Session 208: Where’s the Money? Recovering Hidden Assets – International Judgment Enforcement

When companies hide their assets in offshore jurisdictions, finding the money, enforcing judgments and recovering assets across national borders can be challenging. This panel of highly experienced professionals will provide their insights on how sophisticated judgment debtors hold assets in a variety of structures in offshore financial centers, creating roadblocks that can only be overcome with the right tools. They will share first-hand insights into the international judgment enforcement and asset recovery process, including how to sequence enforcement in key Asian jurisdictions and leverage intra-Asian arrangements for judgment enforcement, when to deploy the various injunction and discovery options available to parties in the British Virgin Islands, the Cayman Islands, and other offshore financial centers, how to maximize the international reach of discovery devices available in the U.S. court system, and what type of assistance to seek from the U.S. Department of Justice and select other governments known to be aggressive in international asset forfeiture.

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Where's the Money?

Recovering Hidden Assets: International Judgment Enforcement

CONVERGENCE: 2014 NAPABA Annual Convention

Materials Prepared for Michael S. Kim of Kobre & Kim LLP

Contents:

1. International Execution Against Judgment Debtors (Thomson Reuters, 2014), excerpted chapters on:
   a. Argentina
   b. Brazil
   c. Germany
   d. China
   e. U.K.
   These chapters have been reprinted from International Execution Against Judgment Debtors, with permission of Thomson Reuters. For more information about this publication, please visit http://legalsolutions.thomsonreuters.com.

2. Getting the Deal Through: Asset Recovery
   a. United States (2015)
   b. Cayman Islands (2015)
   These chapters have been reproduced with permission from Law Business Research Ltd. This article was first published in Getting the Deal Through: Asset Recovery 2015, (published in October 2014; contributing editors: Jonathan Tickner and Sarah Gabriel, Peters & Peters Solicitors LLP). For further information please visit www.gettingthedealthrough.com.

3. “Protecting the Rights of Third Parties from the Effects of Interim Relief”, excerpted from the November 2013 edition of the Kobre & Kim LLP London Litigation and Arbitration Update

4. “Monetizing Large Judgments and Arbitration Awards”- presented for the Association of Corporate Counsel on April 24, 2014

5. “Lifting the Lid on Interim Measures: A Comparative Analysis”- presented for C5 Conference on Transatlantic Litigation on June 17, 2014

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§ 2:1. Introduction—In general

A judgment rendered by a foreign court cannot be directly executed against the interests or assets of a person or entity in Argentina. First, it must be given effect by the competent domestic court. This is done in a procedure by which the foreign judgment is provided with an exequatur, which authorizes the execution of the foreign judgment in Argentina. This chapter will outline the conditions to be met and the procedures to be pursued to obtain the recognition and enforcement of a foreign judgment in Argentina. It will address the relevant jurisdictional issues, judicial proceedings, international and domestic laws, and case law.

Footnotes

* Allende & Brea, Buenos Aires, Argentina
1 The authors thank Manuel Werder for his valuable contribution in analyzing the international treaties ratified by Argentina and comparing them with the European legal framework.
§ 2:2. Introduction—Federal jurisdiction and federal procedural rules

Argentina is composed of 23 provinces and one autonomous city, the City of Buenos Aires. Each of the provinces, as well as the City of Buenos Aires, has local courts which exercise jurisdiction to decide matters that have a certain relation to the respective province. Furthermore, all provinces have their own local procedural codes (the “Local Procedural Codes”), which are applied by the local courts.

There also are federal courts within the provinces and the City of Buenos Aires, which exercise jurisdiction to resolve certain federal matters as stated by federal laws. These courts apply the procedural rules set forth in the National Civil and Commercial Procedural Code (the “National Procedural Code”).

Finally, there are national courts located in the City of Buenos Aires, which have jurisdiction to resolve certain matters that take place in the city and thereby also apply the National Procedural Code.

Consequently, the requirements that a foreign judgment must fulfill to be recognized and enforced in Argentina will vary according to the procedural rules applied by the competent domestic court. This chapter covers the procedural rules regarding the recognition and enforcement of foreign judgments set forth in the National Procedural Code. In general, those set forth in the Local Procedural Codes are similar to these rules; however, their comprehensive analysis is beyond the scope of this chapter.


Footnotes

* Allende & Brea, Buenos Aires, Argentina
§ 2:3. Introduction—Procedures in certain provinces

In certain provinces, the respective Local Procedural Codes have requirements that go beyond those set forth in the National Procedural Code. For example, whereas the National Procedural Code and most of the Local Procedural Codes do not demand reciprocity from the country where the foreign judgment was rendered as a requirement for recognition and enforcement, the Local Procedural Codes of the provinces of Córdoba and Santa Fe require reciprocity. Furthermore, if the laws of the foreign country apply further requirements than those set forth in these two Local Procedural Codes, such further requirements also must be complied with to have the foreign judgment recognized and enforced in these provinces. Finally, there are other issues regarding real estate and default foreign judgments, which are beyond the scope of this chapter.

Footnotes

* Allende & Brea, Buenos Aires, Argentina
§ 9:1. Introduction

The recognition and enforcement of foreign judgments in Brazil is a matter of common practice. However, the guidelines followed by the legislator when enacting the prevalent rules and the positions taken by the courts were much influenced by historical considerations based mostly on the Italian tradition, both medieval and Roman.

The Brazilian Code of Civil Procedure and Resolution Number 9 of 4 May 2005 of the Superior Court of Justice begin by calling the procedure a “homologation”, something slightly different from “recognition”, “confirmation”, or even “acknowledgment” of a judgment. The problem goes well beyond purely semantic grounds and has caused, in practice, peculiarities and difficulties which are alien to some other jurisdictions.

A perfunctory reading of the relevant Brazilian statutes indicates that recognition is a special procedure, different from and not necessarily following the usual patterns of Brazilian judicial law and practice.

On the other hand, the increasing frequency of legal demands from citizens and entities of independent states and nations requires that the decisions thereon should be recognized (or homologated following the Brazilian terminology) in the territory of another state or nation; otherwise, their meaning, significance, and legal bearing will be lost.
§ 9:2. Introduction—Limited review

Brazil recognizes the principle of limited review, but with certain peculiarities, in the sense that Brazilian laws confer upon the foreign judgment the indispensable qualities for enforcement and the authority of res judicata (a final judgment conclusive as between parties in the same action or subsequent proceeding). The effectiveness of the foreign judgment must involve all its consequences (retroactivity included) and may not affect or change the merits thereon, except in some unusual cases, as will be seen below.

The possibility of the direct enforcement of a foreign judgment, without the need to institute a new procedure, is definitely excluded by Brazilian law, which requires a full execution of the homologated judgment following the same rules as a local decision, the only exception being the existence of international conventions to which Brazil has adhered and which have been ratified.

Although Brazil has, through Federal Decree Number 18871 of 13 August 1929, ratified the Havana Convention on Private International Law of 1928, which approved the Code of Private International Law (the Bustamante Code), providing for the enforcement of foreign judgments in civil and commercial matters, it does not mean that Brazil has adopted automatic enforcement.

Among the Conventions on Judicial Cooperation to which Brazil is signatory are those with Argentina, France, Italy, Spain, Uruguay, and Mercosur. However, these do not eliminate the need for a proper execution after recognition. Brazil is not a party to the Hague Convention of 15 November 1965, relating to the service abroad of judicial and extra-judicial documents in civil or commercial matters. Although some of the Conventions on Private International Law are being ratified and are coming into force in Brazil, the matter is far from being settled. Negotiations do exist with Argentina, Paraguay, and Uruguay for something similar to the Brussels Convention of 27 September 1968.

The enforcement of foreign judgments issued by courts in those countries belonging to the Common Market of the South (Mercosur) is a difficult question of procedure, although no supranational entities exist within Mercosur. According to the Las Lenas Protocol, foreign judgments issued by courts of Mercosur countries are subject to a faster procedure (the procedure established for rogatory letters).


Footnotes

* Professor of Public International Law, University of São Paulo Law School. The author wishes to thank Jose Nantala Badue Freire for his assistance in preparing this chapter.

1 Res judicata, as defined by Black's Law Dictionary (5th ed.), at p. 1173.

2 Code of Civil Procedure, section 484.

3 Cooperacão Judiciária Internacional, Casella and Sanchez, eds. (2002).

4 The Federal Supreme Court recognized the applicability of this faster procedure for member countries of Mercosur in 1997.
§ 9:3. Introduction—Two procedures

Therefore, at the time of writing, it must be clearly established that the admission of a foreign judgment into the Brazilian legal system encompasses two distinct judicial procedures, one concerning the recognition thereof and the other regarding its execution and enforcement.

Based upon the recognition judgment, the interested party may seek enforcement thereof by filing an executory action, following the same rules as a local judgment.

Foreign judgments may be recognized and enforced in Brazil irrespective of reciprocity of any foreign countries' laws and procedures. In principle, any judgment pronounced abroad can be recognized, provided certain conditions are fulfilled. As recognition is basically a limited review of the substance of the decision and the nature and origin of the relevant law of the judgment to be recognized should not be a concern to the Brazilian court, judgments rendered in a country that follows the Common Law system can be recognized with no difference from those originating from a Civil Law country, provided the required conditions are fulfilled.

The enforcement of the recognized decision must be in conformity with the Brazilian Code of Civil Procedure and Resolution Number 9 of 4 May 2005 of the Superior Court of Justice, applying the same norms as for judgments given by Brazilian courts. It is possible that some peculiarities of the foreign judgment cannot be enforced when some procedures or legal measures are not known in Brazil, even if they do not offend public order (a condition for recognition).

As an example, a judgment may require one of the parties to institute a trust in Brazil. Since the trust is a legal institution alien to the Brazilian system, the judge will have to find a similar fiduciary form to enforce the decree.

As the enforcement of a foreign judgment requires, in almost all cases, a letter rogatory and even though Brazilian law does not require reciprocity for complying and serving such letters (exequatur), it is true that, in practice, judgments rendered by courts that are not expedient in complying with letters rogatory coming from Brazil may be treated with some unwillingness and delay.¹

Finally, it should be pointed out that recognition under Brazilian law is retroactive to the date that the foreign judgment became final and conclusive when pronounced by the foreign court. Therefore, all legal concepts including the one referring to res judicata must be construed and applied in accordance with the Brazilian norms regulating conflicts of law which are encompassed in the so-called Law of Introduction to the Brazilian Law.²

Footnotes

¹ Note of the Secretary of State of the United States of America, Revista Forense, number 266, at p. 451.
² Decree Law Number 4657 of 4 September 1942, as amended by Law Number 3238 of 1 August 1957. Section 12 thereof attributes to the Brazilian judiciary personal jurisdiction over a defendant domiciled in Brazil and subject matter jurisdiction over a dispute in connection with obligations to be carried out in Brazil or referring to real estate located in Brazil.
§ 28:1. Introduction

Court decisions are sovereign acts which have no legal effect beyond the rendering state's territory. Therefore, judgments of a foreign court can have legal effect in another state only if they are recognized by the domestic jurisdiction of that state. This recognition is as well a sovereign decision of the recognizing state as the regulation of the preconditions on which the recognition is made.¹

§ 28:2. Introduction—Sources of Law—In general

Germany recognizes foreign judgments due to European Community secondary legislation, due to an international convention, or because of its autonomous law.

Footnotes
* Voller Rechtsanwälte, Frankfurt/Main, Germany
§ 28:3. Introduction—Sources of Law—European Community secondary legislation

The mutual recognition and enforcement of judgments given within the European Union (EU) is mostly governed by European Community secondary legislation, in particular by:


Under Regulation 44/2001, a judgment of a court of an EC member state can be enforced in another member state once it has been declared enforceable by a court of that member state. In Germany the respective regional court (Landgericht) of the domicile of the debtor is the relevant court for the enforcement declaration procedure. Pursuant to the new regulation 1215/2012 (effective 1 January 2015) this enforcement declaration is no longer necessary. For uncontested claims, however, Regulation 805/2004 provides now the possibility that a party can obtain a European Enforcement Order. A claim shall be regarded as uncontested, if the debtor has expressly agreed to it by admission or by means of a settlement which has been approved by a court or concluded before a court in the course of proceedings, or if the debtor has during a court proceeding never objected to a claim, or if the debtor has not appeared or been represented at a court hearing, or if the debtor has expressly agreed to a claim in a notarial deed.

With a European Enforcement Order, claims can be enforced within member states without any prior enforcement declaration procedure. Regulation 1896/2006 has the objective to simplify and accelerate cross-border procedures in connection with payment claims and to reduce costs by creating a European order for payment procedures. It is not applicable to non-contractual claims.

Regulation 861/2007 is applicable for claims in civil and commercial matters where the value does not exceed €2,000 (excluding interest, expenses, and disbursements). A standard procedure to simplify and speed up litigation is provided. It is an optional tool in addition to the possibilities existing under the laws of the EC member states. A judgment obtained in a
member state under the European Small Claims Procedure will be recognized and enforced in another member state without
the need for a declaration of enforceability and without any possibility of opposing its recognition.

Footnotes

1 O.J. L 012, 16/01/2001, at p. 0001–0023, the “Brussels I Regulation”. The Regulation supersedes the Brussels Convention on
Jurisdiction and on the Enforcement in Civil and Commercial Matters of 27 September 1968, the “Brussels Convention” (O.J. L 299,
13/12/1972, at p. 0032–0042, consolidated version O.J. C 027, 26/01/1998, at p. 0001–0027) between the member states of the EU
(except for Denmark); Council Regulation (EC) 44/2001, articles 1 and 68. With respect to Denmark, the agreement between the
European Community and Denmark of 19 October 2005 on jurisdiction and the recognition and enforcement of judgments in civil
and commercial matters applies, see O.J. L 299,16 November 2005, at p. 0062–0070. The agreement came into force on 1 July 2007;
see O. J. L 94, 4 April 2007, at p. 0070.

article 72.


5 O.J. L 399, 30 December 2006, at p. 0001–0032.

§ 15:1. Introduction

The People's Republic of China (hereinafter “China”) is developing a unique system of private international law by learning from the experiences of both socialist and capitalist nations and developing rules which are consistent with China's special conditions. In theory, China appears to be open to enforcing a foreign judgment. However, in practice there have been few cases in which the recognition and enforcement of foreign judgments has been an issue.

China has not concluded any bilateral treaty, nor acceded to or ratified any multilateral convention dealing solely with the recognition and enforcement of foreign judgments. However, in contrast, China has acceded to and ratified the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the “New York Convention”).

A section on arbitration has been added at the end of this chapter due to its importance as a method of resolving disputes between parties from different countries and the resulting necessity of enforcing arbitral awards across national boundaries. Special attention has been paid to how the return of Hong Kong to China has changed the enforceability of arbitral awards and, more recently, of court judgments in civil and commercial matters between these two formerly autonomous jurisdictions.

While the New York Convention plays a major role in determining the recognition and enforcement of foreign arbitral awards, the recognition and enforcement of foreign court judgments is governed by domestic law. China's first legislation dealing with this issue was embodied in its Civil Procedure Law (Trial Implementation) (the “old Civil Procedure Law”), which had been in operation since 1 October 1982. On 9 April 1991, the National People's Congress of the People's Republic of China adopted a revised version of the Civil Procedure Law (the “Civil Procedure Law 1991”), which replaced the old Civil Procedure Law.

The Civil Procedure Law 1991 contains provisions relating to the recognition and enforcement of foreign judgments, which are welcomed by foreign judgment creditors. One of the significant changes to the Civil Procedure Law 1991 is that a foreign judgment creditor must apply directly to the relevant Intermediate People's Court, whereas the old Civil Procedure Law only permitted a foreign court to entrust a Chinese court for the recognition and enforcement of a judgment through diplomatic channels.

The basic system relating to the recognition of foreign judgments is that it requires a foreign judgment to be final and conclusive, in the old Civil Procedure Law's words, the “already determined” foreign judgment or ruling or, in the Civil Procedure Law 1991’s words, the “legally effective judgment or ruling” of a foreign court. Despite this change in language, this provision is still too vague to provide much comfort to judgment creditors.

The conditions required under both the old and the Civil Procedure Law 1991 that a foreign judgment must fulfill are general. Moreover, many of the concepts contained in the available text of the Civil Procedure Law 1991 are expressed so abstractly that their concrete meanings can only be elucidated by the courts. For instance, any foreign judgment seeking recognition and enforcement must satisfy the court that it does not violate the basic principles of the law of China or the national and social interest of the country. This standard, although often likened to public policy considerations common in many jurisdictions, still leaves uncertain the actual breadth of interpretation of these concepts.

As to foreign judgments deciding on matters which are deemed to be decided solely by the relevant People's Court according to the provisions in the Civil Procedure Law 1991 of exclusive jurisdiction, recognition will be refused. These matters, considered to be subject to such exclusive jurisdiction, will be dealt with below.

Although the enactment of the Civil Procedure Law 1991 marked a significant improvement in Chinese private international law and was a step forward in the process of China's legal development, the legal basis for enforcing foreign judgments has made little progress in the ensuing years. No significant changes have taken place in those laws concerning foreign judgments.
since the promulgation of the Civil Procedure Law 1991, although the latest amendment of the Civil Procedure Law by Standing Committee of the National People's Congress in October 2007 focuses on increasing the efficiency of enforcement of civil judgments dealing mainly with domestic judgments. The amendments entered into force on 1 April 2008. Furthermore, it is difficult to analyze how the laws are applied in a practical manner, due to the lack of publicly available data concerning the applications for the recognition and enforcement of foreign judgments in China. In the 2009 Annual Work Report of the PRC Supreme People's Court, it was noted that judicial assistance represented 1.37 per cent of all the enforcement cases. Considering the current situation, it is clear that Chinese private international law is still in a period of transition and remains incomplete. However, there are reasons to be optimistic and to believe that China's continuing efforts to develop a market economy and the subsequent changes in the nature of Chinese socialism will encourage the growth of a more comprehensive legal system.


Footnotes
* Dechert, LLP, Beijing, People's Republic of China.
§ 15:2. Statutes and legislation

As indicated above, the only statute relevant to the recognition and enforcement of foreign judgments is the new Civil Procedure Law, which was enacted and effective on 9 April 1991 and has been amended by the Standing Committee of the National People's Congress (the "Civil Procedure Law 2008"). There are also several judicial interpretations that have the same legal effect as statutes or legislation, such as the Supreme People's Court's Opinions Regarding Several Questions on the Implementation of the Civil Procedure Law, the Supreme People's Court's Regulations Regarding the Procedure for the Recognition and Enforcement of Foreign Divorce Judgments at the Application of Chinese Citizens, the Supreme People's Court's Regulations Regarding the Relevant Issues on the Acceptance of the Application for Recognition and Enforcement of Foreign Divorce Judgments, and the Supreme People's Court's Provisions on the People's Courts' Recognition of Civil Judgments made by Courts in Taiwan. Judgments rendered in Macao and Hong Kong are not considered foreign judgments, and their recognition and enforcement is respectively subject to the Arrangement between the Mainland and the Macao Special Administrative Region on the Mutual Recognition and Enforcement of Civil and Commercial Judgments and the Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters by the Courts of the Mainland and of the Hong Kong Special Administrative Region Pursuant to Choice of Court Agreements between Parties Concerned, signed on 16 July 2006 and effective from 1 August 2008.


Footnotes

* Dechert, LLP, Beijing, People's Republic of China.
1 Adopted by the Judicial Committee of the Supreme People's Court at the 528th Meeting, 14 July 1992.
2 Adopted by the Judicial Committee of the Supreme People's Court at the 503rd Meeting on 5 July 1991, Fa (in) Fa (1991), number 21.
3 Adapted by the Judicial Committee of the Supreme People's Court at the 1090th Meeting on 1 December 1999 and implemented on 1 March 2000.
4 Approved by the Judicial Committee of the Supreme People's Court at the 957th Meeting, 15 January 1998.
5 Promulgated on 21 March 2006 and effective as per 1 April 2006.
§ 15:3. International treaties

China has not concluded any bilateral treaty or ratified any multilateral convention dealing solely with the recognition and enforcement of foreign judgments. However, China has entered into a number of judicial assistance agreements with countries including, but not limited to, Belgium, Bulgaria, Byelorussia, Canada, Cuba, Cyprus, Egypt, France, Greece, Hungary, Italy, Kazakhstan, Kirghizstan, Laos, Mongolia, New Zealand, North Korea, Poland, Romania, Russia, Singapore, Spain, Thailand, Tunis, Turkey, Ukraine, the United Arab Emirates, and the United States. The scope of judicial assistance that China and other countries provide to each other is subject to agreement between the concerned parties as specified in the bilateral treaties. For example, Belgium, Italy, Spain, Bulgaria, Hungary, Thailand, Singapore, and Argentina have concluded treaties with China on civil and commercial judicial assistance, whereas others, such as the United States, Bulgaria, Indonesia, The Philippines, Canada and New Zealand, have entered into treaties with China on criminal judicial assistance. France and Korea have concluded treaties involving all three areas. The civil and commercial judicial assistance prescribed in the treaties usually includes the service of legal documents and the investigation and collection of evidence during civil procedures; the scope of criminal judicial assistance is generally limited to actions affiliated to serving writs and investigating evidence during criminal procedures. Some agreements on civil and commercial judicial assistance also provide simplified procedures for the recognition and enforcement of foreign judgments. Such agreements provide some facilitated procedures for the recognition and enforcement of foreign judgments.

In addition, China is a signatory to the International Convention on Civil Liability for Oil Pollution Damage, in which some articles deal with the recognition and enforcement of foreign judgments rendered in the contracting states.

Footnotes

1 China has participated in the negotiations which led to the 2005 Hague Convention on Choice of Court Agreements, which provides for the recognition and enforcement of judgments rendered by a court of a contracting state designated in an exclusive choice-of-court agreement. It is, however, still unknown whether China will sign and ratify the Convention.

2 The judicial assistance treaty between China and Belgium contains no provision regarding the recognition and enforcement of judgments.

3 The International Convention on Civil Liability for Oil Pollution Damage was enacted in Brussels on 29 November 1969, and article 10 reads as follows: (1) Any judgment given by a court with jurisdiction in accordance with article IX, which is enforceable in the state of origin where it is no longer subject to ordinary forms of review, shall be recognized in any contracting state, except: (a) where the judgment was obtained by fraud; or (b) where the defendant was not given reasonable notice and a fair opportunity to present his case. (2) A judgment recognized under paragraph 1 of this article shall be enforceable in each contracting state as soon as the formalities required in that state have been complied with. The formalities shall not permit the merits of the case to be reopened.
§ 24:1. Introduction

There is no single regime in England for the enforcement of judgments given by foreign courts. Foreign in personam judgments may be enforced in the following ways:

1. At Common Law by action on the judgment;

2. By registration under part II of the Administration of Justice Act 1920 (“the 1920 Act”);

3. By registration under the Foreign Judgments (Reciprocal Enforcement) Act 1933 (“the 1933 Act”);

4. By registration under EC Regulation 44/2001 of 22 December 2002 (“the EC Judgments Regulation”);

5. By registration under the Lugano Convention of 30 October 2007 (“The Lugano Convention”).

6. By registration under the Civil Jurisdiction and Judgments Act 1982 (the “1982 Act”) and 1991 (the “1991 Act”), which give effect to the Brussels Convention and the Lugano Convention; and

7. Under the European Communities (Enforcement of Community Judgments) Order 1972 relating to the enforcement in the High Court of certain decisions, judgments, and orders of European Community (EC) institutions under the EC Treaty, the Euratom Treaty, and the European Coal and Steel Community Treaty, and the enforcement in the High Court of Euratom inspection orders.

The procedure of registration in England of judgments under the EC Judgments Regulation and the Brussels and Lugano Conventions (“Convention Regulation Judgments”) is set out below. Other matters relevant to the enforcement of Convention Regulation Judgments are noted in the chapter where appropriate.

