which might be under appeal, relying on section 5(2) of the Israel-UK convention, which allowed the court to do so when a potential appeal is pending.[25]

Enforceability of the Judgment Where Issued

This condition set forth in the Enforcement Law § 3(4) is seemingly a puzzling one. Will a court render a verdict that is unenforceable in its own jurisdiction? The one example I found in the Israeli case law is when the losing party is declared bankrupt and is later discharged of his or her debts by the bankruptcy court. In such a case, the foreign judgment, once a valid enforceable judgment, is revoked de facto, and can no longer be enforced in the jurisdiction where rendered, and hence cannot be enforced in Israel.[26]

Public Policy Considerations

Rarely will public policy considerations result in rejection by an Israeli court of an action to enforce a foreign judgment. That is so because of the definition of "public policy" under Israeli case law and the desire to show comity to foreign nations. The following precedent is cited over and over again in relevant cases:

> It is a well rooted case law rule that only rarely shall we reject the enforcement of a foreign judgment due to public policy reasons. Indeed, that public policy stipulated under the provision of sec. 3(3) of the law is an "external" public policy (ordre public externe), different for an "internal" public policy (ordre public interne), and such public policy engages in "…the core values of a country and of a society, moral, justice and fairness, and only if a foreign judgment harms any of those shall we reject it…an argument of a foreign judgment being erroneous or causing injustice shall not suffice": CiA 1137/93 Ashkar v. Heims [1], pp. 652-653. And as we have expressed ourselves elsewhere (on the matter of extradition) an exterior public policy engages with "…the basic principles, the depth-views and the supreme interest of the society and the country…" (CrA 2521/03 Sirkis v. State of Israel [2], p. 346)….[27, 28]

In particular a judgment of monetary consequences will rarely be deemed offensive to public policy in Israel.[29]

However, though a rarity, Israeli courts have declined recognition of foreign judgments or foreign awards when such awards were achieved by means of extreme prejudice, threats and attempted blackmail addressed at one of the arbitrators, and threats to the arbitrator's life, which caused the arbitrator to sign the arbitration award. It should be emphasized that such denial of enforceability was not based only on the arbitration award being issued by fraud, but also—and mainly—as one in contrast to public policy:

> There are extraordinary occasions, where validating the foreign law and its results will materially harm the public order by which we live, and only where a foreign law be in contrast with the justice and moral senses of the Israeli public, shall we be obligated to dismiss it.[30]

Is a judgment that lacks proper reasoning, or lacks reasoning altogether, nevertheless enforceable? In a relevant case, where the judgment sought to be enforced lacked reasoning the defendant argued, that lacking reasoning is in violation of public policy, and therefore enforcement should be denied. The court ruled that lacking reasoning is not per se a reason to deny enforcement. The court mentioned the famous Courts Law [Combined Version] 5744-1984 § 79A, which allows the court to issue a judgment lacking any reasoning, subject to the parties' agreement to empower the court to act in such manner. That alone proves, that lack of reasoning is not against Israeli public policy.[31]

V. The Defenses—Defendant's Burden

The Enforcement Law § 6 present a number of defenses, which—if existing—shall cause denial of the action for enforcement.

Lack of Reciprocity—Enforcement Law § 4(a)

A judgment will not be enforceable, if it was issued by a country, that holds that under its law an Israeli judgment is unenforceable. What if there is no precedent in the foreign country—neither enforcing an Israeli judgment, not denying enforcement thereof?

In *Double K Petrolium Products (1996) Ltd. v. Gaspetrum Transgas Ochta Ltd.*[32] the Israeli Supreme Court ruled that in such an event there is a rebuttable presumption that a foreign court will enforce Israeli judgments, and it is the defendant's burden to rebut such presumption. Considering the basic principle underlying the issue of recognition and enforcement of foreign judgment, i.e., comity and mutual cooperation between nations, with an added value of legal stability and justice for the triumphant party, all that is required is to show a reasonable potential for reciprocal enforcement. There is no need to prove enforcement de facto. Other benefits have been discussed:

> It enables the party that had already won the proceeding to receive what it allegedly deserves; contributes to efficiency by not leading to double litigations on the same subject matter; as well as contributing to legal certainty. It also assists business parties to plan their steps (where, in looking into the future they consider

> taking various steps, such as the inclusion of a jurisdiction clause in a contract. Finally, it contributes to the enforcement of Israeli judgments abroad in those systems that also take the reciprocity approach with respect to the enforcement of foreign judgments.[33]

The court repeated that rule in *Reitman v. Jiangsu Overseas Group Co Ltd*.[34] In that case it was the Chinese legal system' enforcement practices that were debated. As mentioned above, having no indication in either direction, the court ruled that there is reasonable potential that Israeli judgments will be enforced in China; hence, Enforcement Law § 4(a) was not proven by the opposing party.

Statute of Limitation—the Enforcement Law § 5

The Enforcement Law § 5 sets a five-year period of limitation for the enforcement of a foreign judgment. It is a rather unique and short period of limitation compared to the general period of limitation set forth in the Israeli law of seven years.[35] However, such period of limitation does have a few reservations and caveat notes attached thereto:

The five-year period for filing an action to enforce the foreign judgment begins upon the service of the foreign judgment unto the defendant; not at the time of issue of the foreign judgment.[36] However, I believe (I found no case addressing the matter) that one should take steps in order to attempt and serve the foreign judgment upon the losing party as soon as possible, lest the Israeli court deem it bad faith in the practice of judicial rights.

If there is an agreement between Israel and the foreign judgment country of a different period of limitation, such other period shall apply (note: not necessarily a longer one).

If the court finds "special reasons justifying the delay," the period may be extended.

Such period applies to motions to enforce a foreign judgment; it does not apply to motions to recognize a foreign judgment under an incidental recognition process, in which case there is no statute of limitation as stipulated in *John Doe v. Jane Doe*:

> When dealing with an action for enforcement, lack of pursuing the right for years weakens it much like other actionable rights, which are subject to statute of limitation. That is not the case with respect to incidental recognition of a judgment for purposes of denying an action determined in a previous proceeding. In such a case, abstaining from demanding to enforce the judgment for years foes no indicate at all the forsaking of the judgment's consequences, and does not weaken them. Any other instruction would result in an absurd, because its practical meaning is that a person whose action was lawfully denied in one country following a due process can re-submit the same action in another country after the passage of five years, as if nothing was ever done, and that a defendant seeking such a result is obligated to ratify the judgment issued in his favor in every country in which it may be sued.[37]

The period to object to a motion for enforcement or recognition of a foreign arbitration award to which the N.Y. Convention applies is not 45 days from the date of receiving the award (as is the case in a motion to set aside an award not subject to the N.Y. Convention), but within 15 days from the date on which the motion for recognition and enforcement of the award was filed.[38]

In fact, when it comes to motions regarding the recognition and enforcement of arbitration awards to which the N.Y. Convention applies, a motion to set the award aside may only be filed with the competent court of the country in which the award was issued. The party objecting enforcement or recognition cannot initiate an objection thereto, but rather only a motion to set the arbitration award aside, as set forth in the N.Y. Convention § 5.[39]

Fraud—Enforcement Law § 6(a)(1)

A foreign judgment will not be enforced if the defendant proves that it was obtained fraudulently. The Israeli courts have chosen to follow a strict meaning for such "fraud" and accept the argument only if it meets the Israeli bar for "fraud." In doing so the Israeli courts have drifted away from the Common Law (more liberal) construction of the term with respect to enforcement of foreign judgments, and follow a test of new evidence (extrinsic to the judgment), which were unknown both in fact and constructively, at the time the judgment was rendered.[40] As general rule, fraud requires the same elements required for a re-hearing of a civil case under Israeli law[41] (which means the bar is extremely high).

Due Process Defense—Enforcement Law § 6(a)(2)

A foreign judgment will not be enforced if the defendant was not given a reasonable opportunity to argue and present his or her case before the original tribunal.

This defense shall be examined objectively rather than subjectively. The test is whether the court provided the defendant with a reasonable opportunity to appear and take part in the trial.

Hardships that the defendant might have experienced shall not negate due process.[42] Hence personal hardships met by the defendant (his mother having just

passed away and him having to cope with many other emotional issues that took his focus away from the trial) were not recognized as not granting him a reasonable opportunity to present his case.[43]

A judgment in default is, therefore, enforceable despite the fact that the defendant did not appear. It is not defendant's appearance that is examined, but rather the court's grant of a fair chance and an opportunity to appear, whether or not used.

Service of Process Issues

A recurring issue in actions for enforcement of foreign judgments is the matter of service of process, i.e., the defendant argues that he had no knowledge of the foreign proceeding until presented with the judgment, or even later—until served with the summons for the Enforcement of foreign judgment action. The courts have deliberated whether they should examine the matter at all.

On the one hand there is the presumption that the original tribunal, which rendered the sought-to-be-enforced judgment, did examine the service issue and would not have rendered a judgment in default lacking satisfying proof that the defendant was properly informed of the proceeding and had his, her or its fair opportunity of appearing in court and defending their case.

Therefore, and considering the basic principle, that the Israeli court does not act as an appellate court over the original ruling court, the Israeli court should not look into any such arguments at all, just as it should ignore any material defense arguments (the content v. the shell). That was the dissent opinion in *Brasslauer v. Brautz*.[44]

The opinion of the court in *In re Brasslauer* was, however, that the Israeli enforcing court should look into any defected service arguments, because if the defendant was indeed unaware of the proceeding, he or she could not have possibly been afforded due process, hence the condition set forth in the Enforcement Law § 6(a)(2) is met, and the judgment should not be enforced.

It should be noted that the opinion of the court was despite the fact that the court administration (which is the authorized entity under the N.Y. Convention) confirmed that service was performed properly. The case was remanded for further hearing in the matter of the service of process in the underlying sought-to-be-enforced action.

An earlier ruling by a lower court reflected the suggested rule by the *In re Brasslauer* dissent.[45] In both cases, the courts seemed to have unanimously agreed that valid service is to be established pursuant to the laws of the jurisdiction of the foreign judgment, not under Israeli law.

The Foreign Court's Jurisdiction—Enforcement Law § 6(a)(3)

A foreign judgment will not be enforced, if it was issued by a court, which under the private international law applicable in Israel, lacked jurisdiction.

However, one should note that the defendant is presumed to have accepted the foreign court's jurisdiction unless he or she appeared before the foreign court either solely in order to deny such court's jurisdiction or to deny such foreign court's jurisdiction along with other affirmative defenses.

"As individuals and corporations do business and accumulate wealth and debts while transcending political borders, more and more proceedings, including bankruptcy proceedings, take an international angle."

In any event, in order for this defense to apply, the defendant must object to the foreign court's jurisdiction at the very first chance. Raising affirmative defenses and only then presenting an objection to the foreign court's jurisdiction will deny the defendant from being able to use the § 6(a)(3) defense.[46]

VI. Special Issues

Bankruptcy Proceedings

As individuals and corporations do business and accumulate wealth and debts while transcending political borders, more and more proceedings, including bankruptcy proceedings, take an international angle. Under U.S. bankruptcy law, orders issued in bankruptcy proceedings may be both *in rem* and *in personam*, i.e., they strive to be all-inclusive, so that one bankruptcy proceeding will… well…"rule them all."

11 U.S. Code, Chapter 15 ("Ancillary and Other Cross-Border Cases") presents a greatly comity-oriented approach, recognizing foreign (non-U.S.) jurisdictions' bankruptcy proceedings and (very simplistically put) where relevant awarding them priority on a chronological basis.

It seems that the Israeli law does not entirely follow that spirit or at least not to such an extent. Courts have ruled that a chapter 11 stay order does not include any personal obligations, and therefore requires direct recognition pursuant to Enforcement Law § 11(a), which is impossible with respect to bankruptcy proceedings, lacking any treaty between Israel and the US in such matter

(the court referred to the lack of an Israel-New York State treaty).

In *Israel's First International Bank Ltd. v. Gold and Honey (1995) L.P.*,[47] the Israeli court refused to automatically recognize the US bankruptcy court's power to issue stay orders applicable to all debtor's assets, wherever located. Instead it insisted on reviewing the matter under the Enforcement Law, referring to the stay order as to any other "foreign judgment."

However, once taking that road, the Israeli court manifested extreme "flexibility" in construing the Enforcement Law and its inherent restrictions, as stipulated in the case law. It agreed to review direct recognition of such order, despite the lack of possibility to do so under the explicit language of the Enforcement Law, as above noted. It went on to say that due to the dynamic nature of all bankruptcy proceedings—especially those under Chapter 11—the demand for non-appealability (as above detailed) does not apply.

However, the court did consider two further issues: personal jurisdiction and the majority of connecting factors test. In *In re Gold and Honey* the court ruled that most connections were to Israel rather than to New York State, and therefore refused to recognize the stay order issued in the US bankruptcy court.[48] It should be noted that in *In re Gold and Honey*, the movant's bad faith played a key role.[49]

With respect to a different issue, in *In re Shpelter* it was ruled that once a defendant includes a certain debt in his or her statement in a chapter 7 proceeding, such declaration constitutes admission of the debt, and the defendant is estopped from denying such debt or the foreign bankruptcy court's jurisdiction.

Inheritance Proceedings

A final short note: Under Israeli case law, a foreign probate administration order is not to be enforced at all as such. The proper proceeding is to file for a separate Israeli probate or administration order, which will refer to the assets located in Israel.[50] The Israeli Supreme Court has just recently repeated that rule addressing an obiter, which might have been misunderstood as overruling said rule.[51]

Endnotes

1. All Israeli Statutes bear the Hebrew year and the Gregorian year.
2. LCiA 9296/16 Supreme Court (Jerusalem), *Professor Marta(Erika) Band De Rosenberg v. Yad Va-Shem* (12.04.2017), Nevo Legal Database (by subscription, in Hebrew), (Isr.) (hereinafter *In re De Rosenberg*). The case involved a succession dispute over a suitcase which belonged to the late Oscar Schindler and contained many historically valuable, not to say priceless, documents.
3. Unless otherwise indicated, citations are from Israel's Supreme Court's ruling, which makes them binding precedents upon lower Israeli courts. The initials refer to the type of proceeding, e.g., CiC means Civil Case; CiA means Civil Appeal; LCiA means a motion for Leave for Civil Appeal; etc. Citations follow the Israeli citation rules.
4. *In re De Rosenberg*, p. 8.
5. CiA CA 221/78 *Ovadia v. Cohen*, 33(1) SCD 293 (1979); CiC 8349-11-10 DC (Center District), *Eurostar Inc. v. Shar'abi (04.01.2014)*, Nevo Legal Database (by subscription, in Hebrew), (Isr.) (hereinafter *In re Eurostar*).
6. *In re Eurostar*, p.11.
7. CiC 38969-08-17 Magistrate (Ashdod), *Wynn Las Vegas LLC v. Udi Sa'ada et al.* (05.21.2018), Nevo Legal Database (by subscription, in Hebrew), (Isr).
8. CiA CA 3459/94 I.P. *Enterprises Inc. v. Milozan Ltd.*, 52(1) SCD 273, 276 (1998) (hereinafter *In re Milozan*); *In re Eurostar*, p. 17.
9. *In re Milozan*, p. 277.
10. CiC 33559-09-10 DC (Tel Aviv) *Gerber Finance Inc. v. Ovad et al.* (01.05.2012), Nevo Legal Database (by subscription, in Hebrew) (Isr.) (hereinafter *In re Gerber*).
11. Enforcement Law § 10(a).
12. LCiA 3973/10 Supreme Court (Jerusalem), *Stern v. Verifone Holdings, Inc.* (04.02.2015), Nevo Legal Database (by subscription, in Hebrew), (Isr.) (hereinafter *In re Verifone)*.
13. *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247 (2010).
14. *In re De Rosenberg*, p. 11.
15. *Id.* at p. 10.
16. *Id.* at p. 12.
17. CiA 1297/11 Supreme Court (Jerusalem), *Levine v. Aharon Zohar, CPA* (12.29.2013), Nevo Legal Database (by subscription, in Hebrew) (Isr.) (hereinafter *In re Levine*).
18. *In re De Rosenberg*, p. 12.
19. Currently the equivalent of approx. U.S. $700,000-$715,000.
20. LCiA CA 7551/00 *Fuchs v. Katsanelnbogen*, 56(1) SCD 253, 256-57 (2001).
21. OM 39326-06-17 Supreme Court (Jerusalem), *Tsasersky v. Mittleman* (01.30.2018), Nevo Legal Database (by subscription, in Hebrew) (Isr.).
22. LCiA 2214/00 Supreme Court (Jerusalem), *Carlo Nubilli Rubintaria S.P.A.v. Moshe Katan Ltd.* (09.07.2000), Nevo Legal Database (by subscription, in Hebrew) (Isr.); CiC 42972-11-16 Magistrate (Herzliya), *Ohana v. Zalmanivitch* (12.11.2017), Nevo Legal Database (by subscription, in Hebrew) (Isr.) (hereinafter *In re Ohana*); CiC 51725-10-10 DC (Tel Aviv), *Udeshkin Valentine International Group Ltd. v. A.M. Yuka Ltd.* (08.30.2011), Nevo Legal Database (by subscription, in Hebrew) (Isr.).
23. A legal expert for the foreign law is one who engages in the foreign law, typically an attorney admitted to both the Israeli and the applicable foreign Bar.
24. CiC 48665-05-12 DC (Haifa) *Transfield Er Futures Limited v. Deiulemar Shipping Spa et al.* (05.31.2012), Nevo Legal Database (by subscription, in Hebrew) (Isr.) (hereinafter *In re Transfield).*
25. The court in *In re Transfield* noted that even if it had reached a contrary conclusion, i.e., that the UK judgment was final and therefore enforceable under the Enforcement Law, it would still have avoided granting the sought interim relief due to balance of convenience discussed in the decision.
26. CiA 4587/01 Supreme Court (Jerusalem), *Shpelter v. Shoval* (06.19.2006), Nevo Legal Database (by subscription, in Hebrew) (Isr.) (hereinafter *In re Shpelter*).
27. CiA CA 4949/03 *Bulus Gad Ltd. v. Globe Master Management Ltd.*, 59(5) SCD 616, 619-20 (2003) (hereinafter *In re Bulus*).
28. Note though that the matter in *In re Bulus* was the cancellation of a tourism contract due to security consideration unforeseen at the

time of the engagement. In his opinion Justice Rubinstein opined, though concurring with the opinion of the court, that a security consideration may, under some circumstances, be considered a matter of "Public Policy" worthy of protection by way of rejecting an action to enforce a foreign judgment detrimental to such considerations.

29. *In re Ohana*, p. 10.
30. HCJ 693/91 *Efrat v. the Supervisor over the Population Registration*, 47(1) SCD 749, 780 (1993).
31. *In re Ohana*, p. 10. However, one should note that the court did restrict its analysis to the specific circumstances of the case, due to the fact that the foreign judgment in that case did concisely detail the facts and the reasoning, as well as referred to the reasoning incorporated in one of the hearings.
32. CiA 3081/12 Supreme Court (Jerusalem), *Double K Petrolium Products (1996) Ltd. v. Gaspetrum Transgas Ochta Ltd.* (09.09.2014), Nevo Legal Database (by subscription, in Hebrew) (Isr.) (hereinafter *In re Double K*).
33. *In re Double K*, p. 17.
34. CiA 7884/15 Supreme Court (Jerusalem), *Reitman v. Jiangsu Overseas Group Co Ltd.* (08.14.2017), Nevo Legal Database (by subscription, in Hebrew) (Isr.).
35. Though there are other exceptions, some as short as two years.
36. CiC 2045/06 DC (Tel Aviv), *Emily Shipping Company Limited v. Waldhorne* (09.27.2012), Nevo Legal Database (by subscription, in Hebrew) (Isr.).
37. FA 15416-03-17 DC (Jerusalem), *John Doe v. Jane Doe* (11.22.2017), Nevo Legal Database (by subscription, in Hebrew) (Isr.).
38. LCiA 4320/11 Supreme Court (Jerusalem), *E.I.M. Communications Holding Ltd. v. Michael Wilson and Partners Ltd.* (02.15.2012), Nevo Legal Database (by subscription, in Hebrew) (Isr.) (hereinafter *In re Michael Wilson*).
39. *In re Michael Wilson*, pp 24-25
40. CiA CA 490/88 *Dr. Bassilius, the Kopti Muteran v. Adila*, 44(4) SCD 397 (1990); CiA CA 3441/01 *John Doe v. Jane Doe*, 58(3) SCD 1 (2004); *In re Double K*; CiA 7884/15 Supreme Court (Jerusalem), *Reitman v. Jiangsu Overseas Group Co Ltd.* (08.28.2017), Nevo Legal Database (by subscription, in Hebrew) (Isr.); CiC 35884-05-14 DC (Tel Aviv) *Otkritie International Investment v. Averbuch et al.* (10.17.2016), Nevo Legal Database (by subscription, in Hebrew) (Isr.) (hereinafter *In re Averbuch*).
41. *In re Averbuch*, p. 19.
42. CiA 6796/97 Supreme Court (Jerusalem), *Berg Jacob and Sons (Furnitures) Lrd. v. Berg East Imports Inc.* (03.07.2000), Nevo Legal Database (by subscription, in Hebrew) (Isr.); CiA 10854/07 Supreme Court (Jerusalem), *Pickholtz v. Jaime Sohacheski* (03.17.2010), Nevo Legal Database (by subscription, in Hebrew) (Isr.).
43. *In re Ohana*, pp. 14-16, and see the case law referred to there.
44. CiA 33106-10-12 DC (Haifa), *Brasslauer v. Brautz and Stolberg, Attorneys at Law* (02.21.2013), Nevo Legal Database (by subscription, in Hebrew) (Isr.).
45. CiC 1010/07 Magistrate (Rishon L'Zion), *Nava v. Sardas* (03.31.2010), Nevo Legal Database (by subscription, in Hebrew) (Isr.).
46. OM 40309-05-12 Supreme Court (Jerusalem), *Altshuler Shaham mutual Funds and Pensions Ltd. v. Kushnir* (07.29.2013), Nevo Legal Database (by subscription, in Hebrew) (Isr.).
47. BNRP 2193/08 DC (Tel Aviv), *Israel's First International Bank Ltd. v. Gold and Honey (1995) L.P.* (10.30.2008), Nevo Legal Database (by subscription, in Hebrew) (Isr.); *aff'd* by the Supreme Court.
48. While continuingly referring to the order as one issued by the courts of the State of New York.
49. The same methodology of reviewing a foreign bankruptcy order (from Italy) under the terms and conditions of incidental recognition was applied in CiC 19350-12-13 DC (Tel-Aviv), *Fahed v. Intaziaitiv Industrialy S.P.A. Ltd. et al.* (02.13.2017), Nevo Legal Database (by subscription, in Hebrew) (Isr.).
50. CiA CA 970/93 *The Attorney General v. Agam*, 49(1) SCD 561 (1995).
51. *In re De Rosenberg*, p. 12.

Enforcing Foreign Awards in Russia

By Evgeniy Lidzhiev, Sergey Kislov and Sergey Kovalev

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International commercial arbitration in Russia is governed by Law No. 5338-1 on International Commercial Arbitration (ICA). Rules on enforcing and challenging arbitral awards are stipulated in the Commercial (Arbitrazh) Procedural Code which refers to international treaties, including the 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards (New York Convention). This article focuses on the application of the public policy concept as it pertains to the enforcement of foreign arbitral awards in Russia.

Background

The ICA is based on the provisions of the UNCITRAL Model Law on International Commercial Arbitration 1985 ("UNCITRAL Model Law"). Thus, most of the rules regarding arbitration agreements, arbitration proceedings, and arbitral awards comply with the UNCITRAL Model Law, except for a few rules adopted in 2006 and later.

In 2015, in accordance with amendments to arbitration related legislation, the ICA was changed. On September, 1, 2016 (the New Law), the new Federal Law of 29 December 2015 on Arbitration (Treteyskiy proceedings) in the Russian Federation came into force. It mostly governs domestic arbitration in Russia but also contains a few changes related to international arbitration:

a. Mandating the registration of arbitration institutions in Russia by the Russian Ministry of Justice (with a preliminary recommendation of the Council on modernization of arbitration proceedings under the auspices of the Ministry of Justice (the Council)) with strict rules for launching and functioning of arbitration institutions;

b. Obliging the deposit of arbitral awards and requiring the storage of arbitration case materials in arbitration institutions (for ad hoc arbitration, in an arbitration institution specified in an arbitration agreement or a clause, or in a commercial court at the place of the enforcement of an award);

c. Mandating the compulsory enforcement of an arbitral award if the arbitral award provides for any changes in state or other registers (including shareholders' register); and

d. Commanding the arbitrability of corporate disputes, but the arbitration proceedings may be conducted only under the auspices of an arbitration institution, in accordance with the special rules on corporate dispute-resolution—rules have to be approved, published and deposited in the register.

These unnecessary complications in launching arbitration institutions in Russia and arranging their everyday processes were caused by state authorities' fight with "pocket" arbitration institutions for fraudulent purposes. This new approach also applies to international arbitration seated in Russia:

- International arbitration institutions have to be approved by a recommendation of the council and registered by the Russian government;
- Rules on international commercial arbitration, on corporate or other disputes, and on expedited arbitration, must be approved, published and deposited in accordance with the rules of the Ministry of Justice; and
- Foreign arbitration institutions have to be well-known and recognized worldwide to be registered.

One of the key amendments to arbitration-related legislation is the broadening of the scope of "international arbitration" under Russian law. Previously, arbitration was considered to be international if a dispute arose out of foreign trade relations, other international relations, or concerned a foreign party or a Russian company with foreign investments. As for the changes, the scope has been extended: a dispute is now considered to be interna-

tional if (1) it arises out of foreign trade relations or other international relations, (2) concerns a foreign party or a Russian company with foreign investments, (3) concerns a foreign company with Russian investments, (4) or if obligations are to performed abroad or closely connected to a foreign state.

However, some amendments to the regulation of international arbitration are not reflected in Russian arbitration law. The UNCITRAL Model Law in 2006 stipulated the enforceability of orders from arbitral tribunals on interim measures. Unfortunately, this provision was not anchored in the Russian ICA in 2006. Due to the reasoning of Russian higher courts, only final arbitral awards are enforceable.

The Russian Federation is one of the contracting states to the New York Convention. The Union of Soviet Socialist Republics, as the predecessor to the Russian Federation, signed the New York Convention on 29 December 1958, which was ratified in August 1960 and came into force on 22 November 1960. A foreign arbitral award is enforceable on the territory of the Russian Federation if an application for enforcement is filed within three years from the date of entry into force of said award.

A local competent (commercial) court has to consider an application for recognition and enforcement of a foreign arbitral award within one month from the date of its filing. However, actual enforcement proceedings before the court of first instance take about four to six months because of high caseloads.

If an arbitral award is declaratory and the international treaties Russia is signatory to stipulate the recognition of such awards, it has to be recognized in Russia without further enforcement proceedings. An enforcement procedure is the same for awards issued both in the Russian Federation and abroad.

The application for the enforcement of the award has to be filed with the competent (commercial) state court of the Russian Federation, which is determined by a debtor's place of stay or residence, or location of a debtor's property, if the debtor's place of stay or residence is unknown.

According to the New Law, parties are entitled to change the court. To do so, an application for enforcement on the parties' agreement may be submitted to the competent court in the seat of arbitration, or to a competent (commercial) court which is close to the winning party. A competent (commercial) court may dismiss an application on recognition and enforcement of a foreign arbitral award if:[1]

- One of the parties to an arbitration agreement is incapable;
- An arbitration agreement is invalid under the applicable law chosen by parties or in absent of such choice—under the law of the seat of arbitration;
- The arbitral award has not yet become binding on the parties or was set aside by the competent state court;
- The party against whom an arbitral award was issued has not been timely and properly notified about appointment of arbitrators or an arbitration procedure or could not present its objections;
- An arbitral award over a dispute is not covered by an arbitration agreement or exceeds the scope of the arbitration agreement. If the part which is not covered by the agreement can be separated from the rest of the award, only that part would be invalid;
- An arbitral tribunal or a procedure do not comply with the parties' agreement or applicable law in the seat of arbitration;
- The dispute is not arbitrable under the Russian legislation; and
- The enforcement of the arbitral award contradicts the public policy of the Russian Federation.

In Russia, in accordance with Article V of the New York Convention, an arbitral award will not be recognized and enforced if a competent (commercial) court finds that recognition and enforcement of the arbitral award contradicts with the public policy of Russia.

Public Policy

Black's Law Dictionary defines public policy as

> 1. Broadly, principles and standards regarded by the legislature or by the courts as being of fundamental concern to the state and the whole of society. Courts sometimes use the term to justify their decisions, as when declaring a contract void because it is "contrary to public policy." Also terms policy of the law… 2. More narrowly, the principle that a person should not be allowed to do anything that would tend to injure the public at large.

It is widely known that public policy is a traditional element for determining the recognizability and enforceability of foreign arbitral awards. Almost all international treaties and agreements have provisions relating to public policy.[2]

Nonetheless, in order to prevent "public policy" in Article V(2)(b) from hindering the New York Convention's pro-enforcement policy, it is commonly recognized that every Contracting State should interpret and under-

stand "public policy" in the context of Article V(2)(b) as "international public policy."[3]

Authors of this article consider "international public policy" to refer to the public policy applicable to those cases with an international element in the enforcing state. This understanding demands ascertaining the enforcing state's legislative purpose and intent rather than directly exploring international sources of law. It appears that almost the same approach has been adopted by Russian legislation.

The most recent clarifications made by the Supreme Commercial Court regarding public policy were issued in 2013 (the Resolution of the High Commercial Court No. 156) and is binding for all Russian courts (Resolution). As for the Resolution, a competent (commercial) court is not allowed to recourse an arbitral award on merits while analyzing its contradiction to the public policy. A competent (commercial) court refuses to recognize and enforce an arbitral award if it states that recognition and enforcement contradict the Russian public policy.

Contradictions to the public policy shall be proven by a party having declared this contradiction. A competent (commercial) court shall apply relevant legislation and international treaties directly. A particular award is not contrary to Russian public policy if there is no comparable award available in Russia. A competent (commercial) court will have recognized an arbitral award if it states that arbitration proceedings were conducted impartially. Consequently, Russia courts apply the same approach as dictated in the Resolution, which approach is demonstrated in the case below

One of the elements of the public policy in Russia is protecting creditors' rights in a bankruptcy proceeding against a debtor. In general, all monetary and other material claims of creditors are to be converted into a bankruptcy proceeding from the moment of it is initiation. Thus, anything granted by the arbitral award has to be entered into a registry of creditors' claims. In a bankruptcy proceeding any creditor may raise objections against claims of other creditors, which may breach the rights of certain creditors.

