Enforcement of Foreign Judgments 2020

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Getting The Deal Through

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Lexology Getting The Deal Through is delighted to publish the ninth edition of *Enforcement of Foreign Judgments*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Armenia, Brazil, Canada (Quebec), Cyprus, Germany, Hong Kong, Jordan, Luxembourg, the Netherlands and Sweden.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Patrick Doris of Gibson, Dunn & Crutcher LLP, for his continued assistance with this volume.

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United States

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LEGISLATION

Treaties

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

The United States is not a signatory to any convention or treaty that governs the recognition or enforcement of non-US court judgments in US courts. While this chapter does not specifically address international arbitration awards, it is worth noting that the US is a party to multilateral conventions that bear on US court enforcement of arbitration awards: the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention) and the Inter-American Convention on International Commercial Arbitration 1979 (Panama Convention). Typically, foreign arbitration awards issued pursuant to the New York and Panama Conventions face an easier path to recognition and enforcement in US courts than foreign judgments, because of these Conventions.

The US is also party to the multilateral Convention on the Settlement of Investment Disputes Between States and Nationals of Other States 1965 (ICSID Convention). Awards falling under the ICSID Convention are to be treated by signatory states as though they were enforcing domestic court awards.

Intra-state variations

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

No. Recognition and enforcement of foreign judgments in the United States is typically addressed on a state-by-state basis, although the law in almost all of the states can be traced back to the principles set forth in the US Supreme Court case *Hilton v Guyot*, 159 US 113 (1895).

Despite sharing origins in the *Hilton* case, state law approaches to the recognition and enforcement of foreign judgments display some significant differences, including the way they address reciprocity with the foreign jurisdiction as a prerequisite to recognition and enforcement, and the way they analyse the discretionary grounds for non-recognition of a foreign judgment.

Sources of law

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

Recognition and enforcement of foreign judgments is governed in the United States by individual state statutes or by common law. There is no federal statutory provision governing the recognition or enforcement of foreign judgments on a nationwide level. See Restatement (Third) of the Foreign Relations Law § 481 (1987) ('Since *Erie v Tompkins*, 304 U.S. 64 . . . (1938), it has been accepted that in the absence of a federal statute or treaty or some other basis for federal jurisdiction, such as admiralty, recognition and enforcement of foreign-country judgments is a matter of State law, and an action to enforce a foreign-country judgment is not an action arising under the laws of the United States.'). Nor will foreign judgments be recognised in US courts through the use of a letter rogatory.

The 1962 Uniform Foreign Money-Judgments Recognition Act (the 1962 Model Act) sought to generally codify the principles set forth in *Hilton v Guyot*, 159 US 113 (1895), and was drafted in significant part to help address a concern that foreign courts were refusing to recognise US judgments due to serious inconsistencies in US recognition and enforcement law. The 1962 Model Act was eventually adopted in substantial part by 32 states, the District of Columbia and the US Virgin Islands.

The 1962 Model Act was updated in 2005 and renamed the Uniform Foreign-Country Money Judgments Recognition Act (the 2005 Model Act), which has since been adopted by 24 states and the District of Columbia. Most recently, legislators in Tennessee adopted and enacted the 2005 Model Act in 2019, and legislators in North Dakota and Texas did so in 2017. Legislators in Massachusetts introduced legislation in 2019 to adopt the 2005 Model Act, but that legislation is still pending and awaiting further action. Therefore, presently, some US states follow a version of the 1962 Model Act, some follow a version of the 2005 Model Act, and some continue to address recognition and enforcement issues through common law principles reflected in case law.

Hague Convention requirements

4 | 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?

The United States is not a signatory to the Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters 1971.

BRINGING A CLAIM FOR ENFORCEMENT

Limitation periods

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

The 2005 Model Act expressly provides that '[a]n action to recognize a foreign-country judgment must be commenced within the earlier of the time during which the foreign-country judgment is effective in the foreign country or 15 years from the date that the foreign-country

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judgment became effective in the foreign country'. However, the statute of limitations varies, according to state law, in jurisdictions that have not adopted the 2005 Model Act. The 1962 Model Act, unlike the 2005 Model Act, does not address the question of a statute of limitations and leaves this issue to state law.

Types of enforceable order

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

Typically, subject to certain requirements, US courts are willing to entertain the recognition and enforcement of foreign civil judgments for a fixed sum of money, excluding judgments for fines, penalties or taxes.