The process of enforcement of judgments under the 1920 Act and the 1933 Act are procedures which are not different in kind, though they may differ in detail, to the procedure at Common Law. Accordingly, decisions on the principles of enforcement under Common Law are highly relevant to enforcement of judgments under the 1920 Act and the 1933 Act. The following particular issues should be considered when deciding whether to take steps to enforce a foreign judgment in England:

1. Whether the judgment is of a type which the English court will, in principle, enforce, namely, a judgment for a debt or definite sum of money (other than a sum payable in respect of taxes or other charges of a like nature, a fine, or other penalty) which is final and conclusive on the merits;

2. Whether the foreign court had jurisdiction in accordance with the requirements of English law or, where appropriate, the EC Judgments Regulation or the Brussels and Lugano Conventions;

3. If the foreign court did have such jurisdiction, whether the action to enforce the judgment can be challenged on any of the following grounds: (a) fraud, (b) public policy, (c) breach of requirements of natural justice, (d) it is contrary to Article 6 of the European Convention of Human Rights, or (e) that it is a claim for multiple damages;

4. Whether the action to enforce the judgment is statute barred;
5. What the limitation consequences may be if the action to enforce or register the judgment does not succeed;

6. Whether security for costs may be ordered to be provided by the judgment creditor;

7. Whether to seek an injunction restraining the judgment debtor from dealing with his assets pending the outcome of the English action;

8. What costs are recoverable from the judgment debtor if the action succeeds or are payable if the action fails; and

9. What means of execution are available in the event that the action is successful.

Footnotes

* Stephenson Harwood LLP, London, England
1 References to “England” throughout include England and Wales.
3 Applicable between the European Community, Switzerland, Norway and Iceland respectively.
4 As of 1 July 2007, the Brussels Convention applies only in relation to Aruba and French overseas territories and as between the United Kingdom and Gibraltar (see text, below).
§ 24:2. Enforcement at Common Law—In general

The Common Law rules are applicable in all instances where a judgment of the foreign court is not registrable under the statutory provisions referred to above. Thus, they are relevant to the enforcement of judgments of courts in the United States, Asia, Africa, Eastern Europe, and Central and South America (save for Commonwealth countries and United Kingdom overseas possessions). They also are relevant to the enforcement of judgments of courts which are not superior courts under the 1920 Act or recognized courts under the 1933 Act.


Footnotes

* Stephenson Harwood LLP, London, England
§ 24:3. Enforcement at Common Law—General principles

In the absence of a statute, the foreign judgment has no direct operation in England and Wales because of the principle of the territoriality of a court’s jurisdiction. The judgment is, therefore, regarded as imposing a legal obligation on the defendant which will be enforced in an action on the judgment by an English court.¹

The basic rule under English law is that any foreign judgment for a debt or definite sum of money (not being a sum payable in respect of taxes, or other charges of a like nature, a fine, or other penalty) which is final and conclusive on the merits may be enforced at Common Law in the absence of fraud or some other overriding consideration of public policy provided that the foreign court had jurisdiction over the defendant in accordance with conflicts of law principles.²

In order for the foreign judgment to be enforced in England and Wales, it is essential that the foreign court should have had jurisdiction over the defendant, not in the sense of the foreign law but according to the rules of English law.³

If the foreign court is regarded by the English court as one of competent jurisdiction, then any judgment in personam⁴ given by it which is final and conclusive on the merits is conclusive in England as to any issue upon which it adjudicates, with three exceptions:

1. A foreign judgment will not be recognized or enforced if obtained by fraud;
2. A foreign judgment will not be recognized or enforced if to do so would be contrary to public policy;
3. A foreign judgment will not be recognized or enforced if obtained in proceedings contrary to natural justice; and
4. A foreign judgment will not be recognised or enforced if it was obtained in circumstances which involve a breach of Article 6 of the European Convention of Human Rights.⁵

“Final and conclusive” means that the judgment must finally and conclusively determine the rights and liabilities of the parties to it so as to be res judicata in the country where it has been pronounced.⁶

In determining whether a judgment is final and conclusive, the only question to be addressed is whether all issues between the parties have been conclusively dealt with by the foreign court. It is immaterial that the judgment is subject to appeal and that an appeal is pending or being issued in the foreign court, unless a stay of execution has been granted in the foreign court pending the appeal hearing.

However, an English court has the discretion to order a stay of English proceedings pending determination of such an appeal.⁸

By contrast, a judgment is not final and conclusive if the court pronouncing it has power to rescind it or vary it subsequently. A judgment must be a judgment for a debt or definite sum of money, other than a sum payable in respect of taxes or penalties. Thus, for example, an order for specific performance is not a judgment capable of enforcement at Common Law. Claims for damages or costs are only enforceable if they have been expressed in monetary terms by the foreign court.

Where a foreign judgment imposes both criminal liability and awards civil compensation, the judgment is severable so that the compensatory award for damages is still capable of enforcement.⁹

An interlocutory judgment of a foreign court on a procedural issue where there was express submission of the procedural or jurisdictional issue to the foreign court and the specific issue of fact was raised before and decided by the court could give rise to an issue estoppel, such that the question may not be relitigated in English enforcement proceedings. In Desert
§ 24:3. Enforcement at Common Law—General principles, 1 International Execution...

Sun Loan Corporation v. Hill, the Court of Appeal decided that an issue as to whether the lawyer in the foreign court proceedings had been properly authorized by the judgment debtor was sufficiently an issue to enable the judgment debtor to obtain leave to defend enforcement proceedings in England.


Footnotes
* Stephenson Harwood LLP, London, England

4 Except a judgment in an action for multiple damages.
5 As explained below (24:16), this is a recent and developing principle of English law.
8 Colt Industries Inc. v. Sarlie (No. 2) [1966] 1 W.L.R. 1287.
Asset Recovery

In 26 jurisdictions worldwide

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2015
United States

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Civil asset recovery

1 Legislation

What are the key pieces of legislation in your jurisdiction to consider in a private investigation?

The United States is an amalgamated federal constitutional republic comprising 50 states plus the District of Columbia, and various territories, each with separate legislation relevant to asset recovery. In the absence of a unified corpus of statutes, there are a few major categories of federal US legislation to consider when pursuing a civil recovery action in the US: federal securities laws, racketeering laws and insolvency laws.

There are four principal provisions of US federal securities law under which most plaintiffs file when alleging fraud regarding the sale or purchase of securities: sections 11, 12(1) and 12(2) of the Securities Act of 1934 and rule 10(b)(5) of the Securities Exchange Act of 1934.

The US also affords victims of organised crime civil action under federal and state Racketeering Influenced and Corrupt Organization (RICO) Acts. 18 United States Code (USC) section 1962 lays out requirements for violations under the federal RICO statute and also lays out the serious crimes that qualify as ‘racketeering activity’.

Foreign plaintiffs confronting complex, cross-border fraud with a significant US aspect may also want to avail themselves of chapter 15 of the US Bankruptcy Code, promulgated under 11 USC sections 101-1532, which can be a useful tool for tracing and recovering assets in crimes involving commercial entities.

2 Parallel proceedings

Is there any restriction on civil proceedings progressing in parallel with, or in advance of, criminal proceedings concerning the same subject matter?

There are no blanket restrictions on civil cases proceeding in parallel with criminal cases. The management of parallel civil and criminal proceedings, however, can bring challenges. In particular, the assertion of Fifth Amendment privileges against self-incrimination can slow down civil proceedings, especially if deponents are examined before the resolution of criminal proceedings. Additionally, civil litigants should be aware that the Speedy Trial Act may give the criminal proceeding priority in resolution of the action, if simultaneous adjudication is not practicable.

Because of these challenges, prosecutors sometimes seek a stay of civil asset recovery action by calling into question the factors that were considered in making the determination of the particular forum:

• counsel should determine whether the facts of the case justify a federal action;
• counsel should determine the state(s) in which the defendant has assets and where the activity took place; and
• if the defendant is a business entity, counsel should determine the jurisdiction under which the entity was formed.

Potential causes of action and related remedies vary by state. Because material differences can exist among jurisdictions, counsel should analyse the pertinent laws of the considered jurisdictions in determining where to pursue asset recovery.

3 Forum

In which court should proceedings be brought?

Generally speaking, counsel should consider the relevant state court(s) and federal district court(s) in bringing an action. The decision of where to file depends on many factors. A few considerations should guide counsel in making the determination of the particular forum:

• counsel should determine whether the facts of the case justify a federal action;
• counsel should determine the state(s) in which the defendant has assets and where the activity took place; and
• if the defendant is a business entity, counsel should determine the jurisdiction under which the entity was formed.

Time limitations on initiating civil court proceedings vary widely depending on the type of action sought as well as the jurisdiction in which the action is brought. Because the universe of potential actions is vast, only a survey of two types of common federal actions is considered here. Counsel should conduct a thorough statutes-of-limitations analysis on applicable causes of action in the relevant jurisdiction as soon as practicable in anticipation of litigation.

Time restraints on bringing actions for securities fraud in federal court typically bar cases brought more than one year after the victim had actual or constructive notice of the fraud and more than three years after the date the securities were offered to the public or otherwise sold, regardless of when the fraud was discovered. See generally 15 USC section 77(m) (governing the limitations of relevant securities actions).

Plaintiffs may also consider filing a civil action under RICO, codified under 18 USC section 1962. The statute of limitations for civil RICO claims is generally four years. See Agency Holding Corporation v Malley-Duff and Associates, 483 US 143 (1987).

4 Limitation

What are the time limits for starting civil court proceedings?

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5 Jurisdiction

In what circumstances does the civil court have jurisdiction? How can a defendant challenge jurisdiction?

Jurisdiction questions in the US can be broken down into three elements:

• whether the court has jurisdiction over the person;
• whether the court has jurisdiction over the subject matter; and
• whether the court has the jurisdiction to render the decision sought.

Jurisdiction in a civil case is determined by considering a series of factors from the main elements above, including the location of the at-issue assets, transactions or defendant(s); nationality or citizenship of the defendant(s); the relationship of the defendant(s) to the particular jurisdiction; whether the law or contract under which the action was brought stipulates venue; and the subject matter of the action. Defendants may challenge jurisdiction by calling into question the factors that were considered in making the
jurisdiction determination. Such objections are most typically be raised (or, at the very least, preserved) at the outset of an action.

6 Admissibility of evidence

What rules apply to the admissibility of evidence in civil proceedings?

For US federal actions, litigants should consult the rules promulgated under the Federal Rules of Evidence (and, to a lesser extent, the Federal Rules of Civil Procedure), which govern evidence submission across the US federal court system. If an action is brought under the laws of a particular state, litigants should consult the applicable rules of evidence in the particular jurisdiction.

7 Publicly available information

What sources of information about assets are publicly available?

In the US, various public offices and agencies collect information on assets and in some cases make that information available to the public. Depending on the jurisdiction in which the asset is located and asset type, there can be various public records available. Examples of public records include: lien filings, real estate records, property tax records, automobile filings, aircraft filings and business registration filings.

Generally speaking, counsel should investigate the relevant federal and state agencies charged with regulating certain asset types and work from there. It is worth noting that there is no shortage of databases and investigative agencies available to assist counsel in identifying assets. Some major firms and sources are listed below:

- annual and quarterly accounting reports for publicly traded companies;
- business libraries;
- government databases;
- court records and other public filings with national and local public agencies;
- online databases: Datastream, Infocheck, etc;
- company search agencies: Jordan's, Infocheck, ICC;
- credit reference agencies: Dunn & Bradstreet; and
- public records asset locators: KnowX, Westlaw Asset Locator.

In addition, statements and photographs published by defendants on social media platforms may provide clues as to the existence and location of potentially recoverable assets that may provide counsel with a starting point for further investigation.

8 Cooperation with law enforcement agencies

Can information and evidence be obtained from law enforcement and regulatory agencies for use in civil proceedings?

Yes, but to a limited extent and only by use of specific victims’ rights laws. Generally speaking, information collected in the course of a criminal investigation is confidential, even from the victim of the crime. There are limited exceptions that permit a lawyer for a crime victim to access certain types of information in the possession of the government. Asset recovery practitioners should leverage criminal proceedings and law enforcement resources when possible, as this may provide fruitful avenues for recovery while minimising the considerable expense involved in civil litigation. Evidence entered in criminal proceedings may also be useful for civil proceedings, and litigants should utilise discovery mechanisms to gather related information, where possible.

US financial reporting requirements also provide valuable documentation that may become available to an asset recovery practitioner. These requirements implement rigorous record-keeping from the moment the account is opened until years after the account is closed, preserving an accurate and effective asset tracing tool. Civil litigants can attempt to secure relevant information by US discovery mechanisms. Three major types of required reports from financial institutions that may be of use to asset recovery practitioners are Suspicious Activity Reports, Currency Transaction Reports and ‘know your customer’ requirements.

9 Third-party disclosure

How can information be obtained from third parties not suspected of wrongdoing?

Rule 45 of the Federal Rules of Civil Procedure governs discovery including gathering documents or taking testimony from non-parties to a US federal action. It bears noting that a plenary or substantive action must already be pending before a US district court before employing rule 45.

This is not, however, necessarily the case in state court. Certain US states (including New York and Texas, among others) have adopted pre-suit discovery mechanisms that permit prospective plaintiffs to obtain varying degrees of information before initiating a plenary action, provided that the prospective plaintiff can make the requisite showing. In Connecticut, for example, a plaintiff may commence an independent equitable action to obtain discovery for use in another case, regardless of whether that case is already pending. See Berger v Cuomo, 644 A2d 333, 337 (Conn 1994).

In addition, litigants can try to leverage discovery mechanisms to pursue government-required financial institution reports, as discussed above.

10 Interim relief

What interim relief is available pre-judgment to prevent the dissipation of assets by, and to obtain information from, those suspected of involvement in the fraud?

As discussed immediately above, rule 45 of the Federal Rules of Civil Procedure allows subpoenas for testimony and documents to be served upon third parties, well in advance of any judgment.

A temporary restraining order or preliminary injunction may also be a useful tool for civil litigants fearing the dissipation of assets before judgment. Potential litigants should, however, be aware of the relatively high requirements for obtaining such relief, especially if it is sought ex parte. Generally speaking, courts consider the following four elements in granting an injunction:

- whether the plaintiff will be irreparably harmed if the injunction is not issued;
- whether the defendant will be harmed if the injunction is issued;
- whether public interests will be served by the injunction; and
- whether the plaintiff is likely to prevail on the merits.

Notably, some US state jurisdictions, such as Connecticut, have a much lower threshold for prejudgment relief.

It bears noting that civil proceedings should not be viewed as an alternative to criminal proceedings when issues of criminal law are involved. Coordinating with federal prosecutors and local law enforcement agencies, who may also seize or freeze assets, can provide a fruitful avenue for efforts of securing and ultimately recovering assets.

11 Right to silence

Do defendants in civil proceedings have a right to silence?

Yes, the US Fifth Amendment privilege does apply broadly in the civil context, but only if the party reasonably believes that answers could be used in a criminal prosecution or could lead to other evidence that may be so used. Unlike in criminal proceedings, however, a party who exercises his or her Fifth Amendment privilege in the course of a civil proceeding may be subject to the adverse inference that the withheld answer would not have contradicted the opposing party’s evidence.

12 Non-compliance with court orders

How do courts punish failure to comply with court orders?

Failure to comply with court orders can result in the non-compliant party being held in contempt of the court. A contempt finding may have consequences that range from monetary fines to imprisonment.

13 Obtaining evidence from other jurisdictions

How can information be obtained through courts in other jurisdictions to assist in the civil proceedings?

Two major channels for obtaining evidence from foreign jurisdictions include: forfeiture-related bilateral treaties or multilateral treaties; and Letters of Request under the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (Hague Evidence Convention).

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The US has over 70 mutual legal assistance treaties (MLATs) with foreign nations that concern the sharing of evidence. MLATs are typically employed by the US to pursue its own law enforcement interests, and are not directly available to private litigants. Nevertheless, coordination with US authorities can be used in pursuit of information. If the government does make such a request, then private litigants can utilise US discovery mechanisms to attempt to obtain information after information is produced in response to the MLAT request.

The Hague Evidence Convention is also in force in the US, as well as in a long list of other jurisdictions that includes (among others) the Cayman Islands, China, Hong Kong and the United Kingdom. The Convention allows private litigants to seek, by letter of request, evidence from another participating jurisdiction for use at judicial proceedings.

14 Assisting courts in other jurisdictions

What assistance will the civil court give in connection with civil asset recovery proceedings in other jurisdictions?

The US has a variety of channels open to foreign requests for legal assistance in both the civil and criminal contexts. In the civil context, common means include utilising: 28 USC section 1782 (section 1782) and letters rogatory to the US Department of State (DoS) in conjunction with 28 USC section 1781 (section 1781).

Section 1782 allows non-US tribunals, interested parties and litigants to apply for assistance from a US District Court to gather documents or testimony from individuals and companies located in that district. Under the statute, an interested party can make an application (or a foreign proceeding may issue a letter rogatory). If successful, the breadth of discovery allowed under section 1782 is comparable to regular civil discovery in the US.

Generally speaking, three requirements must be met in order to qualify for assistance under section 1782:

- the entity from which the documents or testimony is sought must be located within the district of the court to which the request was made;
- the documents or testimony sought must be for use in a foreign tribunal (which an increasing number of Federal Circuit courts has found to include foreign arbitrations, although the US Supreme Court has yet to formally resolve the issue); and
- the documents or testimony must be requested by the tribunal itself, a litigant to the proceeding, or another interested party.

A less common means by which foreign tribunals may seek evidence is by a letter rogatory pursuant to section 1781. The request must be made directly by the tribunal to the DoS, which in turn sends the request to the tribunal, agency or officer from which the evidence is sought (within the US). The scope of available evidence is the same as that under section 1782, above. Because section 1781 requires that the request be made directly by the tribunal, a better option for an interested party would be to utilise section 1782.

15 Causes of action

What are the main causes of action in civil asset recovery cases and do they include proprietary claims?

There is an enormous number of causes of action for civil recovery within the US. A few common causes of action (eg, fraud, conversion, and conspiracy) are touched on below. Owing to the various jurisdictions under the US federal system and their peculiar laws and statutes, however, counsel must analyse the particular causes of action available within the relevant jurisdiction before initiating any legal action.

Fraud is a cause of action based on the misrepresentation of facts. Although there may be jurisdiction-specific nuances, a prima facie case of fraud in most US jurisdictions requires five elements: a false representation or omission of a material fact; scienter; intention to induce the party claiming fraud to act or refrain from acting; justifiable reliance; and damages.

Conversion is a common law tort action for the wrongful possession or disposition of another’s property, or simply the control of property that seriously interferes with the owner’s use of it. Relief available for conversion is damages. In order to prove conversion, the plaintiff must typically demonstrate that: he or she had an ownership interest in the property before the conversion; the defendant’s use of the property was unauthorised and interfered with the plaintiff’s use of the property; the defendant’s act was contrary to the plaintiff’s right of possession; and that the plaintiff was harmed because of the defendant’s act.

Various US jurisdictions allow for civil conspiracy claims based on vicarious liability based on an independent, underlying tort. These claims are similar to ‘aiding and abetting’ claims in the criminal context. According to the formulation set forth in section 876 of the Restatement (Second) of Torts (which has been adopted as the law in some courts), one is subject to liability for harm that is caused to a third person by the tortious conduct of another if he or she:

- commits a tortious act in concert with the tortfeasor, or pursuant to a common design with him or her;
- knows that the tortfeasor’s conduct constituted a breach of duty and substantially assists or encourages it; or
- gives substantial assistance to the tortfeasor in accomplishing the tortious result and, in so doing, independently breaches a duty that he or she owes to the third person.

Some of the other potential causes of action include, but are not limited to fraudulent transfer claims, civil theft claims and statutory civil racketeering claims.

16 Remedies

What remedies are available in a civil recovery action?

US law allows various remedies in civil recovery actions, depending on the type of action initiated and the jurisdiction in which the action was commenced. For instance, under a conversion action, the plaintiff is typically entitled only to damages. In a fraud action, however, there is a host of potential remedies, including damages, recovery of property by detinue and replevin, and the potential equitable remedies of reformation, constructive trust, accounting, rescission and injunction.

Common types of remedies in civil actions are listed below. Because the list of available remedies may differ materially between jurisdictions, counsel should investigate the potential remedies in each pertinent jurisdiction before bringing an action:

- accounting;
- attachment;
- constructive trust;
- damages;
- injunction;
- punitive damages;
- recovery of consideration;
- recovery of property;
- rescission; and
- reformation.

17 Judgment without full trial

Can a victim obtain a judgment without the need for a full trial?

In some circumstances, a victim in a civil action can obtain a judgment without a full trial. Under federal and state law, summary judgments are not uncommon, especially in the realm of contractual disputes between debtors and creditors. Under rule 56 of the Federal Rules of Civil Procedure, a ‘court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law’.

Similarly, default judgments are allowed if the party against whom a judgment for affirmative relief is sought fails to plead or otherwise defend. See rule 55 of the Federal Rules of Civil Procedure.

18 Post-judgment relief

What post-judgment relief is available to successful claimants?

Post-judgment relief in the US varies according to the subject matter of the case, the language of the statute and the jurisdiction in which the underlying action was brought. Depending on these factors, there may be a wide variety of options available for post-judgment relief.

One option may be the appointment of a receiver, which is not uncommon in federal or state courts. Rule 66 of the Federal Rules of Civil Procedure, for instance, allows the appointment of a receiver when it accords with the historical practice in federal courts or a local rule.

Similarly, post-judgment disclosure may be available under rule 69 of the Federal Rules of Civil Procedure, which allows the judgment debtor or successor in interest to obtain post-judgment discovery from the judgment debtor in aid of execution, under the rules of procedure of the state where the court is located.
19 Enforcement
What methods of enforcement are available?

Asset recovery laws and procedures vary greatly from state to state within the US, and the precise rules differ depending on whether the party that is attempting to recover the assets is a government authority or private litigant. In private actions that are brought in federal courts, the enforcement of money judgments typically draws upon the particular asset recovery laws of the state in which the particular federal court is located. The enforcement of money judgments typically begins with the court’s issuance of a writ of execution. Generally speaking, most jurisdictions also allow for attachment and garnishment.

20 Funding and costs
What funding arrangements are available to parties contemplating or involved in litigation and do the courts have any powers to manage the overall cost of that litigation?

Parties to litigation in the US have historically been able to rely on alternative fee arrangements to pay the legal expenses and fees associated with bringing civil litigation. On the plaintiff’s side, contingency fee agreements (whereby the plaintiff’s attorney’s compensation is derived from a percentage of the damages awarded or settlement (if any) instead of an hourly or task-based rate) are commonplace in civil fraud cases, particularly in those involving racketeering or federal securities laws violations affecting a large number of victims who often join together in a single ‘class’ with joint legal representation. Moreover, companies that might be subject to civil litigation often purchase liability insurance, such as directors and officers (D&O) insurance, that can help pay for the legal expenses of defending against litigation as well as any resulting settlement or judgment.

More recently, large-scale third-party litigation financing (TPLF), in which an outside investor with no other interest in the dispute funds the litigation in exchange for a percentage of the recovery, has become increasingly popular in certain jurisdictions (including, among others, Florida) as an alternate funding mechanism for litigation that is likely to be particularly lengthy, complex or otherwise too expensive even for major law firms to fund on a contingency basis. Notably, however, certain states still subscribe to traditional notions of champerty, maintenance and barratry, and prohibit TPLF on that basis (including, most notably, Delaware, pursuant to whose laws many US corporations are organised and registered). Still others take a blended approach that permits the practice subject to varying degrees of oversight (such as Maine and Ohio). Importantly, even in those jurisdictions that permit TPLF, the practice may implicate ethical considerations and affect the scope and availability of otherwise applicable privileges and protections. Accordingly, counsel should always take care thoroughly to analyse the applicable rules of professional conduct and pertinent privilege laws in the relevant jurisdiction.

Costs of litigation in the US tend to be higher than those in other jurisdictions. For example, the default rule in the US is that regardless of whether a party wins or loses, it is responsible for paying its own attorney’s fees unless a specific authority (ie, contract or statute) ‘shifts’ those fees to the adversary. Although a fair number of federal and state statutes fall within this exception and entitle the ‘prevailing’ party to recover reasonable attorney’s fees from its adversary, it is not always clear which, if any, party has ‘prevailed’ pursuant to a particular litigation outcome.

Additionally, at the beginning of the litigation, the court on its own initiative may impose reasonable limits on discovery and motion practice, including a requirement that attorneys submit an estimate of the hours that they anticipate the case will require. If the attorneys expend more time than the estimate, than the court may presume that the overage is unreasonable and seek to exclude it from any shifting of fees.