The High Commercial Court of the Russian Federation constantly declares that the protection of creditors' rights under the insolvency law is the protection of interests of third parties, and one of the elements of public policy.

According to the Russian insolvency law and relevant case law, creditors are entitled to object to claims of other creditors, and even to challenge a court judgment in favor of a suspicious creditor.[4] This provision is aimed to protect debtors' and creditors' rights against abusive claims of a suspicious creditor hiding behind the enforceability of arbitral awards (mostly domestic).

In the case of *Gartic Limited v. Murmansk multiservisnye set,i*[5] OJSC the Supreme Court pointed out that a protection of third parties' (creditors') interests in relations with an insolvent debtor is a part of the public policy and should be examined while considering an application to recognize an arbitral award.

Moreover, the Supreme Court changed the general burden of proof in enforcement proceedings. If a creditor of a losing party objects to the arbitral award, such creditor should present *prima facie* evidence of any doubt of existence and reasonability of a debtor's obligations,

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while a winning party must prove the reality of arbitration proceedings and validity of the arbitration agreement and arbitral award.

As a result, the Supreme Court declared that courts in enforcement proceedings should examine whether recognition and enforcement of an arbitral award, apart from bankruptcy proceedings, could breach creditors' rights, and unlawfully settle claims of a winning party to the detriment of the interests of creditors and insolvency assets of a debtor.

These conclusions of the Supreme Court fixed that bankruptcy proceedings of a losing party in arbitration may, in general, lead to contradiction of public policy. Furthermore, it might create serious risks involving contradiction of public policy being used by debtors with unlawful aims to avoid the responsibility under an arbitral award.

Public Policy in Bankruptcy Proceedings

Currently, there are concerns regarding a possible negative approach in the application of the doctrine in bankruptcy proceedings never realized in case law of the Supreme Court. In the case *Grain Export LLC v. Rif, Eurotrast, Luch LLC,* the first company, supplier of a grain, applied for enforcement of GAFTA's award in Russia's

Krasnodar region. During two circles of consideration, losing parties (buyer of a grain and its guarantors), and their bankruptcy creditors and receivers argued that GAFTA's award contradicts the public policy, due to the bankruptcy of the buyer, and a breach of its creditors' rights.

Nevertheless, the Supreme Court agreed[6] with the enforcement of the GAFTA's award because creditors and receivers of losing parties failed to present evidence proving that the arbitration proceedings and an arbitral award were used by the winning party to abuse its rights. The approach of the Supreme Court could be summarized as follows: an arbitration and arbitral award should not be used to breach interests of third parties in accordance with the public policy doctrine but application of this doctrine is also not allowed to be used as in instrument to evade liabilities.

Thus, in case law, the Supreme Court has found a balance in application of the public policy as a ground to refuse recognition and enforcement of an arbitral award which does not affect either creditors' interests in insolvency proceedings, or the principles of the international commercial arbitration and its attractiveness in Russia. The above-mentioned law proves a very reasonable approach to application of the public policy doctrine in Russia.

Recent case law demonstrates said doctrine. Case law upholds a view[7] that mandatory rules of Russian law relate directions of Russian executive authorities. A Ukrainian party and a Russian party entered into a contract on soya beans delivery. The applicable law under the contract was English law. Due to the issuance of a directive by a Russian executive body temporarily prohibiting the importation of soya beans from Ukraine (the Directive), the Russian party was not able to accept said goods. The Ukrainian party commenced arbitration proceedings in an arbitration institution of the Federation of Oils, Seeds and Fats Associations (FOSFA), and claimed damages recovery out of non-performance of obligations by the Russian party. The Ukrainian party succeeded and filed application for recognition and enforcement of an arbitral award on damages with a competent (commercial) court.

Russian competent (commercial) courts dismissed the application. Current Russian legislation states that, if upon issuing of a state authority's act, performance of obligation becomes impossible, the obligation ceases. In this case, parties incurring losses are entitled to apply for damages recovery from state authorities.

Following the Russian courts' approach, a right to fair trial is an element of the public policy and the Ukrainian party's reference to arbitration and, thus, enforcement of the award contradict the public policy as the Russian party was not able to perform its obligation because of the Directive, in other words, "beyond its will." Consequently, the Ukrainian party was supposed to apply for damages not against the Russian party, but against the Russian executive state authority that issued the Directive.

Currently, the parties await an opinion from the Russian High Court as the parties have a right to appeal both judgments.

Endnotes

1. Grounds stipulated in ICA and are similar to grounds provided in Article V of New York Convention 1958.
2. Albert Jan van den Berg, *The New York Arbitration Convention of 1958—Towards a Uniform Judicial Interpretation,* Kluwer Law International 1981.
3. Gary B. Born, International Commercial Arbitration 2nd ed., Kluwer Law International 2014.
4. Decree of High Commercial Court of the Russian Federation of October 22, 2012 No. 35, "On several procedural issues related to consideration of bankruptcy cases," para. 24.
5. Ruling of the Supreme Court of the Russian Federation on October 09, 2015 under the case No 305-KT15-5805, A41-36402/12. This case was also considered by the High Commercial Court within the first circle of consideration, the Decree dated May 13, 2014 No. 1446/14.
6. Ruling of the Supreme Court of the Russian Federation dated February 2, 2018 No. N 308-17-12100, A32-1593/2016.
7. Judgment of the North Western Circuit Court dated 25.09.2018 No. A21-4708/2016.

Enforcing a New York Judgment in the English Jurisdiction in the Digital Age

By Adam Erusalimsky

Adam Erusalimsky

The most commonly designated jurisdictions to resolve disputes, arising out of or in connection to all manner of contracts, are either England and Wales or the State of New York in New York City. It is therefore unsurprising that these are the only two jurisdictions used as examples for the model form exclusive jurisdiction clauses suggested under the guidance set out in the *2018 ISDA Choice of Court and Governing Law Guide*.[1] This is to be anticipated, given both jurisdictions are renowned for the fairness and independence of their judges, the dominance of London and New York as finance hubs, and the ubiquity of the English language. But what happens when a creditor obtains a judgment from a court in New York against a debtor whose only assets amenable to enforcement are located in the jurisdiction of England and Wales? This article answers that question and also considers the latter jurisdiction's ability to adapt to the challenges arising from an age when social media is rampant and cryptocurrency transactions may become so.

The United Kingdom is made up of three legal jurisdictions: (i) England and Wales; (ii) Scotland; and (iii) Northern Ireland. For brevity, references in this article to "the English jurisdiction" or "the jurisdiction of the English courts" shall refer to the jurisdiction of England and Wales, and references in this article to the "New York jurisdiction" or the "jurisdiction of the New York courts" shall, albeit imperfectly, refer to the jurisdiction of the courts of the State of New York and the United States District Court located in the borough of Manhattan in New York City.

The private international law of the United Kingdom, and specifically its law on the recognition of foreign judgments, is the result of an iterative patchwork of sources whose iterations largely span from (i) initiatives at the colonial and Commonwealth level;[2] (ii) bilateral treaties, such as those concluded with Canada (though not covering judgments from Québec), Australia, and certain other common law countries;[3] (iii) and multilateral treaties, such as—at least until the United Kingdom leaves the EU[4] —the Lugano Convention, the Treaty on the Functioning of the European Union, and the latter's jurisdictional progeny, the Brussels Regulation Recast.[5] Each of those patches is stitched to the other and given legal effect in the United Kingdom by primary and/or secondary legislation enacted by the United Kingdom's Parliament.

This example of parliamentary sovereignty might give a foreign lawyer the impression that this patchwork is comprehensive since, if it is all woven together by the United Kingdom's Parliament, it might have been designed to be an all-encompassing quilt and provide an avenue for recognition of many foreign states' judgments. Yet this all-encompassing quilt has only been made possible by the common law, in the judge-made sense of the term. Without this common law, the United Kingdom's legislature would have had also to enact legislation as to the recognition of judgments of all those states for which there is no reciprocal regime, either because they were not part of the Commonwealth and colonial initiatives, or because they did not enter into the relevant bilateral or multilateral treaties. Therefore, whether a judgment of the New York courts is recognized in England is determined by the English common law rules of recognition; it is those rules that are summarized in the first part of this article.[6]

Recognition of Foreign Judgments in England

To register a foreign judgment in England under the common law regime, the judgment creditor will need to bring a fresh proceeding in England to demonstrate that the foreign judgment satisfies the following criteria:

1. it is the final and conclusive decision of a court;
2. as a matter of English private international law, that court had what is termed "international jurisdiction" to make the judgment; and
3. there is no defence to recognition.

Looking at the first limb of the test, one would be forgiven for thinking that the word "final" in this context means that all appeals have been exhausted. As noted by Briggs, "the terminology is more easily used than it is defined,"[7] since,

1. "final" in this context means that the decision cannot be reconsidered in the court which made the ruling, even though there are still unexhausted rights of appeal to higher courts; and

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2. "conclusive" means that it represents the court's settled answer on the point, rather than, for example, an interim answer made at an interlocutory hearing.

Turning to the second limb, "international jurisdiction" is established if the foreign judgment debtor either submitted to the foreign court's jurisdiction or was present within the jurisdiction of the foreign court when the proceedings were commenced—which is likely to mean when process was deemed served.[8] It does not consider other principles of the English common law on jurisdiction, such as *forum non conveniens*. This omission might be considered counterintuitive since the English private international law has well-established common law rules which determine whether an English court has jurisdiction over a defendant. This becomes more intuitive, however, when one considers that the English rules recognize that, as a matter of comity, it would be wrong for an English court to hold that a foreign court had surpassed its jurisdiction if, had the roles been reversed, the English court would have declined to exercise its jurisdiction over a matter. Support for this principle also exists on the American side of the pond: "we are not so provincial as to say that every solution of a problem is wrong because we deal with it otherwise at home."[9]

The English court has held that the relevant territorial jurisdiction is defined by reference to the jurisdiction of the court seized, so that a defendant sued in a state court must be within the territorial jurisdiction of the state, but if sued in a federal court all that is required is that the defendant be within the federation.[10] The presence of individuals can usually be established by reference to the stamps in their passports, airline tickets etc., but whether a corporation is present can be trickier to determine. A company is present if it has a reasonably fixed and definite place of business, maintained by the company and from which its business is done.[11] Temporary visits by officers or agents of the company will not suffice, even if—again, counterintuitively—a foreign court may regard such visits as sufficient to exercise its jurisdiction against the company. It is, therefore, important that a New York attorney wishing to bring proceedings against an English company in New York, with a view to enforcing the ensuing judgment in England, ensures that the New York courts' jurisdiction over the defendant will satisfy both the New York test of jurisdiction and the English concept of "international jurisdiction."

Turning now to the final limb, recognition of the foreign judgment in England will be denied if the judgment debtor can make out any one of the following defences:

1. The foreign court had no jurisdiction. This is a more theoretical defence than a practical one, since the foreign judgment will be deemed valid by an English court unless and until action is successfully taken in the foreign court to set it aside; once set aside, there is no valid judgment to recognize in England.
2. The foreign court exercised its jurisdiction in contravention of an arbitration or jurisdiction clause—which is the case even if the foreign court addressed the very issue and concluded, entirely and correctly in accordance with its own law, that there was no breach.[12]

"It is, therefore, important that a New York attorney wishing to bring proceedings against an English company in New York, with a view to enforcing the ensuing judgment in England, ensures that the New York courts' jurisdiction over the defendant will satisfy both the New York test of jurisdiction and the English concept of 'international jurisdiction.'"

3. Fraud. It is an ancient principle of the English common law that fraud unravels everything.[13] If the judgment debtor can demonstrate that the foreign court was either party to, or the victim of, a fraud, whether because the claim was false, or the testimony or documentary evidence was false or both, then recognition of the foreign judgment in England will not be granted. For these purposes, the English court will allow what is effectively a rehearing of any issues relevant to the allegations of fraud that have already been decided against the defendant in the foreign court. Somewhat controversially, the evidence required by the English court to clear this hurdle will vary depending on the foreign court in question; for example, much more persuasive evidence that a New York judge was bribed into granting a fraudulent judgment will be required by the English court than if the allegation concerned, for instance, a Venezuelan judge.
4. Breach of standards of procedural fairness. This encapsulates complaints such as, (i) the defendant was not notified of the proceedings or was not represented in the proceedings and was not afforded

the opportunity to be heard, or (ii) the foreign court violated the principle of finality by reopening a final decision without good reason. Many of these complaints will now be grounded in arguments made under the Human Rights Act 1998 (which must be observed by all UK courts), but their availability have always existed under the common law.

5. Existence of a prior English judgment. If a prior English judgment is inconsistent with the foreign judgment, then the foreign judgment cannot be recognized in England.

6. The recognition of the judgment would be contrary to public policy. Judgments giving effect to laws that are repugnant to human rights will be denied recognition, either as a matter of the pre-existing common law rules or as incompatible with the Human Rights Act 1998.

It is important to note that the circumstances described in paragraph 6, above, are very narrowly circumscribed and so it is very rare that an application to set aside is made by a New York judgment debtor and rarer still that it is successful.

The procedural significance of recognition is that once a foreign judgment is recognized by an English court, it creates an English obligation that can be enforced in England by way of an action for debt. Accordingly, only final judgments for fixed sums of money are amenable to a process of execution once recognized without a further application for an appropriate remedy (such as would be the case for a foreign non-money judgement for, say, specific performance or delivery up).

How Will the English Jurisdiction Cope in the Digital Age?

Now that the common law rules of recognition have been briefly sketched out, the scene is set to consider the English jurisdiction's ability to adapt to the challenges arising from the digital age. In particular, consider a hypothetical New York judgment for the payment of 100 bitcoin, where the initial summons commencing the hypothetical proceedings had been served via Facebook only, in breach of a New York court's direction for alternative service via Facebook as a backstop to the service upon the defendant at his or her known email address (as was allowed in the case in *F.T.C. v. PCCare247 Inc.*).[14] There are two issues in play under this scenario, each of which is dealt in turn below:

1. Is a judgment for 100 bitcoin a judgment for a fixed sum of money such that once recognized by the English court, there will be no need for a further application for an appropriate remedy in order for the judgment to be executed?

2. Does non-compliance with the New York court's order for service by alternative means give rise to the English common law defence to recognition that there has been a breach of the standards of procedural fairness in the foreign proceedings?

This article need not introduce cryptocurrencies and the blockchain technology, since that has already been done admirably by this journal.[15] Whilst cryptocurrencies such as bitcoin are still in their nascent stages, the English court has already recognized their value and utility. Although more commonly featured in the criminal courts, in the context of offences under the Computer Misuse Act 1990,[16] or as demonstrating the ability to evade justice as a consideration relevant to the grant or denial of bail,[17] the use of a cryptocurrency in and of itself is by no means illegal. Adopting the English common law principle that everything which is not forbidden is allowed,"[18] there is no prohibition against cryptocurrencies in England. As such, unless and until the United Kingdom's legislature outlaws cryptocurrencies, there is nothing illegal about buying or using cryptocurrencies as a means to effect payment between willing contracting parties. That is not to say it is legal tender; a judgment debtor does not satisfy a debt in pounds sterling if he pays the judgment creditor in bitcoin, but there is nothing to suggest that a contract where the contract price was to be paid in bitcoin would not be enforced. However, as set out in paragraph 11 above, only final judgments for fixed sums of money can be executed once recognized. Is the sum of 100 bitcoin a fixed sum of money? If bitcoin is to be treated as analogous to a foreign currency, the answer to this question can be found in the House of Lords decision in *Miliangos v. George Frank Ltd*.[19] Until that decision, a long line of English jurisprudence held that all contractual debts for a liquidated sum in a foreign currency were to be paid in pounds sterling at an exchange rate calculated at the date of breach. That rule prejudiced *Miliangos*, who was owed a sum in Swiss francs, since during the life of the English litigation there was a steep fall in the value of the pound against the franc—such that, by the time of judgment, the judgment sum (in pounds) was worth much less than the original Swiss franc debt. Accordingly, the issue before the House of Lords was whether the English courts were able to order a judgment in any currency other than pounds sterling. The Lords held that judgments may be given in an English court in a foreign currency, or the sterling equivalent, at the date the court authorizes enforcement of the judgment. The court has widened the scope of the rule in *Miliangos* in subsequent judgments. It now applies to claims for damages for breach of contract (both liquidated and unliquidated) and tortious claims governed by English law.

The English court's ability to recognize judgments in one currency, as an English judgment for a debt in an-

other currency, gives the process of enforcing the debt in England a degree of pragmatism. For example, if a judgment creditor wishes to enforce his judgment against the judgment debtor's English bank account, he can apply to the court for a third party charging order against the bank in question and ensure that the currency expressed on the judgment matches the currency of the bank account. Where the English judgment is given in a foreign currency, the order should state, "It is ordered that the defendant pay the claimant (sum in foreign currency) or the Sterling equivalent at the time of payment."[20] Accordingly, if the New York judgment was for U.S. $100, upon the order for recognition being made in England, the court would order the payment of U.S. $100 or the Sterling equivalent at the time of payment. So, assuming the English court would treat the sum of 100 bitcoin as being analogous to a foreign currency, it could carry out the same exercise using the conversion rate applicable at the time ordered for payment. But is that a likely analogy?

There is no English authority on this question. The jurisprudence of the European Court of Justice has recognized cryptocurrencies as a contractual means of payment between consenting parties, as part of an examination of their treatment for certain tax purposes, but the law has not gone further than this. In *Skatteverket v. Hedqvist*,[21] the European Court of Justice was required to give a preliminary ruling on a reference from the Swedish court concerning the interpretation of Directive 2006/112 (Principal VAT Directive) and whether transactions to exchange a traditional currency for bitcoin, or vice versa, were subject to VAT.[22] In her advisory opinion to the European Court of Justice, Advocate General Kokott observed that,

> virtual currency has no purpose other than to be a means of payment . . . the "bitcoin" virtual currency, being a contractual means of payment, cannot be regarded as a current account or a deposit account, a payment or a transfer. Moreover, unlike a debt, cheques and other negotiable instruments referred to in Article 135(1)(d) of the VAT Directive, the "bitcoin" virtual currency is a direct means of payment between the operators that accept it.

But unlike air miles, Amazon credits or another retailer's loyalty points, which are all centralized with supply controlled by the issuer of the so-called virtual currency, cryptocurrencies such as bitcoin are decentralized and not created or controlled by a single central entity. This helps to explain why the value of cryptocurrencies is so volatile; with price being purely driven by demand, unmitigated by the interventions of monetary policymakers, a cryptocurrency's price is a pure function of market demand. It is that feature which may make an English court reluctant to recognize a bitcoin judgment as a matter of course and simply convert it into sterling at the date of payment. If, as had been the case up until January 2018, bitcoin has risen in value sharply between the time the foreign proceedings were commenced and the foreign judgment recognized, then such an automatic conversion would risk being unfair to the judgment debtor. On the other hand, the judgment creditor could argue that the volatility and speculative nature of bitcoin is well known, and the judgment debtor should not have agreed to pay a contract sum expressed in bitcoins if he or she did not want to be so bound. It is these competing arguments that may call for a judicial inquiry into the proper conversion rate. Such an inquiry is available to the judgment creditor since he or she could commence a claim in the English court against the judgment debtor and, unless an exception to the doctrine applies,[23] the New York judgment will be recognized as *res judicata* as to the merits of the underlying claim, leaving the English court to order the enquiry.

What about asset classes other than currency? This journal has already explored how,

1. regulatory agencies in the United States have argued, with some success, that in spite of a lack of significant legislation or regulatory frameworks, "[b]itcoin and other digital currencies are subject to their jurisdiction because they are . . . simultaneously commodities, money, property, and (sometimes) securities,"[24] and
2. unlike in the United States, "the Cayman Island's Securities Investment Business Law narrowly defines securities subject to that law, which does not cover cryptocurrencies," although the authors note that cryptocurrency trading could "easily be captured by existing regulatory regimes" in the Cayman Islands and would "probably fall under the control of the Cayman Island's Money Services Law."[25]

In comparison, the United Kingdom lags behind with one of its principal regulators, the Financial Conduct Authority (FCA), only announcing in April of this year that it would unveil "*guidelines*" on cryptocurrency policy later this year.[26] The FCA's website still acknowledges that "cryptocurrencies are not currently regulated by the FCA provided they are not part of other regulated products or services."[27] The absence of a regulatory or statutory framework for the classification of cryptocurrency as a commodity, security or other asset class, however, should not complicate recognition proceedings per se. If the English court was not willing to consider bitcoin as a currency, taking it out of the scope of the *Miliangos* rule described above, the judgment creditor could still commence a claim in the English court and, as before, unless

an exception to the doctrine applies, the New York judgment will be recognized as res judicata, as to the merits of the underlying claim, leaving the judgment creditor free to apply for an order for delivery up of the bitcoins. Unless and until Parliament makes cryptocurrencies illegal, such that recognition of the foreign judgment would be contrary to public policy, a judgment creditor will at least be able to convert his or her foreign bitcoin judgment into an order for delivery up.

We turn now to the second question of whether a defence exists to deny recognition on the basis that there has been a breach of the standards of procedural fairness in the foreign proceedings. Although there is little case law on the point, commentators agree that an argument that there has been a technical breach in the mode or manner of service in the foreign court is insufficient.[28] The judgment debtor needs to show that he has not been made aware of the commencement of the foreign proceedings.[29] So if the judgment creditor can persuade the court that the judgment debtor did access his or her Facebook account on a sufficiently regular basis so as to have received the summons in good time, arguments that the judgment creditor failed to also serve by email are likely to fall on deaf ears and recognition would not be denied on this basis.

Conclusion

Although it remains to be seen how the English courts will react to a claim for recognition of a New York judgment for the payment of a sum in bitcoin, the English courts have at their disposal the necessary machinery to deal with such a problem. To facilitate an enforcement action taken against assets in the United Kingdom, lawyers drafting a contract for a counterparty who wishes the contract sum to be expressed in bitcoin should include a liquidated damages clause stipulating that the bitcoin sum is convertible to a recognized traditional currency upon proceedings being issued to recover that sum. The clause should also provide a mechanism for determining the applicable exchange rate and the date of conversion. This will either (i) enable the court first seized with the matter to make its award in a recognized traditional currency, such that enforcement in England is possible immediately after recognition; or (ii) failing an award being made in a recognized traditional currency, enable the English court to conduct its enquiry at the proper conversion rate. In the absence of such a clause, the English court will still recognize the judgment creditor's entitlement to the bitcoins, but proceedings will need to be brought for an order for delivery up of the bitcoins.

A judgment debtor may cry foul in respect of any aspect of the foreign proceedings, but the English court is accustomed to such ploys and will accordingly only refuse recognition on the basis of some irregularity if it has caused real injustice.

Endnotes

1. Int'l Swaps and Derivatives Ass'n, Inc., *2018 ISDA Choice of Court and Governing Law Guide,* (2018), https://www.isda.org/a/7YsEE/180130_ISDA-Choice-of-court-and-governing-law-guide-prepublication-fina.._02262018.pdf.
2. Enacted as the Administration of Justice Act 1920 and currently in effect under the Reciprocal Enforcement of Judgments (Administration of Justice Act 1920, Part II), (Consolidation) Order 1984 (SI 1984/129)), as amended by SI 1985/1994, SI 1994/1901 and SI 1997/2601. A judgment creditor holding a judgment from many colonial and Commonwealth territories such as Malaysia, Nigeria, New Zealand, and Singapore (and, at one time, Hong Kong) are able to register the foreign judgment for enforcement in the United Kingdom within 12 months of the foreign judgment being delivered under Part II of the Administration of Justice Act 1920.
3. i.e. India, Israel, Pakistan, Guernsey, and the Isle of Man. These bilateral treaties enable judgment creditors holding judgments from the foreign court to register the foreign judgment under the Foreign Judgments (Reciprocal Enforcement) Act 1933. However, it only applies to courts of those countries identified in the domestic legislation which implements the relevant bilateral treaty.
4. It is not clear what arrangements will be made following the United Kingdom's Brexit. Although in September, 2018, the United Kingdom's government issued guidance on which cross-border arrangements would apply vis-à-vis recognition and enforcement of judgments under a "no deal" Brexit-scenario, all this guidance did was confirm that it would repeal the domestic rules implementing the Brussels Regulation Recast and the Lugano Convention and instead accede to the 2005 Hague Convention (which does not require the consent of the other contracting parties). Whilst this will ensure that choice of court agreements in favour of the English courts in commercial cases are respected and judgments given on their basis are enforceable, the Hague Convention is very limited in scope and does not even begin to placate the holes left by the automatic exit from the Brussels and Lugano regimes; for example, where there is no exclusive jurisdiction clause, the Hague Convention does not apply. At present, the only parties to the Hague Convention are the European Union, Singapore, Mexico, and Montenegro (as of April, 2018). In the future, the Hague Convention may gain further importance as the following countries have signed it but not yet ratified it: China, the United States, and Ukraine.
5. 2012 O.J. (L 351) (pertaining to jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast)).
6. A fuller analysis is beyond the scope of this article. See Adrian Briggs, The Conflict of Laws ch. 3 (3d ed. 2013) and Adrian Briggs, Civil Jurisdiction and Judgements ch. 7 (6th ed. 2015), for a thorough examination of the English common law rules of recognition of foreign judgments.
7. *Id.*
8. *Adams v. Cape Industries PLC* [1990] Ch 433 (UK).
9. Adrian Briggs, The Conflict of Laws 171 (3d ed. 2013) (citing Loucks v. Standard Oil Co. of New York, 224 N.Y. 99 (1918)).
10. *Id.* at 170.
11. *Adams v. Cape Industries, PLC* [1990] Ch 433 (UK).
12. Adrian Briggs, The Conflict of Laws 179 (3d ed. 2013) (citing Civil Jurisdiction and Judgments Act 1982, § 32; *AES Ust-Kamenogorsk Hydropower Plant, LLP v. AES Ust-Kamenogorsk Hydropower Plant JSC* [2011] EWCA Civ 647).
13. *Id.* at 179 (citing *HIH Cas. and Gen. Ins., Ltd. v. Chase Manhattan Bank* [2003] UKHL 6).

14. *F.T.C. v. PCCARE247, Inc.*, Case No. 12 Civ. 7189, 2013 WL 841037, at *5 (S.D.N.Y. Mar. 7, 2013); *see also, Ferrarese v. Shaw,* 164 F. Supp. 3d 361 (E.D.N.Y. Jan. 19, 2016).

15. *See* Mayme Donohue, *Blockchain and Cryptocurrency: An Introduction and Primer, in* 31 International Law Practicum 8 (2018).

16. *R v. Mudd* [2017] EWCA (Crim) 1395.

17. *U.S. v. Panovas* [2018] EWHC (Admin) 921.

18. It has been joked that in Germany, the opposite applies, so "everything which is not allowed is forbidden", in France "everything is allowed even if it is forbidden," and in Russia where "everything is forbidden, even that which is expressly allowed" *(see generally*, Jon P. Alston et al., A Practical Guide to French Business (2003); Kishor Bhagwati, Managing Safety: A Guide for Executives (2006)).

19. *Miliangos v. George Frank, Ltd*. [1976] AC 443 (UK). The House of Lords was, at the time, the highest appellate court in the United Kingdom. It was replaced by the Supreme Court on October 1, 2009.

20. CPR PD 40B (Foreign Currency) 10.

21. Case C-264/14, *Skatteverket v. Hedqvist*, 2016 S.T.C. 372.

22. The request was made in proceedings between the Swedish tax authority and Mr. Hedqvist concerning a preliminary decision given by the Swedish Revenue Law Commission that VAT did not have to be paid on the purchase and sale of bitcoin virtual currency units. The Swedish tax authority took the view that bitcoins should be treated like a commodity, making transfers of it subject to VAT, whereas Mr. Hedqvist, who intended to establish a business effecting transactions to exchange traditional currency for the Bitcoin virtual currency, submitted that the preliminary decision by the Revenue Law Commission finding the virtual currency VAT exempt should be confirmed. In that context, having doubts as to whether one of the exemptions for financial services laid down in Directive 2006/112 article 135(1) applied to such transactions, the Swedish court asked the European Court of Justice for guidance.

23. The exceptions are fraud or (for issue estoppel only) fresh evidence or a change in the law.

24. *See* David H. McGill et al., *Cryptocurrency Is Borderless—but Still Within the Grip of U.S. Regulators, in* 31 International Law Practicum 11 (2018).

25. Jalil Asif et al., *Cryptocurrencies: The Cayman Islands Is Open for Business, for Now, in* 31 International Law Practicum 42 (2018).

26. Anthony Cuthbertson, *Cryptocurrency: UK Regulator Focuses on Bitcoin Policy*, The Independent (April 9, 2018), https://www.independent.co.uk/life-style/gadgets-and-tech/news/cryptocurrency-bitcoin-regulation-fca-price-updates-market-a8296411.html.

27. Fin. Conduct Auth., *Cryptocurrency Derivatives,* FCA (Jun. 4, 2018), https://www.fca.org.uk/news/statements/cryptocurrency-derivatives.

28. Adrian Briggs, Civil Jurisdiction and Judgements § 7.71, n.600 (6th ed. 2015).

29. *See Maronier v. Larmer* [2002] EWCA (Civ) 774 (describing an analogous situation under the Brussels regime which held that, as a matter of public policy, it could not recognize a Dutch judgment which had been obtained pursuant to proceedings of which the judgment debtor was not aware).

The Recognition and Enforcement of Foreign Awards in Italy

By Irene Grassi, PhD, and Eva Knickenberg-Giardina

I. Introduction

Italy's enactment of its current legislation on private international law (Law 218/1995[1]) completely changed the approach to recognizing foreign judgments compared to the past. The basic assumption now underpinning the Italian legal system is that decisions issued by foreign judicial bodies are automatically recognized in Italy, provided they fulfil specific essential conditions.

Domestic law applies whenever a judgment is issued in a country which is neither part of the European Union, due to superseding EU Regulations, nor a party to a relevant international treaty with Italy.

On the contrary, the recognition of arbitral awards is always subject to prior judicial review, pursuant to the domestic rules that follow the New York Convention of 1958, to which Italy is a party.

This article will discuss Italian domestic legislation on the recognition and enforcement of civil judgments passed by both courts and arbitration boards.