Further, the United States generally adheres to the rule that the courts of one nation will not enforce the penal laws of another nation. See *Huntington v Attrill*, 146 US 657, 673-674 (1892). The question of whether a statute of a particular nation is a penal law depends on whether the statute's purpose is to punish an offence against the public justice of the state, or to afford a private remedy to a person injured by the wrongful act. See *Plata v Darbun Enterprises, Inc*, 2014 WL 341667, *5 (Cal App 2014):

> *'[T]he issue whether a monetary award is a penalty within the meaning of the [Recognition Act] requires a court to focus on the legislative purpose of the law underlying the foreign judgment. A judgment is a penalty even if it awards monetary damages to a private individual if the judgment seeks to redress a public wrong and vindicate the public justice, as opposed to affording a private remedy to a person injured by the wrongful act.'*

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

Competent courts

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

Most US states require the party seeking recognition and enforcement of a foreign judgment to file an action in a court that has an adequate basis to exercise jurisdiction over the alleged judgment creditor. Recognition and enforcement actions may be brought in a state court or a federal court, depending on procedural rules. However, a federal court sitting in diversity will generally apply the substantive law of the state in which it sits, based on principles emerging from *Erie RR Co v Tompkins*, 304 US 64 (1938). Federal common law principles may be applied in specialised cases.

A party may seek, in a federal court, to recognise and enforce under the Federal Arbitration Act an international arbitral award obtained under the New York or Panama Conventions.

Separation of recognition and enforcement

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

A foreign judgment cannot be enforced in the United States until the judgment is recognised by a US court. The 1962 and 2005 Model Acts deal with the recognition of foreign judgments. See *Electrolines, Inc v Prudential Assurance Co*, 677 NW 2d 874, 882 (Mich Ct App 2003):

> *'[A] foreign country money judgment cannot be enforced until it has been recognized and . . . the [Recognition Act] is not an enforcement act. The [Recognition Act] only serves the purpose of providing a court with a means to recognize a foreign money judgment.'*

Once a judgment has been recognised by a US court and is no longer subject to appellate review, the judgment creditor can commence the enforcement process.

OPPOSITION

Defences

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

Depending on the US state in which the recognition action is filed, defendants may avail themselves of specific defences recognised by common law or enumerated in the 1962 or 2005 Model Acts, or both (see question 11). Where a foreign judgment runs contrary to US constitutional principles, US courts will generally refuse to recognise and enforce it. See *Osorio v Dole Food Co*, 665 F Supp 2d 1307 (SD Fla 2009), aff'd sub nom *Osorio v Dow Chem Co*, 635 F3d 1277 (Eleventh Circuit, 2011), in which the court refused to recognise the foreign judgment on multiple independent grounds, including lack of impartial tribunals, lack of due process and various conflicts with US and state public policy issues (at 1352). See also William E Thomson and Perlette Michèle Jura, US Chamber Institute for Legal Reform, *Confronting the New Breed of Transnational Litigation: Abusive Foreign Judgments* (2011), available at www.instituteforlegalreform.com/resource/confronting-the-new-breed-of-transnational-litigation-abusive-foreign-judgments.

US courts, like many courts worldwide, will strive to avoid relitigating the merits of a foreign case in the context of a judgment recognition action; but as the Supreme Court cautioned in *Hilton*, that goal must be balanced with the need to protect US citizens in the administration of justice. See *Hilton*, 159 US at 163-64:

> *'"Comity," in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws.'*

See also *Laker Airways Ltd v Sabena, Belgian World Airlines*, 731 F 2d 909, 937 & n 104 (DC Circuit, 1984) ('authorities have recognized that the obligation of comity expires when the strong public policies of the forum are vitiated by the foreign act').

International arbitral awards obtained under the New York or Panama Conventions are subject to specific defences to recognition and enforcement as laid out by the texts of those Conventions.

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Injunctive relief

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

US states disagree on this point. However, a 2016 federal appellate decision affirmed an order granting injunctive relief in the foreign judgment context using the US's Racketeer Influenced and Corrupt Organizations Act (RICO). In an 8 August 2016 decision, a unanimous panel of the US Court of Appeals for the Second Circuit affirmed in full the 2014 lower court judgment in favour of Chevron Corporation in *Chevron Corp v Donziger*, Case No. 14-826, which had granted Chevron equitable relief under the federal RICO statute and New York common law from a fraudulently procured US$9.5 billion Ecuadorian judgment.