Criminal asset recovery

21 Interim measures
Describe the legal framework in relation to interim measures in your jurisdiction.

Depending on the subject matter of the criminal activity and related statutes, the government is allowed very broad interim measures upon suspicion of crime. As discussed in more depth below, forfeiture proceedings provide the government broad discretion in seizing assets as well as proceeds of crime. Interim measures are especially powerful under the provisions of money laundering and anti-terrorism statutes. Under the US Patriot Act, for instance, the US has the ability to also issue a ‘pre-trial restraining order or take any other action necessary’ to ensure the property is available to satisfy a judgment. See 18 USC section 1956(b)(j). This also includes orders directed at criminal defendants to cause property worldwide to be brought into the US for preservation pending the resolution of legal proceedings.

22 Proceeds of serious crime
Is an investigation to identify, trace and freeze proceeds automatically initiated when certain serious crimes are detected? If not, what triggers an investigation?

No. Typically, the asset forfeiture specialists in the appropriate prosecutor’s office have to be staffed on the matter, and that usually happens as a result of insistence by the victim’s private attorneys. Once adequate personnel resources are allocated, the process can work very well as there is substantial legal infrastructure to support asset freeze and recovery efforts that run in parallel with criminal prosecutions. The US has an array of criminal statutes covering transactions involving the proceeds of crime or that are structured to prevent such transactions from being discovered. Complementing these laws, the US has imposed a series of reporting requirements on institutions in an effort to identify potentially criminal transactions. These requirements are central to the US’ enforcement activities, and prompt enforcement actions. Victims of crime can also coordinate with relevant authorities to spur investigation.

23 Confiscation – legal framework
Describe the legal framework in relation to confiscation of the proceeds and instrumentalities of crime.

There are three types of asset confiscation (or ‘forfeiture’ procedures available to the government under federal US law: administrative, civil and criminal. In terms of prevalence, administrative forfeitures are by far the most common, followed by civil, then criminal.

Administrative forfeitures are executed by government agencies and apply only to uncontested cases, which require no prosecutor or court. Once the property has been seized, the seizing agency commences the proceeding by sending notice of its intent to anyone with a potential interest in the property. This notice is typically distributed by publishing a notice in a newspaper. If no one contests the forfeiture by filing a claim within the specified time period, then the agency enters a declaration of forfeiture, which in practice has the same effect as a judicial order. If someone files a claim, the government may choose to pursue a civil or criminal forfeiture.

In civil forfeitures, the action is taken in rem against property that was derived from committing, or was used to commit, a criminal offence. Because the action is against the property itself, the owner’s culpability is irrelevant to the decision of whether it is forfeitable, and the action may be filed before, after, or even if there is no indictment filed at all. The owner, or any other third party, must affirmatively intercede to protect his or her interest in the property.

Civil forfeiture actions are procedurally akin to other civil cases, with the government filing a verified complaint alleging that the at-issue property is subject to forfeiture pursuant to the relevant statute, and claimants are required to file claims within a certain period of time. The civil forfeiture procedure is governed by 18 USC section 983 and Supplemental Rule G of the Federal Rules of Civil Procedure. The process is also described in detail in chapters 3 to 14 of Stefan D Cassella, Asset Forfeiture Law In the United States (New York, Juris 2007).

The government succeeds in its civil forfeiture action if it establishes a nexus between the property and a criminal offence by a preponderance of the evidence. Importantly, the government may seek civil forfeiture actions concurrently with criminal forfeiture actions, and no criminal conviction is necessary to support a civil forfeiture. Moreover, prosecutors may change their criminal forfeiture action into a civil forfeiture action.

Unlike civil forfeiture, criminal forfeiture proceeds from a sentence in a criminal case. Accordingly, it may be conceptualised as an action taken in personam against a defendant (rather than in rem against the property itself). The specific criminal statute pursuant to which the action is brought determines which types of forfeiture are available in a given case.

Notably, because it is an in personam proceeding, criminal forfeiture only applies to the defendant’s interest in a particular piece of property. If third parties have an interest in that property, then those rights will be
considered in an ancillary proceeding that follows the entry of the forfeiture order against the defendant’s interest. See 21 USC 833(m). Third-party rights are further discussed in question 27.

Procedurally, at the underlying criminal trial, no mention is made of the forfeiture until and unless the defendant is convicted. If the defendant is convicted and the forfeiture is contested, then the court will hear additional evidence and argument before instructing the jury on how to determine whether the government sufficiently has proven the facts upon which the forfeiture claim is predicated. To prevail, the government must establish by a preponderance of the evidence the requisite nexus between the property and the crime. See rule 32.2(b) of the Federal Rules of Criminal Procedure; see also United States v. Tracy, 639 F3d 32, 48 (2d Cir 2011) (reiterating that because criminal forfeiture is part of the sentencing phase, the government need only prove the forfeiture allegations by a preponderance of the evidence).

24 Confiscation procedure

Describe how confiscation works in practice.

In the US, confiscation procedure is applicable in criminal and non-conviction based confiscation. In criminal confiscation, following conviction, a defendant’s interest in a property (either the proceeds of an offence or the property used in commission of the offence) is forfeited to the US as part of the sentence. In non-conviction based confiscations (civil forfeitures), the action is taken against the property, not the criminal defendant. In pursuing the confiscation, the US does not need a criminal conviction. If the government succeeds in its forfeiture action, then the underlying property is typically either returned to claimants with ownership interest in the property or preserved until the rightful owners claim the property.

25 Agencies

What agencies are responsible for tracing and confiscating the proceeds of crime in your jurisdiction?

The US has many agencies, on the federal, state and local levels, through which it operates to trace and confiscate the proceeds of crime. Below are some major federal agencies supporting asset recovery:

- the Department of Justice (DoJ), Criminal Division, Asset Forfeiture and Money Laundering Section;
- the DoJ, Criminal Division, Office of International Affairs (OIA);
- the Department of Homeland Security, Immigration and Customs Enforcement (ICE), Homeland Security Investigations;
- the DoJ, Federal Bureau of Investigation (FBI);
- the Department of the Treasury, Financial Crimes Enforcement Network;
- the US Internal Revenue Service; and
- the US Securities and Exchange Commission.

26 Secondary proceeds

Is confiscation of secondary proceeds possible?

This is possible in most instances. The government must consult the applicable criminal statute to determine what, if anything, is subject to forfeiture. There are federal statutes that do not provide for forfeiture of secondary proceeds, but others sweep more broadly. For example, 18 USC section 981(a)(1)(G) permits the government to confiscate virtually all assets of a person who is engaged in planning, perpetrating or concealing any terrorism, and 18 USC section 1963(a)(2)(D) permits the government to confiscate ‘all property or contractual right[s] of any kind afford[ing] a [RICO] defendant’ a source of influence over’ the racketeering enterprise.

27 Third-party ownership

Is it possible to confiscate property acquired by a third party or close relatives?

This depends on the circumstances of the third party’s ownership interest and the nature of the property. In general, forfeiture of third party interests is limited to situations involving property that was fraudulently transferred, is illegal to possess (ie, contraband) or is tainted by the criminal conduct (for example, property that constitutes proceeds of the criminal activity, that is derived from such proceeds; that was used in the commission of the crime; or that was otherwise used to facilitate the criminal activity).

Third parties may have defences to such confiscation attempts. Such defences ordinarily turn on whether the third parties were on adequate notice of the cloud on title (or of other facts that would render the property forfeitable); whether they received the property in exchange for the provision of adequate consideration (ie, fair value); and whether the otherwise forfeitable interest pertains to a primary residence.

28 Expenses

Can the costs of tracing and confiscating assets be recovered by a relevant state agency?

Yes. The Comprehensive Crime Control Act of 1984 established the DoJ Assets Forfeiture Fund, which receives the proceeds of forfeiture and aids in paying the costs associated with such forfeitures. The DoJ may also pay amounts to other agencies for assistance in forfeiture cases. Equitable sharing payments reflect the degree of direct participation in law enforcement efforts resulting in forfeiture.

29 Value-based confiscation

Is value-based confiscation allowed? If yes, how is the value assessment made?

Yes. If the forfeitable property has been dissipated, has been commingled with non-forfeitable property from which it cannot be severed, has been placed beyond the court’s jurisdiction, or cannot be found through the exercise of due diligence, then US federal law empowers the court to order the forfeiture of substitute assets of the defendant that are equal in value to the original property. See, for example, 21 USC section 833(p); 18 USC section 1965(m). Value assessments are typically made via expert testimony.

30 Burden of proof

On whom is the burden of proof in a procedure to confiscate the proceeds of crime? Can the burden be reversed?

The burden of proof in actions brought under any civil forfeiture of any property is for the government to establish, by preponderance of the evidence, that the property is subject to forfeiture. See 18 USC section 983(c)(i). Similar burdens apply to private claimants seeking to recover such proceeds under civil fraud theories. Under criminal forfeiture, the crime must be proven beyond a reasonable doubt. The forfeiture of the property only requires showing a preponderance of the evidence. Once established, the burden shifts to the defendant to prove otherwise.

31 Using confiscated property to settle claims

May confiscated property be used in satisfaction of civil claims for damages or compensation from a claim arising from the conviction?

Yes, this is routinely done. In criminal cases, much time and effort is expended to ensure that the wrongdoer’s assets are preserved pending trial, so that they remain available for civil claimants. See 18 USC section 981(e)(6) and 21 USC section 833(i) (authorising the government to retain or transfer forfeited property as restoration, in civil and criminal forfeiture cases, to the victims of the underlying crime).

US remission and restoration procedures provide a compensatory mechanism to victims of crime through which to access proceeds of forfeitures in order to cover or offset losses incurred as a result of the crime. See 28 Code of Federal Regulations (CFR) section 9.4.

32 Confiscation of profits

Is it possible to recover the financial advantage or profit obtained through the commission of criminal offences?

As discussed above, a prosecutor looking into forfeiture options needs to consult the applicable statute and the options for forfeiture associated with it. Some criminal statutes do not provide for any forfeiture, while others allow for the forfeiture of proceeds or the instrumentalities (ie, property that facilitated the commission of the crime). One of the most often-used statutes for forfeiture of proceeds of crime is 18 USC section 981(a)(1)(C), which lays out a broad list of over 200 applicable criminal offences that includes fraud, bribery, embezzlement...
Update and trends

New York has long been an important jurisdiction in which to pursue the restraint and recovery of assets based on a money judgment, forfeiture order or other obligation. The general attractiveness of this jurisdiction to creditors is due to a combination of factors, including the presence in New York of many of the world's financial institutions, as well as certain substantive and procedural features of law. For example, New York law permits a judgment creditor, through counsel, to issue restraining notices and levies. These have the effect of court orders freezing or sequestering the debtor's assets held or received in the future (up to one year) by any party (a garnishee) that is subject to New York jurisdiction. Such notices and levies enable a garnishee to transfer a debtor's assets directly to a creditor. New York law also permits a judgment creditor to obtain, by summary proceeding, turnover orders against debtors and garnishees that require the parties and garnishees to deliver to the creditor the assets of the debtor. This includes any debts that are coming due to the benefit of the debtor, which may be captured through court-ordered periodic payments to the creditor. If the debtor fails to make the court-ordered payments, then he or she may be subject to a finding of contempt or the appointment of a receiver, or both.

A hot topic in New York's enforcement regime, over which the courts have been sharply divided (and in which debtors, creditors and international financial institutions are keenly interested), is what, if any, substantive or procedural effects the common law 'separate entity rule' have on the applicability of New York's enforcement devices to debtors' 'foreign' bank accounts. The separate entity rule is a vestige of the common law pursuant to which branches of a single bank are treated as separate legal entities for certain purposes. Traditionally, the rule limited the effect of any pre-judgment attachment in personam to those accounts that were maintained at the specific branch of the bank on which the writ of attachment was served. The rule arose prior to the advent of modern computer systems, at a time when it would have been impractical for a bank to constantly report to all of its branches the status of an account that was held at one branch. This type of reporting would, of course, have been necessary to make a restraint that was issued to one branch of the bank effective against an account that was maintained at another branch.

Over time, some courts elastificed the separate entity rule and interpreted it to place all out-of-state bank accounts beyond the reach of any New York attachment or garnishment. In some cases, courts even concluded that out-of-state bank accounts could not be reached by in personam injunctions against banks that were before the court in adversary proceedings. The New York Court of Appeals v Bank of Bermuda Ltd, 12 NY3d 331, 339, 911 NEXd 825, 829 (2009). Koehler involved a judgment creditor’s petition for the turnover of certificates evidencing shares of stock that the judgment debtor held in a Bermuda corporation. The stock certificates were physically located in Bermuda, within the possession of the Bank of Bermuda Limited (BBL) to which the judgment debtor had pledged the shares as collateral for a loan. The judgment creditor served his petition upon an officer of a wholly owned subsidiary that BBL operated in New York. Ultimately, the trial court dismissed the petition because, in its view, a New York court cannot attach property that is not within the state’ (Koehler, 12 NY3d at 337; 911 NEXd at 828).

The New York Court of Appeals reversed. In so doing, it confirmed the general principle that if a debtor or garnishee is subject to personal jurisdiction in New York, then New York courts may rely on New York’s substantive and procedural law to order that debtor or garnishee to turn over any target asset, regardless of where the asset is physically located. The Court of Appeals based this ruling on article 52 of New York’s Civil Practice Law and Rules, which does not contain any ‘express prohibition’ on the turnover of certificates evidencing shares of stock held in a foreign entity. Moreover, the Court of Appeals confirmed this option just last year in Commonwealth v the Northern Marianas Islands v Canadian Imperial Bank of Commerce, 2013 WL 1798585 (NY Sup Ct 2013). Notwithstanding the uncertainty spawned by Koehler, one thing is clear: because of the question certified by the Second Circuit, the depth of the split of authority, the volume of pertinent litigation, and the significance of the interests at stake, it is likely that the New York Court of Appeals will bring clarity to at least some of these issues soon. When it does, we expect that it will hold that to the extent that the separate entity doctrine remains viable at all in the post-judgment context.

The analysis, however, is not so simple. In fact, Koehler does not even mention – much less specifically purport to abrogate – the separate entity rule. Presumably, this is because the record did not squarely implicate it: after all, BBL ultimately consented to personal jurisdiction in New York, thereby conferring upon the court the power to order BBL to turn over the stock certificates that it possessed in Bermuda (Koehler, 12 NY3d at 336; 911 NEXd at 827). Koehler has thus yielded an ever-deepening split of authority regarding the continued viability of the separate entity rule in the post-judgment context. See, eg, Motorola Credit Corp v Uzan, 978 FSupp2d 205, 211 (SDNY 2013) (“Thereafter the separate entity rule continues to apply to post-judgment enforcement, only to reach differing conclusions’); Tiffany (NJ) LLC v Dong, No. 11 Civ 2183 (BDL) (FM), 2013 WL 4046380, at ‘1 (SDNY 9 August 2013) (“There is a split of authority as to whether Koehler abrogates the separate entity rule when a judgment creditor seeks to compel a garnishee in New York to turn over assets of the judgment debtor outside New York’s territorial boundaries’). Compare also, eg, JW Oilfield Equip LLC v Commerzbank AG, 764 FSupp2d 587, 593 (SDNY 2011) (“New York courts will not apply the separate entity rule in post-judgment execution proceedings’), with, eg, Parbuk II AS v Heritage Maritime SA, 35 Miscd 325, 239 n.3, 935 NYS2d 838, 839 n.3 (NY Sup Ct 2011) (“In declining to apply the separate entity rule, the court in JW Oilfield Equip stated that ‘Koehler indicates that New York courts will not apply the separate entity rule in post-judgment execution proceedings’”). This continuing effect does the common law ‘separate entity rule’ have on international financial institutions are keenly interested), is what, if any, substantive or procedural effects the common law ‘separate entity rule’ have on the applicability of New York’s enforcement devices to debtors’ ‘foreign’

The analysis, however, is not so simple. In fact, Koehler does not even mention – much less specifically purport to abrogate – the separate entity rule. Presumably, this is because the record did not squarely implicate it: after all, BBL ultimately consented to personal jurisdiction in New York, thereby conferring upon the court the power to order BBL to turn over the stock certificates that it possessed in Bermuda (Koehler, 12 NY3d at 336; 911 NEXd at 827). Koehler has thus yielded an ever-deepening split of authority regarding the continued viability of the separate entity rule in the post-judgment context. See, eg, Motorola Credit Corp v Uzan, 978 FSupp2d 205, 211 (SDNY 2013) (“Thereafter the separate entity rule continues to apply to post-judgment enforcement, only to reach differing conclusions’); Tiffany (NJ) LLC v Dong, No. 11 Civ 2183 (BDL) (FM), 2013 WL 4046380, at ‘1 (SDNY 9 August 2013) (“There is a split of authority as to whether Koehler abrogates the separate entity rule when a judgment creditor seeks to compel a garnishee in New York to turn over assets of the judgment debtor outside New York’s territorial boundaries’). Compare also, eg, JW Oilfield Equip LLC v Commerzbank AG, 764 FSupp2d 587, 593 (SDNY 2011) (“New York courts will not apply the separate entity rule in post-judgment execution proceedings’), with, eg, Parbuk II AS v Heritage Maritime SA, 35 Miscd 325, 239 n.3, 935 NYS2d 838, 839 n.3 (NY Sup Ct 2011) (“In declining to apply the separate entity rule, the court in JW Oilfield Equip stated that ‘Koehler indicates that New York courts will not apply the separate entity rule in post-judgment execution proceedings’”). This continuing effect does the common law ‘separate entity rule’ have on international financial institutions are keenly interested), is what, if any, substantive or procedural effects the common law ‘separate entity rule’ have on the applicability of New York’s enforcement devices to debtors’ ‘foreign’ bank accounts. The separate entity rule will remain a source of both significant risk and opportunity for parties and practitioners.

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and theft (among others). Statutes regarding drug enforcement, money laundering, RICO and terrorism further augment the forfeiture authority.

33 Non-conviction based forfeiture
Can the proceeds of crime be confiscated without a conviction? Describe how the system works and any legal challenges to in rem confiscation.
Yes, see questions 23 and 29.

34 Management of assets
After the seizure of the assets, how are they managed, and by whom? How does the managing authority deal with the hidden cost of management of the assets? Can the assets be utilised by the managing authority or a government agency as their own?
The US Marshals Service (the USMS) is the primary authority over management and disposal of seized assets in the US. The authority of the US Attorney General to dispose of forfeited real property and warrant title was delegated to the USMS pursuant to 28 CFR section 0.111(f).
Generally speaking, DoJ personnel may not use or allow others to use property following seizure and pending forfeiture, except in circumstances where the use of equipment under seizure is necessary to maintain the property if the property is a seized business or ranch.
In addition, DoJ employees are generally prohibited from purchasing or using any property forfeited to the government, even if the property was purchased by a spouse or a minor.
In some circumstances, in order to minimise storage and management costs, the DoJ may ask state and local agencies to serve as substitute custodians of the property, pending forfeiture. This is typical in the context of motor vehicles. Alternatively, the DoJ may enter storage or maintenance agreements with local agencies for the storage, security and maintenance of the assets in custody.

35 Making requests for foreign legal assistance
Describe your jurisdiction’s legal framework and procedure to request international legal assistance concerning provisional measures in relation to the recovery of assets.
The US is signatory to over 70 MLATs with other nations providing a wide breadth of foreign legal assistance, and can also seek evidence by submitting a letter rogatory with a foreign court with specific countries. The OIA within the DoJ is the central US authority for MLAT requests and coordinates all international evidence gathering.

36 Complying with requests for foreign legal assistance
Describe your jurisdiction’s legal framework and procedure to meet foreign requests for legal assistance concerning provisional measures in relation to the recovery of assets.
The US has a variety of channels open to foreign requests for legal assistance under letters of request and letters rogatory under section 1781, as well as relevant MLATs. The US responds to MLAT requests pursuant to section 1782 and 18 USC section 3521, even in cases where there is no existing treaty relationship. The legal requirements for assistance are laid out within the applicable bilateral or multilateral treaty, as well as the grounds for refusals of assistance. See, for example, article 46 of the Merida Convention, article 7 of the Vienna Convention and article 18 of the Palermo Convention.
The OIA executes MLAT requests through law enforcement authorities including: US Attorneys’ Offices, ICE, the US Secret Service, the FBI, the USMS, the DoJ and Interpol.
Common provisional measures of enforcement of foreign requests for freezing, seizing and restraint orders are all covered by 28 USC section 2467.

37 Treaties
To which international conventions with provisions on asset recovery is your state a signatory?
The US is able to provide broad support in response to requests from foreign authorities regarding asset recovery under relevant treaties. These treaties provide a potentially quick mechanism for exchanging information regarding suspects subject to criminal investigations. The DoS regularly publishes a full list of treaties in force, which can be found on the DoS website.
The major treaties regarding asset recovery are as follows:
• the Merida Convention;
• the Organisation for Economic Co-operation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions;
• the Inter-American Convention against Corruption and Inter-American Convention on Mutual Assistance in Criminal Matters;
• the Inter-American Convention Against Terrorism and Inter-American Convention on Letters Rogatory as well as Additional Protocol to the Convention; and
• the Vienna, Palermo and Financing of Terrorism Conventions.

38 Private prosecutions
Can criminal asset recovery powers be used by private prosecutors?
Private practitioners cannot directly use criminal asset recovery powers in the US. However, US victims’ rights legislation allows for broad cooperation and coordination between private practitioners and relevant authorities in obtaining compensation for crime victims. Remission and restoration proceedings, by which funds seized by the sovereign for its own account under asset forfeiture laws are given back to private victims, are examples of how civil practitioners can reap the fruits of criminal recovery efforts. See 28 CFR part 9 (governing remission or mitigation of civil and criminal forfeitures).
Cayman Islands

James Corbett QC and Pamella Mitchell
Kobre & Kim LLP

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

With exceptions limited only to Australia (see question 23) as well as foreign arbitral awards, the Cayman Islands has not itself entered into any international treaties for the reciprocal recognition of enforcement of foreign judgments.

Of note, however, is that as the Cayman Islands is a British overseas territory, the United Kingdom has authority to extend treaties ratified on its behalf to the Cayman Islands by Order in Council. With the exception of the Convention on the Recognition of and Enforcement of Foreign Arbitral Awards (the New York Convention), no such treaty has been extended to the Cayman Islands.

2 Intra-state variations
Is there uniformity in the law on the enforcement of foreign judgments among different jurisdictions within the country?

Not applicable.

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

Although a statutory regime exists in the Cayman Islands for the enforcement of foreign judgments, reciprocity under the Foreign Judgments Reciprocal Enforcement Law (1996 Revision) (the 1996 Law) applies only between the Cayman Islands and judgments from supreme courts in various Australian states and territories, and the Australian federal and high courts. With respect to judgments arising from elsewhere, it is necessary to have recourse to common law principles of enforcement of foreign judgments.

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

Not applicable.

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

Under the 1996 Law, applications for registration of an award must be made within six years of the date of the judgment or, where there have been appeals, the date of the last judgment.

6 Types of enforceable order
Which remedies ordered by a foreign court are enforceable in your jurisdiction?

The types of foreign judgment that may be enforced in the Cayman Islands are traditionally limited to debt or specific sums of money. In Bandone v Sol Properties (2008) CILR 301, regarding an application for rectification of the register of a Cayman Islands company before the Cayman Court following a foreign judgment, it was confirmed that enforcement of in personam foreign judgment is not confined to debts of specific amounts. The court confirmed that non-money judgments may now be recognised and enforced through equitable remedies should the principle of comity require it.

When deciding whether or not to enforce a non-money judgment, in the exercise of its discretion the court will have regard to general considerations of fairness but will not re-examine the merits of the underlying case. Under the 1996 Law, the court must be satisfied that:

- the foreign court had personal jurisdiction over the defendant;
- the foreign judgment was final and conclusive; and
- the enforcement of such a judgment would not be contrary to public policy.

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

A party seeking to enforce a foreign judgment pursuant to the common law, the Foreign Judgments Reciprocal Enforcement Law or the Foreign Arbitral Awards Enforcement Law, must bring an action in the Financial Services Division of the Cayman Islands Grand Court.