II. Foreign Civil Judgments

A. Automatic Recognition and Limited Judicial Review

According to Article 64 of Law 218/1995, foreign judgments are automatically recognized in Italy, provided: (1) the foreign court had jurisdiction according to the jurisdiction criteria applied in Italy; (2) the defendant received service in accordance with foreign law and the defendant's essential rights were respected; (3) the parties appeared, or default of appearance was declared, in accordance with foreign law; (4) the judgment is final according to foreign law; (5) the judgment is not in conflict with final Italian judgments (*res iudicata*); (6) there is no *lis pendens* in Italy; and (7) the effect of the foreign judgment is not contrary to Italian public policy.

This rule applies to civil judgments issued by judicial bodies, thereby excluding criminal judgments and arbitral awards. In addition, it does not apply to provisional measures or awards, whether or not provisionally enforceable, which are still subject to appeal.

An even broader range of recognition is granted to foreign measures regarding family law or personal rights. This includes, in addition to judgments, administrative orders or statements such as marriage certificates. According to Article 65 of Law 218/1995, these measures are simply recognized where public policy and essential defence rights are respected, provided they comply with foreign law.

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If the recognition of a judgment is challenged or if the enforcement of a foreign judgment is required, an application can be filed in order to have the court hold that the conditions for recognition are met (Article 67 of Law 218/1995). The parties and any person who is interested therein may apply for judicial review, which takes place before the Court of Appeal. The Court of Appeal has jurisdiction based on the defendant's residence or the place of enforcement. The Court of Appeal ruling may then be challenged before the Italian Supreme Court (*Corte di Cassazione*). If the recognition is questioned in the course of a trial, the judge can decide on incidental recognition, with effects limited to that single case.

Under no circumstances can the merits of the case on which the foreign judgment was passed be reviewed.

The most relevant requirements are unquestionably the respect of the rights of defence and of public policy. We will, therefore, examine some cases where such issues were discussed.

B. Respect of Essential Defence Rights and the Adversarial Principle

When the enforcement of a foreign judgment is requested, especially in case of a default judgment, the judgment debtor very often claims that it did not have the opportunity to present a proper defence case in the foreign jurisdiction.

The Italian legal system traditionally pays great attention to the adversarial principle (*principio del contraddittorio*), which is also enshrined in the Italian Constitution: courts always make sure that all parties are duly informed of a claim and are given due time to prepare their defence. A default judgment can only be issued if it is proven that

the defendant received the summons in compliance with all formal requirements in due time before the hearing.[2] Equality of arms throughout the proceedings is also crucial.

Consistent with this, an Italian court denied recognition in a case where the notice of proceedings before a foreign court (in this case the High Court of Asmara, Eritrea) was given by publication in a local newspaper rather than being sent directly to the defendants address in Italy,[3] or where the defendant was given only five days notice to appear in court,[4] which was considered insufficient to develop an appropriate defence.

In the above cases, although local law had been complied with, the foreign judgment was held to be ineffective in Italy.

However, the Supreme Court has also clearly held that respect of the defence rights does not mean that all Italian procedural rules should be followed: what counts is respect of the fundamental principles of the legal system and, above all, the adversarial principle.

Therefore, in a ruling passed in March 2000 concerning the recognition of a judgment issued by the Supreme Court of the State of New York,[5] the Italian Supreme Court held that although comprehensive explanatory statements were required in Italian judgments, they were not considered as essential in case of foreign rulings.

More recently, the courts have been less tolerant of alleged violations of defence rights in cases where the defendant failed to appear before the relevant foreign court.

In September 2015, the Italian Supreme Court examined a judgment issued by the District Court of the Northern District of Georgia, Atlanta Division, condemning an Italian company to pay more than U.S. $495,000,00 in default payments.[6] Even though the defendants claimed that they had not been duly served the motion for default judgment, the judge held that their defence rights had not been violated since the notice had been sent by email to the defendants' Italian lawyers. Furthermore, the defendants had the possibility to appoint lawyers but had decided not to do so.

In a landmark case in 2017, in which a judgment granting punitive damages was recognized in Italy for the first time (further discussed below), the Italian Supreme Court held, quite drastically, that a party cannot "entrench itself behind recognition" after failing to assert its rights before a foreign court.[7]

C. Public Policy

1. Scope

The requirement which is frequently invoked when challenging a foreign judgment reflects a respect for Italian public policy. In fact, essential defence rights are often regarded as a sub-category of public policy and are sometimes defined as "procedural public policy."

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The requirement whereby foreign judgments must respect Italian public policy as a condition for their recognition in Italian courts was already enshrined in the Italian Civil Code of 1865. Therefore, both scholars and the courts have long been discussing the scope and content of this important instrument. This notion is not a pre-established concept, rather it changes along with the evolution of the legal system, which is also a reason for its success among lawyers.

According to the Italian Supreme Court, internationally relevant public policy is the set of fundamental principles underpinning the ethical and social structure of the Italian community during a specific historical time, together with the imperative rules enshrined in the Italian Constitution and in the laws regulating the most important legal instruments contained in the legal system.[8] More recently, the definition has evolved to incorporate the supreme values that Italy shares at a supranational level, in particular in the European Union.[9]

In fact, when examining whether a foreign judgment is in accordance with or against Italian public policy, the subject of this assessment is not the judgment as such, rather its effects in Italy. Therefore, even where a judgment contains statements which are inconsistent with Italian law, it can nevertheless be recognized if the effects of the judgement are in accordance with the main principles of the Italian system. This was stated in a case concerning the recognition of an award issued by the Circuit Court of Cook County, Illinois and dealing with the division of a couple's property after their divorce.[10] The American judgment attributed to the wife the property of an estate in Italy exclusively belonging to the husband, a decision which would not be allowed under Italian law. The Italian Supreme Court rejected the husband's argument that the foreign judgment violated public policy, and particularly private property rights, affirming that such an exam concerned the merits of the case and was therefore precluded. On the contrary, the effects of the foreign judgment did not violate any essential values of the legal system, so that the award could be enforced in Italy.

The interesting aspect of this approach is that, since not all imperative rules are considered as public policy,

the recognition of foreign judgments can often have effects that are not envisaged by the Italian legal system.

2. Decisions concerning family law

Most case law dealing with public policy concerns family law. Due to the importance of the values at stake in these cases (such as marital status, rights of the children, non-discrimination and personal and religious principles), public policy is often invoked as a barrier against legal systems that are regarded as being incompatible.

As early as 1969, the Supreme Court of Italy held that a declaration of repudiation (the husband's unilateral decision to put an end to a marriage) was considered to be against Italian public policy.[11] In 1985, an Iranian law, which grants child custody to the father in case of divorce, was also regarded as being against Italian public policy for violation of the principle of non-discrimination. Some foreign laws, such as the Moroccan law denying full status to children born outside marriage, have also been held to be against Italian public policy.[12]

However, this is not always the case. In a judgment passed by the Supreme Court in 1999,[13] the court recognized the effects in Italy of an Islamic marriage celebrated in Eritrea as a condition for the granting of inheritance rights to the widow of an Italian national. The late husband's children invoked public policy since Islamic marriage envisages polygamy and repudiation, but the Supreme Court held that these issues did not concern the case and that the marriage had been duly celebrated abroad, thereby producing effects in Italy. Similarly, in 2016,[14] the Supreme Court recognized the effects in Italy of a marriage celebrated in Pakistan where one of the spouses had not attended the wedding but had given her consent over the phone. The Supreme Court in that case held that Italian public policy only required the spouses to express their conscious consent before a public officer but did not require them to be physically present.

3. Same-sex marriage and stepchild adoption

In recent times, the most interesting developments have concerned the recognition of same-sex marriages and stepchild adoptions by same-sex parents. Although same-sex civil unions are now allowed in Italy and have almost the same effects as heterosexual marriage, same-sex couples cannot yet get married. Adoption by same-sex parents is also prohibited.

In order to avoid circumvention of the national rules, a marriage celebrated abroad by couples in which one or both spouses are Italian cannot be recognized in Italy as such and is downgraded to being a civil union.[15] However, according to Italian private international rules, same-sex marriages celebrated abroad between foreign nationals, provided they are valid according to the country where they were celebrated, are recognized in Italy; gender not being viewed as a public policy limit.[16]

In a very controversial ruling passed by the Supreme Court in May 2018,[17] it was held that foreign judgments granting stepchild adoptions of same-sex parents were not contrary to Italian public policy. In the past, the court had denied such recognition by insinuating that adoption was only allowed by married couples, which are strictly heterosexual in Italy, according to a fundamental principle of Italian law. Yet in this case, since the parents had legally married in France, thereby recognizing their marriage in Italy, the court held that French adoption judgments did not violate public policy. Since the guiding principle at the center of the adoption judgment was the interest of the child in living in a stable family, the parents' gender did not affect their parental responsibility.

4. Punitive damages

Outside the scope of family law, the notion of public policy has significantly evolved in Italy as a result of the enforcement of a judgment issued by the District Court of Appeal of the State of Florida, which granted punitive damages against an Italian manufacturer of motorcycle helmets that were found to be defective.[18]

In the Italian civil legal system, damages have a compensatory function whereas punitive damages were reserved to criminal law. Until this case, foreign civil judgments awarding punitive damages had always been considered contrary to public policy.

In the much-debated sentence passed in July 2017, the Italian Supreme Court recognized that public policy had evolved to include the values that Italy shared at a supranational level, in particular in the European Union, and that Italy could not refuse to recognize legal arrangements that were widely accepted at the international level. Moreover, the court held that Italian legislation did, in fact, grant some sort of civil punitive damages in some specific matters. Therefore, a foreign judgment granting punitive damages is not contrary to public policy provided that it is based on foreign laws that satisfy the principles of legality, foreseeability and of quantitative limits of penalties.

Notwithstanding this significant development, the domestic approach to civil damages has not changed and is not expected to change in the near future.

III. Arbitral Awards

A. The New York Convention of 1958

Italy has adopted the New York Convention of 10 June 1958 on the Recognition and Enforcement of Foreign Arbitral Awards,[19] formulating no reservations or declarations. Therefore, the New York Convention applies also to awards made in non-contracting States.

Unlike civil judgments, foreign arbitral awards always need judicial review. The application for recognition and enforcement is regulated by Articles 839 and 840 of the Italian Civil Procedure Code (*codice di procedura civile*),

both of which have been amended and rephrased to ensure compliance with the Convention.

Judicial review is conducted before the Court of Appeal where the defendant resides,or, if the defendant resides outside Italy, before the Court of Appeal in Rome. Pursuant to a recognition petition, the Court assesses *inaudita altera parte*, the formal requirements of the award and the conditions set forth in Article V.2 of the Convention. To specify, the subject matter must be capable of settlement by arbitration and the award must not be contrary to public policy.

The defendant is then notified of the decision and can challenge it within 30 days, before the same Court, giving one or more reasons established in Articles V.1 and V.2 of the New York Convention. The review of the merits of the case is always excluded.

The award cannot be enforced until the case is settled, though the claimant may seek an interim measure.

Court of Appeal decisions can be reviewed by the Italian Supreme Court.

B. Public Policy and Antitrust Rules in Arbitral Cases

The scope of public policy as a limit to the recognition of foreign arbitral awards is comparable to that discussed above in relation to foreign judgments. However, there are some specific features.

Following a European Court of Justice sentence passed in 1999, antitrust rules that prohibit restrictive agreements and the abuse of a dominant position are regarded as a matter of public policy within the meaning of the New York Convention. This is so that questions concerning the interpretation of antitrust rules should be open to examination by national courts asked to determine the validity of an arbitration award.[20] However, according to Italian courts, the arbitrators' interpretation of such rules relates to the merits of the case and cannot be reviewed by national courts. The issue was raised in a case in which a Swiss company claimed the violation of a licence agreement by its Italian licensee; the latter argued that the agreement contained clauses that were contrary to EU antitrust rules, such as the prohibition of passive sales, and such clauses were null and void; the licensee was not successful before the arbitration court and the licensor was awarded damages. During enforcement proceedings in Italy, the licensee claimed that the award was contrary to public policy since it violated EU antitrust rules. However, the Court of Appeal of Florence[21] ruled that the public policy assessment did not encompass the arbitrators' interpretation of the parties' agreements. In other words, in order for public policy to be respected, it was sufficient in this case that the arbitrators had taken antitrust rules into account and given reasons for their decision; their possibly wrongful interpretation was irrelevant as this concerned the merits of the case and thus fell outside the scope of judicial review.

Endnotes

1. Law 31 May 1995 n. 218, Statute on Private International Law, available in English (unofficial translation) at http://www.unife.it/giurisprudenza/studiare/private-international-law/materiale-didattico/archivio/italian-statute-on-private-international-law-of-31-may-1995-no-2018-as-originally-adopted-unofficial-english-translation/view.
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3. Cass. Civ., Sez. I, Sent. 17/07/2013 n. 17463. All judgments cited are available in Italian at http://pluris-cedam.utetgiuridica.it. Judgments of the Italian Supreme Court of the last five years are available for free in Italian at http://www.italgiure.giustizia.it/sncass.
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12. Cass. Civ. Sez. I, Sent. 08/03/1999 n. 1951.
13. Cass. Civ. Sez. I, Sent. 02/03/1999 n. 1739.
14. Cass. Civ. Sez. I, Sent. 25/07/2016 n. 15343.
15. Cass. Civ. Sez. I, Sent. 14/05/2018 n. 11696.
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17. Cass. Civ. Sez. I, Ord. 31/5/2018 n. 14007.
18. Cass. Civ. Sez. Unite, Sent. 05/07/2017 n. 16601. For a detailed analysis of the case, see Stefania Boscarolli, *Italian Supreme Court Gives the Green Light to Foreign Judgments Granting Punitive Damages*, NYSBA, International Law Practicum, 2018, vol. 31, no. 1., page 108.
19. For the text and status of the New York Convention of 1958 *see* http://www.unictral.org/uncitral/it/uncitral_texts/arbitration/NYConvention.html
20. European Court of Justice, Judgment of 1 June 1999, case C-126/97, *Eco Swiss China Time vs. Benetton*, available at http://www.curia.europa.eu.
21. Corte d'Appello di Firenze, Sez. I, 16 May 2006; the same view was taken by the Court of Appeal of Milan in a similar case (Corte d'Appello di Milano, 15/7/2006 n. 1897, *Terra Armata v. Tensacciai*).

Enforcing Foreign Judgments and Arbitral Awards in Guernsey

By Gareth Bell and Emma Taylor

Introduction

Gareth Bell

Guernsey is one of the Channel Islands, situated between France and England. Whilst a British Crown Dependency (like Jersey and the Isle of Man), it is a distinct jurisdiction from England and Wales, and has its own separate legal system that is rooted in Norman French customary law.

As a result, Guernsey has its own unique laws and customs for dealing with the enforcement of foreign judgments and arbitral awards. This article is intended to be a practical and informative guide on the ways in which foreign judgments and arbitral awards can be enforced in Guernsey.

Guernsey is a major offshore finance centre and, as a result, the home to many trusts, asset holding companies, offshore bank accounts, investment funds and the like, which may form part of the wealth structuring of individuals and companies against whom judgments may have been obtained in other countries. It is therefore common for worldwide judgment creditors to enforce judgments in Guernsey.

Foreign Judgments

There are two routes to enforcement of foreign judgments in Guernsey: (i) pursuant to statute, by reliance on the Judgments (Reciprocal Enforcement) (Guernsey) Law, 1957 (as amended) ("Reciprocal Enforcement Law"); and (ii) pursuant to the common law.

Enforcement By Way of Statute

The Reciprocal Enforcement Law provides for the recognition and enforcement of a foreign judgment by way of registration. The scope of the Reciprocal Enforcement Law is limited to jurisdictions which offer reciprocal treatment to judgments of the Guernsey courts.

There are a limited number (and somewhat surprising group) of reciprocating countries. These countries include: England and Wales, the Isle of Man, Israel, Jersey, the Netherlands, Curacao and St. Maarten (previously known as the Netherlands Antilles), Northern Ireland, Italy, Scotland, and Surinam.

Emma Taylor

Whilst these countries are reciprocating countries, it does not mean that *all* judgments from those countries will be able to be registered. There are a number of conditions which must be met in order to be able to rely on the Reciprocal Enforcement Law.

What Judgments Can Be Registered?

A judgment of a reciprocating country can only be registered pursuant to the Reciprocal Enforcement Law if it satisfies a number of conditions.

- The first of these is that it is a judgment of a "superior court" of the reciprocating country. The definition of a "superior court" is set out in secondary legislation. So, in the case of England and Wales, for example, judgments of the Supreme Court, Court of Appeal and High Court can all be registered. However, judgments of the County Court cannot and therefore must be enforced by way of the common law.
- The judgment must be for a debt or a definite sum of money, other than a sum payable in respect of taxes or similar charges, or a fine or other penalty.
- The judgment must be final and conclusive. A judgment will be final and conclusive notwithstanding the fact an appeal is pending or that the time period for making an appeal is still open.
- The judgment must not be more than six years old.
- The court of the reciprocating country must have had jurisdiction to grant the judgment. Whether a foreign court has jurisdiction is determined by reference to Guernsey laws rather than the laws of the reciprocating country.

  For actions *in personam,* the Reciprocal Enforcement Law deems the foreign court to have had jurisdiction, where the judgment debtor was the *defendant*, if he or she, (1) submitted to the jurisdiction of the foreign court by voluntarily appearing in the proceedings or agreed to submit; (2) counterclaimed in the proceedings; (3) was resident in the jurisdiction of the foreign court at the time of the proceedings

(or in the case of a company had its principal place of business there); or (4) had an office or place of business there and the action was in respect of a transaction effected through that office. Where the judgment debtor was the *plaintiff* the foreign court will be deemed to have had jurisdiction.

For actions relating to immovable property, or in an action *in rem* relating to movable property, the test is whether the property in question was at the time of the proceedings situate in the same jurisdiction as the court.

What Judgments Cannot Be Registered?

In addition to satisfying the conditions above, there are a number of foreign judgments that are not capable of being registered under the Reciprocal Enforcement Law. These include:

- Judgments that have been wholly satisfied.
- Judgments that are not capable of being enforced by execution in the court of the reciprocating country.
- *In personam* judgments that relate to matrimonial matters, the administration of a deceased person's estate, insolvency and winding up of companies, and lunacy or guardianship of infants.

What Is the Process for Registration?

In order to register a judgment under the Reciprocal Enforcement Law, a judgment creditor must apply to the Royal Court of Guernsey seeking permission for the judgment to be registered. An application for registration may be made on an *ex parte* basis.

The application must also be accompanied by a supporting affidavit. This must include a certified copy of the foreign judgment and a statement that the judgment creditor is (a) entitled to enforce the foreign judgment, and (b) that the foreign judgment has not been satisfied.

The Royal Court of Guernsey is able to impose conditions on the registration of a foreign judgment, including requiring that notice of the registration of the judgment is given to the judgment debtor and making provision for security for costs.

Following registration, a certified copy of the foreign judgment and certificate will be provided to the judgment creditor. The judgment debtor then has a period of fourteen days (unless this has been extended by the Royal Court) to apply to have the registration set aside.

What is the Effect of Registration?

Once registered, the foreign judgment is enforceable in Guernsey in the same way as a Guernsey judgment (see below for methods of enforcement).

Enforcement by way of common law

In the case of foreign judgments which cannot be registered under the Reciprocal Enforcement Law, the only route open to enforce them is by way of the common law.

Enforcement by way of the common law requires the judgment creditor to sue on the foreign judgment in the same manner as they would a civil debt.

What Judgments can be Recognized/Enforced?

Similar conditions apply to judgments enforced pursuant to the common law as apply to registration under the Reciprocal Enforcement Law.

The judgment must be final and conclusive, be for a debt or definite sum of money (but not payable in respect of taxes of a fine or penalty) and granted by a court which had jurisdiction (in this case usual conflicts of law principles apply).

It is not, however, necessary for the judgment to be a judgment of a superior court.

What Judgments Cannot be Recognized/Enforced?

If the judgment can be recognized under the Reciprocal Enforcement Law, it is not possible to enforce it pursuant to the common law route.

In addition, a foreign judgment is not capable of enforcement under the common law if it was obtained by way of fraud, or if it is contrary to public policy or principles of natural justice.

What is the Process for Recognition/Enforcement?

In order for a judgment creditor to enforce a foreign judgment pursuant to the common law it must sue on the judgment as if it were a civil debt, which will require the commencement of fresh proceedings in Guernsey.

In order to commence proceedings in Guernsey it is necessary to prepare a "summons" and a "cause" (similar to a claim form and particulars of claim in England and Wales, or a complaint in the United States) setting out the details of the foreign judgment and confirming that it has not been satisfied.

Where the judgment debtor is resident outside of Guernsey (but enforcement is sought in Guernsey because assets are situated here) it will be necessary to make an application to the Royal Court for permission to serve the summons outside of the jurisdiction. Such applications are made ex parte.

Once service has been affected on the judgment debtor, the summons will specify a "return date" for the judgment debtor to appear before the Royal Court. On the return date, the judgment creditor will usually apply for summary judgment and unless the judgment debtor is able to establish one of the reasons for not recognizing the foreign judgment—e.g., that the foreign court did not

have jurisdiction—the Royal Court should usually grant summary judgment. If the judgment debtor fails to appear on the return date, it is possible to apply for judgment in default of appearance, provided it can be shown the summons and cause were effectively served.

What is the Effect of Recognition/Enforcement?

If the Royal Court grants a judgment in the debt proceedings the judgment creditor will have a Guernsey judgment which it can enforce in the usual way (see below for methods of enforcement).

Foreign Arbitral Awards

In a similar way to the enforcement of foreign judgments, there are two principal ways of enforcing foreign arbitral awards: pursuant to the Arbitration (Guernsey) Law, 2016 (as amended) ("2016 Arbitration Law"); and the Arbitration (Guernsey) Law, 1982 (as amended) ("1982 Arbitration Law").

Enforcement Under the 2016 Arbitration Law

This is the main method of enforcement of foreign arbitral awards in Guernsey.

The 2016 Arbitration Law provides for the recognition and enforcement of awards, which have been made in pursuance of a written arbitration agreement, and in a territory of a state which is a party to the New York Convention on the recognition and enforcement of foreign arbitral awards.

What Arbitral Awards Can Be Recognized/Enforced?

As stated above, the 2016 Arbitration Law applies to awards, which have been made in pursuance of a written arbitration agreement, and in a territory of a state which is a party to the New York Convention. If the award does not satisfy these requirements it may nevertheless be possible to enforce it under the 1982 Arbitration Law.

What Arbitral Awards Cannot Be Enforced?

Recognition and enforcement of an award can be refused if the person against whom it is invoked proves that

- A party to the arbitration agreement was (under the applicable law) under some incapacity.
- The arbitration agreement was not valid under the law to which the parties subjected it or, failing any indication of it, under the law of the country where the award was made.
- That person was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present a case.
- The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration or contains decisions on matters beyond the scope of the submission to arbitration (although those decisions that are within the scope are enforceable).
- The composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, with the law of the country in which the arbitration took place.
- The award has not yet become binding on the parties or has been set aside or suspended by a competent authority of the country in which, or under the law of which, it was made.
- The award is in respect of a matter that is not capable of settlement by arbitration, or if it would be contrary to public policy to recognize or enforce the award.

What is the Process for Recognition/Enforcement?

An arbitral award that complies with the requirements set out in the 2016 Arbitration Law is automatically recognized as binding on the parties to the award and is capable of being relied upon by way of defence, setoff or otherwise in any civil legal proceedings in Guernsey.

In order to enforce an arbitral award under the 2016 Arbitration Law, it is necessary to apply for the permission of the Royal Court (similarly as with foreign judgments under the Reciprocal Enforcement Law (see above)).

In order to obtain permission, the applicant must provide the Royal Court with a duly authenticated original award or a duly certified copy of it, and the original arbitration agreement or a duly certified copy. If the award or agreement is in a foreign language, the applicant must also provide a translation of the document which must be certified by an official or sworn translator or by a diplomatic or consular agent.

What is the Effect of Recognition/Enforcement?

As stated above, if an award satisfies the requirements set out in the 2016 Arbitration Law, it is treated as binding on the parties—subject to the award—and may be relied upon in any Guernsey civil proceedings.

If the Royal Court grants leave to enforce the award, it may be enforced in the same way as a Guernsey judgment (see below for methods of enforcement).

Enforcement by the 1982 Arbitration Law

Whilst most of the 1982 Arbitration Law has been repealed by the 2016 Arbitration Law, the 1982 Arbitration Law continues to provide for the enforcement of awards in arbitral proceedings that are subject to the Geneva Convention and the Protocol on Arbitration Clauses of 24

September 1923 (which are also not New York Convention awards).

What Arbitral Awards Can Be Enforced?

In addition to the requirement that the award is made in arbitral proceedings subject to the Geneva Convention and the Protocol, an arbitral award will only be enforceable under the 1982 Arbitration Law if it complies with the following conditions set out in Section 33(1):

- It must have been made under an arbitration agreement that was valid under the law by which it was governed.
- It must have been made by the tribunal provided for in the agreement or constituted in the way agreed to by the parties.
- It must have been made in conformity with the law governing the arbitration procedure.
- It must have become final in the country in which it was made. An award will not be deemed final if any proceedings for the purpose of contesting the validity of the award are pending in the country in which it was made.
- It must have been in respect of a matter which may lawfully be referred to arbitration in Guernsey.
- Finally, it must not be contrary to the public policy of Guernsey.

What Arbitral Awards Cannot Be Enforced?

It is not possible to enforce an arbitral award under the 1982 Arbitration Law where the Royal Court is satisfied that

- The award has been annulled in the country in which it was made;
- The party against whom enforcement is sought was not given notice of the arbitration proceedings in sufficient time to enable him to present his case, or was under some legal incapacity and was not properly represented; or
- The award does not deal with all the questions referred or contains decisions on matters beyond the scope of the agreement for arbitration.

What is the Procedure for Recognition/Enforcement?

It is also necessary to seek the permission of the Royal Court to enforce a foreign award under the 1982 Arbitration Law. The process is almost identical to that under the 2016 Arbitration Law, save for the applicant must also provide evidence that the award has become final and may be required to provide evidence that the conditions set out in Section 33(1) of the 1982 Arbitration Law.

Any foreign award which would be enforceable under the 1982 Arbitration Law is treated as binding on the persons subject to the award and may be relied on by those persons by way of defence, setoff or otherwise in any legal proceedings in Guernsey.

What is the Effect of Recognition/Enforcement?

As stated above, if an award satisfies the requirements set out in the 1982 Arbitration Law, it is treated as binding on the parties, subject to the award, and may be relied upon in any Guernsey legal proceedings.

If the Royal Court grants leave to enforce the award, it may be enforced in the same way as a Guernsey judgment (see below for methods of enforcement).

Methods of Enforcement in Guernsey

There are two main methods of enforcement in Guernsey, depending upon whether the property against which enforcement is sought is personalty (movable property such as cash, shares, art, choses in action etc.) or realty (immovable Guernsey property).

Enforcement against personalty is via Her Majesty's Sheriff (and possibly *désastre* proceedings, if the judgment creditor is insolvent) and enforcement against realty is via *saisie* proceedings.

Her Majesty's Sheriff

The main method of enforcement is by way of Her Majesty's Sheriff ("HM Sheriff"), an officer of the Royal Court. HM Sheriff has wide powers to investigate the existence of assets, to arrest and (if necessary) sell personalty situated in Guernsey and then apply those proceeds to satisfy a judgment. The costs of instructing HM Sheriff are very reasonable.

In practice, HM Sheriff will be provided with a copy of the judgment and will take steps to investigate what personalty the debtor has in Guernsey (for example, by writing to all high street banks). Any personalty identified is then "arrested" (in the case of a bank account the funds will usually be transferred to HM Sheriff to hold).

Following the arrest, the creditor (known as the arresting creditor) needs to summons the judgment debtor to the Royal Court to see the court confirm the arrest and grant permission to sell the arrested items, the proceeds of which would be applied to satisfy the judgment.

Désastre

If the personalty arrested by the HM Sheriff is inadequate to satisfy the judgment, the arresting creditor will (subject to at least one other debt being owed to another creditor) be able to initiate a Guernsey customary law procedure called *désastre.* Equally, if HM Sheriff arrests assets which are sufficient to satisfy a judgment creditor's debt but is aware that other debts are due to other creditors, and insufficient assets are available to satisfy all debts, then it will be necessary to begin *désastre* proceedings.

The core process of *désastre* begins with a hearing involving the arresting creditor, debtor and any other creditors before a Jurat (a lay magistrate) who will act as Commissioner and who will be responsible for marshalling the claims against the debtor. At this first hearing, HM Sheriff will confirm that the proceeds realized by the arrest are insufficient to satisfy the debts of which she is aware. The Commissioner will then declare the debtor to be *en etat de désastre* (literally translated as, in a state of (financial) disaster!)

The Commissioner will then convene a meeting of creditors to examine the claims against the debtor. At the meeting, attending creditors are invited to make their claims against the debtor and establish an entitlement to any priorities over other creditors. At the conclusion of the meeting the Commissioner will prepare a report declaring dividends for each creditor, taking account of the various amounts and priorities of each creditor's proven claims.

The first stage is to obtain a preliminary vesting order (PVO), which gives certain rights to the creditor; these include the right to evict the people living in the property, or collect rent from tenants.

The second stage is to obtain an interim vesting order (IVO) which takes the debtor's property away from him and transfers it to the arresting creditor to hold on trust for all potential claimants against that property.

Once the IVO is obtained, the arresting creditor must make a call for any other claims against the debtor's property which is done by way of publication of a notice in the local Gazette Officielle for two successive weeks. Following a period of 28 days, a Commissioner is appointed to assess the claims and a date set for the final stage of the process—the final vesting order (FVO). This hearing is typically dramatic, as each creditor must decide in turn, starting with those having the lowest priority, if they wish to take the real property (on the condition that they repay *all* higher priority creditors in *full*, immediately) or renounce their claim against the debtor. If substantial equity is available in the property and the creditor is well-resourced then it may be worth taking the property (strictly speaking there is not a requirement to return surplus equity to the judgment debtor).

"A significant quirk of saisie proceedings is, once they are initiated by a judgment creditor, they are deemed to give up their right to enforce their debt against any of the debtor's other assets. As a result, judgment creditors should take care to satisfy themselves that the debtor's real estate is sufficient to discharge the debt."

The priority of claims in *désastre* is organized in the following manner: first, the cost of the *désastre* itself (including HM Sheriff's fees and the arresting creditor's costs); second, the claims of creditors holding a security interest under the Security Interests (Guernsey) Law, 1993; third, preferred debts (for example, debts owed to a landlord in relation to rent, unpaid wages and unpaid taxes); and finally, unsecured creditors.