The lower court's decision had detailed how New York plaintiffs' attorney Steven Donziger and his co-conspirators procured a multi-billion-dollar Ecuadorian judgment against Chevron through corrupt means and then attempted to leverage it to extract a massive payment from the company. The Second Circuit noted that the defendants' wrongful conduct included fabricating evidence, bribing foreign officials in violation of the Foreign Corrupt Practices Act, and even ghost-writing the multi-billion-dollar judgment against Chevron and bribing the Ecuadorian judge to issue it.

Importantly, the Second Circuit affirmed in full the relief granted by the lower court, including enjoining Donziger and his Ecuadorian clients from attempting to recognise and enforce the judgment in any court in the United States, and placing a constructive trust over any proceeds they managed to collect from the judgment. The Second Circuit's decision addressed several important questions of law, including the ability of private plaintiffs to obtain equitable remedies under RICO. This federal decision, *Chevron Corp v Donziger*, 833 F3d 74 (Second Circuit, 2016), which is final after the US Supreme Court declined to review the matter in June 2017, should have important implications for other companies and individuals faced with similar corrupt schemes.

REQUIREMENTS FOR RECOGNITION

Basic requirements for recognition

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

A final, conclusive and enforceable judgment, often required to be a civil judgment for a fixed sum of money, is the starting point for recognition by a US court (eg, section 3(a)(2) of the 2005 Model Act and section 3 of the 1962 Model Act). Unlike in some countries, this 'finality' requirement is not usually interpreted by US courts to mean that the foreign judgment is no longer subject to any appeals in the foreign jurisdiction. However, in many US state courts, if a foreign judgment is still subject to appeal in the issuing forum, a related US recognition action will likely be stayed pending resolution of the appeal in the foreign forum. See *PJSC Credit-Moscow Bank v Khairoulline*, No. CV 15-6604, 2016 WL 4454208 (ED Pa 24 August 2016), finding that, under Pennsylvania's recognition statute, the court had jurisdiction over five Russian judgments, even though all five judgments had been appealed in Russia, but ultimately issuing a discretionary stay, as permitted under Pennsylvania's recognition statute, pending the outcome of the Russian appellate proceedings.

Typical mandatory grounds for non-recognition

In states that follow the 1962 and 2005 Model Acts, mandatory non-recognition of a foreign judgment is generally required where:

- the judgment was rendered under a judicial system that does not provide impartial tribunals;
- the judgment was rendered under a judicial system that does not provide procedures compatible with the requirements of due process of law;
- the foreign court did not have personal jurisdiction over the defendant; or
- the foreign court did not have jurisdiction over the subject matter.

For further information, see section 4(a) of the 1962 Model Act and section 4(b) of the 2005 Model Act.

Typical discretionary grounds for non-recognition

The 2005 Model Act provides that courts in a state adopting the Act:

> *'[…]need not recognize a foreign-country judgment if:*
> 1. *the defendant in the proceeding in the foreign court did not receive notice of the proceeding in sufficient time to enable the defendant to defend;*
> 2. *the judgment was obtained by fraud that deprived the losing party of an adequate opportunity to present its case;*
> 3. *the judgment or the [cause of action] [claim for relief] on which the judgment is based is repugnant to the public policy of this state or of the United States;*
> 4. *the judgment conflicts with another final and conclusive judgment;*
> 5. *the proceeding in the foreign court was contrary to an agreement between the parties under which the dispute in question was to be determined otherwise than by proceedings in that foreign court;*
> 6. *in the case of jurisdiction based only on personal service, the foreign court was a seriously inconvenient forum for the trial of the action;*
> 7. *the judgment was rendered in circumstances that raise substantial doubt about the integrity of the rendering court with respect to the judgment; or*
> 8. *the specific proceeding in the foreign court leading to the judgment was not compatible with the requirements of due process of law'.*

For further information, see section 4(c) of the 2005 Model Act.

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

US states that have not adopted either version of the Model Act are governed by common law principles, which also tend to provide for non-recognition grounds similar to those listed above.