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

In the limited scenarios where it is applicable (see question 7), section 4 of the 1996 Law requires judgments to first be registered or recognised before they can be enforced and take effect as if they were a judgment of a Cayman Islands court. In order to register a judgment, the claimant must apply to the Cayman Islands Grand Court, who will then make a determination as to whether that judgment meets the requirements for registration. Once a Cayman judgment has been obtained, a number of execution options are potentially available such as writs of fieri facias, garnishee proceedings and charging orders.

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

A party is only permitted to challenge the authority of or basis for the foreign judgment on the limited grounds set out in section 6 of the 1996 Law. These grounds are as follows:
that the court issuing the judgment did not have valid jurisdiction to pronounce the judgment;
- that the judgment debtor, being a defendant in the proceedings in the original court, did not receive proper notice of those proceedings in time to defend the proceedings and did not appear;
- that the foreign judgment was obtained by fraud;
- that the enforcement of the judgment would be contrary to public policy; or
- that the rights under the judgments are not vested in the person by whom the application was made.

The court may exercise its discretion to set aside the registration of the judgment if the matters in dispute in the proceedings had already been the subject of a final and conclusive judgment by a court having jurisdiction in the matter.

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

To the extent that the foreign judgment is one to which the 1996 Law applies, a defendant may prevent foreign judgment enforcement proceedings by obtaining an order to set aside a registration on the basis of the grounds described above.

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

Section 4 of the 1996 Law sets out three basic requirements that must be satisfied for a foreign judgment to be registered in the Cayman Islands:
- the judgment must have been from one of the jurisdictions to which 1996 Law applies;
- the application for registration falls within the specified time period; and
- at the date of the application, the judgment must not have been wholly satisfied or enforceable in the foreign country.

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

No. Factors that are to be taken into consideration are specified and mandatory.

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

No.

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

According to section 6 of the 1996 Law, the Cayman Islands Grand Court must examine whether the foreign court had the required jurisdiction over the judgment debtor and will refuse to register a judgment where it is proven that the original court lacked the required jurisdiction.

To determine that the original court had the required jurisdiction, the court will need to be satisfied that the judgment debtor:
- voluntarily submitted to the jurisdiction of the court as evidenced by his or her voluntarily appearing in the proceedings;
- agreed, prior to the commencement of the proceedings, that he or she would submit to the jurisdiction of that court in respect of the subject matter of the proceedings;
- at the time when the proceedings were instituted, was resident in the country of that court or carried on business there; and
- was a plaintiff in, or counterclaimant in, the proceedings in the original court.

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

Where the issue of subject-matter jurisdiction is raised, the court needs to be satisfied that the foreign court had jurisdiction. The foreign court will be deemed to have jurisdiction where:
- the court has personal jurisdiction over the parties if any of the requirements for personal jurisdiction, as expressed above, are met; and
- the subject matter is movable or immovable property and the property was at the time of the proceedings in the original court situated in the country of that court.

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

The 1996 Law requires a judgment debtor to have properly been served for that judgment to be registered in the Cayman Islands. Service must be effected in accordance with the requirements of the foreign country. Failure to provide sufficient notice forms one of the bases upon which enforcement of an award may be refused if the person against whom an award was made was not given proper notice of the appointment of an arbitrator or given notice of arbitration proceedings.

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

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

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

According to section 6 of the 1996 Law, if a foreign judgment has been obtained by means of fraud, the Grand Court will refuse to register that judgment. So, in circumstances where fraud is alleged, the Cayman Islands Grand Court will carefully examine whether a foreign court has been misled.

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

The Cayman Islands Grand Court will have regard to whether public policy has been impeached. However, the scope is very narrow and refusal on the grounds of public policy will only arise where there has been a breach of the most basic notions of morality and justice.

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

If a foreign judgment is inconsistent with a previous final and conclusive decision of a Cayman court, the foreign court or a competent court of a third jurisdiction, it will not be recognised.
21 Enforcement against third parties
Will a court apply the principles of agency or alter ego to enforce a judgment against a party other than the named judgment debtor?
No.

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

Except where the defendant has voluntarily submitted to the jurisdiction of the foreign court by voluntarily participating in proceedings, or he or she was the plaintiff or counterclaimed in the proceedings, the Cayman Islands Court will refuse registration of a foreign judgment where the bringing of the proceedings in the foreign court is contrary to an agreement between the parties that the dispute was to be settled by alternative dispute resolution.

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

Judgments of any superior court in Australia and its external territories will be registered in the Cayman Islands provided that they meet the requirements for registration. Once registered, those judgments may be treated as though they are Cayman Islands judgments and enforced in the same manner. Judgments from other jurisdictions are not directly enforceable in the Cayman Islands and the judgment must be sued upon in the Cayman Islands Grand Court. However, this will not involve a re-litigation of the issues previously decided in the foreign court.

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

The Cayman Islands Court will only register certain types of judgments, for example money judgments. If, on the application for registration of a judgment, it appears to the Cayman Islands Court that the judgment is in respect of a variety of different matters (i.e., to those that can be registered) some, but not all, of the provisions are of such a nature that if they were contained in separate judgments it could properly be registered, the judgment may be registered in respect of those provisions but not the others.

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

Because the judgment will be enforced in the same manner as a judgment of the courts of the Cayman Islands, section 4 of the 1996 Law states that where the judgment is in a currency different from that of the Cayman Islands, the judgment is converted into Cayman Islands dollars, on the basis of the rate of exchange prevailing at the date the judgment was made in the original foreign court.

The foreign judgment may already contain an order for costs, interest or both and, once it is finally determined, may form part of the capital amount of the judgment debt awarded in the Cayman Islands. Even where the foreign judgment contains no award for interest, the Cayman Islands judgment will automatically accrue interest at the standard rate from the date of its award unless the court orders otherwise. In the Cayman Islands, the general principle is that a successful party will recover the fees and cost of the litigation incurred in the islands from the opposing party (often referred to as costs shifting). Such awards are subject to an assessment process or agreed by the losing party before it becomes enforceable as a monetary judgment.
26 Security

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

An application may be made to the Cayman Islands Grand Court to set aside the registration of the judgment. However, the applicant must satisfy the court that an appeal is pending or he or she is entitled to and intends to appeal the original judgment of the foreign court. If he or she is successful, the court may set aside registration of the judgment entirely or it may adjourn the application to permit the defendant sufficient time to have the appeal disposed of.

Where the original decision of the foreign court is affirmed, if the registration of the foreign judgment had been set aside, a new application may be brought for registration. Additionally, there is a right of appeal to the Cayman Islands Court of Appeal.

27 Enforcement process

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

Once the foreign judgment is registered in the Cayman Islands it may be enforced in the same manner as any other judgment of a Cayman Islands court.

28 Pitfalls

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

Not applicable.
Civil asset recovery

1 Legislation
What are the key pieces of legislation in your jurisdiction to consider in a private investigation?

BVI laws are composed of English common law, equitable principles, locally enacted legislation and some English statutory law. English common law was extended to the BVI by virtue of the Common Law (Direction of Application) Act. A decision at the Privy Council level in respect of any Eastern Caribbean Court of Appeal decision on BVI law is binding. Below that level of authority, decisions of English higher courts are simply highly persuasive. Other Commonwealth jurisprudence (Australia, New Zealand, Canada and others) is also often relied on. English statutes having force in the BVI include:

- West Indies Associated States Supreme Court Act;
- Supreme Court of Judicature (Consolidated) Act 1925; and
- Reciprocal Enforcement of Judgments Act 1921.

Other BVI-specific statutes of potential relevance include the BVI Business Companies Act 2004 and the BVI Evidence Act 2006.

In the asset recovery context, it is worth noting the Privy Council (hearing a Cayman Islands appeal in 2005) concluded that section 122 of the Bankruptcy Act 1914 – which requires courts in former colonial or Commonwealth territories to assist each other in bankruptcy matters – was still in force in British Overseas Territories despite its repeal in England (Al Sabah and Another v Grupo Torres SA, [2005] UKPC 3).

2 Parallel proceedings
Is there any restriction on civil proceedings progressing in parallel with, or in advance of, criminal proceedings concerning the same subject matter?

There is no statutory bar, but rather discretion to stay (ie, suspend) the civil proceedings. However, BVI would follow the line of cases commencing (at least in modern times) with Jefferson Ltd v Bhetcha, [1979] 1 WLR 898 at 904 and culminating in the English Court of Appeal decision in Attorney General of Zambia v Meer Care & Desai, [2006] EWCA Civ 390 and in which the defendants facing concurrent civil and criminal proceedings (the civil proceedings taking place in England) were given the protection of the civil proceedings being ‘ring-fenced’ such that nothing in those civil proceedings could be used against the defendants in the criminal context. See also Swallow v Commissioners for Revenue and Customs, [2010] UKFTT 481 (TC), John Walters QC.

The primary issue in Attorney General of Zambia (being whether the claimant could be trusted to abide the undertaking to ‘ring-fence’) would likely not arise in the BVI context where both criminal and civil proceedings were progressing within the BVI.

Attempts to stay civil proceedings on the basis of concurrent criminal investigations have been seen in the Turks and Caicos Islands, following the commission of an inquiry by Sir Robin Auld. Such attempts have failed: see Attorney General of the Turks & Caicos Islands v Salt Cay Devo Limited and others, CL53/2010, TCI Supreme Court, as well as Attorney General of the Turks & Caicos Islands v Emerald Cay Limited and others, CL192/2010. In the latter case, an application to access the embargoed decision from the former case was supported by the claimant (in that jurisdiction ‘plaintiff’) in both cases but nevertheless was refused. In Emerald Cay and others the definition of the ‘defendant’ in the civil context was narrowly construed (to exclude an unserved defendant facing police interviews under caution), and an order for evidence to be given by videolink was allowed such that the relevant hearing progressed that way in light of expressed fears of arrest in attending in person to give evidence (see also Polanski v Condi Nast, [2005] 1 WLR 637).

3 Forum
In which court should proceedings be brought?
The principal trial court is the Eastern Caribbean Supreme Court (ECSC). In April 2009, a new commercial division of the court was opened in the BVI. Generally, under Part 69A and 69B of the ECSC CPR (Application to the Virgin Islands) (Amendment) Order 2009, subject to a statutory discretion to include other (ie, ‘non-qualifying’) cases, a case is suitable for determination in the Commercial Court if it is a ‘commercial claim’, ie, arising out of the transaction of trade or commerce, and the value of the claim is above US$500,000. The discretion to include cases outside these qualifying criteria is exercised on the basis of the claim still being of a commercial nature and one which warrants being in the commercial list.

The intermediate Court of Appeal is the itinerant appellate division of the ECSC and the ultimate court of appeal is the Judicial Committee of the Privy Council in London, England.

4 Limitation
What are the time limits for starting civil court proceedings?
Cause of action limitation periods are governed by statute and broadly follow the English framework. Thus the statute of limitation will differ depending on the cause of action, as set out in the Limitation Act (Cap 43). For example, the relevant limitation period for claims based in tort or contract is six years; the same limitation period applies for the enforcement of a debt or an award.

Applicable limitation with respect to claims against trustees differs by reference to the way in which such a claim is characterised and whether the trust on which the claimant relies pre-exists the conduct relied on so as to found the cause of action. Where a breach of fiduciary duty in the absence of deliberate concealment is based on the same facts as a claim for either a claim in contract or in tort then the same six year period will apply.

However, where the fiduciary has deliberately concealed facts relevant to the cause of action then the limitation will not apply (for example, an undisclosed interest in a transaction) but considerations of laches (unjustified delay causing prejudice to the defendant in defence of the claim) will still be necessary in respect of consideration of a claim.

5 Jurisdiction
In what circumstances does the civil court have jurisdiction?
How can a defendant challenge jurisdiction?
Freezing orders
Jurisdiction of the courts in the BVI is based on the section 24(l) West Indies Associated States Supreme Court Act and is ordinarily ancillary to the court’s substantive jurisdiction.

In Black Swan and Yukos, the Commercial Court held that it had discretion to grant stand-alone freezing injunctions in support of foreign proceedings where the respondent was subject to the in personam
jurisdiction of the BVI court. A defendant may still challenge jurisdiction on a freezing order based on the principles set out in Yukos, eg, the relief obtained in the main, foreign proceedings would not lead to a judgment that is enforceable against BVI assets owned or controlled by the defendant.

Receivership
Jurisdiction is based on section 24 of the West Indies Associated States Supreme Court Act.

6 Admissibility of evidence
What rules apply to the admissibility of evidence in civil proceedings?
In broad terms, in civil cases the law of evidence of England and Wales has been adopted in the BVI.

In certain cases, Anton Piller orders, or search orders, can be issued to permit a party to a civil litigation to enter such person’s home, office of other premises for the purpose of searching for and preserving evidence that may be destroyed or suppressed.

Section 55 to 62 of the Criminal Procedure Act make admissible:
- hearsay documentary evidence;
- the statement of an unavailable witness who previously made an out-of-court statement;
- the out-of-court statement of an available witness while testifying;
- expert reports; and
- oral opinion evidence.

Evidence is admissible where the relevant requirements under the Evidence Act 2006 are met.

7 Publicly available information
What sources of information about assets are publicly available?
- Company registration – the only publicly available information is:
  - litigation history of a BVI company;
  - its present and historical status;
  - the identity of the registered agent;
  - the place of its registered office;
  - the date when it was incorporated; and
  - the contents of its memorandum and articles of association;
- list of entities regulated by the BVI Financial Services Commission;
- court documents and judgments;
- land registry search: can provide certain details including confirmation of the owner of BVI land or real estate upon application;
- BVI Ship Registry: certain information regarding vessels registered under a BVI flag; and
- disqualified director: registrar of corporate affairs is required to maintain a list of disqualified directors in the Register of Disqualification Orders and Undertakings, which is open to inspection upon payment of a prescribed fee.

8 Cooperation with law enforcement agencies
Can information and evidence be obtained from law enforcement and regulatory agencies for use in civil proceedings?
Since civil proceedings may be conducted in parallel with the criminal investigation and prosecution, the information obtained and promulgated in a public trial can be used to justify civil proceedings subject to the caveats set out in question 2.

The sharing of information during investigative action is at the discretion of the Financial Crimes Unit of the Royal Virgin Islands Police Force and the Financial Investigation Agency, which is primarily responsible for investigating white collar crimes. The BVI Attorney-General also has discretion in such matters, particularly relating to advising the government on requests for information or sharing evidence outside the territory, eg, with intra-national groups such as Interpol.

9 Third-party disclosure
How can information be obtained from third parties not suspected of wrongdoing?
There is no statutory basis for third-party disclosure or pre-action disclosure as is now possible under English procedural law (English Civil Procedure Rules 34.16 and 14.17). The remnant of the old equitable bill of discovery, the Norwich Pharmacal order, is possible in the BVI and most often obtained when a person, through no fault of their own, has become involved in the tortious acts of another and facilitates their wrongdoing. This gives rise to a duty to assist the person who has been wronged by giving them full information, including as to the location of assets (see Al-Rashaid Petroleum Investment Company Limited v TSI Engineering Consulting Company Limited, BVIHCV(Com) 17/2010), and disclosing the identity of the wrongdoers. This is subject to the usual provisos in respect of Norwich Pharmacal relief (including that it be relevant, necessary to enable the assertion of rights and not simply a mechanism for accelerating standard disclosure, and that it follow the 'mere witness rule'). Norwich Pharmacal orders have been made in the BVI in support of foreign proceedings and against the registered agents of respondent companies incorporated in the BVI (see, eg, JSC BTA Bank v Fidelity Corporate Services Limited et al, HCVAP 2010/35; Jeremy Outen et al v Mukhtar Afzijuwon, HCVAP 2011/30) to disclose details of the BVI company’s assets. Note that an equitable remedy, the grant of Norwich Pharmacal relief is subject to the exercise of discretion.

10 Interim relief
What interim relief is available pre-judgment to prevent the dissipation of assets by, and to obtain information from, those suspected of involvement in the fraud?

Freezing orders
These are granted if:
- the applicant has a good arguable case;
- the court uses its discretion to decide whether an order is ‘just and convenient’; and
- the defendant presents a risk of asset flight.

These orders are often coupled with a disclosure order regarding the defendant’s assets to ensure that the freezing order is effective (ie, by which to ‘police’ the order). Orders can be granted ex parte but cannot exceed 28 days. A claimant who successfully obtains an interim freezing order must give an undertaking for damages and costs with the object of compensating the defendants if the claimant ultimately is unsuccessful at the trial and the court should later find that the defendants have suffered loss as a result of the grant of the order.

Appointment of a receiver
There are three requirements for appointment:
- there must be sufficient evidence to show a good arguable case;
- there must be property to be preserved; and
- the claim must not be frivolous or vexatious.

There are two specific cases in which appointment is made:
- where the applicant already has an existing right to the property to be preserved (the claimant must have a good prima facie title and the property that is the subject matter of the proceedings must be in danger if left in the possession or under the control of the party against whom the appointment of a receiver is asked for); and
- where a receiver is appointed to preserve property to ensure its proper management pending litigation to decide the rights of the parties to that property.

The appointment of a receiver is often regarded as a remedy of last resort and they are usually appointed ex parte where the court is faced with allegations of fraud and immediate action is needed to prevent the court’s orders from being rendered futile.

11 Right to silence
Do defendants in civil proceedings have a right to silence?
Privilege against self-incrimination may be available to a defendant pursuant to both the common law and the, as yet, untested provisions within the
Evidence Act. On that basis, the defendant will be able to invoke privilege where a defendant may expose himself to criminal proceedings or, where he has failed to comply with the order, contempt proceedings. As noted in question 2, tensions arise in respect of concurrent civil and criminal proceedings.

12 Non-compliance with court orders

How do courts punish failure to comply with court orders?

Non-compliance with court orders can be punished by holding a party in contempt of the court. This might include a punitive fine, sequestration of assets or even jail time, depending on the seriousness of the non-compliance. Contempt proceedings are ‘quasi-criminal’ in nature, regarding both the standard of proof and the strict observance of procedural requirements, such as personal service of the application to commit to prison.

The recent English Court of Appeal decision in Dar Al Arkan Real Estate Development Co and another v Al Refai and others, [2014] EWCA Civ 715, gave a committal order extra-territorial effect. In this case, the court held that the principle against the extra-territorial application of legislation does not prevent a committal order under the CPR being made against a foreign director who was not within the jurisdiction and cannot be served in the country. The director was resident and domiciled in Saudi Arabia. In the context of asset recovery, a party can apply to commit a company director to prison – wherever in the world the director may be – as a handy weapon to enforce an order or an undertaking against the company. There is not yet a Caribbean equivalent case to Dar Al Arkan.

13 Obtaining evidence from other jurisdictions

How can information be obtained through courts in other jurisdictions to assist in the civil proceedings?

The BVI is a signatory to the March 1970 Convention on Taking Evidence Abroad in Civil or Commercial Matters (see www.hcch.net) and it is pursuant to this convention that ‘letters rogatory’ requests are usually pursued. The proceeding must be civil or commercial in nature and in respect of actual or contemplated proceedings in the BVI. The permissible breadth of such questions would obviously require input from legal practitioners in the receiving state. Typically, where there are asset dissipation issues, such requests are not appropriate because of the notice of such provided to the target of the request.

14 Assisting courts in other jurisdictions

What assistance will the civil court give in connection with civil asset recovery proceedings in other jurisdictions?

BVI courts have the power to stay (ie, suspend) their own proceedings after granting a freezing order so as to permit litigation to be conducted in another jurisdiction.

Under the BVI’s Reciprocal Enforcement of Judgments Act of 1922 (the 1922 Act), final money judgments competently obtained in the High Court in England and Wales, Northern Ireland or the Court of Session in Scotland (extended to the Bahamas, Barbados, Bermuda, Belize, Grenada, Guyana, Jamaica, St Lucia, St Vincent, Trinidad and Tobago, New South Wales (Australia) and Nigeria) can be registered in the BVI if the court is satisfied with registration, and it is made within 12 months of perfection of the judgment.

In cases where a money judgment has been obtained in a country other than those listed under the 1922 Act, the judgment will be treated by BVI courts as the basis for a cause of action at common law called a ‘suit on the civil recovery of assets or even jail time, depending on the seriousness of the non-compliance. Contempt proceedings are ‘quasi-criminal’ in nature, regarding both the standard of proof and the strict observance of procedural requirements, such as personal service of the application to commit to prison.

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where the mixed fund has been used to buy a further asset, the claimant will be able to trace his share in the new asset which may increase or depreciate in value.

Common law claims
The common law equivalent of knowing receipt is a personal (ie, not a proprietary) claim.

It is usually used in more straightforward recovery cases, where the claimant still retains title at the time of its receipt by another party. In the absence of payment of any consideration or a potential change of position defence, a court can order that monies are paid back.

Restitutionary claims arising from unjust enrichment are, like most other common law claims, an allegation of wrongdoing on the part of the recipient. However in respect of restitutionary claims, the recipient must have been one of the wrongdoers. Restitutionary claims are not dependent on tracing into any specific property.

Fraudulent misrepresentation
A fraudulent misrepresentation is a statement of fact made without belief in its truth, knowingly or recklessly made with the intention that it should be acted upon. Bad faith is not a prerequisite to proof of fraudulent misrepresentation. Where a contract has been entered into by reason of fraudulent misrepresentation, the person so induced may rescind the contract, claim damages, or do both.

17 Judgment without full trial

Can a victim obtain a judgment without the need for a full trial?

Yes. Summary judgment is an option under part 15 of the Civil Procedure Rules 2000.

Rule 12.4 of the BVI Civil Procedure Rules provides for an automatic default judgment for failure to file an acknowledgement of service within the prescribed period on a claim for a specified sum of money.

Types of judgment in which declaratory relief is sought (such as declarations of ownership or other legal rights) cannot be obtained on a default basis.

18 Post-judgment relief

What post-judgment relief is available to successful claimants?

Orders for the delivery of information post-judgment are available in a variety of different contexts: for example oral examination of a judgment debtor or of a former director or officer by a liquidator of a company in liquidation. Where a contract has been entered into by reason of fraudulent misrepresentation, the person so induced may rescind the contract, claim damages, or do both.

19 Enforcement

What methods of enforcement are available?

Garnishment
A judgment creditor may obtain payment of a judgment debt from a person who owes money to the judgment debtor, including money in a BVI bank or financial institution.

The court will initially issue a provisional order against the garnishor and debtor and will subsequently consider whether to make a final attachment of debts order at hearing.

Charging orders
A judgment creditor will seek to enforce a judgment against shares in a BVI company held by the debtor by obtaining a charging order over the shares and thereafter making an application for the sale of those shares.

Application is made without notice but must be supported by affidavit evidence.

Writs of possession or execution
These are available upon court order.

The bailiff is then able to enforce judgment against land or goods as the case may be.

20 Funding and costs

What funding arrangements are available to parties contemplating or involved in litigation and do the courts have any powers to manage the overall cost of that litigation?

There are no statutory provisions in place governing the funding of litigation in the BVI, and the BVI Courts have not had occasion to assess the lawfulness of third-party funding arrangements such as conditional fee agreements (CFAs) or damages-based agreements (DBAs). The torts of champerty and maintenance have not been formally abolished as in England and Wales, but it can be expected that BVI Courts would give consideration to the global trends permitting third-party funding of litigation, and CFAs, at least, would be possible. Note that in Hugh Brown & Associates (BVI) Ltd v Kermas Limited (BVIHCV(COM) 2011/13), the Commercial Court was willing to assume, without actually deciding, that there was nothing unlawful about a third-party funding arrangement adopted by the claimant. Although uncommon, it is possible to obtain ATE insurance in the BVI.

Reflecting this trend, the litigation funding market in the BVI is growing.

The courts can manage the costs of litigation through case management orders. Part of the court’s case management functions include considering whether the likely benefits of taking a particular step will justify the cost of taking it (Part 25 of the ECSC Civil Procedure Rules). Part 16 of the CPR gives the court a wide spectrum of powers which could be used to manage costs directly or indirectly in the proceedings. These powers supplement the existing costs rules in the BVI, which cap costs in one of three ways: fixed, prescribed or budgeted costs. Costs are usually prescribed, meaning that a successful defendant will receive a percentage of the value of the claim, and a successful claimant would receive a percentage of the sum recovered. This costs regime often results in under-recovery to the prevailing party and the courts have gone to some lengths to alleviate or circumvent it. Since 2009, updated rules have applied in large commercial cases (ie, those cases heard in the Commercial Division, which could include asset recovery cases), to allow greater recovery to the successful party based on an English-style assessment of costs.