Notably, *désastre* does <u>not</u> extinguish creditors' claims against the debtor to the extent that those claims remain unpaid (unlike bankruptcy proceedings in England and Wales). Therefore, there is nothing to stop a creditor claiming in subsequent *désastre* proceedings, should further personal property be discovered, or initiating a *saisie* proceeding in respect of the debtor's real estate (set out below), for any unpaid amounts.

Saisie

Where a judgment debtor has real property situated in Guernsey it will be necessary to follow another customary law procedure known as "*saisie.*"

Saisie consists of a three-stage process that results in the seizure and forfeiture of the real property owned by the judgment debtor.

A significant quirk of *saisie* proceedings is, once they are initiated by a judgment creditor, they are deemed to give up their right to enforce their debt against any of the debtor's other assets. As a result, judgment creditors should take care to satisfy themselves that the debtor's real estate is sufficient to discharge the debt. As a result of this and the protracted and complicated procedure, *saisie* is typically regarded as a last resort.

Corporate Insolvency

The scope of Guernsey's corporate insolvency law is beyond the scope of this article, but it should be noted that Guernsey has a well-established system of corporate insolvency law, including liquidation and administration. The recognition and assistance of foreign liquidators, receivers and trustees in bankruptcy is frequently ordered by the Royal Court.

Enforcement Against Trusts

Issues in relation to enforcement against assets held in trust established by a judgment debtor and/or that a judgment debtor is a beneficiary of can be particularly complex. Most Guernsey trusts are discretionary trusts and beneficiaries do not have any beneficial interest in the assets of the trust against which a judgment or arbitral award can be enforced; legally speaking they are a "mere object of a power."

The notion that a beneficiary of a trust has no beneficial interest against which a judgment or arbitral award can be enforced is often alien to lawyers from civil law jurisdictions and even to lawyers from common law jurisdictions who are not especially familiar with trust law.

In order to "enforce" against the assets of a trust, it is therefore necessary to think laterally and explore other potential routes, which may include seeking to

- appoint an equitable receiver over any powers reserved to the judgment debtor (such as a power to remove the trustee, add beneficiaries and/or remove beneficiaries), as occurred in the Cayman case of *TMSF v. Merrill Lynch Bank and Trust Company (Cayman Limited)* and Others (2009);
- set aside the judgment debtor's dispositions into trust on the grounds that they constituted fraudulent transfer on creditors, whether utilising statutory provisions such as s.423 of the UK's Insolvency Act 1986 or a customary law Pauline action;
- establish that the trust is a "sham" and the judgment debtor remains the beneficial owner of its assets;
- establish that, whilst not a sham, the trust is "illusory" because an excessive retention of control by the judgment debtor never successfully alienated the relevant assets, as was decided in the recent English case of *Mezhprom v. Pugachev* [2017] EWHC 2426 (Ch).

These avenues are complex and the prospects of their application and success will be highly fact specific. However, if a judgment debt is substantial and significant assets are located within a Guernsey trust, they should be explored carefully.

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Enforcement of Foreign Court Decisions Under the Hungarian Legislation

By Dr. Péter Nógrádi

I. Introduction

Dr. Péter Nógrádi

When it comes to recognizing and enforcing a foreign civil law judgment in Hungary, several legal application and practical legal questions arise as to whether such judgement was given in a criminal or a civil procedure. In this article, we shall answer those questions, initially in terms of the applicable laws and then the practical aspects. Since the extent of this article is limited, it is not possible to get into the very details of this topic. First, we provide a broad, but comprehensive, description of the basics of the applicable Hungarian legal rules governing this field. Second, through specific cases, we explain the jurisprudence of the supreme court of Hungary, namely the Curia (*Kúria* in Hungarian). We note that recognizing and enforcing judgements drawn in criminal cases are not the subject of this article, because this is an examination of this topic in the field of civil law.

II. Domestic and International Laws to Be Applied

When enforcing foreign judgements in Hungary, the laws of three different jurisdictions are applied simultaneously: (A) Hungarian domestic laws, including jurisprudence, (B) relevant legal acts of the European Union, and (C) international legal documents, such as bilateral or multilateral international treaties and conventions.

A. Domestic Laws

Enforcing foreign judgements in Hungary is governed by Act XXVIII of 2017 on the International Private Law (hereinafter referred to as the International Private Law Act) and Act LIII of 1994 on the judicial enforcement (hereinafter referred to as the Enforcement Act).

The International Private Law Act regulates the general and basic rules and conditions for recognizing foreign judgments, at first generally, and then it establishes some special provisions for property law cases, family law cases and cases affecting personal status. In relation to this law, it must be noted that it is applied in matters which do not fall within the scope of the generally effective and directly applicable legal act of the European Union or international treaty.[1]

The Enforcement Act includes the basic and special procedural rules regarding the acknowledgement and enforcement of foreign judgments.

B. EU Laws

Hungary has been a member of the European Union since 1 May 2004, therefore the relevant community laws also shall be applied for enforcement of foreign judgments, especially when the judgment to be enforced was passed by a decision within the EU. The main legal act governing this subject is the Regulation (EU) No 1215/2012 of the European Parliament and of the Council on the Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Brussels I). This regulation superseded the previous Brussels I regulation, Council Regulation (EC) No 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters. It must be noted that 1215/2012/EU Regulation shall be applied to cases where the procedures started after 10 January, 2015, while 44/2001/EC Regulation shall be applied to procedures commenced before that date. Besides those main regulations, the EU has other laws governing enforcement of foreign judgments regarding different, specific legal areas.[2]

C. International Legal Acts

- Hungary is signatory to several international conventions and treaties concerning enforcement of foreign judgments. Among several other international conventions and treaties, the following are the most important:[3]
- Hague Convention of 1 March, 1954 on Civil Procedure;
- Hague Convention of 15 April, 1958 concerning the Recognition and Enforcement of Decisions-Relating to Maintenance Obligations Towards Children;
- Hague Convention of 15 November, 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters;
- Hague Convention of 25 October, 1980 on the Civil Aspects of International Child Abduction;
- Convention on Recognition and Enforcement of Foreign Arbitral Awards, New York 10 June, 1958;
- Convention on Recovery Abroad of Maintenance, New York 20 June, 1956;

- Treaty between Czech Republic and Hungary on Legal Assistance and on Regulation of Legal Relations Pertaining to Civil, Family and Criminal Matters;
- Treaty between France and Hungary on Legal Assistance in Civil and Family Law Cases, on Recognition, and Enforcement of Decisions, and on Legal Assistance in Criminal Cases and Extradition;
- Treaty between Hungary and Turkey on the Mutual Enforcement of Judgments Resolved in Criminal Matters; and
- Treaty between Finland and Hungary on Legal Protection and Assistance concerning Civil, Family, and Criminal Law Cases.

III. Foreign Court Decisions, Requirements of Recognition, Grounds of Refusal

A. Requirements

Within the meaning of the International Private Law Act, a decision shall mean (1) judgments given in civil law cases by regular foreign courts, (2) awards passed by foreign arbitration tribunals and (3) other decisions by any other foreign authority acting and issuing final decisions (hereinafter are jointly referred to as courts).

Foreign court decisions are recognized in Hungary if the decisions meet the following legal requirements:[4]

- The jurisdiction of the foreign court that proceeded in the case is in compliance with the applicable rules of the International Private Law Act;
- The decision given is final and binding, or has equivalent legal effect (meaning formal validity, such decision cannot be appealed) as per the foreign law under which it was passed; and
- There is no ground for refusal as per Section 109 (4) of the International Private Law Act (see later).

In addition to the above, it has to be noted that settlements reached in foreign courts or other authorities acting in civil cases shall be recognized and enforced under the same conditions, which are applicable to the decisions of foreign courts or other judicial authorities.[5]

In addition to the above, there are special rules applicable to specific areas, such as property-related matters in which case reciprocity is an additional condition for enforcement, family law and personal status matters (which include special grounds of jurisdiction).

It must be emphasized that the EU and international laws may stipulate different requirements which shall be met by specific foreign decisions for which enforcement has been requested. As it was mentioned in Section 2 (A) above, international treaties and EU laws have priority over the provisions of the International Private Law Act. Therefore, the special rules and requirements of such EU law or international treaties shall prevail in cases that fall under the scope of those acts. In connection with this, the International Private Law Act has a special, auxiliary provision, according to which, with respect to a given foreign decision, the recognition and enforcement of the decision of a foreign court is governed by international treaty concluded by Hungary (but not by the European Union). If the decision is not in compliance with the relevant provisions of the applicable international treaty, the decision will be recognized and enforced if it complies with the requirements specified by the International Private Law Act. For the purposes of this rule, reciprocity between Hungary and the foreign nation will be considered as granted.[6]

B. Grounds of Refusal

As mentioned before, Section 109(4) of the International Private Law Act sets forth the rules when the recognition of a foreign court decision shall be refused. Such reasons include:

- Recognition of the decision would be against the public order;
- The party against whom the decision was made did not attend the proceeding, neither personally nor by proxy, because the document based on the proceeding was initially written and not delivered to the address or habitual residence of such party in a way and at such time as is appropriate to enable the party to prepare a defense;
- The proceedings regarding the subject of the same right originating from the same factual basis, regarding the same parties have been commenced before initiating the foreign proceedings;
- A Hungarian court or another authority has already resolved a final decision about the same right originating from the same factual basis, regarding the same parties; and
- A court of a foreign state other than the state of the foreign court resolving the decision has already resolved a final decision about the same right originating from the same factual basis, regarding the same parties that is fulfilling the requirements of recognition in Hungary.

The court will examine *ex officio* if the decision is against the public order; however, further grounds for exclusion shall be deemed absent unless proven otherwise. In this regard, the defendant has the right to refer to these grounds in a non-litigious procedure aiming the recognition of the foreign decision.

With regard to the refusal, we note that EU laws and international laws determine other grounds for the refusal of specific foreign decision.[7]

IV. Procedural Rules

Recognition of a foreign decision does not require a separate procedure unless otherwise stipulated by law. Recognition is examined *ex officio* by the Hungarian court or authority during the procedure in which the question of recognizability arose.[8] However, the party concerned[9] may request a special court procedure for the recognition of a foreign decision in Hungary. In such cases, the courts make their decision in non-litigious procedures.[10]

A decision of a foreign court meeting the preconditions of recognition in Hungary may be enforceable.

The decision of a foreign court or an award of an arbitration tribunal may be executed through the same procedure as a Hungarian court decision or arbitration award pursuant to the rules recorded in Chapter XII of the Enforcement Act.[11] While enforcing a foreign resolution, the provisions set forth in specific other legislation and in the international conventions shall also be applied, and jurisprudence based on reciprocity shall also be taken into consideration.[12]

A foreign decision shall be enforced based on an act, international treaty or reciprocity.[13] If a decision is delivered in a civil or administrative case, or in a criminal case provided that it includes a civil law obligation, or it is based on a settlement approved by the court,[14] the decision must meet the following fundamental conditions:[15]

- It is final and binding (or having equivalent legal effects) or subject to preliminary enforcement;
- It contains an obligation; and
- The deadline for performance of the obligation has expired.

If the judgment in question is considered enforceable, the respective Hungarian court shall certify this fact with a "confirmation of enforcement."[16] This decree provides that the foreign decision shall be enforced in the same method as a Hungarian court judgment/arbitration award.

Generally, an appeal may be submitted to the court of second instance to object to the decree of the Hungarian court.[17]

Regarding the court decisions passed in EU member states, in proceedings initiated as of 10 January, 2015, the Brussels I regulation is applicable, based on a judgment given in an EU member state. The judgment is enforceable in that EU member state and shall be enforceable in the other EU member state without any declaration of enforceability being required. In addition to this, we also note that there are some other EU rules in which no recognition is required for the enforcement of decisions drawn in an EU member state in procedures falling under the scope of these laws.[18]

V. Cases

Before we explain two cases, which went through all levels of the court of the Hungarian judicial system, we must point out some basic facts regarding the Hungarian court system and the applicability of the court decisions in other court procedures.

Hungary has a four-level court system. On the lowest level there are the district courts; on the third level there are the regional courts having jurisdiction over counties; on the second level there are the high courts having jurisdiction over multiple counties; and at last, at the top of the system, there is the Curia, which acts as the supreme court of Hungary (before 1 January, 2012 it was actually called Supreme Court). Civil lawsuits, depending on competent application of the pertinent laws, start either before a district court or before a regional court. Against the decision of the court of first instance, one appeal may take place at the higher court. With regard to the remedies system, the Curia is responsible for the judicial review procedures.

Hungary is a civil law jurisdiction; therefore judicial decisions are not binding for other courts. However, the higher court decisions are frequently followed and referred to by other courts, especially the lower courts. In addition to this, the Curia is entitled to issue judicial guidance opinions, which are applied by the lower courts.

In this section, we will discuss two cases that focus on protecting public order. As we described previously, should a foreign court decision be against the public order, the recognition thereof shall be refused. In Hungarian case law, the public order is an ambiguous reason for the refusal to recognize a foreign court decision; therefore, cases which affect this legal institution are often brought before the Curia. We present as an example two lawsuits below, which decide against recognition of EU and a U.S. court decisions, provided that the decisions of the Curia contain guidance concerning the public order.

A. Decision of the Curia No. 2018.6.174 Made in Family Law Field[19]

1. Facts

T.M., a Hungarian-Belgian dual-citizen married to the father of a first-degree and second-degree applicant (hereinafter jointly referred to as Applicants) in 2005. T.M. then adopted the Applicants. The applicants were adults at the time of adoption which is permittable under French law, which the Marseille court decided on in 2008. T.M., the adopter, died in 2009; then the applicant's father, T.T.K., also died in 2012. T.T.K. left a will and the Applicants had a legal interest in the inheritance procedure of T.T.K. in the following manner: the first-rate applicant as a legal heir and the second-rate applicant as legatee. The Applicants submitted an application regarding the judgment on adoption, which became final and binding on 19 May, 2008, to the Marseille Court with a confirmation of en-

forcement to the Hungarian court. The reason for submitting the application was because the notary could only determine the Applicants' entitlement to inheritance if they possessed a birth certificate issued by the Hungarian Civil Registry Authority in which T.M. is indicated as a parent or if it is verified by a court decision that the judgment on the adoption made by the court of first instance based in Marseille can be enforced in Hungary.

2. Decisions of the Court of First and Second Instance

The Hungarian court of first instance provided the decision of Marseille Court of first instance with its judicial order. The Hungarian court of second instance – acting due to the appeal of the second-rate applicant – maintained the judicial order of the Hungarian court of first instance.

3. The Curia's Decision and Its Legal Grounds

Having regard to the fact that the second-rate applicant submitted a request for review for the repeal of the final and binding judicial order, the Curia examined the case in its entirety and concluded the following.

The Curia pointed out in its decision that both courts of first and second instance referred correctly to the fact that adoption of a foreign adult citizen by a Hungarian citizen and the acknowledgement thereof does not conflict with the fundamental rules of the Hungarian legal system. Civil and family law principles do not entail any consequences which would go beyond the legal relationship, namely the inheritance. Having regard to the fact that the aim to be reached by the adoption in the case of adopting an adult deviates from the case of adopting a minor, the interest of a minor cannot be considered as *aim mutatis mutandis*. Thus, the acknowledgement of a foreign decision cannot be refused on the basis of that there is a discrepancy between the legal provision of the state of origin (in this case France) and the law which would have been applied by the court or guardianship authority of the requested State (in this case Hungary).

In the present case, the refusal of the application to recognize a foreign decision is also not justified since the acknowledgement of a foreign decision does not violate Hungarian public order. In this regard, the Curia emphasized that the public order is a changing category in its content, always dependent on the economic and social structure and the moral and political perception both in time and in space. The essence of the public order is that the law intends to protect, enforce the institutions and principles within this concept against the effect of applicable foreign law leading to a different result in some cases. Consequently, the requested state ignores the application of foreign norms that could violate public order in their concrete effect.

However, a conflict with public order can only be established if the acknowledgement of a foreign decision violates fundamental rights and the social value judgment; thus, the acknowledgement would have consequences for public order beyond the legal status of the parties. A conflict with public order can be established if the decision requested to be acknowledged is obviously and materially in breach of the principles of legal order. Public order suffers serious detriment when the decision directly violates the basis of the economic and social order. In addition, it cannot be established that the procedure initiated by the Applicants was intended to circumvent the purpose of the institution of adoption.

In light of this, the Curia maintained the final and binding judicial order in force by the abovementioned legal rationale.

B. Decision of the Curia No. 2014.1.13 Made in Family Law Field

1. Facts

The litigants met in 1990 and three of their children were born from their relationship. The children were adopted by the plaintiff with a fully enforceable statement of paternity. The litigants married in Hungary in 1995 according to church ritual, but their civil marriage did not take place. Following the religious marriage, they moved to the United States of America in 1998. In 2003, due to the deterioration of their relationship, the Superior Court of California, County of San Mateo, obliged plaintiff, via a final and binding judgment, to pay child support for the three children in a total amount of $8,996.00 per month and pay alimony to the defendant in an amount of $13,292.00 per month for a three-year period of time starting on 1 March, 2003.

2. Decisions of the Court of First and Second Instance

At the request of the defendant, the court of first instance issued a confirmation of enforcement in 2010 in which it stated that the enforceable, final and binding judgement of the Superior Court of California, County of San Mateo may be enforced in the same way as a domestic court decision according to the Hungarian law. The court of first instance then issued an enforceable document for the enforcement of the child support and alimony on the basis of the confirmation of enforcement in 2011.

The plaintiff requested the termination of enforcement with reference to the fact that the foreign judgment on which the enforcement was based violates Section 72(2)(c) of Legislative Decree No. 13 of 1979 on international private law (hereinafter referred to as the International Private Law Legislative Decree),[20] since it was the result of a procedure that seriously violated the fundamental principles of Hungarian procedural law. The principle of equality before the courts, the principle of directness and good faith, the right of representation and the right of appeal have all been violated. In addition, it can

be stated that the judgment of the U.S. court is in conflict with the public order. Secondly, the plaintiff claimed that the right to enforce alimony completely lapsed and the right to enforce child support prior to December 2010 has also lapsed.

The court of first instance limited the enforcement for the child support, which was effective from 1 May, 2010 in an amount of $8,996 per month, and refused the claim beyond that amount. According to the reasoning of the judgment, the court of first instance did not find the primary arguments of the claim compelling and pointed out that there is reciprocity between the jurisdictions of Hungary and the State of California in the U.S. Therefore, the U.S. judgment shall be acknowledged under Section 72(2)(c) of the International Private Law Legislative Decree and there is no place for a substantive review of a foreign decision according to Section 74(3) of the International Private Law Legislative Decree. In addition, the court of second instance pointed out that the foreign decision cannot be reviewed from a procedural point of view according to Section 74(3) of the International Private Law Legislative Decree.

3. The Curia's Decision and Its Legal Grounds

Regarding the fact that the plaintiff submitted a request for review against the final and binding judicial order, the Curia examined the case in its entirety and concluded the following.

The Curia concluded that a lawsuit may be initiated for the termination of or limitation of an enforcement ordered by an enforcement sheet or an enforceable document.

Section 72 (2) of the International Private Law Legislative Decree contains several conditions according to which the foreign decisions cannot be acknowledged. The court of second instance did not make a mistake concerning the fact that when a party disputes the existence of these conjunctive conditions, the decision shall be examined by the court conducting a lawsuit for the termination (limitation) of enforcement of the decision. In the plaintiff's claim and in his request for review, the plaintiff referred to Section 72(2)(a) and (c) of the International Private Law Legislative Decree as circumstances which constitute an obstacle to the domestic acknowledgement of a foreign decision. However, the court of second instance had reached a correct conclusion in that the grounds of objection appointed by the plaintiff are not valid.

The plaintiff has rightly stated in his request for review that the essence of the public order is the unconditional legal protection of the institutions and principles under the concept and the enforcement of protection.

However, according to the standpoint of the Curia, the collision with public order implies a violation of the public interest and manifests a breach of a fundamental legal provisions. Conflict of rights in public order may only be established if it leads to consequences that may violate the fundamental rights or the social value judgment beyond the legal status of the parties; in other words, it can be stated to conflict with public order in the case of obvious and material breach of the principles of the legal order. Public order suffers when the decision directly violates the basis of an economic and social order. In the present case, such circumstances do not exist.

In view of the above, the Curia maintained the final and binding judgment since it did not infringe on the procedural rules set out in the request for review and complies with the applicable substantive rules.

VI. Conclusion

The acknowledgement and enforcement of the foreign court decisions is a widely regulated field of law in Hungary, though the courts usually encounter some application and practical uncertainties. Even in our practice, we have faced cases in which the court was not sure how a foreign court decision should have been handled. In our opinion, this uncertainty is caused by the intersection of domestic and international legal acts which are to be applied simultaneously. Fortunately, from our perspective, as time goes by and the courts handle more and more foreign decision cases, the above-mentioned uncertainties will become rare. In addition, we hope that the adaptation and application of the EU laws will be unambiguous for the courts and lawyers of Hungary.

Endnotes

1. 2017. évi XXVIII. törvény a Nemzetközi Magánjogról (Act XXVIII of 2017 on Private International Law) (Hung.).
2. Including but not limited to:
   - Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure;
   - Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations;
   - Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000.
3. In Hungary, the sources of international law, other than the generally acknowledged rules of the international law, become part of the Hungarian legal system with their promulgation by law.
4. 2017. évi XXVIII. törvény a Nemzetközi Magánjogról (Act XXVIII of 2017 on Private International Law) (Hung.).
5. 2017. évi XXVIII. törvény a Nemzetközi Magánjogról (Act XXVIII of 2017 on Private International Law) (Hung.).
6. 2017. évi XXVIII. törvény a Nemzetközi Magánjogról (Act XXVIII of 2017 on Private International Law) (Hung.).

7. For example:

   Council Regulation (EC) 44/2001: the foreign judgment resolved in an EU Member State cannot be recognized in Hungary if:

   - it is irreconcilable with a judgment given in a dispute between the same parties in Hungary;
   - it is irreconcilable with an earlier judgment given in another EU Member State or in a third State involving the same cause of action and between the same parties, provided that the earlier judgment fulfills the conditions necessary for its recognition in Hungary;
   - it conflicts with sections 3 [Jurisdiction in matters relating to insurance], 4 [Jurisdiction over consumer contracts] or 6 [Exclusive jurisdiction] of Chapter II, or in a case provided for in Article 72 of Council Regulation (EC) 44/2001.

   Regulation (EU) No. 1215/2012: the foreign judgment resolved in an EU Member State cannot be recognized in Hungary if:

   - it conflicts with sections 3 [Jurisdiction in matters relating to insurance], 4 [Jurisdiction over consumer contracts] 5 [Jurisdiction over individual contracts of employment] of Chapter II, where the policyholder, the insured, a beneficiary of the insurance contract, the consumer or the employee was the defendant, or with section 6 [Exclusive jurisdiction] of Chapter II.

8. 2017. évi XXVIII. törvény a Nemzetközi Magánjogról (Act XXVIII of 2017 on Private International Law) (Hung.).
9. This wording suggests that recognition cannot only be sought by a person who participated in the proceedings before the foreign decision, but also by anyone who has a legal interest in the recognition of the decision.
10. 2017. évi XXVIII. törvény a Nemzetközi Magánjogról (Act XXVIII of 2017 on Private International Law) (Hung.).
11. 2017. évi LX. törvény a Választottbírósági (Act LX of 2017 on Arbitration).
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. 2017. évi XXVIII. törvény a Nemzetközi Magánjogról (Act XXVIII of 2017 on Private International Law) (Hung.).
18. For example, the EU laws listed in endnote No. 2
19. This form of citation is the official form of Hungarian court decisions.
20. It was the predecessor of the International Private Law Act, which entered into effect on 1 January 2018.

The Scope of Due Service of Process: Swiss Law Considerations on the Enforcement of Foreign Default Judgments

By Cristian Casanova and Andreas Schregenberger

I. Introduction

Cristian Casanova

Obtaining a final and binding judgment ordering the adversary party to pay a substantial sum to the claimant may raise the hope to have arrived at the end of a dispute. However, more often than not, the losing party fails to comply with the judgment, leading to necessary enforcement actions. These enforcement actions come with the growing realization that the proceedings on the merits of the case were only the first step to overcome what has proven to be a protracted and arduous resistance from the defendant to fulfill judgement obligations.

One of the recurrent topics in enforcing foreign judgments in Switzerland is whether there has been proper service of at least the initial document starting the proceedings to be enforced, which otherwise can lead to a valid defense against enforcement. After an overview of the basic mechanisms of recognition and enforcement under Swiss law, this article discusses practical issues arising in this context based on two recent decisions from the Swiss Federal Tribunal concerning the enforcement of a default judgement rendered from a court in the United Arab Emirates (UAE).

Service of court documents in civil and commercial matters between Switzerland and the United States is governed by The Hague Convention of 15 November 1965, on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (hereinafter The Hague Service Convention). Experience shows that the formalities requested for service by Switzerland are not always fully appreciated by United States (U.S.) authorities and attorneys. This article provides an overview of the requirements Swiss courts set for proper service under this convention, in view of a specific enforcement proceeding concerning a U.S. judgment.

II. Legal Framework of Recognition and Enforcement of Foreign Judgments

To the extent that there is no pertaining international treaty,[1] recognition and enforcement of foreign judgments in civil and commercial matters in Switzerland is governed by the Swiss Private International Law Act (PILA).[2] PILA rules apply to the recognition and enforcement of

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U.S. judgments in Switzerland, and this article therefore focuses on these rules. In contrast, the recognition and enforcement of foreign arbitral awards in Switzerland is governed by the New York Convention.[3]

Under PILA,[4] a foreign judgment shall be recognized and enforced if (1) the judicial or administrative authorities of the state in which the decision was rendered had jurisdiction; (2) if no ordinary appeal can be lodged against the decision or the decision is final; and (3) if there are no grounds for refusal.

The grounds for refusal are listed in PILA, Article 27. The recognition is denied if the foreign judgment is manifestly incompatible with Swiss public policy, or if a party establishes (1) lack of proper notice to the defendant, unless the defending party proceeded on the merits without reservation; (2) that the decision was rendered in violation of fundamental principles to the Swiss conception of procedural law, including that fact that said party did not have an opportunity to present its defense; or (3) that either a pending or already decided dispute in Switzerland between the same parties and with respect to the same matter exists, or a respective recognizable decision in a third state.

In addition, Article 29 of PILA lists documentation which must be presented to the court in recognition and enforcement proceedings. Although these requirements only concern formal points in an enforcement proceeding, receiving the proper documentation may prove a substantial burden in practice; in particular, in the case of a default judgment.[5]

This article focuses on one particular aspect of the recognition and enforcement of foreign judgments—i.e., *the due service of the document initiating the process,* as requested in PILA, Article 27(2)(a).

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Pursuant to PILA, Article 27(2)(a), a foreign judgment shall not be recognized if a party establishes that "it did not receive proper notice under either the law of its domicile or that of its habitual residence, unless such party proceeded on the merits without reservation."[6]

The requirements of PILA, Article 27, are deeply rooted in Swiss public policy (*ordre public*). The goal of the provision is to ensure the consideration of fundamental procedural principles when it comes to the recognition and enforcement of foreign judgments in Switzerland. The requirement of a due summoning in the foreign court proceedings leading to the judgment, as set out in PILA, Article 27(2)(a), refers to the summoning to the first hearing of the court rendering the judgment,[7] or to the court document initiating the proceedings (CDIP), respectively.[8] The CDIP is a document which provides the defendant for the first time, the opportunity to take notice of the proceedings initiated against them.[9] The first summoning aims to make the defendant formally aware of the proceedings and to afford the defendant with the opportunity to organize a defense. This opportunity is comprised of an appearance before the court, the submission of an answer to the complaint, and the appointment of a legal representative or of an agent for service of process. The summoning is "due" if it complies with the requirements of the law at the domicile or, if there is no domicile, the law at the place of habitual residence of the defendant at the time the proceedings are commenced.[10] Relevant for the recognition is the law of the state where the CDIP is effectively being delivered to the defendant; such law determines the content, the form, and the point in time of the summoning.[11]

The requirement of due summoning is a norm of protection in favor of a defendant domiciled (or having its habitual residence) in Switzerland,[12] who is being sued and convicted abroad without being aware of it and without having the opportunity to defend itself in such foreign proceedings.[13] Such protection of a Swiss defendant under PILA, Article 27(2)(a), presumes that the need for protection is genuine. Against this backdrop, a defendant may be barred from invoking this provision (i.e., ground for refusal of recognition) if they "turn a deaf ear" or insists on formalities—albeit the defendant had actual knowledge about the proceedings and the timely possibility to defend.[14] Notwithstanding this principle, controversial cases have discussed how a defendant should be treated where the defendant was made aware of the foreign proceedings accidently, or in another fashion as would be formally required, and on such basis would have sufficient time to organize a defense.[15] Court practices tend to request the formal service without taking into account any prior actual knowledge of the proceedings on the merits by the party resisting the enforcement.

It should be noted that the considerations for valid service in an enforcement procedure may differ from the requirements in the proceedings on the merits. While the court deciding on the merits may well accept that the service has been made in accordance with its rules, and will therefore validly render its judgment, a foreign court confronted with the request of recognition of the same judgment may come to the conclusion that no proper service took place under its own applicable rules—thus denying the recognition and enforcement of the judgment. If, in a dispute with a foreign party, an enforcement of a judgment abroad is to be expected, it is therefore recommended to not only focus on the domestic rules, but also to keep in mind the potentially relevant jurisdictions abroad.

III. Two Decisions on the Recognition and Enforcement of Foreign Default Judgments

The implementation of the principles described above is often fraught with uncertainties, as it forces the courts to assess procedural steps and documents stemming from an unfamiliar jurisdiction to determine whether and when the CDIP has been served.

In two decisions[16] concerning the same matter, the Swiss Federal Tribunal considered whether a default judgment rendered in the UAE could be recognized and enforced in Switzerland ("Default Judgement"). The Default Judgment ordered a company incorporated in Switzerland ("Swiss Company") to pay a certain sum to the claimant, a company domiciled in the UAE ("UAE Company"). The Default Judgment had been issued by the first instance court of the Dubai International Financial Centre ("DIFC Court").

The DIFC Court had first tried to serve the Swiss Company with documents by means of international judicial assistance. However, the Swiss Company was able to (validly) reject the acceptance of these documents, given that they were not accompanied by a German translation.[17] In a further attempt, the Swiss Company was served with a translated request for judicial assistance,[18] requesting confirmation of the receipt within 14 days, but setting no deadline for filing a response to the claim. The Swiss Company did not react, and the DIFC Court issued the Default Judgment roughly 16 months later.