Other factors

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

While *Hilton* contained a reciprocity requirement, such a requirement is expressly retained by only a handful of US states. In addition, some US courts have specified that the principle of 'comity' must be applied

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in a manner consistent with 'the rights of [US] citizens, or of other persons who are under the protection of [US] laws'. See *Hilton*, 159 US at 163-64; see also *De Brimont v Penniman*, 7 F Cas 309 (CCSDNY 1873): '[comity] does not require [recognition], but rather forbids it, when such a recognition works a direct violation of the policy of our laws, and does violence to what we deem the rights of our own citizens'.

Procedural equivalence

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

Yes. Both Model Acts provide for mandatory non-recognition of foreign judgments where the judgment was rendered under a judicial system that does not provide impartial tribunals or procedures compatible with the requirements of due process of law. These same requirements exist under US and state common law principles governing recognition and enforcement.

As the court explained in *Osorio*, 'a judicial safety valve is needed for cases . . . [in] which a foreign judgment violates international due process, works a direct violation of the policy of our laws, and does violence to what we deem the rights of our citizens' (*Osorio*, 665 F Supp 2d 1307 (No. 07-22693) (Order on Motion for Reconsideration at 7)). Note, however, that courts in states that follow the 1962 Model Act, which focuses on the due process provided by the judicial system of the foreign forum, take that system-based analysis seriously. See, for example, *Harvardsky Prumyslovy Holding, AS-V Likvidaci v Kozeny*, 166 AD3d 494, 495 (NY App Div 2018) ('[B]ecause the statute refers to a system which does not provide procedures compatible with due process, "it cannot be relied upon to challenge the legal processes employed in a particular litigation on due process grounds"'), citing *CIBC Mellon Tr Co v Mora Hotel Corp NV*, 296 AD2d 81, 89 (NY App Div 2002).

JURISDICTION OF THE FOREIGN COURT

Personal jurisdiction

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

A judgment debtor (defendant) in a US recognition action may seek to defeat recognition of the foreign judgment on the basis that the foreign tribunal lacked personal jurisdiction over the defendant. A foreign judgment is not conclusive in a US court if the foreign forum court did not have personal jurisdiction over the defendant. See *Bank of Montreal v Kough*, 430 F Supp 1243, 1246 (ND Cal 1977).

On this issue, many US courts analyse both whether the foreign court properly exercised jurisdiction under its own laws and whether it properly exercised personal jurisdiction under US principles. See *EOS Trans, Inc v Agri-Source Fuels LLC*, 37 So 3d 349, 352-53 (Fla Ct App 2010), holding that 'in assessing whether the exercise of personal jurisdiction is proper under the [1962 Model] Act, the trial court must determine whether the exercise is proper under both the law of the foreign jurisdiction and under US Constitutional Due Process requirements'; and *Nippon Emo-Trans Co v Emo-Trans, Inc*, 744 F Supp 1215 (EDNY 1990), finding that New York law does not require that a foreign court's determination of a jurisdictional challenge be given preclusive effect. If the foreign or US standards for personal jurisdiction are not satisfied, the judgment will not be recognised in a US court.

That said, there are certain ways in which the defence of lack of personal jurisdiction can be waived. See, for example, the 2005 Model Act, section 5, noting that a defence of lack of personal jurisdiction is waived if, among other things, the defendant was personally served in the foreign country, the defendant had agreed to submit to the jurisdiction of the foreign court, the defendant was domiciled in the foreign country at the time the lawsuit was commenced, etc.

A judgment debtor may be faced with the quandary of voluntarily appearing in a foreign action where it believes the odds are stacked against it, thereby potentially submitting to personal jurisdiction, or refusing to appear in the foreign action and permitting the expected judgment to be entered via default, while preserving a stronger position for challenging jurisdiction in a US court. This 'catch 22' may put defendants outside of the foreign jurisdiction where the lawsuit was filed at a distinct disadvantage in the context of personal jurisdiction.

Subject-matter jurisdiction

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

A defendant may seek to defeat enforcement of a foreign judgment on the basis that the foreign tribunal lacked subject-matter jurisdiction over the action. Both Model Acts provide that lack of subject-matter jurisdiction is a defence against recognition of a foreign judgment. See *Osorio*, 665 F Supp 2d at 1326, holding that defendants invoked their opt-out rights under local law, thereby divesting the local trial court of jurisdiction and preventing recognition and enforcement of foreign judgment under Florida law. It is also possible to argue under common law rules that the foreign court did not have the power to render the decision in the case. See *Hilton*, 159 US at 166-67 and section 482, comment c of the Restatement (Third) of Foreign Relations (1987): 'A court in the United States need not recognize a judgment of the court of a foreign state if . . . the court that rendered the judgment did not have jurisdiction of the subject matter of the action.'