21 Interim measures

Describe the legal framework in relation to interim measures in your jurisdiction.

In 1997 the BVI enacted the Proceeds of Criminal Conduct Act (the 1997 Act), which is now the statutory basis for both prosecuting a criminal offence that results in the financial benefit or gain for a defendant as well as ensuring the preservation of such assets when awaiting the outcome of such prosecutions.

Should there be sufficient evidence and cause, the 1997 Act empowers the court to issue confiscation orders, restrain property and prevent parties from engaging in business with the defendant among other interim measures. Some of the specific sections are described in greater detail in the answers given below.

22 Proceeds of serious crime

Is an investigation to identify, trace and freeze proceeds automatically initiated when certain serious crimes are detected? If not, what triggers an investigation?

There is no automatic trigger. Investigations can be the result of regulatory action taken by the Financial Investigative Authority, when in the course of conducting its duties it detects some serious crime of a financial nature. Similarly, the attorney general can employ the enforcement agencies to initiate an investigation if a situation is referred to its office that merits further action, but there is no automatic trigger.

23 Confiscation – legal framework

Describe the legal framework in relation to confiscation of the proceeds and instrumentalities of crime.

The 1997 Act is the legal basis for granting the court the ability to issue confiscation orders and determines other powers that can be used to effect the confiscation orders.
24 Confiscation procedure
Describe how confiscation works in practice.

Pursuant to section 6 of the 1997 Act, if an offender is convicted of an offence in any proceedings before a court and the court determines that the offender has benefited from any relevant criminal conduct, it shall determine the amount to be recovered in his case and make an order directing the offender to pay the amount determined.

A person benefits from the offence if he obtains property as a result of or in connection with its commission and his benefit is the value of the property so obtained.

The sum that an offender is required to pay by virtue of an order shall be equal to:
- the benefit in respect of which it is made; or
- the amount appearing to the court to be the amount that might be realised at the time the order is made, whichever is the lesser.

25 Agencies
What agencies are responsible for tracing and confiscating the proceeds of crime in your jurisdiction?
- The Director of Public Prosecutions for the BVI government;
- the Financial Crimes Unit of the Royal Virgin Islands Police Force; and
- the Financial Investigation Agency (FIA).

26 Secondary proceeds
Is confiscation of secondary proceeds possible?

Yes. The definition of realisable property at section 3(9) of the 1997 Act includes 'property which, in whole or in part, directly or indirectly represent in his hands the property he received as a result of his criminal conduct'.

Based on this, any property in which a person has an interest as a result of his criminal proceeds would be subject to a confiscation order.

27 Third-party ownership
Is it possible to confiscate property acquired by a third party or close relatives?

No. Section 4 of the 1997 Act catches gifts of the proceeds of crime as it relates to the convicted party, including the value of such gifts in any confiscation order made as against the convicted criminal defendant. The 1997 Act does not provide for a confiscation order to be made against the spouse or cohabitee of that defendant (or other third-party transferee) where such person(s) are not also convicted criminal defendants. It is possible for the confiscation order to be made in respect of the convicted criminal defendant's interest in property in which the spouse or cohabitee holds their own interest.

Instead, recovery as against those transferees would be by way of civil claim (whether on a proprietary or other basis, see above).

Section 11 of the 1997 Act requires the convicted criminal defendant to provide information in the context of any confiscation proceedings, and any failure to cooperate gives rise to adverse inference as to benefit. This adverse inference would not be to the detriment of any third-party transferee.

28 Expenses
Can the costs of tracing and confiscating assets be recovered by a relevant state agency?

The 1997 Act does not address this directly. That said, the 1997 Act does enable the imposition of a fine. There is no statutory or otherwise known direct hypothecation as to the way in which any such fine is applied (for example, there is no equivalent scenario to that of the US Department of Justice participating financially in forfeiture recoveries). In the BVI context, it is possible that the proceeds of a fine (or part thereof) could be applied to defray investigative or prosecutorial costs, but whether this in fact occurs is neither publicly known nor ascertainable.

29 Value-based confiscation
Is value-based confiscation allowed? If yes, how is the value assessment made?

Yes. Pursuant to section 18(1) of the 1997 Act, the court may make a charging order on realisable property for securing the payment to the Crown, where a confiscation order has been made for an amount equal to the value of that property.

30 Burden of proof
On whom is the burden of proof in a procedure to confiscate the proceeds of crime? Can the burden be reversed?

The burden of proof is – and remains throughout – on the prosecuting authorities. Note also that the proof of criminal benefit and also the amount of such benefit is subject to the civil standard of proof (ie, the balance of probabilities, see section 6(9) of the 1997 Act).

31 Using confiscated property to settle claims
May confiscated property be used in satisfaction of civil claims for damages or compensation from a claim arising from the conviction?

No. There is no statutory regime for compensation to the victims of crime, whether from recovered amounts or otherwise.

Note, however, that the information that surfaces from a criminal trial, including a court's determination of guilt, can be used in civil proceedings to make a claim.

32 Confiscation of profits
Is it possible to recover the financial advantage or profit obtained through the commission of criminal offences?

Yes. There is scope for exactly this by the prosecuting authorities: sections 16 to 18 of the 1997 Act provide the basis for restraint or charging orders so as to freeze property where there are pending proceedings.

33 Non-conviction based forfeiture
Can the proceeds of crime be confiscated without a conviction?

Describe how the system works and any legal challenges to its confiscation.

No. Confiscation of criminal proceeds under the BVI statutory regime requires a criminal conviction (see section 6(1) of the 1997 Act). However, there is legislation subsidiary to the Criminal Justice (International Cooperation) Act 1991, namely the Criminal Justice (International Cooperation) Enforcement of Overseas Forfeiture Orders) Order 1996 (liaising with designated countries in relation to particular ‘triggers’ at schedules 1 to 3 thereof) and which creates a regime where BVI enforcement of non-BVI forfeiture orders is feasible in specific circumstances.

An alternative to domesticating the non-BVI forfeiture order would be civil proceedings in the BVI on the basis of the non-BVI order.

Where, as is very often the case, extremely prompt action is required preconviction to safeguard assets pending a criminal trial and anticipated confiscation, a restraint order can be obtained pursuant to section 17 of the 1997 Act and this can be an application made ex parte – see section 17(1)(a)(b).

34 Management of assets
After the seizure of the assets, how are they managed, and by whom? How does the managing authority deal with the hidden cost of management of the assets? Can the assets be utilised by the managing authority or a government agency as their own?

The court manages the seizure of assets on a case-by-case basis, and subject to its general supervision (as distinct from day-to-day control). The most common approach is the appointment of an experienced accountant or insolvency practitioner as receiver. There is no government agency to do so. As to running costs referable to such asset(s), these can be defrayed from income (where the asset(s) produces income, such as real estate or a business). The running costs of other types of assets (ie, non-income producing) will be an expense to the BVI government itself.

Where seized assets are ‘put to work’ by means of commercial use, this would be on an arm’s-length (ie, charged-for) basis.
35 Making requests for foreign legal assistance

Describe your jurisdiction’s legal framework and procedure to request international legal assistance concerning provisional measures in relation to the recovery of assets.

The framework for making requests for foreign legal assistance is essentially the same as the framework described in question 36. For some countries, bilateral or multilateral treaties are in place to facilitate mutual requests for foreign legal assistance. In other cases, the various UN conventions and treaties assist the BVI in requesting legal assistance as needed. In cases of mutual legal assistance in tax matters, the BVI is signatory to several tax information exchange agreements, which comply largely with the OECD’s model template.

Procedure

As is also described below, the procedures for requesting foreign legal assistance are very similar to the process of complying with requests for foreign legal assistance.

Where a treaty is in place, the process can be streamlined such that courts and law enforcement agencies can work directly together.

Where no treaty exists, the court will have the option to submit letters of rogatory to other courts for assistance or direct letters to relevant agencies in other countries.

36 Complying with requests for foreign legal assistance

Describe your jurisdiction’s legal framework and procedure to meet foreign requests for legal assistance concerning provisional measures in relation to the recovery of assets.

Framework

**Mutual Legal Assistance (United States of America) Act 1990**

Implements the bilateral treaty between the United States and the United Kingdom to improve the effectiveness of the law enforcement authorities of both the BVI and the US in relation to the prosecution and suppression of crime through the process of cooperation and mutual legal assistance. It is limited to criminal matters.

**Criminal Justice (International Cooperation) Act 1993**

Creates a flexible and comprehensive regime that enables the BVI to cooperate with other countries in matters pertaining to criminal investigations. It also regulates substances useful for the manufacture of controlled drugs.

**Proceeds of Criminal Conduct Act 1997**

Represents an all-crimes, anti-money laundering legislation. It provides for the recovery of the proceeds of crime and establishes a regime for the registration and enforcement of external confiscation orders.

**Financial Services Commission Act 2001**

Establishes the Financial Services Commission as the BVI’s autonomous regulatory institution with powers to license, regulate and develop the financial services industry. It empowers the Commission to receive and grant assistance on request from a foreign regulatory authority for the purpose of enabling the foreign authority to discharge its regulatory functions.

37 Update and trends

As is well known, the US Foreign Account Tax Compliance Act (FATCA) has been reshaping the global regulatory landscape for non-US financial institutions and fiduciary structures. BVI has entered into a bilateral ‘Model 1(B)’ inter-Governmental Agreement with the United States to govern the applicable FATCA obligations. Although FATCA is primarily concerned with account disclosures between foreign financial institutions and the US government, it has several important implications for civil asset recovery. First, FATCA has caused many countries to amend their bank secrecy laws, and thus FATCA may indirectly facilitate information-sharing even outside the context of US tax evasion. Second, FATCA is shining a spotlight on non-US fiduciary structures and causing the industry to reevaluate its non-US structuring. Third, as the US government requires global financial institutions to divulge account information in connection with criminal prosecutions or civil subpoenas, that information may become available to private litigants as well.

**Financial Investigation Agency Act 2003**

Establishes the FIA, which works with foreign governments and regulatory agencies to prosecute financial crimes and offences. It has the authority to order persons to refrain from completing transactions, freeze bank accounts and produce documents.

**Mutual Legal Assistance (Tax Matters) Act 2003**

Gives effect to the agreement between the government of the US and the government of the UK (including the government of the BVI) for the exchange of information relating to tax matters and it extends to any similar agreements the government of the BVI may enter into.

Procedures

The FIA (see above) remains the focal point for conducting investigations. Mutual legal assistance is only provided in respect of valid requests from established government or government-related authorities or agencies. Note that with respect to the current regime no assistance is provided to individual non-government persons or institutions. Every request for legal assistance must be clear and precise regarding its nature and purpose. It must be written legibly in English.

With respect to requests for legal assistance:
- Law enforcement: requests for assistance are sent to the governor and the attorney general. The attorney general will advise the governor on how to respond to the request.
- Regulatory breaches or investigations: the managing director/chief executive of the Financial Services Commission will receive the request.
- Tax matters (information exchange): requests of this nature are managed by the financial secretary.

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Protecting the Rights of Third Parties from the Effects of Interim Relief

This article originally appeared in the November 2013 edition of Kobre & Kim’s London Litigation & Arbitration Update.

The availability of interim injunctions in English law jurisdictions has always been an attractive tool for plaintiffs seeking to protect their rights against potential wrongdoing on the part of defendants. For instance, a freezing order (still referred to as a *Mareva* injunction in some jurisdictions) can have worldwide effect. It is a powerful tool, described by Lord Justice Donaldson, a leading English judge, as “one of the English law’s two nuclear weapons” — the other being the search and seizure (or *Anton Pillar*) order. Specifically, these orders are so potent not only because of the coercive terms of the orders themselves but because they can also affect the rights of third parties who are caught up in the dispute.

As such orders are quite powerful, it is important to be aware of a few important points:

1. Interim orders are made without a determination as to the merits of the applicant’s case;
2. They may cause damage to the respondent’s business or reputation; and,
3. The orders are usually served on third parties, who may also suffer losses as a result of complying with them.

Since these orders, whether for the direct recipient or a third party, can be extremely costly and potentially very damaging, there has always been a potentially equally costly safeguard in place to ensure that if an order turns out to have been obtained without justification, the recipient is protected.

A party seeking an interim injunction is required to provide an undertaking in damages (also known as a “cross-undertaking”) by which the applicant promises the Court that he or she will compensate the respondent or any third party for any loss suffered if the Court subsequently determines that the injunction should not have been granted.¹

¹ (paragraphs 5.1(a) and 5.1A of Practice Direction 25A of the Civil Procedure Rules (“CPR”)).
However, there has been a recent change in this requirement with respect to public and regulatory bodies in a key decision\(^2\) by the English Supreme Court, which held that, when these types of entities apply for an interim injunction or freezing order, they are not automatically required to provide a cross-undertaking in damages in respect of third parties and that such a cross-undertaking will only be ordered in special circumstances. The rationale for this is that public authorities should be able to enforce the law without being inhibited by the fear of cross-claims and of exposing financially the resources allocated by the state for their functions.

*FSA v Sinaloa Gold plc & Ors and Barclays Bank plc* [2013] UKSC 11 concerned an application by the FSA (equivalent to the SEC and now known as the Financial Control Authority (FCA)) for a freezing injunction over the assets of Sinaloa Gold plc ("Sinaloa") and others which the FSA alleged were involved in promoting the sale of shares in Sinaloa without proper authorisation and without an approved prospectus. Sinaloa's assets included bank accounts held at Barclays. The FSA gave no cross-undertaking in damages with respect to the respondents' losses. However, the order included the standard wording required by English courts by which the FSA undertook to cover both costs and losses incurred by third parties as a result of the injunction. That undertaking in respect of third party losses was included inadvertently and the FSA applied to have the terms of the order varied to remove it.

The Supreme Court unanimously held that there is no general rule that the FSA, acting pursuant to a public law duty, should be required to give a cross-undertaking in respect of losses incurred by third parties. The Court held that it is necessary to consider the individual circumstances of each case in order to determine whether a cross-undertaking should be required. In this case, the facts did not present any particular circumstances to warrant a cross-undertaking.

The implications of the decision could be profound for innocent third parties affected by a freezing order granted at the request of a regulatory body such as the FCA. They may suffer losses for which they may not be compensated, even if it is subsequently determined that the order should never have been made. While significant financial institutions such as global banks may be able to bear the risk, smaller trading and investment entities reliant upon liquidity of their funds and assets may not.

Innocent third parties caught up in matters involving government entities or regulatory agencies will need to consider the potential risk of suffering loss, and, if loss is significantly likely, apply to the court requesting a variation of the order at the earliest opportunity. The initial injunction

\(^2\) FSA v Sinaloa Gold plc & Ors and Barclays Bank plc [2013] UKSC 11
orders are usually made *ex parte* and are given a short return date, usually a matter of days, at which point the recipient parties have the opportunity to seek to have the order varied by the court. A third party which is adversely affected may take advantage of the hearing and appear to seek protection against the risk of a court ultimately concluding that loss was suffered and the applicant was not entitled to the interim relief granted.

Attorneys representing the interests of third parties who have been unwittingly ensnared in a lawsuit should pay particular attention to the desirability and availability of interim relief for plaintiffs. In situations where plaintiffs are likely to request a preliminary injunction or freezing orders, it is important for the third party to be ready to intervene and request a cross-undertaking in order to fully protect their rights and assets. While not automatic, the court should give due consideration to the possible effect of the order on an innocent third party. However in the maelstrom of an urgent *ex parte* application in which the third party is not served or represented, those interests may not be initially considered by the court. A third party which seeks to have a cross-undertaking implemented based on “special circumstances”, should bring these issues to the attention of the court as soon as possible.
Monetizing Large Judgments and Arbitration Awards

Presented for the Association of Corporate Counsel on April 24, 2014
Agenda

- Developing a global strategy
- Challenges to enforcement
- Practical considerations prior to litigation and enforcement
- Tools to locate assets
- Tools to recover assets
- Special considerations for PRC
- Lessons learned
Challenges to Enforcement

• The judgment debtor refuses to pay the judgment
• Assets are located in foreign jurisdictions
  • Commonly used jurisdictions: Bermuda, British Virgin Islands, Cayman Islands, Bahamas, Panama, Singapore, Luxembourg and Switzerland
• Company structures
• Language barriers
• Unfamiliarity with legal procedures
• Cost
Practical Considerations Prior to Judgment

- Considerations prior to litigation
  - Know the company you do business with
  - Be aware of the company’s locations
  - Where to bring the proceedings?
  - Arbitration clause in contract?
- Considerations during litigation
  - Which parties to include in the suit
  - Pre-judgment attachment
Practical Considerations Prior to Enforcement

• Criteria when evaluating outside counsel
• Costs – alternative fee arrangements?
• Determining where to enforce
  • Location of high-value assets
  • Enforcement regimes in relevant jurisdictions
  • Proceedings in multiple jurisdictions
• Resources
• Timeline
Identifying Target Assets

Target assets include:

- Real property
- Bank accounts
- Debts and accounts receivable
- Loan facilities
- Shares in investment vehicles
- Operating assets
- Property and collectables: aircraft, yachts, cars (vintage or not), works of art, antiques, wine etc.
Search Tools to Locate Target Assets

- Public records searches
  - Industry publications
  - Trade shows
  - Shipping records
  - Property search tools
- Media reports
- Use of investigators
- Witness interviews
- Judicial Intervention
Discovery Tools

In the U.S.:

- Subpoena power (covert vs. overt)
- Discovery for foreign proceedings (28 USC 1782)

Other Common Law Jurisdictions:

- *Norwich Pharmacal* order
- Freezing order (*Mareva* injunction)
- *Bankers Trust* order

Considerations for Civil Law Jurisdictions
Recovering the Assets

U.K and Offshore
  • Direct seizure of assets
  • Charging order
  • Third-party debt order

• U.S.
• Laws of the individual states provide different enforcement mechanisms
• Favorable jurisdictions- New York
• Allow seizure of assets from debtor and third party
Some Key differences between enforcing Judgments and Arbitration Awards

- Arbitral awards tend to be significantly easier.
- Procedures for recognizing and enforcing a foreign arbitral award or court judgment vary dependent on the various domestic regimes.
- Variation of limitation periods
- PRC
Special Considerations When Enforcing in the PRC

- Easy to enforce foreign arbitral awards in the PRC
- Difficult to enforce foreign court judgments in the PRC
- Difficulty of accessing debtor information
  - State Secrecy Law
  - Local regulations
  - Limited electronic databases
  - Sensitivity in the use of investigators
- Possible solutions/supplemental devices
  - Common use of offshore structures
  - Assets located outside the PRC
Lessons Learned

• In-house counsel can develop and/or oversee an international strategy for monetizing judgments
• Key points to keep in mind:
  • Pre-action considerations
  • Devise an enforcement strategy that fits the your expectations and needs
  • Investigatory and judicial discovery tools can work hand in hand
  • Utilize asset tracing and enforcement tools in different jurisdictions to maximize chances of success
Lifting the Lid on Interim Measures:
A Comparative Analysis

Presented for the C5 Conference on Transatlantic Litigation on June 17, 2014
Sources of Law

• Amalgamated federal constitutional republic comprising 50 states plus the District of Columbia, and various territories, in addition to the U.S., each with separate courts, legislation and common law relevant to interim measures.

• “State law” remedies available in federal proceedings.
Pre-Judgment Devices

- Attachments;
- Restraining orders and injunctions;
- Discovery and preservation of evidence;
- Avoidance of fraudulent conveyances; and
- Government administrative and civil seizures and confiscations (forfeiture).
Restraining Orders & Preliminary Injunctions

Generally

• Will the claimant be irreparably harmed if the injunction is not issued?
• Will the defendant will be harmed if the injunction is issued?
• Are the public interests served by the injunction?; and
• Is the plaintiff is likely to prevail on the merits?
Grupo Mexicano Doctrine

• U.S. federal courts supposedly have the equity jurisdiction as was exercised by the English Court of Chancery around 1789.

• The rule then was that a judgment fixing a debt was a prerequisite to judicial interference with a debtor’s property.

• Interim injunctive relief in aid of purely legal claims is unauthorized because it was unknown to traditional equity practice.
Cross-Border Considerations

• Direct interim measures ordinarily unavailable to private litigants in aid of foreign proceedings.

• Recognition of foreign non-money judgments subject to judicial discretion.

• Discovery and asset investigations.

• Instigation and coordination of government activity.
Discovery in Aid of Foreign Proceedings

Request for judicial assistance under 28 U.S.C. § 1782

(1) made by a foreign or international tribunal, or by any interested person;
(2) seeking evidence, whether it be the testimony or statement of a person or the production of a document or other thing;
(3) for use in a proceeding in a foreign or international tribunal; and where,
(4) the person from whom discovery is sought resides or is found in the district.
Risk/Opportunity of Government Coordination

- Civil discovery of information disclosed pursuant to MLAT requests and financial disclosure obligations.
- Administrative and civil forfeiture.
- Broad interim measures (anti-money laundering and anti-terrorism).
- Fifth Amendment considerations.
- Restitution, remission and restoration.

4. 16 states have enacted the 1962 Recognition Act, 18 states have enacted the 2005 Recognition Act. The remaining 16 states apply common law.

   a. Practice Point: It is important not to confuse the Recognition Acts with the 1964 Revised Uniform Enforcement of Foreign Judgments Act, which applies to enforcement of other United States sister state judgments, not foreign country judgments.

B. Recognition Acts

   1. Overview

      a. The Recognition Acts apply only to judgments that grant or deny a sum of money.

      b. The Recognition Acts exclude judgments for:

         (i) taxes, fines, or penalties; or

         (ii) support in matrimonial or family matters.

      c. The Recognition Acts provide that where there is a basis for recognition, the judgment is enforceable in the same manner as the judgment of a sister state which is entitled to full faith and credit.

   2. Key Differences Between Recognition Acts

      a. The 1962 Recognition Act sets out three mandatory grounds for non-recognition and six discretionary grounds.


      c. The 2005 Recognition Act clarifies that an action must be filed to obtain recognition.

      d. Each Act applies a different burden of proof and statute of limitations (discussed below).

C. Need for a Final, Conclusive and Enforceable Judgment

   1. Both Recognition Acts apply only to judgments that are final, conclusive, and enforceable in the originating state.
2. Final judgments are those that are not subject to additional proceedings in the rendering court except for execution.

3. The Recognition Acts give courts discretion to stay recognition while an appeal of a final and enforceable foreign judgment is pending.

D. Jurisdiction

1. Courts have split over the jurisdictional requirements for an action to enforce a foreign judgment.

2. Some courts, including courts in New York, allow an enforcement action to proceed whether or not the judgment debtor had contacts with the forum state or assets within the state.

3. Some courts grant jurisdiction when the defendant either has minimum contacts or has assets located in the forum state.

4. The most stringent courts require personal jurisdiction over the judgment debtor defendant.

E. Reciprocity of Judgments

1. Neither of the Recognition Acts requires reciprocity from the originating country in order to recognize a judgment from that country.

2. However, eight of the U.S. states enacting one of the Recognition Acts have included a reciprocity requirement (Florida, Idaho, Maine, North Carolina, Ohio and Texas make reciprocity a discretionary ground for non-recognition, and Georgia and Massachusetts make reciprocity mandatory).

F. Exclusions

1. *The Revenue Rule*: Taxes, fines, and other penalties are outside the scope of the Recognition Acts. The Revenue Rule involves a determination of whether the judgment is remedial in nature.

2. *Domestic Relations:*
   
   a. The 1962 Recognition Act excludes judgments for “support in matrimonial or family matters”
   
   b. The 2005 Recognition Act expands the exclusion to cover judgments beyond just judgments for support, to include judgments “for divorce, support, or maintenance, or other judgment[s] rendered in connection with domestic relations.”

G. Other Grounds for Non-Recognition

1. Mandatory Grounds for Non-Recognition

a. **Lack of systemic due process.** The procedures required of foreign courts need not comply exactly with domestic due process requirements, but they must be “compatible with the requirements of due process of law.”

b. **Lack of In Personam or In Rem Jurisdiction.** The originating court must have had jurisdiction over the judgment debtor under the U.S. rules for jurisdictional due process developed by the Supreme Court in International Shoe and its progeny.

c. **Lack of Subject Matter Jurisdiction.** The originating court must have had subject matter jurisdiction under the jurisdictional rules applied by the originating court.