The UAE Company had subsequently initiated enforcement proceedings against the Swiss Company on basis of the payment order contained in the Default Judgment. While the first instance court in Switzerland granted the request, the second instance court reversed.

A. First Decision—Rejection of Enforcement

The issue presented to the Swiss courts was whether the DIFC Court was to be considered a state court or whether it was to be qualified as an arbitral tribunal. In the first case, PILA would apply to the enforcement proceedings; in the second case, the New York Convention. On the other hand, the Swiss courts needed to determine whether the requirements for recognition and enforcement under the applicable rules were effectively met.

While the first instance judge had recognized and enforced the DIFC Court judgment, the second instance

court held that the Swiss Company had not been properly notified of the DIFC Court proceedings and thus, recognition and enforcement of the Default Judgment had to be refused.[19] Interestingly, the second instance court did not decide the status of the DIFC Court as a state court or an arbitral tribunal. The court concluded that the requirements of a due summoning under PILA, Article 27(2)(a), would not be met. In other words, it did not address whether the requirements of a proper notice under the New York Convention would be fulfilled.

Upon challenge, the Swiss Federal Tribunal reversed the second instance's judgment. The highest court in Switzerland considered that, if it was to decide that the Default Judgment constitutes a state court judgment and, on that basis conclude that the PILA would not prevent its recognition and enforcement, it would nevertheless be possible for the Default Judgment to be refused recognition and enforcement under the New York Convention, if applicable. Thus, the Swiss Federal Tribunal held that the qualification of the DIFC Court, as either a state court or an arbitral tribunal, was of utmost importance for the material outcome of the case. Accordingly, the case was remitted to the second instance court to determine the qualification of the DIFC Court and decide on the enforcement.

B. Second Decision—Granting of Enforcement

The second instance court subsequently issued a new decision, which held that the DIFC Court was a state court, and not part of the DIFC-LCIA Arbitration Centre. Nevertheless, it again came to the conclusion that the Default Judgment could not be recognized and therefore could not be enforced, pursuant to the requirement of due service of process under PILA, Article 27(2)(a). The UAE Company again challenged the second instance court's decision before the Swiss Federal Tribunal.

The Swiss Federal Tribunal considered that the second instance court misinterpreted the purpose of PILA, Article 27(2)(a). Commonly, the term "summon" would mean the summoning to a court hearing. The purpose of the provision is that a defendant party is by means of a due summoning made aware of proceedings abroad and to put a party in a position to organize its defense. For this, it was not necessary to set a time limit for the defendant party to file an answer to the claim or that the parties were notified of the first date of the oral hearing. This is against the background that the Swiss Company had, based on the indications in the request for service, specific knowledge about the initiation of court proceedings for a claim for payment before the DFIC Court in Dubai. The Swiss Company knew that such claim for payment was a claim for accrued fees out of a contract on financial services; it was also notified about the place of the hearing. In view of this actual knowledge, it was difficult to understand how the Swiss Company could not have been in a position to arrange for the necessary steps to prepare its defense in the proceedings.

If the Swiss Company decided not to follow the express request by the DIFC Court and did not acknowledge receipt of the delivered documents, then it had also to bear the risk that it would not receive any further correspondence from the DIFC Court. With the judicial request to confirm receipt of the claim documents, the CDIP had evidentially and formally been delivered to the Swiss Company. In light of this document, the Swiss Company must have been aware of the fact that a claim was brought against it before the DIFC Court and that it would need to prepare for its defense. Hence, the guaranty of a due summoning, the compliance of which is decisive for the recognition and enforcement under PILA, Article 27(2)(a), was sufficiently respected. Accordingly, the challenge was granted, the decision by the DIFC Court was recognized and declared to be enforceable.

The case exemplifies the difficulties courts encounter in assessing the foreign judicial documents served on a party. The second instance court denied a sufficient service, as it would have expected the CDIP to include a summoning in the sense of an invitation to a hearing or a deadline to submit a response. It was up to the Federal Tribunal to confirm that the barrier for proper service is lower, which it did, thereby enabling the enforcement.

IV. Service by International Judicial Assistance in Civil MattersBetween Switzerland and the United States

A. Means of Service Under The Hague Service Convention

The service of documents between Switzerland and the US is governed by The Hague Service Convention.[20]

The basic mechanism for service of process prescribed in The Hague Service Convention, Article 2, is that "[e]ach Contracting State shall designate a Central Authority which will undertake to receive requests for service coming from other Contracting States and to proceed in conformity with the [subsequent] provisions."

In addition to this "ordinary" service through the Central Authorities designated by each member state, The Hague Service Convention provides for five subsidiary ways of service:[21]

1. Direct service of judicial documents through diplomatic or consular agents upon persons abroad, without application of any compulsion.[22] Switzerland has submitted an opposition to this means of service, thereby excluding it unless the document is served upon a national of the state in which the documents originate.

2. Service through consular channels to the authorities designated for this purpose by another Contracting State.[23]

3. Direct service to persons abroad by postal channels.[24] Switzerland has submitted an opposition to this means of service, excluding its application.

Thereagainst, service by postal channels from Switzerland to other countries remains possible, as long as that state has not made a reservation of its own and waived the requirement of reciprocity.[25] This applies for example to the United States.

4. Direct Service by judicial officers, officials or other competent persons of the state of origin directly through the judicial officers, officials or other competent persons of the state of destination,[26] thus leaving out the Central Authority. Also, this means is excluded for service to Switzerland due to a respective opposition—but may be available for service from Switzerland.

5. Direct Service by a person interested in a judicial proceeding through the judicial officers, officials or other competent persons of the state of destination,[27] e.g., attorneys or parties. Again, this means of service is excluded for service to Switzerland due to a respective opposition.

Service is evidenced by the use of the Model Form and the respective certification of service on such form.[28] In case a recipient accepts the served documents *voluntarily*, a translation of the documents may not be necessary.[29]

Due to the various oppositions formed by Switzerland, in essence only the ordinary means of service through the Central Authorities is available for valid service to a defendant with domicile or habitual residence in Switzerland. In particular with regard to service by postal channels, the Swiss Federal Court has clearly held that such service is void for recognition purposes.[30] It can be expected that the Swiss Federal Court would come to a similar conclusion with regard to the service by other means, for which an opposition is in place.[31]

B. Further Requirements for Recognition and Enforcement of Default Judgments

The Swiss Federal Tribunal had, in a recent decision,[32] the opportunity to consider the recognition and enforcement of a judgment rendered in the US in circumstances where service of the CDIP was contested.

The dispute involved a debtor ("Debtor"), at that time resident of the United States, and a Swiss company ("Swiss Company"). Following a complaint for compensatory damages in the U.S. by the Swiss Company, the Debtor filed for insolvency at the respective bankruptcy court ("Bankruptcy Court"). The Bankruptcy Court subsequently ordered the Swiss Company to withdraw attachments the Debtor's assets abroad.

The Debtor claimed in the later Swiss enforcement proceedings that the Swiss Company had not complied with this order, and that the Debtor had filed a motion for sanctions with the Bankruptcy Court. While the Debtor claimed that this motion for sanctions had been served to the Swiss Company in accordance with The Hague Service Convention, this claim was not supported by any exhibits.

Five months after filing the motion for sanctions, the Debtor filed with the Bankruptcy Court a further motion to set an *ex parte* proof hearing on damages. This motion was sent to the Swiss Company by the Debtor's attorney through first class mail, including a notice informing the Swiss Company that it was to reply to the motion within 11 days after receipt of the notice.

The Swiss Company reacted neither to the first motion for sanctions, nor to the later notification of the motion to set hearing and subsequent orders of the Bankruptcy Court. It was subsequently ordered by the Bankruptcy Court to pay damages to the Debtor, as well as daily penalty payments to the state. This judgment was validly served on the Swiss Company.

In the Swiss enforcement proceedings, the issues contested between the parties were (1) the proper service of the motion to set hearing and whether this motion was to be qualified as the CDIP; (2) whether a deadline of 11 days was sufficient to prepare a defense; and (3) the question whether the judgment to be enforced violated Swiss public policy, in particular with regard to the punitive element potentially included in the damages.

The Swiss Federal Tribunal confirmed its jurisprudence that under PILA, Article 27(2)(a), a party has to be served the CDIP in the formally correct way, irrespective of the service of later documents in the foreign proceedings. It also confirmed that service by postal service is not accepted in Swiss recognition proceedings.[33] The Swiss Federal Tribunal additionally held that proper service requires the CDIP to be served in a manner leaving sufficient time for the defendant to prepare a defense.[34] The Swiss Federal Tribunal went further, elaborating on the burden of proof for due service of process. In general, the party resisting the enforcement of a judgment has to prove that no proper service was made. However, this burden is to be shifted in the case of a party seeking recognition and enforcement of a default judgment.[35]

In applying these principles, the Swiss Federal Tribunal only had to decide on the first issue. The Swiss Federal Tribunal relied on the judgment to be enforced to determine that the basis of the judgment was the first motion for sanctions, and neither the later notice of the motion to set a hearing, sent by the Debtor's attorney, nor additional communications by the Bankruptcy Court summoning the Swiss Company to a hearing, were served by way of international judicial assistance.

The Swiss Federal Tribunal continued in its assessment of whether the motion for sanctions was duly delivered under PILA, Article 27(2)(a). It pointed out that, in the case of a default judgment, it is the party seeking to enforce the judgment who has to prove proper service of the CDIP. Consequently, the Debtor would have, according to its burden of proof, to submit to the Swiss courts

the CDIP, i.e., the motion for sanctions, and the formal confirmation of service on the Model Form. As the Debtor had omitted to submit these exhibits, such proof had failed. The Swiss Federal Tribunal finally held that such lack of proof of formal service cannot be cured under the PILA by actual knowledge of the party resisting the enforcement, i.e., if such knowledge was gained informally. The request for recognition and enforcement of the U.S. judgment was thus denied.

V. Conclusion

The enforcement proceedings described above illustrate some of the issues that can arise in the context of enforcing foreign default judgments. Enforcement proceedings are based on a set of seemingly simple rules, for which a partial standardization is envisaged by international treaties. However, when it comes to applying these rules to a case, a substantial uncertainty arises when the Swiss courts must fit the effects of foreign judicial (or even extrajudicial) acts or documents into the requirements presented by the Swiss law.

The question of which document can be considered as the document initiating the proceedings is often contested. As the discussion in the case concerning the enforcement of the U.S. judgment shows, additional factors may become relevant. Although that case was decided on a rather formal point, the argument that a deadline of 11 days would have been insufficient to provide proper service may well have had some merit, if it had been considered by the court.

Last but not least, it can be concluded that the chances for successful enforcement of foreign (default) judgments rise substantially if the requirements of potential enforcement proceedings are taken into account not only after the proceedings on the merits have been finished, but from the beginning of the main proceedings.

Endnotes

1. In practice, the most important international treaty on the recognition and enforcement of foreign judgments in Switzerland is the so-called Lugano Convention of October 30, 2007; signatory states are the Swiss Confederation, the European Community, the Kingdom of Denmark, the Kingdom of Norway and the Republic of Iceland.
2. [Federal Act on Private International Law] Dec. 18, 1987, SR 291 (hereinafter PILA).
3. [Convention on the Recognition and Enforcement of Arbitral Awards] 1958 (hereinafter, "New York Convention"); cf. PILA art. 194.
4. PILA art. 25.
5. See below, p. [<to be filled in according to the print set>].
6. It should be noted that even a party participating in the foreign procedure can still rely on the defense of improper service, as far as it has made a respective reservation; *cf.* Tribunal fédéral [STF] [Federal Supreme Court] Feb. 19, 2016, 4A_364/2015 (Switz.).
7. *Cf.* Tribunal fédéral [STF] [Federal Supreme Court] Oct. 31, 1996, 122 III 439, § 4a; Tribunal fédéral [STF] [Federal Supreme Court] Mar. 30, 2017, 5A_889/2016, § 5.1.
8. *Cf.* Tribunal fédéral [STF] [Federal Supreme Court] Apr. 14, 2008, 5A_633/2007, § 3.3; Tribunal fédéral [STF] [Federal Supreme Court] Mar. 30, 2017, 5A_889/2016, § 5.1.
9. *Cf.* Leandro Perucchi, Anerkennung und Vollstreckung von US class action-Urteilen und—Vergleichen in der Schweiz 83 (2008); Thomas bischof, Die Zustellung im internationalen Rechtsverkehr in Zivil- oder Handelssachen 367 (1997).
10. *Cf.* PILA art. 27(2)(a).
11. *Cf.* Tribunal fédéral [STF] [Federal Supreme Court] Mar. 30, 2017, 143 III 225, § 5.1; *see also,* Paul Volken, Zürcher Kommentar ¶ 77–79, 82 (2d ed. 2004); Dorothee Schramm & Axel Buhr, Handkommentar zum Schweizer Privatrecht, ¶ 23, 25 (3d ed. 2016); Robert K. Däppen & Ramon Mabillard, Basler Kommentar, Internationales Privatrecht, ¶ 9 (3d ed. 2013); different opinion Teddy Svatopluk Stojan, Die Anerkennung und Vollstreckung ausländischer Zivilurteile in Handelssachen 123 (1986).
12. It should be noted that in case of the defendant having its residence outside of Switzerland at the time of service of the CDIP, the applicable law to determine the proper service is the law at the place of residence, i.e., not the Swiss law.
13. *Cf.* Tribunal fédéral [STF] [Federal Supreme Court] Mar. 30, 2017, 5A_889/2016, § 5.2.
14. *Cf.* Volken, *supra* note 11, at ¶ 75; Schramm & Buhr, *supra* note 11, at ¶ 29; Blätter für Zürcherische Rechtsprechung [ZR] [Supreme Court of the Canton of Zurich] Sept. 10, 2010, 109/2010, 300.
15. *Cf.* Tribunal fédéral [STF] [Federal Supreme Court] Mar. 30, 2017, 5A_889/2016, § 5.2.
16. *Cf.* Tribunal fédéral [STF] [Federal Supreme Court] Sept. 2, 2016, 5A_672/2015; Tribunal fédéral [STF] [Federal Supreme Court] Mar. 30, 2017, 5A_889/2016, 143 III 225.
17. Service was governed in that case by The Hague Convention of 1 March 1954 on Civil Procedure.
18. Including a Claim Form, the Particulars of Claim, Exhibits, Change of Legal Representation and Correspondence.
19. *Cf.* PILA art. 27(2)(a).
20. See already above, p. [<to be filled in according to the print set>].
21. *Cf.* Gerhard Walter & Tanja Domej, Internationales Zivilprozessrecht der Schweiz 390 (5th ed. 2012).
22. Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters art. 8, Nov. 15, 1965, (hereinafter "Hague Service Convention").
23. Hague Service Convention art. 9.
24. Hague Service Convention art. 10(a).
25. *Cf.* Walter & Domej, *supra* note 21, at 391.
26. Hague Service Convention art. 10(b).
27. Hague Service Convention art. 10(c).
28. Hague Service Convention art. 3, art. 6.
29. Hague Service Convention art. 5(2); *cf.* Walter & Domej, *supra* note 21, at 393.
30. *See also,* Tribunal fédéral [STF] [Federal Supreme Court] Apr. 6, 2009, 135 III 623, § 3.
31. In this context, it should also be noted that a direct service in violation of The Hague Service Convention may potentially be considered as "activities on behalf of a foreign state on Swiss territory without lawful authority" according to article 271 of the Swiss Criminal Code, which constitutes a blocking statute.
32. Tribunal fédéral [STF] [Federal Supreme Court] Feb. 19, 2016, 142 III 180.
33. *Id.* at § 3.3.1, 3.3.2.
34. *Id.* at § 3.3.3.
35. *Id.* at § 3.3.4 (referencing PILA art. 29(1)(c)).

Recognition and Enforcement of Foreign Arbitral Awards in Senegal

By Codou Sow-Seck

Codou Sow-Seck

Foreign acts and decisions, either judgments or arbitral awards, may be enforced in the territory of a state other than that in which they were rendered, only after having undergone the control of the competent judicial authority by the procedure of *exequatur*. *Exequatur* is the procedure by which a judge recognizes a judgment rendered by a foreign jurisdiction, or even a national arbitral tribunal, and confers on the judgment enforceability in the territory of the originating state, subject to having previously verified a certain number of conditions prescribed by law. These conditions are generally fixed in the legal corpus of states by the laws organizing the judicial proceedings.

In Senegal, *exequatur* is governed by the provisions of the Code of Civil Procedure and Enforcement. If the *exequatur* remains, the obligatory passage, which makes it possible to give force to foreign acts or decisions made abroad, including judgments or arbitral awards. Our analysis will be particularly focused on arbitral awards, which raise interesting issues.

The issue of enforcement of an arbitral award is generally considered by the parties even before the dispute arises or, at the very least, at the beginning of the proceedings in order to anticipate measures that would facilitate its enforcement. If the parties have the right to choose the law that would apply to their relations and to designate the body that would be competent to hear any dispute that arises, the place of enforcement of the award must not be neglected, especially when it comes to the effectiveness of the decision that will be made later. This is the point of knowing what the process of recognizing foreign decisions is, in the territory where this decision is to be enforced.

From the Senegalese legal perspective, considering the enforcement of a foreign award would be to identify whether the award whose *exequatur* is sought is an arbitral award, made either at national, regional,[1] or international level; this determination has a definite effect on the procedure to be followed by the party who seeks its enforcement.

Senegalese legal provisions relating to arbitration are varied, and differ depending on the basis of the arbitration in question. Senegal is party to various international conventions, all of which are designed to govern an arbitration of certain kind.

Thus, in addition to the provisions on internal arbitration, Senegal has ratified:

- the Convention for the Settlement of Investment disputes between states and nationals of other states known as the ICSID Convention;[2]
- the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York on June 10, 1958;[3] and
- the Treaty of the Organization for the Harmonization of Business Law in Africa (OHADA).[4]

This diversity of legal instruments affects the *exequatur* process, which will differ depending on whether the award is made by the Chamber of Commerce of Dakar, the common court of justice and arbitration of OHADA, or an international arbitration center. Interpretations by these institutions could change the ground on which the competent judge will grant enforcement).

Faced with the coexistence of these seemingly competing provisions, it would be interesting to investigate to what extent foreign arbitral awards could apply in Senegalese territory. To answer this question, we must, first, address the issue of the recognition of foreign arbitral awards in Senegal (I) and then consider the issue of their enforcement on Senegalese territory (II).

I. Recognition of Foreign Arbitral Awards in Senegal

Before Senegal's ratification of the New York Convention , foreign arbitral awards were subject to the provisions of the Code of Civil Procedure for their execution in Senegalese territory. Requests for *exequatur* were then governed by Articles 787 *et seq*., which did not distinguish between awards and judgments and did not provide for specific provisions on arbitral awards.

Subsequently, Senegal has led a real reform of its arbitration law by adopting Law No. 98-30 of 14 April 1998 on arbitration supplemented by Decrees, No. 98-492 of 5 June 1998 on internal and international arbitration, and No. 98-493 of 5 June 1998 on the creation of arbitration institutions. The adoption of the Uniform Act on Arbitration, which is intended to govern any arbitration within the OHADA area, was added to the pre-existing provisions applicable both to the arbitration awards made in

the OHADA zone as well as the foreign arbitral awards of a certain nature. With the ratification of various international legal instruments relating to arbitration, the question arises as to how these norms are articulated in relation to the modalities of their application by the Senegalese judge seized of requests for the enforcement of foreign sentences.

In fact, the procedure for enforcing a foreign sentence differs according to whether it is rendered under the influence of an international convention, or if it falls outside the scope of any international convention. Without ignoring the latter, our analysis will be more interested in the first example. Thus we distinguish the arbitral awards recognized under the New York Convention (A) and those recognized under the ICSID Convention (B).

A. Recognition of Arbitral Awards Under the New York Convention

Senegal has ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards even though it is party to the OHADA Treaty whose legal instruments, including the Uniform Act on Arbitration, are binding to him and are an integral part of his body of law.

Because the provisions of international conventions are superior to the national laws, could they defeat the provisions of a treaty, even if this one is of regional level? The answer is given by Article 34 of the Uniform Act on Arbitration, which provides that:

> Arbitral awards made on the basis of rules other than those provided for in this Uniform Act shall be recognized in the States Parties, under the conditions provided for by the international conventions that may be applicable, and failing that, under the same conditions as those provided for in the provisions of this Uniform Act.

The OHADA Uniform Act thus excludes from its scope foreign arbitral awards that may be governed by international conventions, thereby regulating any conflict of laws that may arise.

In a judgment dated 26 January 2017,[5] the CCJA applied this solution in a case where an ICC arbitral award was denied the *exequatur* on the grounds that the rules under the Uniform Act on arbitration were not respected. The court annulled the decision, refusing the *exequatur* on the grounds that it violated the provisions of Article 34 above. According to that provision, the enforcement of an arbitral award rendered in a third state to OHADA operates according to international conventions. However, arbitral awards made in a state which is not party to these international conventions remain subject to the provisions of the Uniform Act on arbitration for their enforcement.

It is therefore clear from the analysis of the provisions of the OHADA Uniform Act and the OHADA case law that the enforcement of arbitral awards made in third party states to OHADA is conducted in accordance to the rules of procedure laid down in international conventions, including bilateral agreements. Therefore, whenever the national court receives a request for the enforcement of a foreign arbitral award, it will be bound to apply the rules of international conventions, in particular that of the New York Convention.

A Senegalese judge, in a decision dated January 25, 2016, made a correct application of these rules after having noted the international character of the arbitration award that was under his control.[6] This decision shows, among other things,[7] the correct application by the Senegalese courts of the 1958 New York Convention on the recognition of foreign awards.

It should be noted, however, that the New York Convention, for its part, provides the parties with the option of resorting to the internal rules of procedure of each state applicable to *exequatur* when they are less stringent and less onerous.

Article VII.1 of the New York Convention stipulates that:

> the provisions of this Agreement ... shall not deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaty of the country where such award is sought to be relied upon.

Some authors consider that option as paradoxical, and fear it causes the enforcement of foreign awards to be more effective in the OHADA member states that have not signed the New York Convention[8] since, according to them, the provisions of the OHADA Uniform Act are less severe than those of the Convention.

B. Recognition of Arbitral Awards Under the ICSID Convention

The ICSID Convention was ratified on 18 March 1965 to settle, by arbitration, investment disputes that may arise between contracting states and nationals of other contracting states. Article 54 of the ICSID Convention states as follows:

1. Each Contracting State shall recognize 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….

2. A party seeking recognition or enforcement in the territories of a Contracting State shall furnish to a competent court or other authority which such State shall have designated for this purpose a copy of the award certified by the Secretary-General. Each Contracting State shall notify the Secretary-General of the designation of the competent court or other authority for this purpose and of any subsequent change in such designation.

In the light of these provisions, the recognition of ICSID awards should not pose any particular difficulties within the contracting states; the parties to an investment contract are obliged to consent to a bilateral or multilateral agreement, prior to the submission of their dispute to ICSID arbitration. Recognition is all the more facilitated by the fact that the ICSID Convention requires contracting states to recognize the awards made under its authority by granting the same enforceability to sentences as that conferred on judgments rendered by state courts. In addition, the authority responsible for affixing the enforceable form proceeds more in verifying the authenticity of the award than to a control per se, as generally performed by the state judge seized of an *exequatur* procedure in the conditions set out below.

II. Enforcement of Foreign Arbitral Awards in Senegalese Territory

Entering the state court for the purpose of obtaining the enforcement of foreign awards requires one to identify and comply with the procedural rules applicable to such awards. As pointed out above, the rules of the Uniform Act on Arbitration exclude from their scope the enforcement of foreign awards, and refer to the procedures provided for by the applicable international conventions.

The New York Convention, for its part, provides the parties with the option of resorting to the internal procedural rules of each state, applicable in matters of *exequatur* when they are less stringent and less onerous. In the same vein as Article VII.1 of the New York Convention, which refers to domestic provisions, the Code of Civil Procedure also provides, in Articles 819-85 *et seq*., specific provisions for recognition, enforcement and appeal against awards made abroad or in international arbitration. These provisions organize the methods of supervision by the national judge, which are essentially related to the conditions in which the enforcement order is appended to foreign awards (A) and to the conditions limiting the exequatur (B).

A. Conditions for Affixing the Enforcement Order on the Foreign Arbitral Award

The party calling for the enforcement of an arbitral award on Senegalese territory shall refer to a judge dealing with summary proceedings of the court of first instance within the district of which the award is to be enforced, in accordance with the provisions of articles 819-86 to 819-88, reproducing *in extenso*, the provisions of Articles IV to V of the New York Convention. This referral is made by way of a summons served by bailiff, which would allow the party against whom the *exequatur* of the award is invoked to assert its means of contesting the decision, as stipulated in Article 819-88 of the Code of Civil Procedure. This summons shall be accompanied by the original or a certified copy of the arbitration award and the original, or a certified copy, of the arbitration agreement. All documents must be translated into French by a certified translator if they are written in another language. Most often, arbitral awards whose *exequatur* is requested are written in a foreign language. Since the official language of Senegal is French, it is normal to file a certified translation of documents, to allow the judge to properly exercise his control.

Before granting the *exequatur* application, the judge will check whether the party against whom the award is invoked has proved that:

- The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made, or
- The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case, or
- The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced, or
- The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place, or
- The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

If, in view of the arguments put forward by the parties, the judge finds that the proceedings are lawful, he will grant the *exequatur*.

It should be noted that these above-mentioned conditions relate to the regularity of the rules of procedure applicable to arbitration, and could reasonably be anticipat-

ed by the parties when initiating arbitration proceedings. However, in addition, there are also conditions linked to the domestic law of the jurisdiction where the *exequatur* of the award is sought. These conditions, including the capacity of the dispute to be settle by arbitration and compliance of the award with Senegalese public order, set the limits to the apposition of the enforceable formula by the judge.

B. Internal Limits to the Request for *Exequatur*

The combined provisions of Article V of the New York Convention as well as Article 819-88[9] allow the judge of the state where enforcement of the award is performed, to refuse to grant the *exequatur* under the following conditions:

- The subject of the dispute is not likely to be settled by arbitration under Senegalese law, or
- Recognition or enforcement of the sentence would be contrary to public order in Senegal.

For this second case of refusal, the annoyance of the award to the Senegalese public order deprives the law of its effectiveness, since the judge cannot grant the *exequatur* without violating the law.

If one refers to the case law, although it is not specific to a foreign arbitral award, the Senegalese courts have had to refuse the *exequatur* of foreign decisions for annoyance to the Senegalese public order.[10] Thus, in a case in which the High Court of England had, by way of an injunction, prohibited the party against whom the foreign decision was invoked, to bring an action before the Senegalese courts on the basis of his employment contract, the Senegalese judge refused *exequatur,* on the grounds that access to justice is a fundamental right proclaimed by the Senegalese Constitution in its preamble.[11]

This case could arise for an arbitral award where the exequatur procedure often involves two different legal systems. Indeed, the award may apply a specific rule to common law that would run up against the law applicable in the state where the award is performed, whose legal system is civil law.

III. Conclusion

Arbitration law has made great strides in the business world by promoting and ratifying international reference conventions, which have facilitated the recognition of arbitral awards in a large number of jurisdictions around the world. However, the issue of enforcement remains dependent on the internal procedural rules of the states that have ratified said conventions.

Indeed, since the purpose of any arbitration is to obtain enforcement of the awards rendered, their submission to domestic law of the states alters the effectiveness of those awards, which would be limited either by the internal public order of the states in which the execution of law is sought, or by the judge who exceeds his control over the awards submitted to him. Some conventions such as the ICSID Convention and some arbitration rules, such as the CCJA arbitration, attempt to curb these effects by minimizing the intervention of the judge.

In any case, because of the importance of the interests at stake in the transactions they conclude, the parties would benefit from anticipating as far as possible the applicability of the awards, even if it is almost impossible to measure the compliance of the law applicable to their relations with the rules of public order of the states to which each party may be attached in order to execute those awards.

Endnotes

1. This is the case if the decision emanates from the Common Court of Arbitration Justice, which is a regional arbitration center established within the framework of the Organization for Harmonization in Africa of Business Law (OHADA).
2. Senegal ratified the ICSID Convention on April 21, 1967.
3. The New York Convention was ratified by Senegal on October 17, 1994.
4. Supreme Court Judgment No. 2 of 14 January 1981: "In Senegalese law, and notwithstanding the lack of ratification of the Geneva Convention, there is nothing to prevent an arbitration award made abroad from obtaining exequatur in Senegal when as in this case, this award that provided for by Articles 787 and following of the code of civil procedure is assimilated to a court decision."
5. CCJA, 2nd Ch., Judgment No. 03/2017 OF 26 January 2017, *VODACOM International Limited v. Congolese Wireless Network SPRL.*
6. Order of summary judgment no. 183 of 25 January 2016, rendered between ASCOT COMMODITIES SA and Bocar Samba DIEYE, by the Dakar Regional Court Off-Class.
7. See also order of summary judgment of 9 July 1997 issued by the Regional Court of Dakar between CONAGRA and SEDIMA; this order forms part of the first decisions implementing the 1958 New York Convention.
8. Attorney at the Court "Arbitration in the OHADA: regionalism or universalism" Amadou DIENG, communication presented at the joint international seminar UIA / Bar Association of Senegal- 19 and 20 February 2010.
9. Article 819-88 of the Code of Civil Procedure of Senegal, which essentially reproduces the provisions of Articles IV to V of the New York Convention.
10. Article 819-88, *ibid.*
11. Interim order No 1131 of 19 September 2016, DHL C / Amadou GUEYE.

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Enforcement of Foreign Judgments and Arbitral Awards in Switzerland: Cracking One of the World's Safe Boxes

By André Brunschweiler, Sandrine Giroud, and Deborah Hondius

I. Introduction

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Being among the world's leading financial centres, and often a place of refuge to transfer assets, Switzerland is considered a highly attractive place for the enforcement of foreign judgments and arbitral awards but it remains generally very favorable to debtors.

This article aims to present the general legal framework applicable to the enforcement of foreign judgments and arbitral awards in Switzerland, and it also addresses selected key issues often encountered in practice, such as asset tracing, creditors hidden behind third parties and immunity issues, as well as protective briefs, which are a useful tool to consider in an asset protection strategy.

II. What Rules Apply

The organization of the legal and judicial system of Switzerland reflects its political and federalist structure of 26 cantons.

When it comes to enforcement proceedings, Swiss law distinguishes between non-monetary (e.g., specific performance) and monetary claims (i.e., payment of an amount of money). Whilst enforcement of non-monetary claims is governed by the Swiss Code of Civil Procedure (SCCP), in particular articles 335 *et seq*., enforcement of monetary claims is governed by the Swiss Debt Collection and Bankruptcy Act (DCBA).