Service

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

In general, the guiding principle in determining whether a litigant in the foreign action had notice of the proceedings so as to allow the recognition and enforcement of the foreign judgment in a US court is whether a reasonable method of notification was employed and a reasonable opportunity to be heard was afforded to the person or entity affected. See *Somportex Limited v Philadelphia Chewing Gum Corp*, 453 F 2d 435, 443 (Third Circuit, 1971) ('The polestar is whether a reasonable method of notification is employed and reasonable opportunity to be heard is afforded to the person affected'); *Batbrothers LLC v Paushok*, 172 AD3d 529 (NY App Div 2019) ('Defendant's voluntary participation in multiple rounds of appeals in the Russian courts, in which he raised arguments about personal jurisdiction and the merits of the bona fides of the judgments, is fatal to his argument that he did not receive adequate notice or due process in Russia'); and *Gardner v Letcher*, Slip Copy, 2014 WL 3611587, *1 (D Nev 2014):

> *'Here it is undisputed that no summons was served and that the "Summary of the Document to be Served" form was not completely filled out. There is also no evidence that service was accomplished by other means that would have satisfied the Hague Convention. Therefore, service under the Hague Convention was void and the Swiss court did not have personal jurisdiction over Defendant.'*

See also section 4(b) of the 1962 Model Act – a foreign judgment need not be recognised if 'the defendant in the proceedings in the foreign

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court did not receive notice of the proceedings in sufficient time to enable him to defend' – and section 4(c) of the 2005 Model Act (same).

Fairness of foreign jurisdiction

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

Yes, but given the deference traditionally afforded to foreign courts, litigants in US courts have not frequently objected to recognition of foreign judgments on the basis that the foreign forum was inconvenient. Nevertheless, this defence does exist in the recognition and enforcement context. For example, the 1962 Model Act, which is still followed by several US states, provides that a US court may deny recognition where 'the original action should have been dismissed by the court in the foreign country on grounds of forum non conveniens'. See also section 4(b)(6) of the 2005 Model Act: 'in the case of jurisdiction based only on personal service, the foreign court was a seriously inconvenient forum for the trial of the action.'

EXAMINATION OF THE FOREIGN JUDGMENT

Vitiation by fraud

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

Yes. US courts may refuse to recognise a foreign judgment that was obtained fraudulently. See *United States v Throckmorton*, 98 US 61, 65 (1878); *Bridgestone/Firestone, Inc Tires Prod Liab Litig*, 470 F Supp 2d 917 (SD Ind 2006), refusing to recognise a Mexican judgment where the plaintiff colluded with a judicial officer, reversed on other grounds, 533 F 3d 578, 593-94 (Seventh Circuit, 2008); *In re Topcuoglou's Will*, 174 NYS 2d 260 (NY Surr Ct 1958), refusing to recognise a Turkish judgment procured through fraud; *Matter of Estate of Weil*, 609 NYS 2d 375 (1994), refusing to recognise an Israeli probate judgment procured through fraud; section 4(b)(2) of the 1962 Model Act; and section 4(c)(2) of the 2005 Model Act.

Specifically:

> *'[i]n considering whether a litigant is entitled to relief from a prior judgment on the ground of fraud, [US] courts usually consider whether (1) the fraud (whether intrinsic or extrinsic) prevented a full and fair presentation of the litigant's claim or defen[ce] in the prior action or otherwise would render it unconscionable to give effect to the prior judgment; (2) the party seeking relief was diligent in discovering the fraud and attacking the judgment; and (3) evidence of the fraud is clear and convincing.'*

See *Chevron Corp v Donziger*, 886 F Supp 2d 235, 285 (SDNY 2012).

Public policy

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

Yes. US courts may refuse to recognise a foreign judgment that contravenes federal or state public policy (see section 4(b)(3) of the 1962 Model Act and section 4(c)(3) of the 2005 Model Act). In general, a foreign judgment is considered contrary to the public policy of the recognising state where the judgment 'tends clearly to undermine the public interest, the public confidence in the administration of the law, or security for individual rights of personal liberty or of private property' (see *Ackermann v Levine*, 788 F 2d 830, 841 (Second Circuit, 1986)).