2. Discretionary Grounds for Non-Recognition

a. **Denial of Notice and Opportunity to be Heard.** Courts focus on whether proper notice was provided under the foreign court’s rules, as well as whether the notice actually provided the defendant with notice of the proceedings.

b. **Fraud.** A foreign judgment can be impeached for extrinsic fraud, such as withholding evidence. Matters of fraud considered by the originating court, such as false testimony, do not provide a basis for non-recognition.

c. **Public Policy.** Courts will usually exercise discretion to not recognize a foreign judgment where the judgment contravenes U.S. constitutional concerns, such as free speech. Lesser differences in public policy typically do not lead a court to refuse to recognize a foreign judgment.

d. **Inconsistent Judgments.** Courts have discretion to refuse to recognize a judgment that is inconsistent with a separate foreign judgment that is also entitled to recognition.
e. **Forum Selection Agreement.** U.S. courts may refuse to enforce a judgment from a court that is not the forum selected in a valid agreement between the parties.

f. **Inconvenient Forum.** Where a U.S. court determines that the U.S. doctrine of forum non conveniens would have provided a basis for dismissal of the foreign suit, the court has discretion to not enforce the foreign judgment.

g. **Due Process in Specific Case.** The 2005 Recognition Act provides for discretionary non-recognition where circumstances raise doubts as to the integrity of the enforcing court or where the specific proceeding was not compatible for the requirements of due process.

H. **Burden of Proof**

1. The 1962 Recognition Act does not have specific provisions on burden of proof, but courts interpreting the 1962 Recognition Act typically place the burden on the party seeking recognition.

2. The 2005 Recognition Act places the burden on the party opposing recognition with respect to the grounds for non-recognition.

I. **Statute of Limitations**

1. The 2005 Registration Act provides a specific statute of limitations - the earlier of 15 years from the effectiveness of the judgment, or the date the judgment is no longer enforceable in the country of origin.

2. The 1962 Recognition Act does not provide a statute of limitations. Courts interpreting the 1962 Recognition Act tend to apply the statute of limitations applicable to enforcement of a domestic, sister state judgment.

II. **Judgment Collection Issues**

Once a judgment creditor has obtained a recognition of its foreign judgment, it may pursue judgment collection procedures. We discuss both the procedures, and the steps to take before you begin the federal or state court procedures.

*Practice Point:* In federal court, a district court will typically apply the judgment collection proceedings of the state in which it sits (i.e., the District Court for the Northern District of Illinois will apply the post-judgment collection proceedings employed by the Circuit Court of Cook County).

*Practice Point:* Post-judgment collection process will vary from state-to-state. We discuss some highlights of the process below.
A. **Pre-Enforcement Considerations.**

The process of judgment collection begins before you begin to take post-judgment enforcement actions. It will assist the judgment collection process if you identify assets of the potential judgment debtor, and the methods of collection against that judgment debtor before you obtain the judgment.

1. Review the judgment. The judgment will hopefully include the principal, accrued pre-judgment interest, post-judgment interest and attorneys’ fees.

2. Interview your client and investigate.

3. Review client’s documentation. Look for information regarding the debtor: financial account information (e.g., bank where debtor deposits its checks), potential counter-claims, asset information (personal and real properties held by the debtor), credit applications and client’s prior attempts at collection prior to litigation.

4. Evaluate the claim(s). Assess the merits of client’s claims, merits of potential defenses and counter-claims, the age of client’s claim (this is important to determine likelihood of collection---older debts are generally harder to collect) and collectability of judgment (e.g., financial condition of debtor, etc.).

5. Initial investigations. Some basic preliminary investigation work will give you a head start on collection strategies later on.

6. Courthouse records. Research and analyze: (1) general execution dockets (this will provide information on other collection attempts on debtor and what properties may be available for collection); and (2) pending suits (this will give you an idea as to whether there may be any assets left for collection and whether you may want to work with, or anticipate working against, another creditor).

7. UCC: Research UCC financing statements to see if the debtor has personal property subject to liens from other creditors.

8. Other governmental records: Tax liens, real property records, and lis pendens. Also, as a precautionary matter, you should check the bankruptcy dockets to make sure the debtor has not filed for bankruptcy relief and that your client’s claim has been discharged.

9. Secretary of State records: If a debtor is a corporate entity, you should determine when and where it was incorporated, and ascertain the name and address of the agent, officers and the principal place of business.

B. **After Recognition of The Foreign Judgment.**

Once you obtain a judgment, you should immediately take certain steps to facilitate collection. For collection efforts, we will focus on two common forms of collection: garnishment and execution/levy.

C. **Post-Judgment Discovery.**

1. Many discovery tools are available: depositions, document production, interrogatories, and request for admissions. You can use these tools to get information on the debtor’s financial status, assets, banking information, accounts receivables, etc.

D. **Garnishment.**

1. Garnishment is the most used judgment collection method at law. Garnishment can be used on a debtor’s bank or his/her employer.

2. Limitations. Typically, garnishment is limited to some percentage of disposable earnings. The exact limitation can vary from state to state.

3. What is subject to garnishment? Basically, anything can be garnished. There are, however, a few exemptions: pensions (until paid to the member or his/her beneficiary), IRAs, ERISA, etc.

E. **Execution/Levy:**

1. Once the foreign judgment is recognized, a judgment lien may be considered perfected as against third parties. Executions on a judgment empowers and commands local constabularies to effectuate money judgments by means of seizure and sale of the real or personal property of the judgment debtor in full or partial satisfaction of the judgment amount, together with judgment interest and certain expenses.

2. Stay of execution. A few stay provisions may apply to limit your ability to immediately collect against a debtor. Some examples

   a. Automatic Stay: A judgment debtor may be granted, under statute, a period of time following the recognition of a judgment during which no execution may issue and no enforcement proceedings may be undertaken.

   b. Bond Stay: A debtor may be able to stay execution if he/she posts a bond securing the full amount, typically with a set period of time after recognition of the judgment.

   c. Suspension of execution by appeal or post trial motion.
3. Priority of judgment lien: Date of entry of judgment. A stay does not affect the effective priority date. A few exceptions/limitations:
   a. PMSI: Purchase money security interests have priority over judgment liens.
   b. Real property security deeds/mortgages: a judgment rendered upon a debt for money loaned for the purchase of real property enjoys super-priority until satisfied.
   c. Judgment liens on real estate: You may need to record your judgment in any counties (in the applicable states) where your judgment debtor is located.

F. Settlement.

If a settlement is reached in connection with your post-judgment collections actions, make sure the settlement agreement:

1. reiterates the settlement amount and the actual claim amount (if different) so that you obtain an acknowledgement in writing from the Debtor of the legitimacy and amount of your claim;
2. contains provisions on what will happen if the debtor defaults under the agreement (e.g., choice of law, stipulated judgments, consent to relief from stay, etc.); and
3. details a payment plan/structure.


In lieu of seeking to enforce a foreign judgment against a judgment debtor directly in federal or state courts, some creditors may prefer placing the judgment debtor in an involuntary bankruptcy proceeding, with or without the judgment debtor’s consent.

An involuntary bankruptcy is a powerful option where creditors suspect that the subject debtor is engaged in fraudulent activities (e.g., Ponzi schemes, extensive avoidable transfers of assets, etc.). Also, in certain situations, involuntary bankruptcies provide creditors, particularly unsecured creditors, with an efficient way to collect debts against a debtor with multiple creditors and varying assets by creating economies of scale in a single proceeding to resolve such issues. Also, an involuntary bankruptcy allows the creditor to choose the acceptable venue to litigate various issues.

Nevertheless, involuntary bankruptcy petitions are not always preferable because creditors who file such petitions may be subject to costs, attorneys’ fees, and/or damages (including punitive damages) if a bankruptcy court dismisses the involuntary petition and/or determines that the involuntary petition was filed in bad faith. Therefore, counsel for creditors
should engage in an extensive analysis of the costs and benefits of an involuntary proceeding, including the risk of bad faith claims, prior to pursuing the option. Also, counsel should note that until an involuntary petition is formally approved by a bankruptcy court, the traditional protections and restrictions imposed during a bankruptcy (e.g., the automatic stay, etc.) are not triggered by the mere filing of an involuntary petition.

A. Eligibility and Requirements.

11 U.S.C. § 303, along with other provisions of the Bankruptcy Code, provide guidance on who may qualify as an involuntary debtor, who may qualify as a petitioning creditor for an involuntary bankruptcy proceeding, and how many petitioning creditors are needed to initiate an involuntary bankruptcy.

1. Eligible Debtors. 11 U.S.C. § 303(a) limits involuntary chapter 7 or 11 debtors to only persons “that may be a debtor under the chapter under which such case is commenced.” Accordingly, in order to qualify as an involuntary debtor and be subject to the jurisdiction of a bankruptcy court, the debtor must meet the qualifications of a “debtor” under 11 U.S.C. s. 109(a).

   a. Section 109(a) authorizes any person or corporation that “resides or has a domicile, a place of business, or property in the United States” to be a debtor under the Bankruptcy Code. 11 U.S.C. s. 109(a).

   b. Practice Point:

      (i) Foreign debtors may be subject to involuntary bankruptcy in the U.S. An involuntary bankruptcy is an option even where the debtor is not a U.S. resident or corporation, so long as certain requirements are met.

      (ii) A foreign debtor may be subject to an involuntary bankruptcy if it has some assets or operations in the U.S. Even if foreign debtor has minimal assets and operations in the U.S., it may still qualify as an eligible debtor under the Bankruptcy Code. There is virtually no formal barrier to having federal courts adjudicate foreign debtors’ bankruptcy proceedings.

      (iii) Moreover, a bankruptcy court may exercise power over a foreign corporation’s assets located outside the U.S. Pursuant to 28 U.S.C. § 1334(e), “[t]he district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction of all of the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate[.]” Although this does not guarantee that foreign companies and jurisdictions
will abide by the orders of a U.S. bankruptcy court, for purposes of evaluating bankruptcy court jurisdictional issues, it is clear that a U.S. bankruptcy court may assert its jurisdiction and powers over a foreign debtor and its assets outside the U.S.

2. **Eligible Petitioning Creditors - How does a creditor qualify to be a petitioning creditor for an involuntary proceeding?**

   a. 11 U.S.C. § 303(b) provides that an involuntary petition may be filed by the debtor’s creditors. Regardless of how many petitioning creditors are necessary to initiate a particular involuntary petition, any petitioning creditor must be qualified to be a petitioning creditor under Section 303(b).

   b. To be a qualifying creditor, the creditor must hold an unsecured claim (or claims) (i) that is not contingent as to liability or subject to a bona fide dispute as to either liability or amount, and (ii) that totals (in the aggregate) at least $15,325. [Note that this figure is adjusted every three years to track inflation, with the next adjustment due in 2016.]

   c. **Related Practice Point: Foreign creditors may qualify as petitioning creditors.** So long as the threshold requirements of Section 303(b) are satisfied, the Bankruptcy Code does not prohibit foreign creditors from being a petitioning creditor in an involuntary bankruptcy proceeding. Indeed, numerous reported involuntary bankruptcy cases involve foreign petitioning creditors.

   d. **Related Practice Point: Creditors holding foreign debts/judgments may qualify as petitioning creditors.** Similarly, creditors holding foreign judgments or claims rooted in foreign jurisdictions, are not foreclosed from being petitioning creditors. With respect to creditors holding foreign judgments, a bankruptcy court may recognize the foreign judgment for purposes of a Section 303(b) analysis so long as the claim underlying the judgment is not contingent or subject to a bona fide dispute.

   (i) Even if there is a question as to whether a bankruptcy court will recognize a foreign judgment, so long as the petitioning creditor can prove that its claim is not contingent as to liability or subject to a bona fide dispute as to either liability or amount, and that its claim totals (in the aggregate) at least $15,325. The operative term is “claim,” and not “judgment.”
Related Practice Point: Contractual choice of law provisions and lawsuit limiting provisions are unlikely to preclude a creditor from petitioning for an involuntary proceeding. In many cases, a potential petitioning creditor may be subject to a contract with the debtor that purports to limit the options for litigating disputes between that creditor and debtor. For example, contracts may have forum selection clauses, arbitration clauses, or other limitations on filing lawsuits. However, because an involuntary bankruptcy petition is not considered to constitute a lawsuit, most courts will not enforce such contractual provisions for purposes of an involuntary proceeding.

3. Eligible Petitioning Creditors - How many petitioning creditors are necessary? Depending on the amount of creditors a debtor has, there are two different mechanisms by which an involuntary petition may be filed.

a. If the debtor has twelve or more creditors, an involuntary petition requires: (i) three or more creditors whose claims are not contingent as to liability or subject to a bona fide dispute as to either liability or amount to file the petition; and (ii) those qualifying claims must total, in the aggregate, at least $15,325 more than the value of any lien on property of the debtor securing such claims (e.g., an unsecured claim totaling at least $15,325).

b. If the debtor has less than twelve creditors, an involuntary petition requires: (i) one (or more) creditor whose claim is not contingent as to liability or subject to a bona fide dispute as to either liability or amount to file the petition; and (ii) the qualifying unsecured claim must total, in the aggregate, at least $15,325.

Accordingly, if a debtor has twelve or more creditors, at least three “qualifying” creditors must file the involuntary petition. If a debtor has less than twelve creditors, at least one “qualifying” creditor must file the involuntary petition. Regardless of how many petitioning creditors are necessary, each such creditor must hold a qualifying claim that is not contingent or subject to a bona fide dispute as to liability or amount.

c. Related Practice Point: Analyzing “contingent” standard. A claim is contingent as to liability if the debtor’s legal duty to pay does not come into existence until triggered by the occurrence of a future event and such future occurrence was within the actual or presumed contemplation of the parties.

d. Related Practice Point: Analyzing “or subject to a bona fide dispute” standard. The Bankruptcy Code does not define “bona fide dispute.” However, most circuits apply an “objective” test, which requires the bankruptcy court to determine whether there is
an objective basis for either a factual or a legal dispute as to the validity of [the] debt. Because the standard is objective, neither the debtor’s subjective intent nor his subjective belief is sufficient to show the existence of a bona fide dispute.

B. The Process and Key Litigated Issues.

1. **If the debtor does not timely object, the involuntary bankruptcy proceeding commences.** If the debtor does not timely object, pursuant to Section 303(h), the bankruptcy court shall enter an order of relief, which will initiate the bankruptcy proceeding.

2. **If the debtor timely objects, the bankruptcy court will hold a trial.** If the debtor timely objects to the petition, Section 303(h) requires that the bankruptcy court conduct a trial and grant an order of relief only if “(1) the debtor is generally not paying such debtor’s debts as such debts become due unless such debts are the subject of a bona fide dispute as to liability or amount; or (2) within 120 days before the date of the filing of the petition, a custodian, other than a trustee, receiver, or agent appointed or authorized to take charge of less than substantially all of the property of the debtor for the purpose of enforcing a lien against such property, was appointed or took possession.” 11 U.S.C. § 303(h). If either of these elements are satisfied, the bankruptcy court may enter an order of relief to initiate the bankruptcy case.

3. **Related Practice Point: Counsel should consider significant downsides of an objection.** If the debtor timely files an objection, the actual bankruptcy case may be delayed for a substantial period of time. Because the filing of a timely objection results in a trial over certain issues, a petitioning creditor may incur substantial fees and costs to conduct such a trial before procuring any substantive benefits of an involuntary bankruptcy case. During this interim period, the automatic stay will not apply and the debtor will be free to continue its operations. Further, should the involuntary petition be dismissed after trial for bad faith, the petitioning creditor may be subject to sanctions in the form of damages and attorneys’ fees and costs.
Elements of Recognition for Typical Foreign Judgment Case

Start

Is the judgment final, conclusive, and enforceable in the state of origin?

Is subject matter jurisdiction based on diversity or federal question jurisdiction?

If diversity jurisdiction, apply law of state where court is located
If federal question jurisdiction, apply federal common law

Is there either in personam or in rem jurisdiction to hear the recognition action?

Does state law require reciprocity from state of origin?

Revenue Rule: Is the judgment for taxes, fines, or penalties?

Is the judgment the result of a domestic relations matter? If yes, is it subject to recognition under separate statute, treaty, or common law?

Has the statute of limitations lapsed?

Does the burden of proof fall on the party seeking or resisting recognition?

Under 1962 Recognition Act, burden is on party seeking recognition.
Under 2005 Recognition Act, burden is on party resisting recognition.

Has the mandatory basis for non-recognition?

Legal system that denies due process generally or does not have an impartial system of justice.
Lack of foreign court jurisdiction over defendant according to U.S. concepts of in personam jurisdiction.
Lack of foreign court subject matter jurisdiction.

Is there a discretionary basis for non-recognition?

Foreign court denied notice or an opportunity to be heard and Fraud in the foreign proceedings.
Judgment violates public policy of United States or state in which court is located and Inconsistent judgment is also entitled to recognition.
Valid forum selection agreement calling for resolution in court other than court issuing judgment.
Foreign court was inconvenient forum and jurisdiction was based solely on service of process.
Failure to provide impartial judicial procedures in the specific case and Failure to provide due process in the specific case.

End

EXHIBIT A

Under 1962 Recognition Act, most courts apply statute of limitations for enforcement of judgment from domestic sister state.
Under 2005 Recognition Act, earlier of time during which foreign judgment is effective, or 15 years from effective date of foreign judgment.
EXHIBIT B

UNIFORM FOREIGN MONEY-JUDGMENTS RECOGNITION ACT

Drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS

and by it

APPROVED AND RECOMMENDED FOR ENACTMENT IN ALL THE STATES

at its

ANNUAL CONFERENCE MEETING IN ITS SEVENTY-FIRST YEAR
MONTEREY, CALIFORNIA
JULY 30 – AUGUST 4, 1962

WITH PREFATORY NOTE AND COMMENTS

Approved by the American Bar Association
February 4, 1963
UNIFORM FOREIGN MONEY-JUDGMENTS RECOGNITION ACT

The Committee which acted for the National Conference of Commissioners on Uniform State Laws in preparing the Uniform Foreign Money-Judgments Recognition Act was as follows:

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NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS
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UNIFORM FOREIGN MONEY-JUDGMENTS RECOGNITION ACT

PREFATORY NOTE

In most states of the Union, the law on recognition of judgments from foreign countries is not codified. In a large number of civil law countries, grant of conclusive effect to money-judgments from foreign courts is made dependent upon reciprocity. Judgments rendered in the United States have in many instances been refused recognition abroad either because the foreign court was not satisfied that local judgments would be recognized in the American jurisdiction involved or because no certification of existence of reciprocity could be obtained from the foreign government in countries where existence of reciprocity must be certified to the courts by the government. Codification by a state of its rules on the recognition of money-judgments rendered in a foreign court will make it more likely that judgments rendered in the state will be recognized abroad.

The Act states rules that have long been applied by the majority of courts in this country. In some respects the Act may not go as far as the decisions. The Act makes clear that a court is privileged to give the judgment of the court of a foreign country greater effect than it is required to do by the provisions of the Act. In codifying what bases for assumption of personal jurisdiction will be recognized, which is an area of the law still in evolution, the Act adopts the policy of listing bases accepted generally today and preserving for the courts the right to recognize still other bases. Because the Act is not selective and applies to judgments from any foreign court, the Act states that judgments rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law shall neither be recognized nor enforced.

The Act does not prescribe a uniform enforcement procedure. Instead, the Act provides that a judgment entitled to recognition will be enforceable in the same manner as the judgment of a court of a sister state which is entitled to full faith and credit.

In the preparation of the Act codification efforts made elsewhere have been taken into consideration, in particular, the [British] Foreign Judgments (Reciprocal Enforcement) Act of 1933 and a Model Act produced in 1960 by the International Law Association. The Canadian Commissioners on Uniformity of Legislation, engaged in a similar endeavor, have been kept informed of the progress of the work. Enactment by the states of the Union of modern uniform rules on recognition of foreign money-judgments will support efforts toward improvement of the law on recognition everywhere.
UNIFORM FOREIGN MONEY-JUDGMENTS RECOGNITION ACT

[Be it enacted . . . ]

SECTION 1. [Definitions.] As used in this Act:

(1) “foreign state” means any governmental unit other than the United States, or any state, district, commonwealth, territory, insular possession thereof, or the Panama Canal Zone, the Trust Territory of the Pacific Islands, or the Ryukyu Islands;

(2) “foreign judgment” means any judgment of a foreign state granting or denying recovery of a sum of money, other than a judgment for taxes, a fine or other penalty, or a judgment for support in matrimonial or family matters.

SECTION 2. [Applicability.] This Act applies to any foreign judgment that is final and conclusive and enforceable where rendered even though an appeal therefrom is pending or it is subject to appeal.

Comment

Where an appeal is pending or the defendant intends to appeal, the court of the enacting state has power to stay proceedings in accordance with section 6 of the Act.

SECTION 3. [Recognition and Enforcement.] Except as provided in section 4, a foreign judgment meeting the requirements of section 2 is conclusive between the parties to the extent that it grants or denies recovery of a sum of money. The foreign judgment is enforceable in the same manner as the judgment of a sister state which is entitled to full faith and credit.

Comment

The method of enforcement will be that of the Uniform Enforcement of Foreign Judgments Act of 1948 in a state having enacted that Act.
SECTION 4. [Grounds for Non-Recognition.]

(a) A foreign judgment is not conclusive if

(1) the judgment was rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law;

(2) the foreign court did not have personal jurisdiction over the defendant; or

(3) the foreign court did not have jurisdiction over the subject matter.

(b) A foreign judgment need not be recognized if

(1) the defendant in the proceedings in the foreign court did not receive notice of the proceedings in sufficient time to enable him to defend;

(2) the judgment was obtained by fraud;

(3) the [cause of action] [claim for relief] on which the judgment is based is repugnant to the public policy of this state;

(4) the judgment conflicts with another final and conclusive judgment;

(5) the proceeding in the foreign court was contrary to an agreement between the parties under which the dispute in question was to be settled otherwise than by proceedings in that court; or

(6) in the case of jurisdiction based only on personal service, the foreign court was a seriously inconvenient forum for the trial of the action.

Comment

The first ground for non-recognition under subsection (a) has been stated authoritatively by the Supreme Court of the United States in *Hilton v. Guyot*, 159 U.S. 113, 205 (1895). As indicated in that decision, a mere difference in the procedural system is not a sufficient basis for non-recognition. A case of serious injustice must be involved.

The last ground for non-recognition under subsection (b) authorizes a court to refuse recognition and enforcement of a judgment rendered in a foreign country on the basis only of personal service when it believes the original action should
have been dismissed by the court in the foreign country on grounds of *forum non conveniens*.

**SECTION 5. [Personal Jurisdiction.]**

(a) The foreign judgment shall not be refused recognition for lack of personal jurisdiction if

(1) the defendant was served personally in the foreign state;

(2) the defendant voluntarily appeared in the proceedings, other than for the purpose of protecting property seized or threatened with seizure in the proceedings or of contesting the jurisdiction of the court over him;

(3) the defendant prior to the commencement of the proceedings had agreed to submit to the jurisdiction of the foreign court with respect to the subject matter involved;

(4) the defendant was domiciled in the foreign state when the proceedings were instituted, or, being a body corporate had its principal place of business, was incorporated, or had otherwise acquired corporate status, in the foreign state;

(5) the defendant had a business office in the foreign state and the proceedings in the foreign court involved a [cause of action] [claim for relief] arising out of business done by the defendant through that office in the foreign state; or

(6) the defendant operated a motor vehicle or airplane in the foreign state and the proceedings involved a [cause of action] [claim for relief] arising out of such operation.

(b) The courts of this state may recognize other bases of jurisdiction.

**Comment**

New bases of jurisdiction have been recognized by courts in recent years. The Act does not codify all these new bases. Subsection (b) makes clear that the Act does not prevent the courts in the enacting state from recognizing foreign judgments rendered on the bases of jurisdiction not mentioned in the Act.
SECTION 6. [Stay in Case of Appeal.] If the defendant satisfies the court either that an appeal is pending or that he is entitled and intends to appeal from the foreign judgment, the court may stay the proceedings until the appeal has been determined or until the expiration of a period of time sufficient to enable the defendant to prosecute the appeal.