III. Enforcement Measures Available

Prior to starting actual enforcement actions, and to secure later enforcement, provisional measures are of practical importance. Such measures can be applied for at any time, during judicial proceedings, on the merits, or even before proceedings have been initiated.

Swiss courts can, in principle, order any provisional measure suitable to prevent imminent harm in support of a non-monetary claim (article 262 SCCP).

In practice, the most common situation occurs when a plaintiff wishes to secure a monetary claim by attaching the debtor's assets, such as (typically) bank accounts held in Switzerland. It is interesting to note, in this respect, that the Swiss Federal Supreme Court ruled that claims against a debtor residing abroad are located (and may be subject to an attachment order) at the seat of the Swiss third-party debtor (e.g., a Swiss bank), even if said claims arise from his or her relationship with a foreign branch of the Swiss third-party debtor.[1]

To obtain a civil attachment, the creditor must demonstrate *prima facie* that (1) he or she has a claim against the debtor, (2) there exists grounds for an attachment as per the DCBA, and (3) there are assets in Switzerland belonging to the debtor. An (enforceable) foreign judgment or arbitral award constitutes a ground for enforcement, as per article 271 (1)(6) DCBA.[2]

Applications for attachments are decided on an *ex parte* basis, and the debtor will only be informed about the attachment request if the attachment was granted. The creditor may thus benefit from a certain surprise effect. As it will be further developed below, an attachment is often also the first stage in recognising, and enforcing, an enforceable judgment.

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IV. Enforcement of Foreign Judgments

Recognition and enforcement of a foreign judgment in Switzerland is subject to the provisions of the multi or bilateral treaties in force between Switzerland and the state in which the judgment was issued. The most important instrument in force in Switzerland in this respect is the 2007 revised Lugano Convention on Jurisdiction, Recognition and Enforcement of Judgments in Civil and Commercial Matters (the "Lugano Convention").[3] A court seized with a request for enforcement of a judgment rendered in one of the Convention member states must declare it immediately enforceable, upon mere satisfaction of formal conditions. Should an appeal be lodged against the declaration of enforceability, the recognition of the foreign judgment may be refused in case of (1) violation of Switzerland's public policy (punitive damages are, for example, contrary to Swiss public policy),[4] (2) absence of a proper notice to the defendant in case of a default judgment, or (3) *res judicata* (article 34 of the Lugano Convention).

In the absence of any treaty, recognition and enforcement proceedings must follow the provisions set out in the Private International Law Act (PILA). Under the PILA, a foreign judgment shall be recognized in Switzerland (1) if the judicial or administrative authorities of the state in which the judgment was rendered had jurisdiction; (2) if no ordinary appeal can be lodged against the judgment or the judgment is final; and (3) if there are no grounds for refusal as exhaustively listed in the PILA, such as violation of Switzerland's public policy, defective service, violation of the right to be heard or *res judicata* (articles 25 and 27 PILA).

All types of judgment may, in principle, be enforced in Switzerland, with the exception of *ex parte* judgments.[5] Foreign interim measures may, on their side, be enforced in Switzerland under the Lugano Convention, provided that the defendant's right to be heard was respected.[6] Under the PILA, as a foreign judgment must be final in order to be enforced in Switzerland, the enforcement of foreign interim measures remains controversial to date.[7]

The enforcement of foreign judgements follows the Swiss domestic enforcement proceedings applicable to non-monetary and monetary claims. In the attachment proceedings, the Swiss judge will decide on the recognition of the foreign judgment on a *prima facie* basis; no prior, separate recognition and declaration of enforceability are needed for foreign court judgments (even for judgments falling outside the scope of the Lugano Convention[8]) or arbitral awards. Rather, the judge will decide on the recognition within the attachment proceedings (as a preliminary matter for non-Lugano Convention judgments or as a separate issue for Lugano Convention judgments).[9]

Swiss courts may not review the merits of the case on which the foreign judgment was rendered.

V. Enforcement of Foreign Arbitral Awards

Statistics show that approximately 50 percent of awards are complied with voluntarily, and only 10 percent of all international arbitration result in enforcement proceedings.[10]

The recognition and enforcement of foreign arbitral awards in Switzerland is governed by the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (NYC) as per article 194 PILA, regardless of whether the place of arbitration was in a state party or not.

The requirements according to the NYC will typically be directly examined by the Swiss Courts in the course of the enforcement proceedings as a preliminary question. Alternatively, it is also possible to conduct separate proceedings confined to the mere recognition of the award. In practice, having the award declared enforceable (as a preliminary question) within the framework of debt collection proceedings or, if specific assets of the debtor are known within attachment proceedings, is the rule. The main reasons are that the creditor benefits from a surprise effect and there is no risk of (negative) *res judicata* in case not all conditions for recognition and enforcement are met.

Under the NYC, the party applying for recognition and enforcement of the award is required to comply with a limited number of formal requirements set out in detail in Article IV NYC. In particular, the applicant must establish the authenticity and contents of the award as well as the existence of an arbitration agreement on which the award is based.

For this purpose, (1) the duly authenticated original award or a duly certified copy thereof, and (2) the original arbitration agreement or a duly certified copy thereof must be submitted.

If the award or arbitration agreement is not issued in an official language of the canton where enforcement actions are sought in Switzerland (German, French or Italian), an official certified translation must be submitted. The Swiss Federal Supreme Court confirmed that in the case of English awards, a translation of the relevant sections (i.e., namely the operative part of the award) is sufficient and a full translation is not needed.[11] Swiss courts apply a very recognition- and enforcement-friendly approach under the NYC. In order to successfully object to any recognition or enforcement action in Switzerland, a debtor would need to raise and provide evidence for the existence of grounds for refusal of the recognition and enforcement of the arbitral award pursuant to Article V NYC.

The list of grounds for refusal as provided for by Article V(1) NYC is exhaustive, and (in a nutshell) provides for the following: (1) invalidity of the arbitration agree-

ment, (2) violation of due process, (3) the arbitral award is dealing with a difference not contemplated by or not falling within the scope of the arbitration agreement, (4) the arbitral tribunal was not properly constituted or the arbitral procedure was not held in accordance with the arbitration agreement, and (5) the arbitral award is not yet binding, set aside or suspended.

The burden of proof for these grounds for refusal lie with the debtor. This means that, e.g., no certificate or other forms confirming the enforceability of an award must be submitted by the award-creditor, but the award-debtor will have to reverse the presumption that an award is binding and enforceable. On the other side, the award-debtor will, as a rule, not be precluded from raising these objections, if he or she failed to initiate actions to challenge or annul the award in the jurisdiction where the award was rendered.[12] However, the principle of acting in good faith and abuse of right still requires a party to raise any formal objections or challenge in the arbitration proceeding itself; otherwise, according to the Swiss Federal Supreme Court, these formal objections or challenges have been forfeited.[13]

In addition, Article V(2) NYC also sets forth the following two grounds, which, contrary to the above-mentioned grounds any state court may (and indeed should) consider even on its own motion: (1) lack of arbitrability of the dispute, and (2) violation of public policy. Swiss courts would, however, still expect the debtor to raise these grounds and provide some evidence in support thereof. The two grounds must be considered from a Swiss law perspective (*lex fori executionis*).

As mentioned, Swiss courts apply a recognition- and enforcement-friendly approach and the threshold to successfully object to the enforcement of an award is very high. Also, a violation of public policy is only successful in very limited circumstances.

It is also important to note that the NYC allows parties to commence enforcement proceedings outside the seat of the arbitration, even if annulment proceedings have been commenced. Depending on the circumstances, Swiss courts may enforce awards despite annulment proceedings being initiated. That said, Swiss courts do not recognize awards that have been set aside (in contrast to other jurisdictions, such as France and the United Kingdom).

VI. Selected Issues

This section aims at presenting a few practical aspects and requirements to keep in mind when seeking the enforcement of foreign judgments and arbitral awards in Switzerland, in particular with regard to the obstacles commonly encountered and the objections which may be raised.

A. Identifying and Securing Assets

As mentioned, the most effective way of enforcing foreign judgments or arbitral awards is by applying for an attachment of the debtor's assets. This requires, amongst other things, the demonstration of the existence of specific assets and where they are located. This may prove difficult in practice, in particular regarding banking assets, given the (still) existing Swiss banking secrecy.

Under Swiss law, so-called "searching attachments" or "fishing expeditions" (i.e., requests for attachment not sufficiently identifying the assets to be attached, but rather aiming at finding out whether the debtor has any assets in Switzerland) are not allowed.

Public sources for searching for assets are in general limited, but exist, including the following: (1) the commercial register (information on companies, e.g., share capital, legal seat, address, corporate purpose, for some company types also the shareholders), (2) the Swiss Official Gazette of Commerce (gathering of information published in every cantonal commercial register, bankruptcies, composition agreements, debt enforcement, calls to creditors, lost titles, precious metal control, etc.), (3) the land register (record of every plot in Switzerland, except for those in the public domain[14]), (4) the debt enforcement and bankruptcy register (record of debt collecting proceedings against a debtor[15]), and (5) the Swiss aircraft and/or car registries. There also exists an unofficial register recording wills and other testamentary dispositions (it is, however, not exhaustive as it only contains information provided freely). Certain cantons make it possible as well to access certain limited information contained in a person's tax declaration. Lastly, judgments rendered by civil courts are in principle made accessible to the public (article 54 SCCP). Some judgments are directly published by civil courts in redacted form. Judgments which are not published may otherwise be obtained upon request.[16]

"Under Swiss law, so-called 'searching attachments' or 'fishing expeditions' (i.e., requests for attachment not sufficiently identifying the assets to be attached, but rather aiming at finding out whether the debtor has any assets in Switzerland) are not allowed.

Due to Swiss bank secrecy laws, there is not a register of bank accounts in Switzerland.

In practice it is important to know that a bank must only provide information as to the effectiveness of the attachment (i.e., whether the bank account still exists and if so, whether funds were blocked and for which amount) once the deadline to appeal against the attachment order has expired. In cases where the debtor is located abroad and service of documents is to be made through judicial legal assistance proceedings or through consular or diplomatic channels, such essential information might only be available at a very later stage.

Furthermore, an attachment of a bank account is a "snapshot," meaning that only the exact amounts on the bank account at the moment of attachment are (and remain) attached or blocked but, as a rule, not any funds which will be credited on the bank account subsequent to the attachment. These future credits or funds can, as a rule, only be attached with a renewed attachment request.

B. Creditors Hiding Behind Third Parties

Switzerland remains to date one of the biggest offshore private wealth centers of the world, as third parties can still hold assets with Swiss banks in compliance with NYC procedures when applicable. Said assets are not being compulsory registered and most related information (shareholding, etc.) remains confidential.

Swiss law knows the concept of *alter ego*, respectively piercing the corporate veil, but the threshold to successfully apply these concepts is very high. The applicant must demonstrate that the formal owner of the assets is only the *alter ego* or the mere instrumentality of its beneficial owner (economic identity), and that such structure of formal ownership is not legitimately used but merely "used" in bad faith, i.e., as a means of circumventing legal or contractual obligations.[17]

From a strategic point of view, it may thus be interesting for the creditor to explore the option of first lifting the corporate veil based on the *alter ego* concept in a foreign jurisdiction, which might be more open to these concepts (such as the United States), and to have the foreign judgment then recognized or at least referred to when applying for enforcement in Switzerland.

C. Immunity from Enforcement

Swiss courts apply the concept of sovereign immunity restrictively.[18] Accordingly, a distinction is drawn between cases in which the foreign state acts in the exercise of its sovereign capacity (*de iure imperii*), where immunity from enforcement is applicable, and cases in which the foreign state acts in a private capacity (*de iure gestionis*), where it is not. The principal criterion to distinguish between acts *de iure imperii* and acts *de iure gestionis* is the nature of the transaction. In addition (a specific procedural requirement set by Swiss law), the transaction out of which the claim against the foreign state arises must have a sufficient connection to Switzerland (in German: "*Binnenbeziehung*" in French "*rattachement suffisant*").[19] Said connection is established when the claim originated or had to be performed in Switzerland, or when the debtor performed certain acts in Switzerland. Conversely, the mere location of assets in Switzerland or the existence of a claim based on an award rendered by an arbitral tribunal seated in Switzerland does not create such a connection.

Finally, the assets targeted by the enforcement measures must not be earmarked for tasks that are part of the foreign state's duty as a public authority, which are excluded from enforcement proceedings pursuant to article 92(1) DCBA. The concept of tasks belonging to a public authority is interpreted widely by the Swiss Federal Supreme Court.[20] It always includes the assets of diplomatic missions and generally includes cultural goods. However, the Swiss Federal Supreme Court has considered that a dispute relating to a lease agreement entered into by the state was not covered by the immunity from enforcement.[21] Furthermore, money, whether in the form of cash or held on bank accounts, is exempt from seizure only if clearly earmarked for concrete public purposes, which implies a separation from other assets. However, bank accounts and other assets belonging to an embassy are presumed to be for public purpose and are thus immune from enforcement.[22] The same applies to funds specifically allocated to the purchase of arms,[23] the rolling stock of a state railway company,[24] the shares of an international corporation created by an international agreement but performing public functions,[25] and a cultural center or buildings for foreign citizens run by a foreign consulate in Switzerland.[26] Swiss case law has also recognized overflight rights as de *iure imperii* assets and thus immune from enforcement.[27]

D. Protecting Against Enforcement: Protective Briefs

Swiss law provides the debtor with an instrument to defend himself against a (possible) attachment request (or other *ex parte* measure) by filing a so called "protective brief." The protective brief allows a party to submit his or her position in advance to the court.

This brief will only be communicated to the opposing party if and when the *ex parte* injunction is effectively requested and shall remain in effect for six months from the date of its filing. After six months, the brief must be renewed or extended in order to have a continued effect.

This measure is available in all areas where the issuing of an *ex parte* injunction is to be feared, including attachment proceedings. Protective briefs are, however, not permitted in enforcement proceedings under the Lugano Convention, as a court seized with a request for enforcement of a judgment rendered in one of the Convention

member states must declare such a judgement immediately enforceable, upon mere satisfaction of formal conditions. Therefore, the opposing party is not to be heard and may only object to the declaration of enforceability at a later stage.

VII. Conclusion

Despite being generally a debtor-friendly jurisdiction due to Swiss banking secrecy, lack of discovery and centralised registers on specific property, Switzerland remains an important jurisdiction for enforcement actions. Notwithstanding the exequatur and enforcement friendly approach of Swiss courts, turning a foreign judgment or arbitral award into a key to a Swiss safe box is not always straightforward in practice. In particular, the identification of assets, the dealing with creditors hiding behind third parties, and immunity issues require careful planning, anticipation and coordination of the enforcement actions with local counsel.

Endnotes

1. Bundesgericht [BGer] [Federal Supreme Court] Sep. 3, 2014, 5A_723/2013 Entscheidungen Des Schweizerischen Bundesgerichts [BGE], making reference to and confirming its ruling in its decision of [BGer] Aug. 20, 2002, 128 [BGE] III 473.
2. [BGer] Dec. 21, 2012, 139 [BGE] III 135.
3. The signatories are the Swiss Confederation, the European Community, the Kingdom of Denmark, the Kingdom of Norway, and the Republic of Iceland.
4. [BGer] Oct. 10, 1996, 122 [BGE] III 463.
5. [BGer] Jul. 30, 2003, 129 [BGE] III 626, E. 5; Bernard Dutoit, *Droit international privé suisse, Commentaire de la loi fédérale du 18 décembre 1987*, Basel 2005, art. 25 N 9.
6. [BGer] Jul. 30, 2003, 129 [BGE] III 626, E. 5.
7. Andreas Bucher, Commentaire romand, *Loi sur le droit international privé, Convention de Lugano,* 2011, art. 25 N 24 to 31.
8. Decision of the Cantonal Tribunal of Vaud of 12 Apr 2012 (N° 115).
9. [BGer] Dec. 21, 2012, 139 [BGE] III 135, E. 4.5.2; Decision of the First Instance of Zurich of 15 Feb 2015 (EQ150028).
10. Queen Mary & PwC, International Arbitration: Corporate Attitudes and Practices 2008 (2008).
11. [BGer] Jul. 2, 2012, 138 [BGE] III 520.
12. [BGer] Jul. 3, 1985, 111 [BGE] II 175; [BGer] Oct. 4, 2010, 4A_124/2010.
13. [BGer] Jul. 3, 1985, 111 [BGE] II 175; [BGer] Oct. 4, 2010, 4A_124/2010; [BGer] Nov. 21, 2003, 130 [BGE] III 66.
14. The land register may however in principle only be consulted provided that there is a legitimate interest in accessing it (e.g., purposes of contractual negotiations for the purchase of a property etc.).
15. The debt enforcement and bankruptcy register may be consulted upon request by anyone showing a *prima facie* legitimate interest as well.
16. A copy of a civil judgment which has not been published will, however, only be provided upon showing of a legitimate interest and can, depending on the court's practice, also be made anonymous.
17. [BGer] Jun. 7, 2016, 5A_205/2016, E. 7.2 and 8.
18. *See generally*, Sandrine Giroud and Veijo Heiskanen, Sovereign Immunity 2018, Getting the Deal Through (contributing eds. Tai-Heng Cheng and Odysseas G Repousis), available at https://gettingthedealthrough.com/area/113/jurisdiction/29/sovereign-immunity-switzerland/.
19. [BGer] Sep. 7, 2018, 5A_942/2017; [BGer] Jun. 19, 1980, 106 [BGE] Ia 142; [BGer] Sep. 1, 2009, 135 [BGE] III 608.
20. [BGer] Aug. 15, 2007, 134 [BGE] III 122; [BGer] Nov. 23, 2011, 5A_681/2011.
21. [BGer] Oct. 7, 2010, 136 [BGE] III 575.
22. [BGer] Apr. 30, 1986, 112 [BGE] Ia 148.
23. [BGer] Feb. 10, 1960, 86 [BGE] I 23.
24. [BGer] Apr. 30, 1986, 112 [BGE] Ia 148.
25. Decision of the Swiss Federal Supreme Court of 22 June 1966 *in* Annuaire suisse de droit international, 1975, p. 219.
26. [BGer] Apr. 30, 1986, 112 [BGE] Ia 148.
27. [BGer] Aug. 15, 2007, 134 [BGE] III 122.

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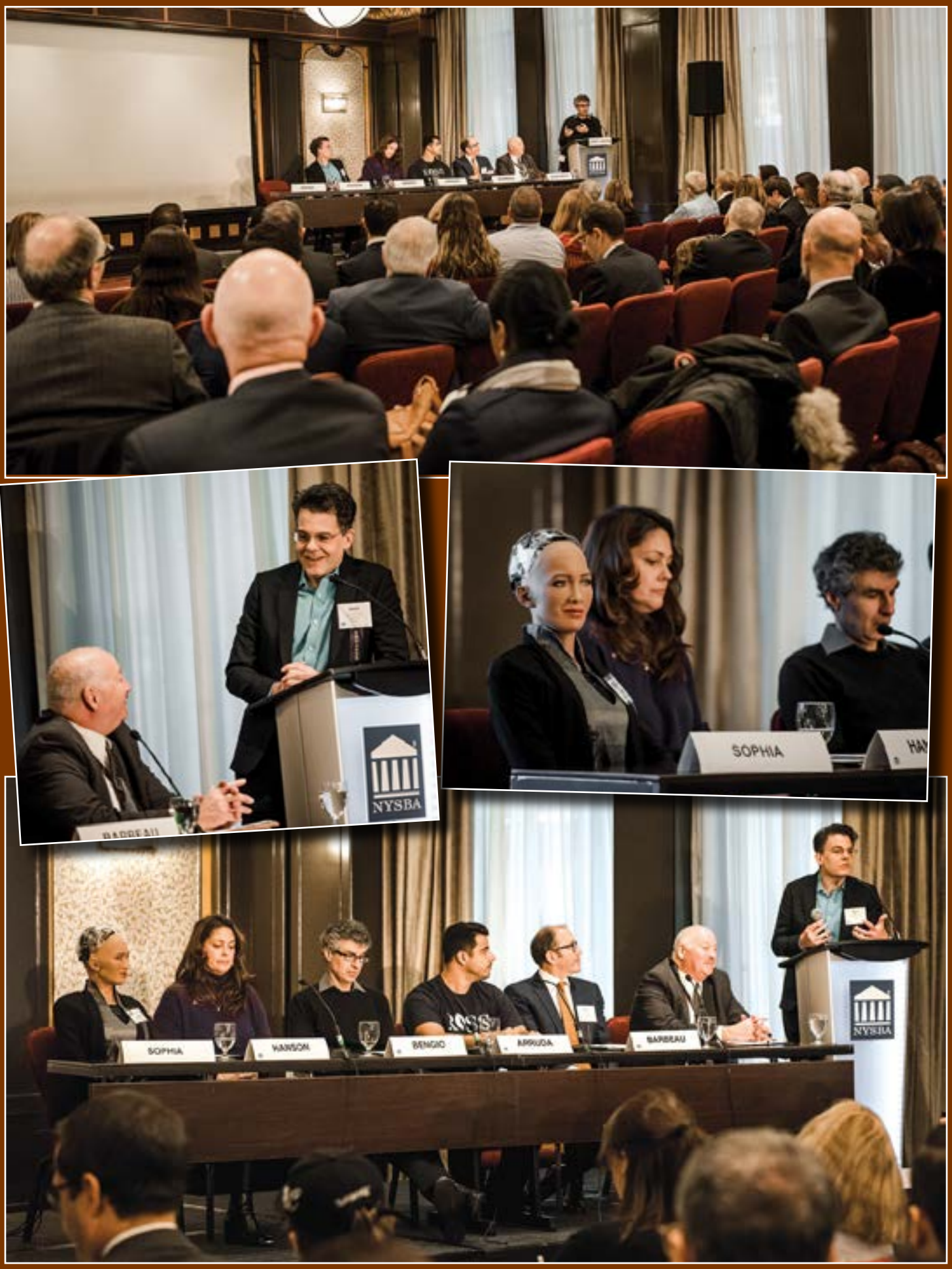
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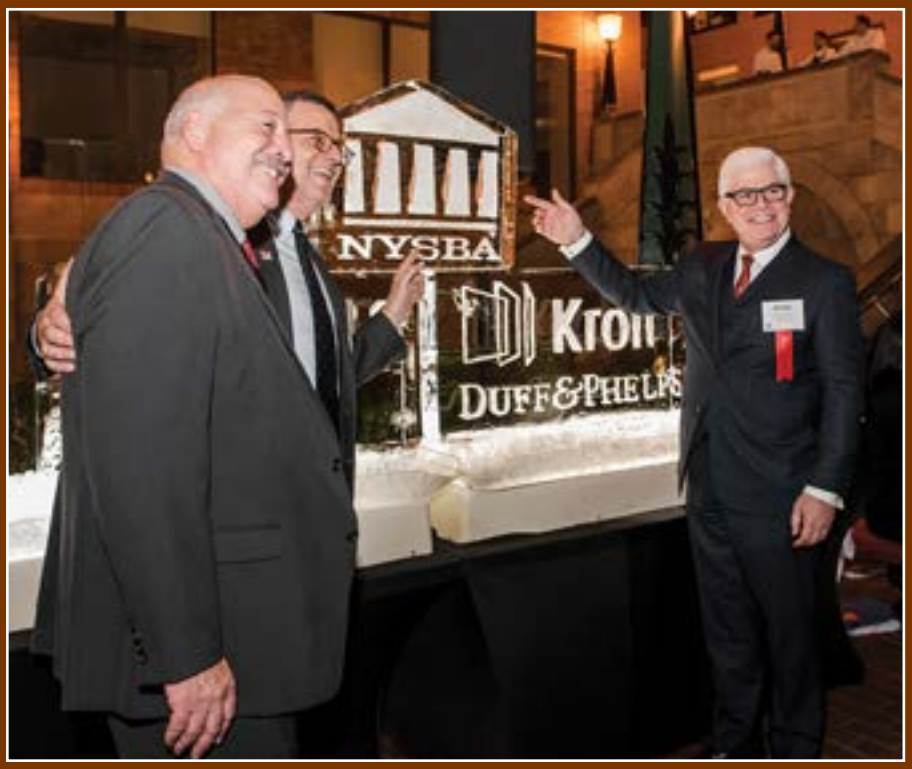

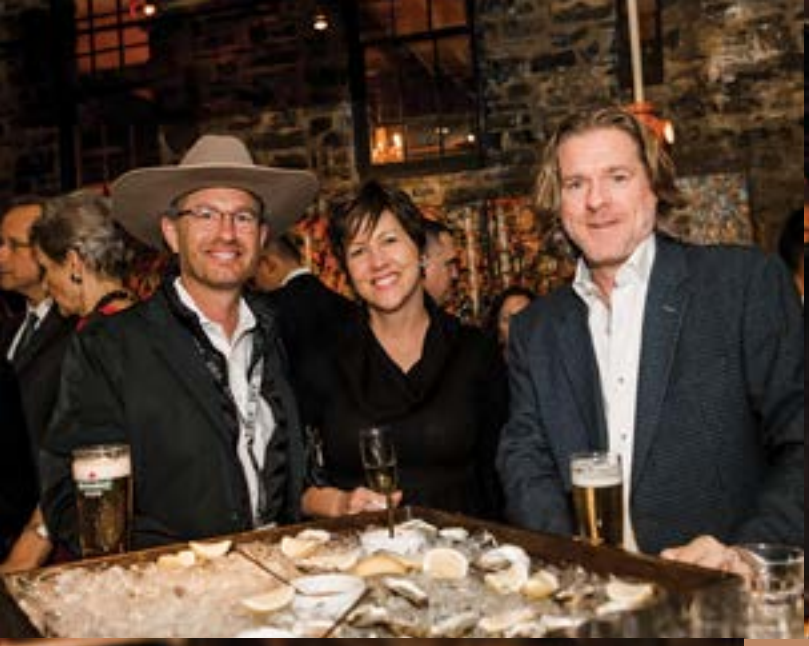

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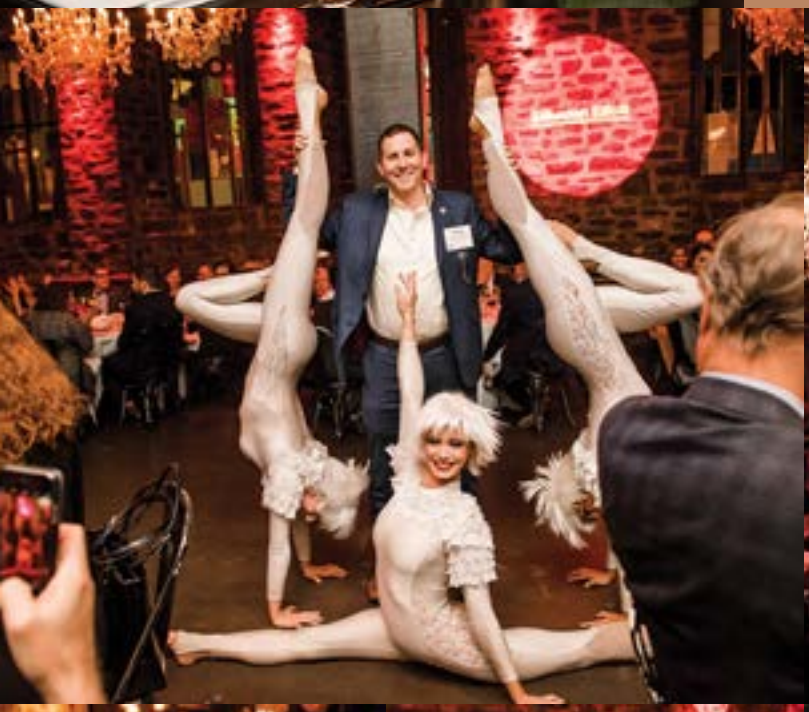

Enforcement of Foreign Judgments and Arbitral Awards in Austria

By Christina Kainzbauer

Obtaining an execution title is often difficult. This makes it all the more important to consider questions of enforceability regarding the target country before acting, and in some cases, even before contracting. The European legislature requires the coexistence of Member States that would be hardly familiar outside of Europe. The following article provides a short summary of the most important regimes of recognition and enforcement concerning foreign judgments in Austria. Family law, administrative law, and other special fields of law will therefore not be covered in favour of giving an overview of civil law as it is relevant in the usual course of business.

I. Introduction

The enforcement of foreign judgments and arbitral awards in Austria is based on regulations of the European Union, different international multilateral and bilateral treaties, as well as Austrian statutory law. Main sources of domestic enforcement law are the Austrian Enforcement Act (EA) and the Austrian Code of Civil Procedure (CCP). These laws apply throughout Austria without modification so there are no intrastate variations concerning the enforcement of execution titles.

Generally, the EA requires a formal declaration of enforceability of foreign judgments. Extensive exceptions to this principle exist where international conventions, and treaties, or the law of the European Union determine otherwise.[1] If a declaration of enforceability is required, it is a prerequisite for any further enforcement measures. The remaining execution procedure follows the same rules as the enforcement of domestic titles.

This article is structured as follows: sources of law, general questions, followed by answers.

II. Law of the European Union

To facilitate the circulation of judgments and enhance access to justice, the European Union, and its predecessor, have issued regulations. These apply between the Member States, yet sometimes there are exceptions. Brussels I,[2] for example, applied to Denmark only due to an agreement. The European Enforcement Order, the European Order for Payment Procedure, and the European Small Claims Procedure do not apply to Denmark. In addition to the following regulations, there is a Regulation on insolvency proceedings that will not be covered by this article in detail, just as there are Regulations concerning other fields of law.[3]

A. Brussels Ia (Recast) Regulation

Regulation (EU) No 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I recast Regulation) is applicable between all Member States of the EU.[4] Due to its extensive scope of application, this Regulation is the most important legal instrument concerning enforcement of foreign titles in practice. The Brussels Ia replaced the Brussels I Regulation (EU) No 44/2001, which replaced the Brussels Convention, a multilateral treaty originally concluded between the first six Member States in 1968 (European Economic Community, entered into force 1973).