The 2005 Model Act provides an expanded basis for challenging recognition of a foreign-country judgment on public policy grounds. While the 1962 Model Act restricts judgment debtors to challenging only the underlying cause of action upon which the judgment is based, the 2005 Model Act permits a judgment debtor to assert that the judgment itself would be contrary to public policy. See section 4, comment 8 of the 2005 Model Act, explaining that the 2005 Model Act rejected the narrow focus on the cause of action alone and 'provid[es] that the forum court may deny recognition if either the cause of action or the judgment itself violates public policy'.

Conflicting decisions

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

In US states that have adopted one of the Model Acts, '[a] foreign judgment need not be recognized if . . . the judgment conflicts with another final and conclusive judgment' (see section 4(b)(4) of the 1962 Model Act, section 4(c)(4) of the 2005 Model Act and section 482(2)(e) of the Restatement (Third) of Foreign Relations Law (1987).

For example, in *Byblos Bank Europe, SA v Syrketi*, 10 NY 3d 243 (NY 2008), the New York Court of Appeals noted that New York courts may, in the exercise of discretion, refuse to enforce a foreign judgment that 'conflicts with another final and conclusive judgment'. Ultimately, the *Byblos* court held that the New York trial court had not abused its discretion under New York's Recognition Act in denying recognition of a Belgian judgment that disregarded and conflicted with a previously rendered Turkish judgment.

Enforcement against third parties

21 Will a court apply the principles of agency or alter ego to enforce a judgment against a party other than the named judgment debtor?

This is a complex issue that is not treated uniformly in all US states and requires state-specific and case-specific analysis.

Alternative dispute resolution

22 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?

US states that have adopted one of the Model Acts make it clear that '[a] foreign judgment need not be recognized if . . . the proceeding in the foreign court was contrary to an agreement between the parties under which the dispute in question was to be settled otherwise than by proceedings in that court'. See section 4(b)(5) of the 1962 Model Act and section 4(c)(5) of the 2005 Model Act: 'A court of this state need not recognize a foreign-country judgment if . . . the proceeding in the foreign court was contrary to an agreement between the parties under which the dispute in question was to be determined otherwise than by proceedings in that foreign court.' See also section 482(2)(f) of the Restatement (Third) of Foreign Relations Law.

Courts have generally applied this section of the Model Acts to cases in which parties had previously agreed to a particular forum, or had agreed to arbitrate. See, for example:

- *Tyco Valves & Controls Distribution GMBH v Tippins Inc*, No. CIV A 04-1626, 2006 WL 1914814 at *7 (WD Pa Oct 10, 2006), declining to enforce a German judgment because it was contrary to an agreement between the parties to arbitrate;

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- *Nicor International Corp v El Paso Corp*, 318 F Supp 2d 1160, 1167 (SD Fl 2004), applying Texas common law and finding that proceedings in the Dominican Republic were not entitled to recognition because they were contrary to an agreement to arbitrate;
- *The Courage Co v The Chemshare Corp*, 93 SW 3d 323, 336 (Tx Ct App 2002), refusing to recognise or enforce a Japanese judgment because the parties had agreed to arbitrate; and
- *Montebueno Marketing, Inc v Del Monte Corporation-USA*, 2014 WL 1509250 (Ninth Circuit, 2014): 'The district court [correctly] found that the Philippine litigation that produced the foreign judgment here was "contrary to" an arbitration agreement between Montebueno and Del Monte.'

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

Favourably treated jurisdictions

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

While the Model Acts do not specifically provide for disparate treatment between foreign countries' judgments, US courts may find, in practice, that certain countries' legal systems are less reliable than others. Conversely, courts may also find that certain foreign legal systems are consistently reliable and compatible with US due process of law. See, for example, *Soc'y of Lloyd's v Ashenden*, 233 F 3d 473, 476 (Seventh Circuit, 2000): 'The courts of England are fair and neutral forums', and '[t]he origins of our concept of due process of law are English' (quoting *Riley v Kingsley Underwriting Agencies Ltd*, 969 F 2d 953, 958 (Tenth Circuit, 1992)).

In addition, in the few US states that still demand reciprocity of judgment recognition, foreign countries that do not provide for reciprocal treatment are de facto disfavoured.