SECTION 7. [Saving Clause.] This Act does not prevent the recognition of a foreign judgment in situations not covered by this Act.

SECTION 8. [Uniformity of Interpretation.] This Act shall be so construed as to effectuate its general purpose to make uniform the law of those states which enact it.

SECTION 9. [Short Title.] This Act may be cited as the Uniform Foreign Money-Judgments Recognition Act.

SECTION 10. [Repeal.] [The following Acts are repealed:

(1) 

(2) 

(3) .]

SECTION 11. [Time of Taking Effect.] This Act shall take effect . . . .
UNIFORM FOREIGN-COUNTRY MONEY JUDGMENTS RECOGNITION ACT

drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS

and by it

APPROVED AND RECOMMENDED FOR ENACTMENT IN ALL THE STATES

at its

ANNUAL CONFERENCE MEETING IN ITS ONE-HUNDRED-AND-FOURTEENTH YEAR PITTSBURGH, PENNSYLVANIA

July 21-28, 2005

WITH PREFATORY NOTE AND COMMENTS

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UNIFORM FOREIGN-COUNTRY MONEY JUDGMENTS RECOGNITION ACT

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UNIFORM FOREIGN-COUNTRY MONEY JUDGMENTS RECOGNITION ACT

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UNIFORM FOREIGN-COUNTRY MONEY JUDGMENTS RECOGNITION ACT

PREFATORY NOTE

This Act is a revision of the Uniform Foreign Money-Judgments Recognition Act of 1962. That Act codified the most prevalent common law rules with regard to the recognition of money judgments rendered in other countries. The hope was that codification by a state of its rules on the recognition of foreign-country money judgments, by satisfying reciprocity concerns of foreign courts, would make it more likely that money judgments rendered in that state would be recognized in other countries. Towards this end, the Act sets out the circumstances in which the courts in states that have adopted the Act must recognize foreign-country money judgments. It delineates a minimum of foreign-country judgments that must be recognized by the courts of adopting states, leaving those courts free to recognize other foreign-country judgments not covered by the Act under principles of comity or otherwise. Since its promulgation over forty years ago, the 1962 Act has been adopted in a majority of the states and has been in large part successful in carrying out its purpose of establishing uniform and clear standards under which state courts will enforce the foreign-country money judgments that come within its scope.

This Act continues the basic policies and approach of the 1962 Act. Its purpose is not to depart from the basic rules or approach of the 1962 Act, which have withstood well the test of time, but rather to update the 1962 Act, to clarify its provisions, and to correct problems created by the interpretation of the provisions of that Act by the courts over the years since its promulgation. Among the more significant issues that have arisen under the 1962 Act which are addressed in this Revised Act are (1) the need to update and clarify the definitions section; (2) the need to reorganize and clarify the scope provisions, and to allocate the burden of proof with regard to establishing application of the Act; (3) the need to set out the procedure by which recognition of a foreign-country money judgment under the Act must be sought; (4) the need to clarify and, to a limited extent, expand upon the grounds for denying recognition in light of differing interpretations of those provisions in the current case law; (5) the need to expressly allocate the burden of proof with regard to the grounds for denying recognition; and (6) the need to establish a statute of limitations for recognition actions.

In the course of drafting this Act, the drafters revisited the decision made in the 1962 Act not to require reciprocity as a condition to recognition of the foreign-country money judgments covered by the Act. After much discussion, the drafters decided that the approach of the 1962 Act continues to be the wisest course with regard to this issue. While recognition of U.S. judgments continues to be problematic in a number of foreign countries, there was insufficient evidence to establish that a reciprocity requirement would have a greater effect on encouraging foreign recognition of U.S. judgments than does the approach taken by the Act. At the same time, the certainty and uniformity provided by the approach of the 1962 Act, and continued in this Act, creates a stability in this area that facilitates international commercial transactions.
UNIFORM FOREIGN-COUNTRY MONEY JUDGMENTS RECOGNITION ACT

SECTION 1. SHORT TITLE. This [act] may be cited as the [Uniform Foreign-Country Money Judgments Recognition Act].

Comment

Source: This section is an updated version of Section 9 of the Uniform Foreign Money-Judgments Recognition Act of 1962.

SECTION 2. DEFINITIONS. In this [act]:

(1) “Foreign country” means a government other than:

(A) the United States;

(B) a state, district, commonwealth, territory, or insular possession of the United States; or

(C) any other government with regard to which the decision in this state as to whether to recognize a judgment of that government’s courts is initially subject to determination under the Full Faith and Credit Clause of the United States Constitution.

(2) “Foreign-country judgment” means a judgment of a court of a foreign country.

Comment

Source: This section is derived from Section 1 of the Uniform Foreign Money-Judgments Recognition Act of 1962.

1. The defined terms “foreign state” and “foreign judgment” in the 1962 Act have been changed to “foreign country” and “foreign-country judgment” in order to make it clear that the Act does not apply to recognition of sister-state judgments. Some courts have noted that the “foreign state” and “foreign judgment” definitions of the 1962 Act have caused confusion as to whether the Act should apply to sister-state judgments because “foreign state” and “foreign judgment” are terms of art generally used in connection with recognition and enforcement of
sister-state judgments. See, e.g., Eagle Leasing v. Amandus, 476 N.W.2d 35 (S.Ct. Iowa 1991) (reversing lower court’s application of UFMJRA to a sister-state judgment, but noting lower court’s confusion was understandable as “foreign judgment” is term of art normally applied to sister-state judgments). See also, Uniform Enforcement of Foreign Judgments Act §1 (defining “foreign judgment” as the judgment of a sister state or federal court).

The 1962 Act defines a “foreign state” as “any governmental unit other than the United States, or any state, district, commonwealth, territory, insular possession thereof, or the Panama Canal Zone, the Trust Territory of the Pacific Islands, or the Ryuku Islands.” Rather than simply updating the list in the 1962 Act’s definition of “foreign state,” the new definition of “foreign country” in this Act combines the “listing” approach of the 1962 Act’s “foreign state” definition with a provision that defines “foreign country” in terms of whether the judgments of the particular government’s courts are initially subject to the Full Faith and Credit Clause standards for determining whether those judgments will be recognized. Under this new definition, a governmental unit is a “foreign country” if it is (1) not the United States or a state, district, commonwealth, territory or insular possession of the United States; and (2) its judgments are not initially subject to Full Faith and Credit Clause standards.

The Full Faith and Credit Clause, Art. IV, section 1, provides that “Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records, and Proceedings shall be proved, and the Effect thereof.” Whether the judgments of a governmental unit are subject to the Full Faith and Credit Clause may be determined by judicial interpretation of the Full Faith and Credit Clause or by statute, or by a combination of these two sources. For example, pursuant to the authority granted by the second sentence of the Full Faith and Credit Clause, Congress has passed 28 U.S.C.A. §1738, which provides inter alia that court records from “any State, Territory, or Possession of the United States” are entitled to full faith and credit under the Full Faith and Credit Clause. In Stoll v. Gottlieb, 305 U.S. 165, 170 (1938), the United States Supreme Court held that this statute also requires that full faith and credit be given to judgments of federal courts. States also have made determinations as to whether certain types of judgments are subject to the Full Faith and Credit Clause. E.g. Day v. Montana Dept. Of Social & Rehab. Servs., 900 P.2d 296 (Mont. 1995) (tribal court judgment not subject to Full Faith and Credit, and should be treated with same deference shown foreign-country judgments). Under the definition of “foreign country” in this Act, the determination as to whether a governmental unit’s judgments are subject to full faith and credit standards should be made by reference to any relevant law, whether statutory or decisional, that is applicable “in this state.”

The definition of “foreign country” in terms of those judgments not subject to Full Faith and Credit standards also has the advantage of more effectively coordinating the Act with the Uniform Enforcement of Foreign Judgments Act. That Act, which establishes a registration procedure for the enforcement of sister state and equivalent judgments, defines a “foreign judgment” as “any judgment, decree, or order of a court of the United States or of any other court which is entitled to full faith and credit in this state.” Uniform Enforcement of Foreign
Judgments Act, §1 (1964). By defining “foreign country” in the Recognition Act in terms of those judgments not subject to full faith and credit standards, this Act makes it clear that the Enforcement Act and the Recognition Act are mutually exclusive – if a foreign money judgment is subject to full faith and credit standards, then the Enforcement Act’s registration procedure is available with regard to its enforcement; if the foreign money judgment is not subject to full faith and credit standards, then the foreign money judgment may not be enforced until recognition of it has been obtained in accordance with the provisions of the Recognition Act.

2. The definition of “foreign-country judgment” in this Act differs significantly from the 1962 Act’s definition of “foreign judgment.” The 1962 Act’s definition served in large part as a scope provision for the Act. The part of the definition defining the scope of the Act has been moved to section 3, which is the scope section.

3. The definition of “foreign-country judgment” in this Act refers to “a judgment” of “a court” of the foreign country. The foreign-country judgment need not take a particular form – any order or decree that meets the requirements of this section and comes within the scope of the Act under Section 3 is subject to the Act. Similarly, any competent government tribunal that issues such a “judgment” comes within the term “court” for purposes of this Act. The judgment, however, must be a judgment of an adjudicative body of the foreign country, and not the result of an alternative dispute mechanism chosen by the parties. Thus, foreign arbitral awards and agreements to arbitrate are not covered by this Act. They are governed instead by federal law, Chapter 2 of the U.S. Arbitration Act, 9 U.S.C. §§ 201-208, implementing the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards and Chapter 3 of the U.S. Arbitration Act, 9 U.S.C. §§301-307, implementing the Inter-American Convention on International Commercial Arbitration. A judgment of a foreign court confirming or setting aside an arbitral award, however, would be covered by this Act.

4. The definition of “foreign-country judgment” does not limit foreign-country judgments to those rendered in litigation between private parties. Judgments in which a governmental entity is a party also are included, and are subject to this Act if they meet the requirements of this section and are within the scope of the Act under Section 3.

SECTION 3. APPLICABILITY.

(a) Except as otherwise provided in subsection (b), this [act] applies to a foreign-country judgment to the extent that the judgment:

(1) grants or denies recovery of a sum of money; and

(2) under the law of the foreign country where rendered, is final,
conclusive, and enforceable.

(b) This [act] does not apply to a foreign-country judgment, even if the judgment
grants or denies recovery of a sum of money, to the extent that the judgment is:

   (1) a judgment for taxes;

   (2) a fine or other penalty; or

   (3) a judgment for divorce, support, or maintenance, or other judgment
rendered in connection with domestic relations.

(c) A party seeking recognition of a foreign-country judgment has the burden of
establishing that this [act] applies to the foreign-country judgment.

Comment

Source: This section is based on Section 2 of the 1962 Act. Subsection (b) contains
material that was included as part of the definition of “foreign judgment” in Section 1(2) of the
1962 Act. Subsection (c) is new.

1. Like the 1962 Act, this Act sets out in subsection 3(a) two basic requirements that a
foreign-country judgment must meet before it comes within the scope of this Act – the foreign-
country judgment must (1) grant or deny recovery of a sum of money and (2) be final, conclusive
and enforceable under the law of the foreign country where it was rendered. Subsection 3(b) then
sets out three types of foreign-country judgments that are excluded from the coverage of this Act,
even though they meet the criteria of subsection 3(a) – judgments for taxes, judgments
constituting fines and other penalties, and judgments in domestic relations matters. These
exclusions are comparable to those contained in Section 1(2) of the 1962 Act.

2. This Act applies to a foreign-country judgment only to the extent the foreign-country
judgment grants or denies recovery of a sum of money. If a foreign-country judgment both
grants or denies recovery of a sum money and provides for some other form of relief, this Act
would apply to the portion of the judgment that grants or denies monetary relief, but not to the
portion that provides for some other form of relief. The U.S. court, however, would be left free
to decide to recognize and enforce the non-monetary portion of the judgment under principles of
comity or other applicable law. See Section 11.

3. In order to come within the scope of this Act, a foreign-country judgment must be
final, conclusive, and enforceable under the law of the foreign country in which it was rendered.
This requirement contains three distinct, although inter-related concepts. A judgment is final when it is not subject to additional proceedings in the rendering court other than execution. A judgment is conclusive when it is given effect between the parties as a determination of their legal rights and obligations. A judgment is enforceable when the legal procedures of the state to ensure that the judgment debtor complies with the judgment are available to the judgment creditor to assist in collection of the judgment.

While the first two of these requirements – finality and conclusiveness – will apply with regard to every foreign-country money judgment, the requirement of enforceability is only relevant when the judgment is one granting recovery of a sum of money. A judgment denying a sum of money obviously is not subject to enforcement procedures, as there is no monetary award to enforce. This Act, however, covers both judgments granting and those denying recovery of a sum of money. Thus, the fact that a foreign-country judgment denying recovery of a sum of money is not enforceable does not mean that such judgments are not within the scope of the Act. Instead, the requirement that the judgment be enforceable should be read to mean that, if the foreign-country judgment grants recovery of a sum of money, it must be enforceable in the foreign country in order to be within the scope of the Act.

Like the 1962 Act, subsection 3(b) requires that the determinations as to finality, conclusiveness and enforceability be made using the law of the foreign country in which the judgment was rendered. Unless the foreign-country judgment is final, conclusive, and (to the extent it grants recovery of a sum of money) enforceable in the foreign country where it was rendered, it will not be within the scope of this Act.

4. Subsection 3(b) follows the 1962 Act by excluding three categories of foreign-country money judgments from the scope of the Act – judgments for taxes, judgments that constitute fines and penalties, and judgments in domestic relations matters. The domestic relations exclusion has been redrafted to make it clear that all judgments in domestic relations matters are excluded from the Act, not just judgments “for support” as provided in the 1962 Act. This is consistent with interpretation of the 1962 Act by the courts, which extended the “support” exclusion in the 1962 Act beyond its literal wording to exclude other money judgments in connection with domestic matters. *E.g.*, Wolff v. Wolff, 389 A.2d 413 (My. App. 1978) (“support” includes alimony).

Recognition and enforcement of domestic relations judgments traditionally has been treated differently from recognition and enforcement of other judgments. The considerations with regard to those judgments, particularly with regard to jurisdiction and finality, differ from those with regard to other money judgments. Further, national laws with regard to domestic relations vary widely, and recognition and enforcement of such judgments thus is more appropriately handled through comity than through use of this uniform Act. Finally, other statutes, such as the Uniform Interstate Family Support Act and the federal International Child Support Enforcement Act, 42 U.S.C. §659a (1996), address various aspects of the recognition and enforcement of domestic relations awards. Under Section 11 of this Act, courts are free to
recognize money judgments in domestic relations matters under principles of comity or otherwise, and U.S. courts routinely enforce money judgments in domestic relations matters under comity principles.

Foreign-country judgments for taxes and judgments that constitute fines or penalties traditionally have not been recognized and enforced in U.S. courts. See, e.g., Restatement Third of the Foreign Relations Law of the United States §483 (1986). Both the “revenue rule,” under which the courts of one country will not enforce the revenue laws of another country, and the prohibition on enforcement of penal judgments seem to be grounded in the idea that one country does not enforce the public laws of another. See id. Reporters’ Note 2. The exclusion of tax judgments and judgments constituting fines or penalties from the scope of the Act reflects this tradition. Under Section 11, however, courts remain free to consider whether such judgments should be recognized and enforced under comity or other principles.

A judgment for taxes is a judgment in favor of a foreign country or one of its subdivisions based on a claim for an assessment of a tax. Thus, a judgment awarding a plaintiff restitution of the purchase price paid for an item would not be considered in any part a judgment for taxes, even though one element of the recovery was the sales tax paid by the plaintiff at the time of purchase. Such a judgment would not be one designed to enforce the revenue laws of the foreign country, but rather one designed to compensate the plaintiff. Courts generally hold that the test for whether a judgment is a fine or penalty is determined by whether its purpose is remedial in nature, with its benefits accruing to private individuals, or it is penal in nature, punishing an offense against public justice. E.g., Chase Manhattan Bank, N.A. v. Hoffman, 665 F.Supp 73 (D. Mass. 1987) (finding that Belgium judgment was not penal even though the proceeding forming the basis of the suit was primarily criminal where Belgium court considered damage petition a civil remedy, the judgment did not constitute punishment for an offense against public justice of Belgium, and benefit of the judgment accrued to private judgment creditor, not Belgium). Thus, a judgment that awards compensation or restitution for the benefit of private individuals should not automatically be considered penal in nature and therefore outside the scope of the Act simply because the action is brought on behalf of the private individuals by a government entity. Cf. U.S.-Australia Free Trade Agreement, art.14.7.2, U.S.-Austl., May 18, 2004 (providing that when government agency obtains a civil monetary judgment for purpose of providing restitution to consumers, investors, or customers who suffered economic harm due to fraud, judgment generally should not be denied recognition and enforcement on ground that it is penal or revenue in nature, or based on other foreign public law).

5. Under subsection 3(b), a foreign-country money judgment is not within the scope of this Act “to the extent” that it comes within one of the excluded categories. Therefore, if a foreign-country money judgment is only partially within one of the excluded categories, the non-excluded portion will be subject to this Act.

6. Subsection 3(c) is new. The 1962 Act does not expressly allocate the burden of proof with regard to establishing whether a foreign-country judgment is within the scope of the Act.
Courts applying the 1962 Act generally have held that the burden of proof is on the person seeking recognition to establish that the judgment is final, conclusive and enforceable where rendered. *E.g.*, Mayekawa Mfg. Co. Ltd. v. Sasaki, 888 P.2d 183, 189 (Wash. App. 1995) (burden of proof on creditor to establish judgment is final, conclusive, and enforceable where rendered); Bridgewater Corp. v. Citibank, 45 F.Supp.2d 276, 285 (S.D.N.Y. 1999) (party seeking recognition must establish that there is a final judgment, conclusive and enforceable where rendered); S.C.Chimexim S.A. v. Velco Enterprises, Ltd., 36 F. Supp.2d 206, 212 (S.D.N.Y. 1999) (Plaintiff has the burden of establishing conclusive effect). Subsection (3)(c) places the burden of proof to establish whether a foreign-country judgment is within the scope of the Act on the party seeking recognition of the foreign-country judgment with regard to both subsection (a) and subsection (b).

**SECTION 4. STANDARDS FOR RECOGNITION OF FOREIGN-COUNTRY JUDGMENT.**

(a) Except as otherwise provided in subsections (b) and (c), a court of this state shall recognize a foreign-country judgment to which this [act] applies.

(b) A court of this state may not recognize a foreign-country judgment if:

(1) the judgment was rendered under a judicial system that does not provide impartial tribunals or procedures compatible with the requirements of due process of law;

(2) the foreign court did not have personal jurisdiction over the defendant;

or

(3) the foreign court did not have jurisdiction over the subject matter.

(c) A court of this state need not recognize a foreign-country judgment if:

(1) the defendant in the proceeding in the foreign court did not receive notice of the proceeding in sufficient time to enable the defendant to defend;

(2) the judgment was obtained by fraud that deprived the losing party of
an adequate opportunity to present its case;

(3) the judgment or the [cause of action] [claim for relief] on which the judgment is based is repugnant to the public policy of this state or of the United States;

(4) the judgment conflicts with another final and conclusive judgment;

(5) the proceeding in the foreign court was contrary to an agreement between the parties under which the dispute in question was to be determined otherwise than by proceedings in that foreign court;

(6) in the case of jurisdiction based only on personal service, the foreign court was a seriously inconvenient forum for the trial of the action;

(7) the judgment was rendered in circumstances that raise substantial doubt about the integrity of the rendering court with respect to the judgment; or

(8) the specific proceeding in the foreign court leading to the judgment was not compatible with the requirements of due process of law.

(d) A party resisting recognition of a foreign-country judgment has the burden of establishing that a ground for nonrecognition stated in subsection (b) or (c) exists.

Comment

Source: This section is based on Section 4 of the 1962 Act.

1. This Section provides the standards for recognition of a foreign-country money judgment. Section 7 sets out the effect of recognition of a foreign-country money judgment under this Act.

2. Recognition of a judgment means that the forum court accepts the determination of legal rights and obligations made by the rendering court in the foreign country. See, e.g. Restatement (Second) of Conflicts of Laws, Ch. 5, Topic 3, Introductory Note (recognition of foreign judgment occurs to the extent the forum court gives the judgment “the same effect with respect to the parties, the subject matter of the action and the issues involved that it has in the
state where it was rendered.”) Recognition of a foreign-country judgment must be distinguished from enforcement of that judgment. Enforcement of the foreign-country judgment involves the application of the legal procedures of the state to ensure that the judgment debtor obeys the foreign-country judgment. Recognition of a foreign-country money judgment often is associated with enforcement of the judgment, as the judgment creditor usually seeks recognition of the foreign-country judgment primarily for the purpose of invoking the enforcement procedures of the forum state to assist the judgment creditor’s collection of the judgment from the judgment debtor. Because the forum court cannot enforce the foreign-country judgment until it has determined that the judgment will be given effect, recognition is a prerequisite to enforcement of the foreign-country judgment. Recognition, however, also has significance outside the enforcement context because a foreign-country judgment also must be recognized before it can be given preclusive effect under res judicata and collateral estoppel principles. The issue of whether a foreign-country judgment will be recognized is distinct from both the issue of whether the judgment will be enforced, and the issue of the extent to which it will be given preclusive effect.

3. Subsection 4(a) places an affirmative duty on the forum court to recognize a foreign-country money judgment unless one of the grounds for nonrecognition stated in subsection (b) or (c) applies. Subsection (b) states three mandatory grounds for denying recognition to a foreign-country money judgment. If the forum court finds that one of the grounds listed in subsection (b) exists, then it must deny recognition to the foreign-country money judgment. Subsection (c) states eight nonmandatory grounds for denying recognition. The forum court has discretion to decide whether or not to refuse recognition based on one of these grounds. Subsection (d) places the burden of proof on the party resisting recognition of the foreign-country judgment to establish that one of the grounds for nonrecognition exists.

4. The mandatory grounds for nonrecognition stated in subsection (b) are identical to the mandatory grounds stated in Section 4 of the 1962 Act. The discretionary grounds stated in subsection 4(c)(1) through (6) are based on subsection 4(b)(1) through (6) of the 1962 Act. The discretionary grounds stated in subsection 4(c)(7) and (8) are new.

5. Under subsection (b)(1), the forum court must deny recognition to the foreign-country money judgment if that judgment was “rendered under a judicial system that does not provide impartial tribunals or procedures compatible with the requirements of due process of law.” The standard for this ground for nonrecognition “has been stated authoritatively by the Supreme Court of the United States in Hilton v. Guyot, 159 U.S.113, 205 (1895). As indicated in that decision, a mere difference in the procedural system is not a sufficient basis for nonrecognition. A case of serious injustice must be involved.” Cmt §4, Uniform Foreign Money-Judgment Recognition Act (1962). The focus of inquiry is not whether the procedure in the rendering country is similar to U.S. procedure, but rather on the basic fairness of the foreign-country procedure. Kam-Tech Systems, Ltd. V. Yardeni, 74 A.2d 644, 649 (N.J. App. 2001) (interpreting the comparable provision in the 1962 Act); accord, Society of Lloyd’s v. Ashenden, 233 F.3d 473 (7th Cir. 2000) (procedures need not meet all the intricacies of the complex concept.
of due process that has emerged from U.S. case law, but rather must be fair in the broader international sense) (interpreting comparable provision in the 1962 Act). Procedural differences, such as absence of jury trial or different evidentiary rules are not sufficient to justify denying recognition under subsection (b)(1), so long as the essential elements of impartial administration and basic procedural fairness have been provided in the foreign proceeding. As the U.S. Supreme Court stated in Hilton:

Where there has been opportunity for a full and fair trial abroad before a court of competent jurisdiction conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court, or in the system of laws under which it was sitting, or fraud in procuring the judgment, or any other special reason why the comity of this nation should not allow it full effect then a foreign-country judgment should be recognized. Hilton, 159 U.S. at 202.

6. Under section 4(b)(2), the forum court must deny recognition to the foreign-country judgment if the foreign court did not have personal jurisdiction over the defendant. Section 5(a) lists six bases for personal jurisdiction that are adequate as a matter of law to establish that the foreign court had personal jurisdiction. Section 5(b) makes clear that other grounds for personal jurisdiction may be found sufficient.