The Brussels Ia Regulation is exclusively applicable to legal proceedings instituted on, or after, 10 January 2015. Executory titles from before that date fall within the scope of the Brussels I Regulation.[5] If they are from before 1 March 2002, the Brussels Convention is still applicable.[6] The Regulation applies to judgments, authentic instruments, and court settlements of the Member States. Rulings regarding civil and commercial matters are governed by the regulation, regardless of the court's nature. This means a court decision on compensation from a criminal court (as civil law right) falls within the scope of the convention as long as the injuring party is not a public authority which acted in the exercise of public powers (exception).[7]

As a general rule, a judgment, an authentic instrument, or a court settlement that is enforceable in a Member State is also enforceable in Austria without any need of a declaration of enforceability under the Brussels Ia Regulation. The exequatur procedure is no longer required under the Brussels Ia Regulation due to more detailed information requested in the certificate form.[8]

1. Procedure of Recognition and Enforcement

Under the Brussels regime, judgments from a Member State are automatically recognized in another Member State. Yet recognition and enforcement shall be refused on any interested party`s application if:

a. the recognition and enforcement would be manifestly contrary to Austrian public policy (*ordre public*);

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b. the right to be heard/due process of law is breached in a specific way;

c. the judgment is irreconcilable with a judgment given between the same parties in the addressed Member State;

d. 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 or,

e) certain provisions regarding jurisdiction are infringed.[9]

Regarding authentic instruments and court settlements, only a conflict with *ordre public* can lead to a refusal. An appeal against the decision on the application for refusal is possible.

To invoke a judgment from another Member State in Austria, an executory title, as well as a certificate from the court of origin, is needed. The court issues the certification after application of any interested party. If a translation is necessary to pursue the proceeding, the court may ask the applicant to provide for it. As soon as these requirements are met, the foreign title is executed in the same way as an Austrian title. The procedure of enforcement is then governed by Austrian law.

Before the temporal scope of application of the Brussels Ia Regulation, the exequatur procedure is still in force. This means the foreign title would have to be formally declared enforceable in Austria.

2. Legal Practice

The Austrian Supreme Court has recently handed down a decision on the assessment of timeliness of the service of documents within the scope of the Brussels I regulation. A disorderly notification is not a breach of the right to be heard, and therefore no reason for refusal, if the defendant could effectively uphold his rights of defense. Due to its wording, this is valid within the scope of the Brussels Ia Regulation as well. Decisions concerning the correctness of notifications are accordingly made on a case-by-case basis.[10]

B. European Enforcement Order Regulation

Regulation (EC) No 805/2004 of 21 April 2004 introduces a European Enforcement Order for uncontested claims concerning judgments given, court settlements concluded, and authentic instruments registered after 21 October 2005. The purpose of this regulation is to make decisions enforceable without a declaration of enforceability. Judgments, court settlements, and authentic instruments on uncontested claims are recognized and enforced in another Member State without any intermediate procedure. In order to apply for a court order warranting enforcement, a confirmation by the court of origin and a translation, where required, are necessary.[11] Since the procedure under European Enforcement Order Regulation was something like a practical test for a wider abolition of the exequatur procedure, it is similar to the procedure later laid down in the Brussels Ia Regulation.

Before the recast of the Brussels I Regulation the European Enforcement Order Regulation was of considerable practical relevance. After the abolition of the exequatur procedure in the scope of Brussels Ia its practical relevance has fallen sharply. However, there is still an area of application left. If the debtor's assets refer to several countries, this regulation is more practicable for the creditor than the Brussels Ia Regulation. The appeal against confirmation is only possible to a very limited extent. The procedure under the European Enforcement Order Regulation is optional, meaning enforcement according to the Brussels Ia Regulation is also possible in its scope.[12]

C. European Order for Payment Procedure and European Small Claims Procedure

To put things short, the European Order for Payment Procedure is applicable to uncontested monetary cross-border claims;[13] the European Small Claims Procedure is applicable to cross-border claims amounting up to 5.000 euros.[14] Both Regulations have in common that they provide for a procedure in order to obtain an execution title that can be easily enforced in another Member State (without declaration of enforceability). If there is no execution title yet, choosing one of these optional procedures could be practical. The procedure is initiated using forms. In case of the Small Claims Procedure, a written procedure is possible and the reasons for refusal of enforcement are very limited.

III. Multilateral Treaties

Austria is party to many multilateral treaties. Hence only few examples will be dealt with;[15] special fields of law such as carriage of passengers and goods or family matters will be left out.

A. Lugano Convention II

The Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters of 30 October 2007 (Lugano Convention II, in force since 2010) is a multilateral treaty between the European Community, Iceland, Norway and Switzerland that is similarly constituted as the Brussels I Regulation.[16] Prior to that, the Lugano Convention I was in force in Austria since 1996.[17]

The aim of the Lugano Convention is to facilitate the recognition and enforcement of titles between the parties to the Convention. The exequatur procedure exists continually in the scope of the Lugano Convention II as well as under the Brussels I Regulation. This means that an additional decision of the competent court of the executing state is required. An appeal against the decision is possible. The declaration of enforceability can only be refused

by the appellate court due to certain reasons for refusal. The Lugano Convention II contains analogous reasons for refusing recognition and enforcement of a foreign title as the Brussels I Regulation.

B. Arbitral Awards

The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (NYC) and the European Convention on International Commercial Arbitration 1961 (Geneva Convention 1961) apply to Austria. Of these two, the New York Convention applies to the United States of America as well, but there are reservations to keep in mind.[18]

C. Convention of 30 June 2005 on Choice of Court Agreements

The Hague Convention 2005 entered into force for Austria on 1 December 2015. As a general rule, an enforceable judgment given by a court of a contracting state designated in an exclusive choice of court agreement is to be recognized and enforced in another state. Since consumers are excluded from the scope of application, the convention (jurisdiction clauses) is mainly an alternative for medium-sized enterprises to the New York Convention 1958 (arbitral awards).[19] The United States has already signed the convention but has not ratified it yet. The ratification by the United States would be in compliance with the conditions lead to enforcement and recognition of U.S. judgments in Austria.

IV. Bilateral Treaties

Bilateral treaties with Member States of the European Union are largely inapplicable due to Regulations of the EU in their scope.[20] In contrast, there are some conventions between Austria and non-EU Member States like Liechtenstein, Israel, Switzerland, Tunisia, and Turkey which are pertinent.[21] Austria has concluded bilateral conventions on the recognition and enforcements of arbitral awards as well.

V. Sources of National Law

As previously mentioned, the Austrian Enforcement Act contains provisions on the recognition and enforceability of foreign execution titles as long as international conventions and treaties, or the law of the European Union, do not determine otherwise.

A. Exequatur Procedure

To become enforceable in Austria, foreign default judgments require a formal declaration of enforceability if Austrian law is not superseded. Basic requirements are the enforceability in accordance with the provisions of the country in which they were created, and reciprocity guaranteed by international treaties or by way of regulation. Further conditions are summarized in compliance with international jurisdiction, due process of law, and *ordre public*.[22] However, it is noteworthy that international jurisdiction in this respect is examined on the basis of the hypothetical application of Austrian jurisdiction standards.[23]

B. General Execution Process Topics

Since foreign execution titles are enforceable only in their country of origin by default, the previously introduced regimes are necessary to extend the enforceability to Austria. If a declaration of enforceability is required, for example, the foreign title and the declaration together form an execution title enforceable under the EA.[24] The further procedure is governed by national law and follows, in general, the same rules as the enforcement of domestic titles. On that account it is widely the same in the main features. After having obtained an execution title valid in Austria, an application for a court order warranting enforcement has to be made.

1. Competent Court

The competent court for issuing a declaration of enforceability is the district court of the obligated party`s domicile, or the court competent for enforcement proceedings. The court decides on the application without prior oral proceedings, or hearing the opponent. Filing the application for declaration of enforceability conjoined with the motion for enforcement is possible. Concerning enforcement proceedings, the competent court—roughly summarized—depends on where the property is registered, where the obligated party's (or garnishee's) domicile is, where the assets lie, or where the enforcement is about to take place. Closing an effective jurisdiction agreement concerning the court competent for enforcement proceedings is not possible.

As enforcement organs the bailiffs intervene. They execute the enforcement, for example, by collecting payments, checking for attachable items and drawing up seizure records.

2. Enforceable Remedies

As a basic principle, the Austrian legal system is to a certain extent open to foreign orders or measures not common to Austrian law. Concerning such orders or measures, an application to adapt them to a measure, or order, with comparable effects provided for in the Austrian legal system is necessary. The court only adapts without request if required by international law. This would, for instance, be the case with Brussels Ia Regulation.[25]

Generally, the foreign execution title has to be sufficiently specific as having content determinable without any further normative assessment.

The execution of monetary claims can, for example, be carried out by executing on property in form of receivables, movables, claims for delivery against third-party debtors, or on other pecuniary rights. Enforcement on real estate can be done by compulsory mortgage, administration, or auction. Execution for effecting acts or omissions

based on claims for specific performance can be, for example, carried out by delivery, eviction, or substitute performance.

3. Identification of Assets

Practically, finding out about assets located in Austria before having an enforceable execution title can be difficult. This is especially problematic when decisions have to be made on where to file applications, or prior to that, in which countries a title shall be enforceable (choice of jurisdiction). In respect of land property and some company data, publicly available registers exist.

After obtaining an enforceable title, a lawyer can be mandated to search for the obligor's name in the land charge register. If the obligee does not know the obligor's employer, or if he meanwhile receives a pension, the court can file a request to the main association of social insurance institutions after execution is warranted. The employer can, as garnishee, be compelled to provide information on the salary. If execution on movables or receivables was unsuccessful, the obligor is to be compelled to give an inventory of assets.

Since 18 January 2017, Regulation (EU) No 655/2014 of 15 May 2014 establishing a European Account Preservation Order procedure to facilitate cross-border debt recovery in civil and commercial matters is in force. Austria extended the scope of application to intrastate cases. Denmark and United Kingdom are not covered. The Account Preservation Order is a means of securing monetary claims against the real risk of enforcement being impeded, or made substantially more difficult. In case the requirements are fulfilled, this procedure has the convenient side-effect that the obligee does not have to know about the obligor's account information when he already has a title. The competent court will obtain the required information.[26] In practice, however, problems often arise from the requirement to demonstrate the urgent need of judicial protection. Therefore, the scope of application is limited in Austria.

VI. Selected Topics of Practical Application

A. Defenses

As a basic principle, the substance of foreign judgements cannot be reviewed by Austrian courts. Therefore, merit-based defenses are usually unavailable in Austria in contrast to a remedial procedure in the country of origin. As a general rule, only the reasons set forth for denying a declaration of enforceability, or refusing the enforcement, can be invoked in the enforcing country.

Nonetheless, some liability limitations are to mind: the obligor may keep a minimum living wage; some personal items, for example, cannot be attached, and after opening of an insolvency procedure, no individual enforcement measures can be undertaken. Moreover, reasons such as the suspension of the title, payment and similar subsequent obstacles can in principle be asserted in Austria.

An appeal against the court order on declaration of enforceability is possible within four weeks, in some cases eight weeks. Recourse against, for instance, the court order warranting enforcement is possible as well. A stay of the proceedings can be applied for, by way of example, in case of an appeal against the court order warranting enforcement, if the suspension of the title is invoked or for the time of appellate proceedings in the jurisdiction of origin of the title.

B. Limitation Periods

In Austrian civil law, limitation periods are treated as an issue of substantive law. Therefore, the law determining the limitation period is the law applicable on the claim. As far as Austrian law is applicable, judgments can be enforced within 30 years from their entry into legal force.[27]

C. *Ordre Public*

A violation of *ordre public* is generally assumed rarely due to strict requirements. The recognition would have to be absolutely and obviously incompatible with the Austrian legal system.[28] The *ordre public* clause is considered an inappropriate exception by the Austrian Supreme Court. Hence, a simple unfairness of the result does not suffice, just as the mere contradiction to compelling Austrian regulations is insufficient for reversal. Rather, fundamental values of the Austrian legal system have to be infringed on in case of enforcement.[29] The violation of the right to be heard is a specification of the procedural *ordre public*.[30]

D. Punitive Damages and Interest Rate

The principle of non-compensatory damages is foreign to the Austrian law system. Currently, there is insufficient judicature yet but, in general, the opinion is widespread that punitive damages would be against the *ordre public* of the Austrian legal system. Private penalties are seen as conflicting with the compensation function of Austrian tort law and the punitive monopoly of the state. Therefore, it seems probable at least that exorbitantly high punitive damages cannot be enforced in Austria.

According to the judicature of the Austrian Supreme Court, a court decision granting an interest rate much higher than the Austrian rate does not *per se* contradict *ordre public*. However, in a specific case, an interest rate of more than 100 percent per annum has infringed *ordre public*.[31] It is to kept in mind that in Austrian civil law the interest in general may not exceed the amount of the principal debt before filing a suit.

VII. Summary

As has been shown with the previous rough overview of the different sources of law, different enforcement

policies coexist in Austria. To ensure that an obtained foreign judgment is enforceable in Austria, carefully evaluating the various options when entering into legal relationships can be crucial. As part of an enforcement strategy, especially when it comes to jurisdiction, the European Union may prove beneficial for future enforcement measures in Austria, or other Member States of the European Union.

Endnotes

1. Austrian Enforcement Act § 403.
2. Regulation (EU) No 1215/2012, OJ L 351/1, art. 66 (1, 2).
3. Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings, OJ L 141/19 (recast version).
4. Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I recast Regulation), OJ L 351/1.
5. Regulation (EU) No 1215/2012, OJ L 351/1, art. 66 (1, 2).
6. Council Regulation (EC) No 44/2001, art. 66 (1, 2), art. 76.
7. *Sonntag v. Waidmann*, C-172/91 (ECJ. April 21, 1993).
8. Frauenberger-Pfeiler, *EuGVVO "2.0" in Kraft—Änderungen bei Anerkennung und Vollstreckung* (2015), JAP 2014/2015/24, 240, page 240, 241.
9. Regulation (EU) No 1215/2012, OJ L 351/1, art. 45 (1), 46.
10. Oberster Gerichtshof [OGH] [Supreme Court] June 7, 2017, 3 Ob 32/17b.
11. 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 O.J L 143/15.
12. Neumayr/Nunner-Krautgasser, *Exekutionsrecht*[4], page 133 (2018).
13. Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006, OJ L 399/1 (effective since 2008).
14. Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007, OJ L 199/1 (effective since 2009); amendments: Regulation (EU) 2015/2421 of 16 December 2015, OJ L 341/1 (effective since 2017).
15. *See also* further examples: Convention of 1 March 1954 on civil procedure (Hague Convention 1945); Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents (Hague Convention 1961).
16. *See also* Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 339/3.
17. Neumayr/Nunner-Krautgasser, *Exekutionsrecht*[4], page 117 (2018).
18. New York Convention 1958, *Reservations:* "The United States of America will apply the Convention, on the basis of reciprocity, to the recognition and enforcement of only those awards made in the territory of another Contracting State." *"The United States of America will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the United States."; Territorial Application: "All the territories for the international relations of which the United States of America is responsible."*
19. Frauenberger-Pfeiler, *Haager Übereinkommen über Gerichtsstandsvereinbarungen in Kraft,* ecolex 2016, 131, 132.
20. Brussel I recast Regulation art. 69.
21. For example: Convention on the Recognition and Enforcement of Judgments and Settlements in Civil and Commercial Matters of 23 May 1989 (Austria and Turkey); Treaty on the Recognition and Enforcement of Judgments and Public Deeds in Civil and Commercial Matters of 23 June 1977 (Austria and Tunisia); The Convention on the Recognition and Enforcement of Judgments, Arbitral Awards, Settlements and Public Deeds of 5 July 1973 (Austria and Liechtenstein); The Convention on the Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters of 6 June 1966 (Austria and Israel).
22. *See also* Austrian Enforcement Act § 406, 407, 408.
23. Neumayr/Nunner-Krautgasser, *Exekutionsrecht*[4], page 122 (2018).
24. Neumayr/Nunner-Krautgasser, *Exekutionsrecht*[4], page 118 (2018).
25. Mohr, *Die Exekutionsordnungs-Novelle 2016, insbesondere die Neuerungen im internationalen Exekutionsrecht*, in: Jahrbuch Insolvenzrecht und Sanierungsrecht 2017, p. 319, page 322 (2018).
26. Martin, *Die europäische und die österreichische vorläufige Kontenpfändung*, JAP 2016/2017/12, 163, page 164, 165.
27. Allgemeines Burgerliches [ABGB] [Austrian Civil Code] § 1478.
28. Oberster Gerichtshof [OGH] [Supreme Court] May 30, 2006, 6 Ob 49/06m.
29. Oberster Gerichtshof [OGH] [Supreme Court] Sept. 24, 1998, 3 Ob 242/98a; RIS RS0110743.
30. Oberster Gerichtshof [OGH] [Supreme Court] March 24, 2015, 8 Ob 28/15y; RIS RS0110743 (T20).
31. Oberster Gerichtshof [OGH] [Supreme Court] [Jan. 25, 2005, 3 Ob 221/04b.

Enforcement of Judicial and Arbitral Awards in the Netherlands

By Marielene De Ruijter-Van Den Brand and Zijad Jusic

Introduction

This article sets out the options for the enforcement of judicial and arbitral awards in the Netherlands. It includes a short explanation of the process of a civil claim in the Netherlands and explains the options for enforcing (within the Netherlands) a judgment obtained in the Netherlands. It also covers what is needed to be able to enforce a foreign judgment in the Netherlands. A distinction is made between foreign judicial and arbitration awards originating from countries that are party to an enforcement treaty (convention) and/or regulation and awards originating from countries that are not party to such a treaty or regulation.

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Judicial Proceedings in the Netherlands

The Netherlands has 11 courts, four courts of appeal and a supreme court. The courts deal with civil, criminal, and administrative law cases. Monetary claims with an interest of up to 25,000 euros; labor-law issues and cases relating to consumer credit (up to 40,000 euros); rental (purchase) contracts; and agency contracts, must be submitted to the subdistrict section within the courts, i.e., the subdistrict court.[1] If you do not agree with a civil judge's decision, you can appeal to the court of appeal within three months after the decision. Finally, it is possible to appeal to the highest court: the Supreme Court. The Supreme Court assesses whether the (sub)district court and/or the court of appeal have properly interpreted and applied the law.

Summons

Civil proceedings in the Netherlands generally start with a summons (or in some cases with a petition when stipulated by law). The summons must state, among other things, the details of the claimant and defendant, as well as the claims, the basis of the claims, and any evidence.[2] The summons must be served, by a bailiff, on the defendant. The costs for service of a summons by the bailiff are 81 euros (as of 2018 excl. VAT). The summons states the date on which the defendant must appear before the court or when his lawyer must appear in the proceedings. At the subdistrict court, the defendant can defend himself; at the district court, legal representation by a lawyer is mandatory.

The standard summons period is at least one week, if the defendant has a known place of residence or domicile in the Netherlands. For defendants living or staying in another European Member State,[3] a summons period of four weeks applies, and outside Europe, a summons period of three months applies.

The claimant sends the served summons to the court, with a request to proceed with the case, as from the day on which the defendant was served with the summons. Until the first day of the hearing, the claimant may withdraw the summons without liability to pay the court registry fee. From the first day of the hearing, the claimant owes the court registry fee. The amount of the court registry fee depends on the amount of the claim, but costs a minimum of 119.00 euros in the subdistrict court and a maximum of 3,946.00 euros in the district court.

Judgment

If the defendant does not appear in person, or is not represented by a lawyer, a judgment in default of appearance will be issued. If, however, a defense is presented, there is then a contested hearing, and the judge can decide to have the parties litigate further in writing or schedule a hearing, at which both parties must appear. Eventually, a judgment is handed down on the basis of a contested claim. The party that the court finds against is usually ordered to pay the costs of the proceedings.

Remedies

A judgment in a contested case may be appealed. An appeal shall be lodged with the court of appeal. The time limit for this is three months after the date of the judgment. Within this period, the appeal must be served[4] with a summons to the other party.

There is the possibility to object to a judgment in default of appearance. The objection must be lodged with the same court that issued the judgment in default of appearance. A time limit of four weeks shall apply to an application to object, starting from the day on which the judgment in default of appearance is served personally

on the defendant by a bailiff, or from the day on which the defendant has acknowledged the judgment, or from the day on which the judgment is enforced.[5]

Judgment Enforceable with Immediate Effect

In general, both judgments in default of appearance and judgments in contested claims are declared provisionally enforceable by the Dutch court, if the claimant has applied for this in the summons. This means that the judgment can be enforced immediately, despite the fact that there are still possible means of redress, such as the right to object to a judgment in default of appearance or to appeal.[6] The claimant party may, in that case, apply for an attachment order or bankruptcy petition. If the defendant makes (timely) use of a legal remedy, this does not[7] suspend the enforcement of a judgment declared provisionally enforceable. The defendant will then have to submit a request for suspension to the court and, in that case, will usually have to provide security for payment of the claim.

Power of Res Judicata

A judgment against which there is no longer any ordinary appeal option (such as objection, appeal, or final appeal) has acquired the force of res judicata. Only in exceptional cases can an extraordinary legal remedy be used against this, such as revocation or final appeal in the interests of the law, but these are not further discussed here.

Dutch Arbitration Award

This document does not detail the conduct of an arbitration procedure, as it depends entirely on the rules of the competent arbitration institute. However, the enforcement of an arbitral award in the Netherlands will be discussed.

Unlike a court ruling, a Dutch arbitration ruling[8] cannot be enforced immediately in the Netherlands. An arbitral award does not directly concern an enforceable title. You must first apply to the "preliminary relief judge" for relief to enforcement. The competent preliminary relief judge is the judge of the court in the district where the place of arbitration is located, and where an original copy of the award has been deposited.

If an appeal against the arbitral award is possible, the leave for enforcement can only be granted if (1) the award has been declared provisionally enforceable; (2) the time limit for appeal has expired unused; or (3) the possibility of appeal has been waived in writing.

The leave is usually granted by notation on the original arbitral award. The leave will only be granted in a separate order if the original has not been deposited with the court or if the application for leave was contested. The court registry fee due for the application for leave is 119 euros.

Remedies

There is no right of appeal against the granting of leave. An appeal against the refusal may be lodged, with the court of appeal, within two months of the date of the decision. The preliminary relief judge may refuse the application for leave if the arbitral award, or the manner in which it was made, is contrary to public policy or morality, or on any other ground as referred to in Article 1063(1) of the Dutch Code of Civil Procedure.

If the court of appeal also refuses to grant leave, a final appeal may be lodged. If the court of appeal does grant leave, there is no further, final appeal.

An arbitral award shall be subject to appeal if the parties have so agreed. The ordinary court can only be asked to set aside or revoke an arbitral award. Possible grounds for setting aside the arbitral award include (1) there is no valid arbitration agreement, (2) the manner in which the arbitral tribunal has been constituted is invalid, (3) the arbitral tribunal has not complied with its mandate, (4) the award has not been signed or reasoned, or (5) the award is contrary to public policy or morality.[9] If the court decides to set aside the arbitral award, this automatically means that the leave for enforcement is also set aside.

Once leave to enforce the arbitral award has been granted, the arbitral award may be sent to the bailiff, together with the note or order for service and enforcement.

Execution via Bailiff

In the Netherlands, the enforcement of judgments is explicitly a task of the court bailiff (referred to below as 'bailiff').[10] The bailiff is appointed by Royal Decree. Before the bailiff can enforce the judgment, the judgment must first be served on the party that must comply with it.[11] Enforcement is void if the judgment is enforced without prior service. The cost of service of the judgment is 77.95 euros (as at 2018 excl. VAT). If, after service of the judgment, the payment order as entered by the bailiff in the notice of service is not complied with, then enforcement of the judgment can be started. The bailiff can then take enforcement measures to ensure that the judgment is complied with. For example, the bailiff can seize all assets of the party that has to comply with the judgment, insofar as they are located on Dutch territory. The costs for official acts performed by a bailiff are adjusted[12] annually. The amount of the enforcement costs therefore depends on the chosen enforcement measure. These costs will be recovered as much as possible, from the other party, by the bailiff.

Execution of Foreign Court Judgment

The above describes how an enforceable title can be obtained (to enforce via a bailiff) a judicial or arbitral award rendered in the Netherlands. But what about an award made by a foreign court or arbitration? Can it be enforced the same way (by a bailiff in the Netherlands), or does it require more?

The Dutch law, as explained below, distinguishes foreign court judgments falling within a convention or regulation from those falling outside it. The same distinction is made for foreign arbitral awards.

Foreign Court Ruling Within Convention / Regulation

Until 2015, rules on recognition and enforcement of judgments in cross-border cases within the European Union were included in the EEX Regulation, also known as the Brussels I Regulation.[13]

On 10 January 2015, the new EEX Brussels Regulation (recast)[14] entered into force. Part of these new regulations is the abolition of the so-called "exequatur procedure." Under this procedure—for the enforcement of decisions in civil and commercial matters in the Netherlands (and other European countries) from other EU Member States—permission had to be sought first from a court in the district in which the judgment was to be enforced.

Under the "new" Brussels Regulation (recast), judgments given by a court of a Member State can, in principle, be enforced directly in the Netherlands and other EU Member States without judicial authorization, provided they are accompanied by a so-called "Article 53 certificate." This only applies for judgments given after 10 January 2015 in civil and commercial matters. This includes provisional judgments or measures concerning seizure of property. The defendant must be domiciled in an EU Member State.

Requesting an Article 53 certificate can be done directly in the summons. The court can then immediately attach this certificate of enforcement to the judgment, so that there is no need for a separate procedure. There are no additional costs involved in applying for Article 53 certificate in the summons.

Possibility of Refusal

The Brussels Regulation (recast) contains a limited number of grounds on which enforcement of a judgment from another Member State may be refused. The main grounds for refusal are as follows:

a. If such recognition is manifestly contrary to public policy in the Member State addressed;

b. Where the judgment was given in default of appearance, if the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him or her to arrange for his or her defense, unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him or her to do so;

c. If the judgment is irreconcilable with a judgment given between the same parties in the Member State addressed or 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 fulfills the conditions necessary for its recognition in the Member State addressed;

d. If the judgment conflicts with rules of competency, if the defendant is a policyholder, consumer, or an employee.

The judgment and Article 53 certificate must be served on the losing party prior to the first enforcement measure being taken. The bailiff can then be called in to take enforcement measures. How the bailiff performs his tasks in the Netherlands is described above under the heading "Execution via Bailiff."

Foreign Court Judgment Outside of the Netherlands Convention/Regulation

Recognition

If there is no treaty or regulation on recognition and enforcement between the Netherlands and the country in which the foreign judgment in question was rendered, the rules developed in Dutch case law will apply. These rules are laid down in Article 431 Dutch Code of Civil Procedure.[15] Pursuant to this article, the case must be heard again before the Dutch court in order to obtain an enforceable title. The Dutch court only tests this foreign judgment marginally. If these tests show that the foreign judgment meets the requirements for recognition, a consideration of the substantive issues is not necessary and the foreign judgment is recognized.

The foreign judgment will (in principle) be recognized by the Dutch court if the following conditions are met:

a. The judgment was delivered by a competent court whose jurisdiction is based on an internationally accepted ground of jurisdiction;

b. The decision was made with due regard for the principles of due process and with adequate safeguards;

c. The recognition of the foreign judgment is not contrary to Dutch public order;

d. The foreign judgment is not incompatible with a decision of a Dutch court given between the parties or with an earlier decision of a foreign court given between the parties in a dispute

concerning the same subject matter and based on the same cause, provided that the earlier decision can formally be recognized in the Netherlands.

If the dictum of the foreign judgment has been formulated in a different way than is customary in the Netherlands, the Dutch court will convert the dictum to what is customary and acceptable according to Dutch standards.

Enforceability

A claim may still be frustrated on the ground that the foreign judgment subject to recognition is not, is not yet, or is no longer enforceable under the law of the country of origin. In a judgment of 2014, the Dutch Supreme Court ruled that this only concerns obstacles concerning the *formal enforceability* of the foreign judgment where, for example:

a. An appeal with suspensive effect has been lodged in the country of origin against the provisional judgment which is not enforceable;

b. The judgment has been set aside by a higher court in the country of origin;

c. If in the judgment itself is requested or if the outcome of judgment results that it can only be enforced within a certain period;

d. The period for enforcement has not yet begun or has already expired.[16]

Such a formal impediment shall not exist if the jurisdiction to enforce the judgment is time-barred or has expired under the law of its country of origin. The prescription or limitation period shall not affect the authority of the judgment.

After the foreign judgment has been recognized by the Dutch court, the judgment and the permit for enforcement must be served on the defendant. The execution can then be initiated via the bailiff.

The costs involved in conducting an exequatur procedure are 119 euros (court fees), plus the attorney's fees. If a defense is made against the application for recognition and enforcement, the court may require the parties to appear at the hearing. This will entail higher lawyer's fees.

The duration of an exequatur procedure depends on whether a defense is made against the application for leave to enforce. This can take an average of a few weeks if no defense is given, and up to a few months if the request is dealt with in substance after a defense has been filed.

Execution of a Foreign Arbitral Award

Foreign Arbitral Award Within Convention/Regulation

There are several advantages to having an international trade dispute settled by arbitration instead of by a judge. For example, the specific expertise of arbitrators, the confidentiality of the procedure, and/or greater freedom to shape a procedure may be a reason to opt for arbitration. In addition, arbitral awards are easier to enforce because most countries are members of the New York Convention.[17] The New York Convention was approved in the Netherlands (the Kingdom of the Netherlands) by the Kingdom Act of 14 October 1963. More than 144 countries have acceded[18] to the New York Convention.

For the enforcement of foreign arbitral awards originating in countries party to the New York Convention, the rules of the New York Convention shall apply. Since the 1958 New York Convention does not generally preclude the application of a more favorable regime for the recognition and enforcement of foreign arbitral awards, other conventions—which also provide for the recognition and enforcement of arbitral awards, and to which the Netherlands is a party—remain relevant. This could include bilateral treaties, such as the Belgian-Dutch 1925 Execution Treaty. The Netherlands does not have many such bilateral treaties that are still of any significance.

The New York Convention shall apply in respect of (1) recognition of arbitration agreements, and (2) recognition and enforcement of arbitration awards rendered in the territory of a State other than that in which recognition and enforcement of such awards is sought. Upon accession to the Convention, Member States may make certain reservations. The Netherlands has made a reservation of reciprocity, but not the reservation regarding the commercial nature of the disputes that the parties submit to arbitration.

The New York Convention requires, as compared to Dutch law, different provisions with respect to the recognition and enforcement of arbitral awards which fall under the scope of this Convention. Thus, Article IV of the Convention requires the applicant party to produce a legalized original of the arbitral award or a duly certified copy thereof and an original or duly certified copy of the arbitration agreement. For the rest, Dutch legislation on recognition and enforcement of arbitral awards shall apply by analogy.[19]

In the Netherlands, as with Dutch arbitral awards, the preliminary relief judge has jurisdiction to hear an application for recognition and enforcement of a foreign arbitral award. Contrary to Article 989(2) of the Dutch Code of Civil Procedure, the period for appeal and final appeal against the decision on the application for recognition and enforcement of an arbitral award is two months, instead of one month for a Dutch arbitral award.