Alteration of awards

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

The US case law is still developing on the alteration of awards at the recognition and enforcement stage. A few US courts have suggested that this may be possible. See, for example, *Ackermann v Levine*, 788 F 2d 830 (Second Circuit, 1986): 'We note that courts are not limited to recognizing a judgment entirely or not at all. Where a foreign judgment contains discrete components, the enforcing court should [endeavour] to discern the appropriate "extent of recognition".' However, foreign judgments that suffer from certain serious defects are impossible to 'partition' so as to grant partial recognition. For example, foreign judgments procured by fraud or rendered under a system lacking due process or impartial tribunals cannot be 'cleansed' or made reliable by partition because these types of legal infirmities taint the entire judgment.

AWARDS AND SECURITY FOR APPEALS

Currency, interest, costs

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

Yes. But US courts apply varying standards to determine the date of conversion, which will affect the exchange rate between US dollars and the foreign currency in which the judgment was rendered. The 'breach-day' rule fixes the exchange rate at the date the foreign judgment was rendered. The 'judgment-day' rule applies the date of the US judgment. Recently, other approaches have been adopted or encouraged, such as the 'payment-day' rule (fixing at the date the judgment is satisfied) and the Restatement (Third) Foreign Relations Law's less rigid standard that permits courts to award payment in whichever way will best make whole the prevailing party (see section 423 of the Restatement (Third) of Foreign Relations Law (1987)).

Security

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

Yes. Judgment debtors have the right to appeal a US court decision regarding the recognition and enforcement of a foreign judgment. A trial court may require the judgment debtor to post an appeal bond before issuing a stay of execution of its ruling.

ENFORCEMENT AND PITFALLS

Enforcement process

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

The 2005 Model Act provides that recognised judgments are 'enforceable in the same manner and to the same extent as a judgment rendered in this state'. While the 2005 Model Act does deal with some of the particulars of judgment enforcement, all states except for California and Vermont have enacted the Uniform Enforcement of Foreign Judgments Act. The Enforcement Act applies to both judgments of US sister states and to those of 'any other court which is entitled to full faith and credit' of the relevant state.

Where states have adopted the Enforcement Act in conjunction with one of the Model Recognition Acts, a path to enforcement of a foreign judgment is more clearly prescribed than where the enforcing state has not done so. It must be noted, however, that 'a foreign-country money judgment cannot be enforced until it has been recognized and that the [Recognition Act] is not an enforcement act' (see *Electrolines, Inc v Prudential Assurance Co*, 677 NW 2d 874, 882 (Mich Ct App 2003)) and that 'the [Recognition Act] and the [Enforcement Act] operate in tandem, with recognition of a foreign money judgment under the [Recognition Act] the precursor to enforcement under the [Enforcement Act]' (idem at 883).

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Pitfalls

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

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

UPDATE AND TRENDS

Hot topics

29 Are there any emerging trends or hot topics in foreign judgment enforcement in your jurisdiction?

Given the United States' state-by-state approach to the recognition and enforcement of foreign judgments, it is important to note that the overall trend in the past few years has been for US states to move towards adopting the 2005 Model Act as the basis for their recognition and enforcement laws. Nearly half of all US states have adopted the 2005 Model Act. In 2019, Tennessee became the latest US state to adopt the 2005 Model Act, while North Dakota and Texas did so in 2017.

As described above, a move towards the 2005 Model Act means that judgment debtors are afforded additional proceeding-specific defences that allow a US court to delve more deeply into how the case was litigated and how the case proceeded in the foreign forum. This ability to look closely at the specific foreign court that issued the judgment and the proceeding itself – not just the country's legal system as a whole – is particularly important when a US court is confronted with recognition defences involving charges of partiality, fraud, lack of due process, etc.

Gibson, Dunn & Crutcher LLP represented the Dole Food Company in two cases cited in this chapter: Osorio v Dole Food Co, *665 F Supp 2d 1307 (SD Fla 2009) and* Osorio v Dow Chem Co, *635 F3d 1277 (Eleventh Circuit, 2011). Gibson, Dunn & Crutcher LLP also represented the Chevron Corporation in two cases cited in this chapter:* Chevron Corp v Donziger, *886 F Supp 2d 235 (SDNY 2012) and* Chevron Corp v Donziger, *833 F3d 74 (Second Circuit, 2016), cert denied, No. 16-1178, 2017 WL 1198372 (US 19 June 2017).*

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