7. Subsection 4(c)(2) limits the type of fraud that will serve as a ground for denying recognition to extrinsic fraud. This provision is consistent with the interpretation of the comparable provision in subsection 4(b)(2) of the 1962 Act by the courts, which have found that only extrinsic fraud — conduct of the prevailing party that deprived the losing party of an adequate opportunity to present its case — is sufficient under the 1962 Act. Examples of extrinsic fraud would be when the plaintiff deliberately had the initiating process served on the defendant at the wrong address, deliberately gave the defendant wrong information as to the time and place of the hearing, or obtained a default judgment against the defendant based on a forged confession of judgment. When this type of fraudulent action by the plaintiff deprivers the defendant of an adequate opportunity to present its case, then it provides grounds for denying recognition of the foreign-country judgment. Extrinsic fraud should be distinguished from intrinsic fraud, such as false testimony of a witness or admission of a forged document into evidence during the foreign proceeding. Intrinsic fraud does not provide a basis for denying recognition under subsection 4(c)(2), as the assertion that intrinsic fraud has occurred should be raised and dealt with in the rendering court.

8. The public policy exception in subsection 4(c)(3) is based on the public policy exception in subsection 4(b)(3) of the 1962 Act, with one difference. The public policy exception in the 1962 Act states that the relevant inquiry is whether “the [cause of action] [claim for relief] on which the judgment is based” is repugnant to public policy. Based on this “cause
of action” language, some courts interpreting the 1962 Act have refused to find that a public policy challenge based on something other than repugnancy of the foreign cause of action comes within this exception. E.g., Southwest Livestock & Trucking Co., Inc. v. Ramon, 169 F.3d 317 (5th Cir. 1999) (refusing to deny recognition to Mexican judgment on promissory note with interest rate of 48% because cause of action to collect on promissory note does not violate public policy); Guinness PLC v. Ward, 955 F.2d 875 (4th Cir. 1992) (challenge to recognition based on post-judgment settlement could not be asserted under public policy exception); The Society of Lloyd’s v. Turner, 303 F.3d 325 (5th Cir. 2002) (rejecting argument legal standards applied to establish elements of breach of contract violated public policy because cause of action for breach of contract itself is not contrary to state public policy); cf. Bachchan v. India Abroad Publications, Inc., 585 N.Y.S.2d 661 (N.Y. Sup. Ct. 1992) (judgment creditor argued British libel judgment should be recognized despite argument it violated First Amendment because New York recognizes a cause of action for libel). Subsection 4(c)(3) rejects this narrow focus by providing that the forum court may deny recognition if either the cause of action or the judgment itself violates public policy. Cf. Restatement (Third) of the Foreign Relations Law of the United States, § 482(2)(d) (1986) (containing a similarly-worded public policy exception to recognition).

Although subsection 4(c)(3) of this Act rejects the narrow focus on the cause of action under the 1962 Act, it retains the stringent test for finding a public policy violation applied by courts interpreting the 1962 Act. Under that test, a difference in law, even a marked one, is not sufficient to raise a public policy issue. Nor is it relevant that the foreign law allows a recovery that the forum state would not allow. Public policy is violated only if recognition or enforcement of the foreign-country judgment would tend clearly to injure the public health, the public morals, or the public confidence in the administration of law, or would undermine “that sense of security for individual rights, whether of personal liberty or of private property, which any citizen ought to feel.” Hunt v. BP Exploration Co. (Libya) Ltd., 492 F. Supp. 885, 901 (N.D. Tex. 1980).

The language “or of the United States” in subsection 4(c)(3), which does not appear in the 1962 Act provision, makes it clear that the relevant public policy is that of both the State in which recognition is sought and that of the United States. This is the position taken by the vast majority of cases interpreting the 1962 public policy provision. E.g., Bachchan v. India Abroad Publications, Inc., 585 N.Y.S.2d 661 (Sup.Ct. N.Y. 1992) (British libel judgment denied recognition because it violates First Amendment).

9. Subsection 4(c)(5) allows the forum court to refuse recognition of a foreign-country judgment when the parties had a valid agreement, such as a valid forum selection clause or agreement to arbitrate, providing that the relevant dispute would be resolved in a forum other than the forum issuing the foreign-country judgment. Under this provision, the forum court must find both the existence of a valid agreement and that the agreement covered the subject matter involved in the foreign litigation resulting in the foreign-country judgment.

10. Subsection 4(c)(6) authorizes the forum court to refuse recognition of a foreign-country judgment that was rendered in the foreign country solely on the basis of personal service
when the forum court believes the original action should have been dismissed by the court in the foreign country on grounds of *forum non conveniens*.

11. Subsection 4(c)(7) is new. Under this subsection, the forum court may deny recognition to a foreign-country judgment if there are circumstances that raise substantial doubt about the integrity of the rendering court with respect to that judgment. It requires a showing of corruption in the particular case that had an impact on the judgment that was rendered. This provision may be contrasted with subsection 4(b)(1), which requires that the forum court refuse recognition to the foreign-country judgment if it was rendered under a judicial system that does not provide impartial tribunals. Like the comparable provision in subsection 4(a)(1) of the 1962 Act, subsection 4(b)(1) focuses on the judicial system of the foreign country as a whole, rather than on whether the particular judicial proceeding leading to the foreign-country judgment was impartial and fair. See, e.g., *The Society of Lloyd’s v. Turner*, 303 F.3d 325, 330 (5th Cir. 2002) (interpreting the 1962 Act); *CIBC Mellon Trust Co. v. Mora Hotel Corp.*, N.V., 743 N.Y.S.2d 408, 415 (N.Y. App. 2002) (interpreting the 1962 Act); *Society of Lloyd’s v. Ashenden*, 233 F.3d 473, 477 (7th Cir. 2000) (interpreting the 1962 Act). On the other hand, subsection 4(c)(7) allows the court to deny recognition to the foreign-country judgment if it finds a lack of impartiality and fairness of the tribunal in the individual proceeding leading to the foreign-country judgment. Thus, the difference is that between showing, for example, that corruption and bribery is so prevalent throughout the judicial system of the foreign country as to make that entire judicial system one that does not provide impartial tribunals versus showing that bribery of the judge in the proceeding that resulted in the particular foreign-country judgment under consideration had a sufficient impact on the ultimate judgment as to call it into question.

12. Subsection 4(c)(8) also is new. It allows the forum court to deny recognition to the foreign-country judgment if the court finds that the specific proceeding in the foreign court was not compatible with the requirements of fundamental fairness. Like subsection 4(c)(7), it can be contrasted with subsection 4(b)(1), which requires the forum court to deny recognition to the foreign-country judgment if the forum court finds that the entire judicial system in the foreign country where the foreign-country judgment was rendered does not provide procedures compatible with the requirements of fundamental fairness. While the focus of subsection 4(b)(1) is on the foreign country’s judicial system as a whole, the focus of subsection 4(c)(8) is on the particular proceeding that resulted in the specific foreign-country judgment under consideration. Thus, the difference is that between showing, for example, that there has been such a breakdown of law and order in the particular foreign country that judgments are rendered on the basis of political decisions rather than the rule of law throughout the judicial system versus a showing that for political reasons the particular party against whom the foreign-country judgment was entered was denied fundamental fairness in the particular proceedings leading to the foreign-country judgment.

Subsections 4(c)(7) and (8) both are discretionary grounds for denying recognition, while subsection 4(b)(1) is mandatory. Obviously, if the entire judicial system in the foreign country fails to satisfy the requirements of impartiality and fundamental fairness, a judgment rendered in
that foreign country would be so compromised that the forum court should refuse to recognize it as a matter of course. On the other hand, if the problem is evidence of a lack of integrity or fundamental fairness with regard to the particular proceeding leading to the foreign-country judgment, then there may or may not be other factors in the particular case that would cause the forum court to decide to recognize the foreign-country judgment. For example, a forum court might decide not to exercise its discretion to deny recognition despite evidence of corruption or procedural unfairness in a particular case because the party resisting recognition failed to raise the issue on appeal from the foreign-country judgment in the foreign country, and the evidence establishes that, if the party had done so, appeal would have been an adequate mechanism for correcting the transgressions of the lower court.

13. Under subsection 4(d), the party opposing recognition of the foreign-country judgment has the burden of establishing that one of the grounds for nonrecognition set out in subsection 4(b) or (c) applies. The 1962 Act was silent as to who had the burden of proof to establish a ground for nonrecognition and courts applying the 1962 Act took different positions on the issue. Compare Bridgeway Corp. v. Citibank, 45 F.Supp. 2d 276, 285 (S.D.N.Y. 1999) (plaintiff has burden to show no mandatory basis under 4(a) for nonrecognition exists; defendant has burden regarding discretionary bases) with The Courage Co. LLC v. The ChemShare Corp., 93 S.W.3d 323, 331 (Tex. App. 2002) (party seeking to avoid recognition has burden to prove ground for nonrecognition). Because the grounds for nonrecognition in Section 4 are in the nature of defenses to recognition, the burden of proof is most appropriately allocated to the party opposing recognition of the foreign-country judgment.

SECTION 5. PERSONAL JURISDICTION.

(a) A foreign-country judgment may not be refused recognition for lack of personal jurisdiction if:

(1) the defendant was served with process personally in the foreign country;

(2) the defendant voluntarily appeared in the proceeding, other than for the purpose of protecting property seized or threatened with seizure in the proceeding or of contesting the jurisdiction of the court over the defendant;

(3) the defendant, before the commencement of the proceeding, had agreed to submit to the jurisdiction of the foreign court with respect to the subject matter
involved;

(4) the defendant was domiciled in the foreign country when the proceeding was instituted or was a corporation or other form of business organization that had its principal place of business in, or was organized under the laws of, the foreign country;

(5) the defendant had a business office in the foreign country and the proceeding in the foreign court involved a [cause of action] [claim for relief] arising out of business done by the defendant through that office in the foreign country; or

(6) the defendant operated a motor vehicle or airplane in the foreign country and the proceeding involved a [cause of action] [claim for relief] arising out of that operation.

(b) The list of bases for personal jurisdiction in subsection (a) is not exclusive. The courts of this state may recognize bases of personal jurisdiction other than those listed in subsection(a) as sufficient to support a foreign-country judgment.

Comment

Source: This provision is based on Section 5 of the 1962 Act. Its substance is the same as that of Section 5 of the 1962 Act, except as noted in Comment 2 below with regard to subsection 5(a)(4).

1. Under section 4(b)(2), the forum court must deny recognition to the foreign-country judgment if the foreign court did not have personal jurisdiction over the defendant. Section 5(a) lists six bases for personal jurisdiction that are adequate as a matter of law to establish that the foreign court had personal jurisdiction. Section 5(b) makes it clear that these bases of personal jurisdiction are not exclusive. The forum court may find that the foreign court had personal jurisdiction over the defendant on some other basis.

2. Subsection 5(a)(4) of the 1962 Act provides that the foreign court had personal jurisdiction over the defendant if the defendant was “a body corporate” that “had its principal place of business, was incorporated, or had otherwise acquired corporate status, in the foreign state.” Subsection 5(a)(4) of this Act extends that concept to forms of business organization other
than corporations.

3. Subsection 5(a)(3) provides that the foreign court has personal jurisdiction over the defendant if the defendant agreed before commencement of the proceeding leading to the foreign-country judgment to submit to the jurisdiction of the foreign court with regard to the subject matter involved. Under this provision, the forum court must find both the existence of a valid agreement to submit to the foreign court’s jurisdiction and that the agreement covered the subject matter involved in the foreign litigation resulting in the foreign-country judgment.

SECTION 6. PROCEDURE FOR RECOGNITION OF FOREIGN-COUNTRY JUDGMENT.

(a) If recognition of a foreign-country judgment is sought as an original matter, the issue of recognition shall be raised by filing an action seeking recognition of the foreign-country judgment.

(b) If recognition of a foreign-country judgment is sought in a pending action, the issue of recognition may be raised by counterclaim, cross-claim, or affirmative defense.

Comment

Source: This section is new.

1. Unlike the 1962 Act, which was silent as to the proper procedure for seeking recognition of a foreign-country judgment, Section 6 of this Act expressly sets out the ways in which the issue of recognition may be raised. Under section 6, the issue of recognition always must be raised in a court proceeding. Thus, section 6 rejects decisions under the 1962 Act holding that the registration procedure found in the Uniform Enforcement of Foreign Judgments Act could be utilized with regard to recognition of a foreign-country judgment. *E.g.* Society of Lloyd’s v. Ashenden, 233 F.3d 473 (7th Cir. 2000). The Enforcement Act deals solely with the *enforcement* of sister-state judgments and other judgments entitled to full faith and credit, not with the *recognition* of foreign-country judgments.

More broadly, section 6 rejects the use of any registration procedure in the context of the foreign-country judgments covered by this Act. A registration procedure represents a balance between the interest of the judgment creditor in obtaining quick and efficient recognition and enforcement of a judgment when the judgment debtor has already been provided with an opportunity to litigate the underlying issues, and the interest of the judgment debtor in being
provided an adequate opportunity to raise and litigate issues regarding whether the foreign-country judgment should be recognized. In the context of sister-state judgments, this balance favors use of a truncated procedure such as that found in the Enforcement Act. Recognition of sister-state judgments normally is mandated by the Full Faith and Credit Clause. Courts recognize only a very limited number of grounds for denying full faith and credit to a sister-state judgment – that the rendering court lacked jurisdiction, that the judgment was procured by fraud, that the judgment has been satisfied, or that the limitations period has expired. Thus, the judgment debtor with regard to a sister-state judgment normally does not have any grounds for opposing recognition and enforcement of the judgment. The extremely limited grounds for denying full faith and credit to a sister-state judgment reflect the fact such judgments will have been rendered by a court that is subject to the same due process limitations and the same overlap of federal statutory and constitutional law as the forum state’s courts, and, to a large extent, the same body of court precedent and socio-economic ideas as those shaping the law of the forum state. Therefore, there is a strong presumption of fairness and competence attached to a sister-state judgment that justifies use of a registration procedure.

The balance between the benefits and costs of a registration procedure is significantly different, however, in the context of recognition and enforcement of foreign-country judgments. Unlike the limited grounds for denying full faith and credit to a sister-state judgment, this Act provides a number of grounds upon which recognition of a foreign-country judgment may be denied. Determination of whether these grounds apply requires the forum court to look behind the foreign-country judgment to evaluate the law and the judicial system under which the foreign-country judgment was rendered. The existence of these grounds for nonrecognition reflects the fact there is less expectation that foreign-country courts will follow procedures comporting with U.S. notions of fundamental fairness and jurisdiction or that those courts will apply laws viewed as substantively tolerable by U.S. standards than there is with regard to sister-state courts. In some situations, there also may be suspicions of corruption or fraud in the foreign-country proceedings. These differences between sister-state judgments and foreign-country judgments provide a justification for requiring judicial involvement in the decision whether to recognize a foreign-country judgment in all cases in which that issue is raised. Although the threshold for establishing that a foreign-country judgment is not entitled to recognition under Section 4 is high, there is a sufficiently greater likelihood that significant recognition issues will be raised so as to require a judicial proceeding.

2. This Section contemplates that the issue of recognition may be raised either as an original matter or in the context of a pending proceeding. Subsection 6(a) provides that in order to raise the issue of recognition of a foreign-country judgment as an initial matter, the party seeking recognition must file an action for recognition of the foreign-country judgment. Subsection 6(b) provides that when the recognition issue is raised in a pending proceeding, it may be raised by counterclaim, cross-claim or affirmative defense, depending on the context in which it is raised. These rules are consistent with the way the issue of recognition most often was raised in most states under the 1962 Act.
3. An action seeking recognition of a foreign-country judgment under this Section is an action on the foreign-country judgment itself, not an action on the underlying cause of action that gave rise to that judgment. The parties to an action under Section 6 may not relitigate the merits of the underlying dispute that gave rise to the foreign-country judgment.

4. While this Section sets out the ways in which the issue of recognition of a foreign-country judgment may be raised, it is not intended to create any new procedure not currently existing in the state or to otherwise effect existing state procedural requirements. The parties to an action in which recognition of a foreign-country judgment is sought under Section 6 must comply with all state procedural rules with regard to that type of action. Nor does this Act address the question of what constitutes a sufficient basis for jurisdiction to adjudicate with regard to an action under Section 6. Courts have split over the issue of whether the presence of assets of the debtor in a state is a sufficient basis for jurisdiction in light of footnote 36 of the U.S. Supreme Court decision in Shaffer v. Heitner, 433 U.S. 186, 210 n.36 (1977). This Act takes no position on that issue.

5. In states that have adopted the Uniform Foreign-Money Claims Act, that Act will apply to the determination of the amount of a money judgment recognized under this Act.

SECTION 7. EFFECT OF RECOGNITION OF FOREIGN-COUNTRY JUDGMENT. If the court in a proceeding under Section 6 finds that the foreign-country judgment is entitled to recognition under this Act then, to the extent that the foreign-country judgment grants or denies recovery of a sum of money, the foreign-country judgment is:

(1) conclusive between the parties to the same extent as the judgment of a sister state entitled to full faith and credit in this state would be conclusive; and

(2) enforceable in the same manner and to the same extent as a judgment rendered in this state.

Comment

Source: The substance of subsection 7(1) is based on Section 3 of the 1962 Act. Subsection 7(2) is new.

1. Section 5 of this Act sets out the standards for the recognition of foreign-country judgments within the scope of this Act, and places an affirmative duty on the forum court to
recognize any foreign-country judgment that meets those standards. Section 6 of this Act sets out the procedures by which the issue of recognition may be raised. This Section sets out the consequences of the decision by the forum court that the foreign-country judgment is entitled to recognition.

2. Under subsection 7(1), the first consequence of recognition of a foreign-country judgment is that it is treated as conclusive between the parties in the forum state. Section 7(1) does not attempt to establish directly the extent of that conclusiveness. Instead, it provides that the foreign-country judgment is treated as conclusive to the same extent that a judgment of a sister state that had been determined to be entitled to full faith and credit would be conclusive. This means that the foreign-country judgment generally will be given the same effect in the forum state that it has in the foreign country where it was rendered. Subsection 7(1), however, sets out the minimum effect that must be given to the foreign-country judgment once recognized. The forum court remains free to give the foreign-country judgment a greater preclusive effect in the forum state than the judgment would have in the foreign country where it was rendered. Cf. Restatement (Third) of the Foreign Relations Law of the United States, § 481 cmt c (1986).

3. Under subsection 7(2), the second consequence of recognition of a foreign-country judgment is that, to the extent it grants a sum of money, it is enforceable in the forum state in accordance with the procedures for enforcement in the forum state and to the same extent that a judgment of the forum state would be enforceable. Cf. Restatement (Third) of the Foreign Relations Law of the United States §481 (1986) (judgment entitled to recognition is enforceable in accordance with the procedure for enforcement of judgments applicable where enforcement is sought). Thus, under subsection 7(2), once recognized, the foreign-country judgment has the same effect and is subject to the same procedures, defenses and proceedings for reopening, vacating, or staying a judgment of a comparable court in the forum state, and can be enforced or satisfied in the same manner as such a judgment of the forum state.

SECTION 8. STAY OF PROCEEDINGS PENDING APPEAL OF FOREIGN-COUNTRY JUDGMENT. If a party establishes that an appeal from a foreign-country judgment is pending or will be taken, the court may stay any proceedings with regard to the foreign-country judgment until the appeal is concluded, the time for appeal expires, or the appellant has had sufficient time to prosecute the appeal and has failed to do so.

Comment

Source: This section is the same substantively as section 6 of the 1962 Act, except that it adds as an additional measure for the duration of the stay “the time for appeal expires.”
1. Under Section 3 of this Act, a foreign-country judgment is not within the scope of this Act unless it is conclusive and enforceable where rendered. Thus, if the effect of appeal under the law of the foreign country in which the judgment was rendered is to prevent it from being conclusive or enforceable between the parties, the existence of a pending appeal in the foreign country would prevent the application of this Act. Section 8 addresses a different situation. It deals with the situation in which either (1) the party seeking a stay has demonstrated that it intends to file an appeal in the foreign country, although the appeal has not yet been filed or (2) an appeal has been filed in the foreign country, but under the law of the foreign country filing of an appeal does not affect the conclusiveness or enforceability of the judgment. Section 8 allows the forum court in those situations to determine in its discretion that a stay of proceedings is appropriate.

SECTION 9. STATUTE OF LIMITATIONS. An action to recognize a foreign-country judgment must be commenced within the earlier of the time during which the foreign-country judgment is effective in the foreign country or 15 years from the date that the foreign-country judgment became effective in the foreign country.

Comment

Source: This Section is new. The 1962 Act did not contain a statute of limitations. Some courts applying the 1962 Act have used the state’s general statute of limitations, e.g., Vrozos v. Sarantopoulos, 552 N.E.2d 1053 (Ill. App. 1990) (as Recognition Act contains no statute of limitations, general five-year statute of limitations applies), while others have used the statute of limitations applicable with regard to enforcement of a domestic judgment, e.g., La Societe Anonyme Goro v. Conveyor Accessories, Inc., 677 N.E. 2d 30 (Ill. App. 1997).

1. Under Section 3 of this Act, this Act only applies to foreign-country judgments that are conclusive, and if the judgment grants recovery of a sum of money, enforceable where rendered. Thus, if the period of effectiveness of the foreign-country judgment has expired in the foreign country where the judgment was rendered, the foreign-country judgment would not be subject to this Act. This means that the period of time during which a foreign-country judgment may be recognized under this Act normally is measured by the period of time during which that judgment is effective (that is, conclusive and, if applicable, enforceable) in the foreign country that rendered the judgment. If, however, the foreign-country judgment remains effective for more than fifteen years after the date on which it became effective in the foreign country, Section 9 places an additional time limit on recognition of a foreign-country judgment. It provides that, if the foreign-country judgment remains effective between the parties for more than fifteen years, then an action to recognize the foreign-country judgment under this Act must be commenced within that fifteen year period.
2. Section 9 does not address the issue of whether a foreign-country judgment that can no longer be the basis of a recognition action under this Act because of the application of the fifteen-year limitations period in Section 9 may be used for other purposes. For example, a common rule with regard to judgments barred by a statute of limitations is that they still may be used defensively for purposes of offset and for their preclusive effect. The extent to which a foreign-country judgment with regard to which a recognition action is barred by Section 9 may be used for these or other purposes is left to the other law of the forum state.

SECTION 10. UNIFORMITY OF INTERPRETATION. In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

Comment

Source: This Section is substantively the same as Section 8 of the 1962 Act. The section has been rewritten to reflect current NCCUSL practice.

SECTION 11. SAVING CLAUSE. This [act] does not prevent the recognition under principles of comity or otherwise of a foreign-country judgment not within the scope of this [act].

Comment

Source: This section is based on Section 7 of the 1962 Act.

1. Section 3 of this Act provides that this Act applies only to certain foreign-country judgments that grant or deny recovery of a sum of money. The purpose of this Act is to establish the minimum standards for recognition of those judgments. Section 11 makes clear that no negative implication should be read from the fact that this Act does not provide for recognition of other foreign-country judgments. Rather, this Act simply does not address the issue of whether foreign-country judgments not within its scope under Section 3 should be recognized. Courts are free to recognize those foreign-country judgments not within the scope of this Act under common law principles of comity or other applicable law.

SECTION 12. EFFECTIVE DATE.

[(a) This [act] takes effect … .]
[(b) This [act] applies to all actions commenced on or after the effective date of this [act] in which the issue of recognition of a foreign-country judgment is raised.]

Comment

Source: Subsection 12(a) is the same as Section 11 of the 1962 Act. Subsection 12(b) is new.

1. Subsection 12(b) provides that this Act will apply to all actions in which the issue of recognition of a foreign-country judgment is raised that are commenced on or after the effective date of this Act. Thus, the application of this Act is measured not from the time the original action leading to the foreign-country judgment was commenced in the foreign country, but rather from the time the action in which the issue of recognition is raised is commenced in the forum court. Subsection 12(b) does not distinguish between whether the purpose of the action commenced in the forum court was to seek recognition as an original matter under Subsection 6(a) or was an action that was already pending when the issue of recognition was raised under Subsection 6(b).

SECTION 13. REPEAL. The following [acts] are repealed:

(a) Uniform Foreign Money-Judgments Recognition Act,

(b) ]

Comment

Source: This Section is an updated version of Section 10 of the 1962 Act.