It is important to note that Article III of the New York Convention prohibits a dispute for the recognition and enforcement of a foreign arbitral award to which the Convention applies from being more burdensome for the applicant than a dispute for the recognition and enforcement of national arbitral awards. This provision can cause some problems in the Netherlands where (in the case of national arbitral awards) the applicant may appeal against the rejection of the application for leave to enforce, but the other party may not appeal against the granting of the application for leave to enforce.

The consequence of this is that the "asymmetry" in the Dutch prohibition on remedies could be in conflict with the principles of fair procedural law within the meaning of Article 6 ECHR.

In assessing whether there has been a violation of the principles of due process, it is important whether a comparable remedy exists in the law of the country where the arbitral award was made, such as the possibility of an appeal against the arbitral award rendered in that country. If that is the case, the asymmetry in the prohibition of remedies in the Netherlands does not constitute a violation of rights protected by Article 6 ECHR.

Costs and Length of Time

The costs involved in the procedure for recognition of a foreign arbitral award are also 119 euros (court fees) plus the attorney's fees.

Again, the duration of this procedure depends on whether a defense is made against the application to grant leave.

Foreign Arbitral Award Outside the Convention/ Regulation

Even if no recognition and enforcement treaty is applicable, an arbitral award rendered abroad can be recognized in the Netherlands, and enforcement can be requested in the Netherlands. In this case, too, the applicant must submit an original or a certified copy of the arbitration agreement and of the award.[20] This procedure is also known as exequatur.

In the Netherlands, it is relatively rare for an arbitral award to be recognized on the basis of an arrangement other than the New York Convention.

Grounds for Refusal

Recognition and enforcement may be refused if a party proves that (1) one of the grounds for refusal of recognition and enforcement listed exhaustively in the law (Article 1076 Dutch Code of Civil Procedure) occurs, (2) the case is not subject to arbitration, and (3) the arbitral award is contrary to public order. The latter occurs, for example, if the arbitral award is contrary to Article 101 TFEU,[21] or if the arbitral tribunal did not apply Article 101 TFEU of its own motion on the basis of the arbitral tribunal, even though the content of the arbitral award is contrary to Article 101 VWU, or if the arbitral tribunal incorrectly applied Article 101 VWU on the basis of the arbitral tribunal.

The limitative grounds for quashing the arbitral award are:

a. The absence of a valid arbitration agreement;

b. Incorrect composition of the arbitral tribunal;

c. The arbitral tribunal has gone beyond its remit;

d. The arbitral award may be appealed against before the arbitrators or the court in the country where the arbitral award was rendered; and

e. The arbitral award has been set aside by a competent authority of the country where that award was made.

If three months have elapsed since the arbitral award was made, the judge can only refuse the exequatur if the award or the manner in which it was made is clearly contrary to public order. For example, there is a conflict with public order when fundamental principles of procedural law, such as the right to a fair hearing, have been violated.

Combination of Article 1076 Dutch Code of Civil Procedure and New York Convention

The following is also important for practice. A foreign arbitral award may be recognized and enforced in the Netherlands pursuant to Article 1076 Dutch Code of Civil Procedure as if a treaty were applicable. However, such treaty should allow a party to invoke the law of the country in which recognition and enforcement is sought. The New York Convention is such a treaty. A party may thus base an application for recognition and enforcement of a foreign arbitral award primarily on Article 1076 and, in the alternative, on the New York Convention. It may be beneficial to pursue the claim in that order because of the New York Convention's stringent requirement of the existence of a valid arbitration agreement. It must, therefore, always be assessed on a case-by-case basis which scheme is more favorable to the applicant.

In practice, an applicant nowadays often bases the application for leave to enforce on the New York Convention because of the likelihood that an appeal against the granting of the leave will no longer be possible.

Indeed, it must be inferred from Article III of the New York Convention that an appeal or final appeal against the granting of leave is excluded, although it is precisely this Article III of the New York Convention that cannot serve as a basis for the exclusion of an appeal or final appeal against the granting of leave to enforce on the basis of Article 1076 Dutch Code of Civil Procedure.

The costs and the duration of these proceedings are the same as those of the application for recognition

and enforcement of a foreign arbitral award under the Convention/Regulation.

Conclusion

It follows from the above that in the Netherlands it is relatively easy to enforce foreign court and/or arbitration awards that fall under the Brussels Regulation (recast) or the New York Convention.

The recognition and enforcement of foreign judicial and arbitral awards that are not covered by a treaty or regulation is more difficult. Nevertheless, the procedures to be followed in this respect are clear and come with guarantees, so that a Dutch enforceable title can also be obtained in these cases, if, of course, the requirements are met.

Endnotes

1. Article 93 BW (NLD).
2. Article 111 BW (NLD).
3. The Hague Service Convention, 15 November 1965 *Trb*. 1965 (NDL).
4. Article 339 BW (NLD).
5. Article 143 BW (NLD).
6. Article 233 BW (NLD).
7. Article 350 BW (NLD).
8. The criterion is that the place of arbitration is in the Netherlands.
9. Article 1065 para. 1 BW (NLD).
10. Dutch Court Bailiffs Act 26 January 2001, Stb. 2001, 70 (NLD).
11. Article 430 BW (NLD).
12. Dutch Bailiffs' Fees Decree 4 July 2001, Stb. 2001, 71(NLD).
13. Council Regulation (EC) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, Brussels, 22 December 2000 *Trb*. 2000, 44/2001 (NDL).
14. Regulation (EU) of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, Brussels, 12 December 2012 *Trb*. 2012, 1215/2012 (NDL).)
15. Article 431 BW (NLD).
16. HR 26 September 2014, RvdW, 2014, 13/04272 m.nt. (Gazprombank Open Joint Stock Company/Defendant) (NDL).
17. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 10 June 1958.
18. Contracting States, New York Arbitration Convention, http://www.newyorkconvention.org/new-york-convention-countries/contracting-states.
19. This refers to articles 985 to 991 of the Dutch Code of Civil Procedure.
20. Article 1076 BW (NLD).
21. The Treaty on the Functioning of the European Union, Rome, 13 December 2007 *Trb*. 2007.

Enforcement of Foreign Judgments in Canada

By Lincoln Caylor and Maureen Ward

Overview

Guided by the principles of comity, co-operation and efficiency in an increasingly connected world, the law surrounding the enforcement and recognition of foreign judgments in Canada has undergone significant change in the past two decades. The general trend in recent case law in Canada has been an expansion in how courts address jurisdiction and comity, and this trend has resulted in a more liberal framework for the enforcement of foreign judgments.

Background & Basic Principles

A judgment is considered foreign in Canada if either it was determined in another province ("extra-provincial judgments") or in another country ("out of country judgments"). Extra-provincial judgments are registered and enforced in another province based on provincial reciprocal enforcement acts, as described herein. For out-of-country judgments, a judgment creditor must seek enforcement based on the common law.

The enforcement of foreign judgments is a matter of provincial jurisdiction under the Canadian Constitution. Provinces and territories have set out rules and laws governing the procedures for enforcing foreign judgments, and have entered into various conventions with foreign states to promote reciprocal enforcement across borders. While there is no single set of nationwide rules laying out the process or test for the recognition and enforcement of foreign judgments, the precedent established by cases that have proceeded to the Supreme Court of Canada ("Supreme Court") are applied by lower courts nationwide. In particular, the Supreme Court of Canada has established in *Chevron Corp. v Yaiguage*[1] that in addressing issues of territoriality and jurisdiction, one of the most important analysis to be applied is whether the original foreign court had proper jurisdiction to make the order.

Chevron is a seminal decision by the Supreme Court, and makes the distinction between cases of first instance and cases of recognition and enforcement. *Chevron* was the result of years of litigation between the two parties, but also a reflection of the change that had occurred in international relations and private international law. In this case a group of Indigenous Ecuadorians asked Ontario courts to exercise jurisdiction over a Canadian subsidiary of Chevron Corporation, which the Court termed "a stranger to the foreign judgment for which recognition and enforcement was being sought."[2]

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The plaintiffs sought the enforcement of a U.S. $9.51 billion order obtained under Ecuadorian law. In this case, the Chevron Corporation did not have assets or presence in Ontario. The Supreme Court held that despite this fact, Ontario courts had jurisdiction to hear and enforce the judgment, stating:

> In an action to recognize and enforce a foreign judgment where the foreign Court validly assumed jurisdiction, there is no need to prove that a real and substantial connection exists between the enforcing forum and either the judgment debtor or the dispute.[3]

The Supreme Court held further that:

> In the recognition and enforcement context, it would hardly make sense to require that the carrying on of business in the province relate to the subject matter of the dispute. The subject matter of recognition and enforcement proceedings is the collection of a debt. A debt is enforceable against any and all assets of a given debtor, not merely those that may have a relationship to the claim. For instance, suppose a foreign judgment is validly rendered against Corporation A in a foreign country as a result of a liability of its Division I, which operates solely in that country. If Corporation A operates a place of business for its separate and unrelated Division II in Ontario, where all its available and recoverable assets happen to be located, it could not be argued that the foreign judgment creditor cannot execute and enforce it in Ontario against

> Corporation A because the business activities of the latter in the province are not related to the liability created by the foreign judgment.[4]

Chevron was most recently followed by the Ontario Court of Appeal in *Dish v. Shava*,[5] where the plaintiff sought summary judgment to recognize and enforce a judgment from the United States. The Court of Appeal found that a summary judgment proceeding was acceptable because the originating court had established a "real and substantial connection" and the order was final and definitive. The Court found that "there was no issue for trial," and the "law concerning enforcement of foreign judgments is well settled."[6]

Kriegman v. Dill is the most recent extensive review of the law on the enforcement of foreign judgments post *Chevron*. The British Columbia Court of Appeal focused on the importance of comity in an interdependent world,[7] stating that this "deferential and non-invasive" approach to foreign judgments "militates in favour of recognition and enforcement."[8]

Elements of Recognition and Enforcement

The elements outlined below elucidate the common law test, and thus apply to out of country judgments. While each province has their own technical requirements governing applications or actions to recognize and enforce a foreign judgment, three basic elements set out by the Supreme Court must be established. The out of country judgment must:

1. be issued by a Court that has properly assumed jurisdiction according to the principles of private international law and has acted according to due process;[9]
2. be a final and binding decision in the original jurisdiction; and
3. be for a definite and ascertainable sum of money (though this requirement has recently been relaxed).[10]

1. The Assumption of Jurisdiction and Due Process

The Supreme Court provided much needed guidance on enforcing foreign judgments in the case of *Beals v. Saldanha*,[11] which dealt with the enforcement of a Florida court judgement in Ontario. The Supreme Court found that for order, fairness and comity in the world of private international law, the concept of jurisdiction needed to be expanded. Originally, courts were unwilling to interfere in matters that did not have either a presence-based connection to Canada or a "real and substantial" connection to Canada. This was called "jurisdictional competence," and the plaintiff seeking to enforce the judgment needed to show "a presumptive connecting factor" with the province in which the judgement is being sought.[12]

Beals established that as long as there was a "real and substantial connection" to the order in the original jurisdiction, the order could be enforced in Canada as long as the original order itself was procedurally fair. As stated by the Supreme Court in *Beals*, claimants who seek the enforcement of foreign orders "face the initial burden of showing that the judgement is valid on its face and was issued by a court acting through fair process and with properly restrained jurisdiction" based on a real and substantial connection test.[13] The claimant must convince the receiving court that the values of international comity require it to exercise its power in favour of enforcing the judgment.[14] Once this burden has been met, the judgment is *prima facie* enforceable by a Canadian court.

The Court will look at the following as indicators of the required "real and substantial connection" to the originating jurisdiction:

- attornment to the jurisdiction;
- an agreement between the parties to submit;
- residence or domicile of the defendant; and
- whether the defendant carries on business in the foreign jurisdiction.[15]

The courts have moved away from rigid understandings of jurisdiction and have adopted a more expansive and policy-based view of when Canada's jurisdiction can be established. A foreign court assumes jurisdiction over a matter through (1) attornment or through residence/presence in the foreign state (the "traditional tests"), or (2) through a real and substantial connection. *Chevron* further clarified and expanded on *Beals*. In *Chevron* and *Beals*, the Supreme Court held that a similar jurisdictional analysis for Canada was not required. As long as the originating Court had proper jurisdiction, enforcement could occur in Canada. Of note, even where a foreign Court assumed jurisdiction mistakenly pursuant to its own law, if there is a real and substantial connection the judgment will still be enforceable.

2. Judgment Is Final and Conclusive

A judgment is considered final and conclusive if it "determines the rights and liabilities of parties so as to be *res judicata*" in the originating jurisdiction.[16] The general rule is that finality of a judgment is established when the court that made the judgment no longer has the power to review, recall or rectify it.[17] However, in Ontario a foreign judgment under appeal may be recognized in the right circumstances[18] and a court may stay enforcement of a judgment pending determination of the appeal.[19]

3. Definite and Ascertainable Sum

An ascertainable sum of money is one which can be determined by a simple arithmetic process.[20] In *Pro Swing Inc.*, the court moved away from long-standing law to find that non-money judgments can also be enforced in

Canada in specific circumstances, as long as the originating court had exercised proper jurisdiction, and the order is both final and clear.[21]

Notwithstanding the three elements above, courts are not blindly mechanistic to the enforcement of out-of-country orders. Based on the precedent established in *Pro Swing*, courts are encouraged to adopt a multi-factor review of the effects enforcement may have outside the scope of the litigation. The Supreme Court instructs courts to review relevant considerations to guide them in their drafting of domestic orders; these considerations include whether the terms of the order are clear and specific enough to ensure that the defendant would know what is expected of him or her. Other considerations include (1) whether the enforcement is the least burdensome remedy for the Canadian justice system, (2) if the Canadian litigant is exposed to unforeseen obligations or (3) whether there are third parties who would be affected by the order.[22]

Procedural Matters Regarding Enforcement

When plaintiffs have obtained a foreign judgment, they have two options. For out of country judgments, they can make a claim to recognize and enforce a judgment based on the debt obligation created by the original judgment based on the common law. A trial is rarely required and the proceeding to enforce is often by way of default or on a motion for summary judgment.[23] Once recognition occurs the judgment can be enforced in the same manner as an extra-provincial judgment.

Provinces and territories have jurisdiction over the enforcement of extra-provincial judgments, and the procedures for enforcement can be found in provinces' respective rules of civil procedure. Additionally, provinces have enacted acts which set out a process of enforcement of money judgments between provinces and between select countries. This is known as the registration process. For example, under the reciprocal enforcement acts enacted in the provinces, a judgment creditor can proceed by action to have the order enforced in one Canadian province and then register such order in another Canadian province. The registered order then has equal enforcement value in the third jurisdiction. This registration process does not alter the standards of enforcement, and preserves the judgment creditor's right to bring an action on the original cause of the action. Each of the provinces has different reciprocating countries, which include Australia, Germany, Austria, France and various other U.S. states.

The reciprocal enforcement acts provide for the registration of money judgments or orders, including costs and awards in arbitration.[24] All of the provinces, save for Quebec, have enacted similar legislation, ensuring comity and co-operation within Canada. The chart in "Appendix A" sets out some of the Provinces' applicable legislations regarding the enforcement of foreign orders. Once an order has been registered pursuant to these statutes, they have the same force and effect as if the judgement had been made in the same Canadian jurisdiction.[25]

While the statutory regime for intra-provincial enforcement under the reciprocal enforcement acts were originally meant to make enforcement and registration seamless between provinces, the statutes have not kept up with the liberal ethos now underlying the common law. The statutory language in the reciprocal enforcement acts continues to be focused on "territorial" and "presence"-based factors. In cases of default proceedings, for example, an order obtained in an extra-provincial court will not be registered if the judgment debtor was not ordinarily resident or conducted business in the jurisdiction of the original court. This is true even if there was real and substantial connection between the provincial court and the claim.[26] In *Beals,* however, the Supreme Court held that even default judgments could be recognized and enforced in Canada based on a "real and substantial" connection.[27] Thus, it may in fact be easier to enforce a default judgment from another country than it is to register that judgment between the provinces. This is a discrete area of the law where Parliament may have to intervene and update the statutes to reflect the notions of liberality and comity underlying *Beals* and *Chevron*.

Canada also is party to the Convention between Canada and the United Kingdom for the Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters 1984,[28] which has been adopted by all the provinces, and establishes a similar registry system between the UK and Canada. There are also acts to facilitate reciprocal enforcements when dealing with issues of terrorism, anti-trust and commercial trade.[29]

Defenses

While the courts will not reevaluate the merits underlying a judgment, there are three common law defenses against the enforcement of extra-provincial foreign orders. Courts will not enforce the judgment in cases where there has been a denial of natural justice, where the judgement was obtained through fraud, or where a judgment is contrary to the public policy of the recognizing jurisdiction.

The fraud defence is a narrow one. For example, the fraud must not have been detectable, with the exercise of due diligence, prior to the judgment being obtained in the foreign jurisdiction.[30] Further, where a defendant chose to not participate in the foreign proceeding it cannot resist enforcement on the basis that the evidence given at the foreign trial was fraudulent. While the ruling in this regard was with respect to an Ontario proceeding, it is likely other provinces would apply this principle.

The defence of natural justice does not involve the merits of the case but rather requires an analysis of the procedure followed in the foreign jurisdiction for the purposes of determining whether the judgment was reached

in accordance with the Canadian notions of natural justice.[31] Key factors to consider would be whether adequate notice was given and whether there was an opportunity to defend. The Court will also consider judicial independence and ethical rules governing participants in the legal system.

Refusal to enforce on the basis of public policy has been noted by the Supreme Court of Canada as being applied only in exceptional circumstances,[32] as it essentially amounts to a condemnation of the legal system of the foreign jurisdiction. For example, the courts have rejected arguments such as the damage award being larger than a Canadian Court would render;[33] financial hardship;[34] or an allegation of bias that falls short of proof on a civil standard.[35]

Limitation Periods

Unless there is a limitation period set out in a relevant reciprocal enforcement statute, the limitation period of the respective provinces apply. For example, in Ontario, the enforcement of foreign judgments is governed under the two-year limitation period set out in the *Limitations Act*, 2002, SO 2002, c 24, Sched ("Limitations Act"),[36] and foreign enforcement cannot occur until the time to appeal in the foreign jurisdiction had expired or all possible appeal routes are exhausted.[37]

Limitation periods start to run when the action becomes discoverable, and the discovery principle is important in all the provinces. In Ontario, for example, the Ontario Court of Appeal commented that a claim is generally seen to be discovered when the time for an appeal has passed.[38] It held further that the test under the *Limitations Act* is not whether a judgment is "final" but rather when a claim is "discovered." This includes inquiries into the claimant's subjective knowledge of injury or loss, their ability to seek a proceeding, and whether a reasonable person would have known to commence proceedings.[39] In addition, the Ontario Court of Appeal noted that a claim based on a foreign judgment may potentially not be discovered until the creditor knew or ought to have known that the debtor had eligible assets in Ontario and could be served with process, which may occur more than two years from the date of the original judgment. The Ontario Court of Appeal further stated that the discoverability assessment must, in response to these types of scenarios, be a factual and context-driven analysis and "each case must be decided on its own facts."

Conclusion

As stated by the Supreme Court in *Pro Swing*,[40] "private international law is developing in response to modern realities." Indeed, the Canadian case law in this area highlights how the courts are still in the process of changing and adapting to modern commercial and judicial developments while also ensuring that there is order and reliability within the system.

Lincoln Caylor and Maureen Ward are partners in Bennett Jones LLP's Fraud Law Group. They thank Archana Ravichandradeva for her assistance with this article.

Appendix A

Province	Statute
Alberta	*Reciprocal Enforcement of Judgments Act*, RSA 2000, c R-6
British Columbia	*Court Order Enforcement Act*, RSBC 1996, c 78, ss 61065.1 as am. SBC 2007, ss 111.11
	Enforcement of Canadian Judgments and Decrees Act, SBC 2003, c 29
Manitoba	*Reciprocal Enforcement of Judgments Act*, CCSM, c J20
	Enforcement of Canadian Judgments Act, CCSM c E116
New Brunswick	*Reciprocal Enforcement of Judgments Act*, SNB 2014, c 127
	Foreign Judgments Act, RSNB 2011, c 162
	Canadian Judgments Act, RSNB 2011, c 123
Newfoundland	*Reciprocal Enforcement of Judgments Act*, RSNL 1990, c R-4
Northwest Territories	*Reciprocal Enforcement of Judgments Act*, RSNWT, 1988 c R-1
Nova Scotia	*Reciprocal Enforcement of Judgments Act*, RSNS 1989, c 388
	Enforcement of Canadian Judgments and Decrees Act, SNS 2001, c 30
Nunavut	*Reciprocal Enforcement of Judgments Act*, RSNWT (Nu) 1988, c R-1

Ontario	*Reciprocal Enforcement of Judgments Act*, RSO 1990, c R 5
Prince Edward Island	*Reciprocal Enforcement of Judgments Act*, RSPEI 1988, c R-6
Quebec	Title Three of Book 10 of the *Civil Code of Quebec*
Saskatchewan	*Reciprocal Enforcement of Judgments Act, 1996*, SS 1996, c. R-3.1
	Judgments Extension Act, RSS 1978, c J-3
	Enforcement of Foreign Judgments Act, SS 2005, c E-9,121, ss 6-7
	Enforcement of Canadian Judgments Act, 2002, SS 2002, c E-9.1001
Yukon	*Reciprocal Enforcement of Judgments Act*, RSY 2002, c 189

Endnotes

1. *Chevron Corp. v Yaiguaje*, 2015 SCC 42 [*Chevron*].
2. *Id.* at para 3.
3. *Id.*
4. *Id.* at para 34.
5. 2018 ONSC 2867 [*Dish*].
6. *Id.* at para 2.
7. *Kriegman v Wilson*, 2016 BCCA 122 at para 89 [*Kriegman*].
8. *Id.* at 92.
9. *Pro Swing v Elta Golf Inc.*, 2006 SCC 52 at para 10 [*Pro Swing*].
10. *Id.*
11. *Beals v Saldanha*, 2003 SCC 72 at para 210 [*Beals*].
12. Pitel, Stephen G A & Nicholas Rafferty. Conflict of laws, ed. (Toronto, ON: Irwin Law, 2016) at 164.
13. *Beals, supra* note 11 at para 210.
14. *Id.*
15. *Id.* at para 37.
16. Halsbury's Laws of Canada (2016), Conflict of Laws at para HCF-75, "*Finality, Definite Sum of Money.*"
17. *Four Embarcadero Center Venture v Mr. Greenjeans Corp,* 1988 CarswellOnt 378 (Ont HCJ), at paragraph 69; affirmed 1988 CarwswellOnt 384 (Ont CJ).
18. *Continental Casualty Co. v. Symons,* 2015 CarswellOnt 16510 (Ont SJ), at para 46.
19. *Monteiro v Toronto Dominion Bank,* 2006 CarswellOnt 43 (Ont Div Ct), at para 28.
20. Halsbury's Laws of Canada (2016), Conflict of Laws at para HCF-75 "*Finality, Definite Sum of Money,*" citing *Beatty v Beatty*, [1924] KB 807 (CA).
21. *Pro Swing*, *supra* note 9 at para 92.
22. *Id.* at para 30.
23. Halsbury's Laws of Canada (2016), Conflict of Laws at para HCF-69, *Procedure for Enforcement*.
24. Halsbury's Laws of Canada (2016) Conflict of Laws at para HCF-83 "*Legislative Schemes for Registering Judgments*"
25. Halsbury's Laws of Canada (2016) Conflict of Laws at para HCF-84, *Registered judgment same as local judgment.*
26. *Reciprocal Enforcement of Judgments Act*, RSO 1990, c R5, s3(b). This language is adopted in most of the other provincial *Reciprocal Enforcement Acts* as well.
27. *Beals*, *supra* note 11, at para 31.
28. RSC, 1985, c C-30.
29. Halsbury's Laws of Canada (2016), *Conflict of Laws* at paras HCF-86 to HCF-88; see also *Competition Act*, RSC 1985, c C-34, s 83; Foreign Extra-territorial Measures Act, RSC, c F-29, ss 2, 8, 8(1.1),9 and the *Justice for Victims of Terror Act*, SC 2012, c 1, s 2, s 4(5).
30. *Beals*, *supra* note 11, at para 53 (see also para 52).
31. *Id.* at para 64.
32. *Id.* at para 72.
33. *Id.* at para 225.
34. *Disney Enterprises Inc. v. Click Enterprises Inc.*, 2006 CarswellOnt 2045 at para 41.
35. *Metalsac Ticdaret Ve Sanayi Ltd. v Raylor Steel Inc.*, 2001 CarswellOnt 215 (Ont SCJ), at para 12.
36. *Independence Plaza 1 Associates LLC v Figliolini*, 2017 ONCA 44 at para 66.
37. *Id.* at para 77.
38. *Id.* at 77-79.
39. *Id.* at para 74, establishing the principle that s5(1) of the *Limitations Act* applies when enforcing foreign judgments.
40. *Pro Swing, supra* note 9, para 64.

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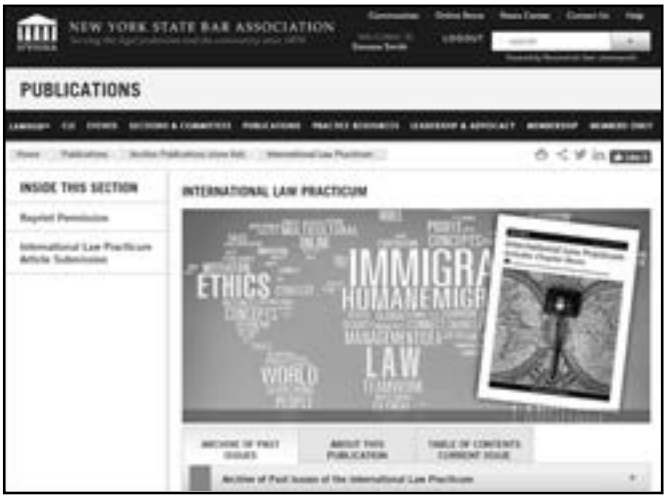

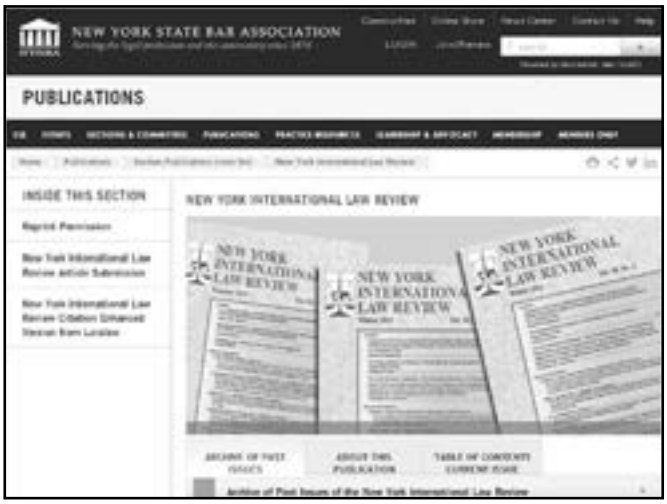

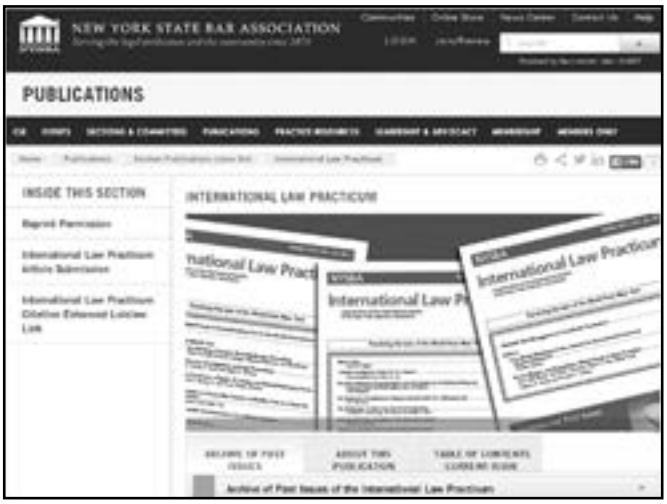

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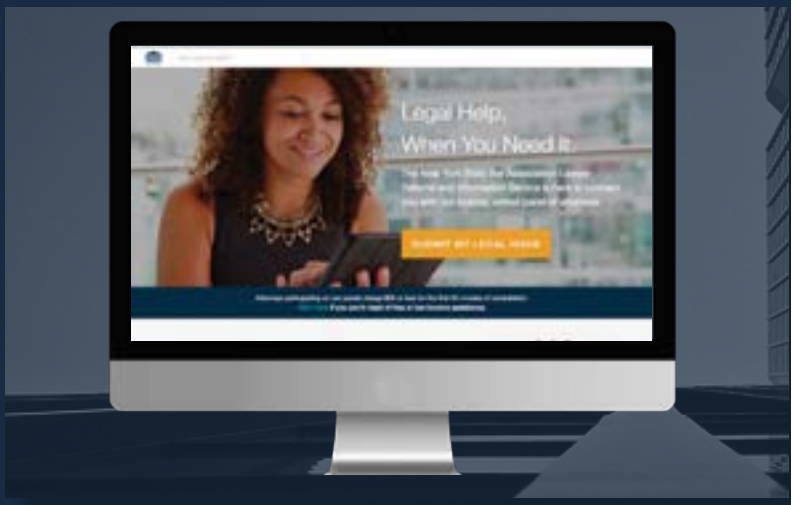
In the age of online marketplaces, the legal profession is experiencing a moment of opportunity. By deeply embedding these tools in our program, we have laid the foundation for seamless connection between our LRIS members and the public.

Better yet, the NYSBA LRIS meets the ABA Standards for Lawyer Referral. You can trust the growth of your practice to a top-notch referral service.



NEW, QUALITY REFERRALS

Our trained, experienced staff screens these calls and passes on the vetted legal matters to our panel members.

TRUSTED

Meets ABA Standards for Lawyer Referral

COST EFFECTIVE

With one low yearly cost to join, our goal is for every attorney to receive referrals that allow them to earn back the cost of joining and then some.

WEB & MOBILE BASED

Our platform offers a range of benefits to members, including online access to your referrals and disposition reporting.

FOR MORE INFORMATION www.nysba.org/JoinLR | LR@nysba.org | 800.342.3661