

Feature

KEY POINTS

- Procedures to enforce foreign judgments vary from country to country.
- Certain requirements must be met.
- For a judgment to be enforced in a foreign jurisdiction, it has to be recognised and accepted by that foreign jurisdiction.

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Enforcement of foreign judgments: a comparative analysis of common law and civil law

■ We would like you to imagine the following scenario:

- A company with assets located in Argentina and the US (only) enters into a secured loan agreement with an English bank.
- The loan agreement is subject to English law and English jurisdiction.
- The company defaults on the loan and the bank commences proceedings in England.
- English courts rule in favour of the bank.
- The English bank has to enforce the judgment both in the US and in Argentina.

This article analyses the main factors that parties should take into account when enforcing foreign judgments in common and civil law jurisdictions. The US and Argentine systems are explained by way of example.

CIVIL LAW – ARGENTINE REGULATIONS

In Argentina, treaties set out the provisions for the enforcement of foreign judgments. If there are no signed treaties on point, the National Code of Civil and Commercial Procedure (the 'CPCC') applies. The recognition of foreign judgments is addressed by the federal procedure rules (ie, the CPCC) which, in principle, presides over any affair in which a foreigner is involved.

of law, given an opportunity to defend itself against the foreign action;

- The judgment must have been valid in the jurisdiction where it was rendered and its authenticity must be established in accordance with the requirements of Argentine law;
- The judgment must not violate the principles of international public policy of Argentine law; and
- The judgment must not conflict with a prior or contemporaneous Argentine judgment on the same dispute involving the same parties.

Argentine courts do not require reciprocity in order to recognise a foreign judgment.

Argentine courts will not automatically acknowledge the foreign court's original jurisdiction over the matter. The foreign court's competence is analysed according to Argentine rules. The foreign court will be considered competent where the defendant is living in the jurisdiction of the court, the obligations of the parties to an agreement are to be performed in that jurisdiction, or, in contractual disputes of a pecuniary nature, the foreign court had jurisdiction as a result of a valid forum selection.

Procedures related to enforcement

Argentine civil procedure prescribes an *exequatur* proceeding in order to domesticate a foreign judgment provided the following standards are satisfied:

"... the Argentine courts will uphold foreign rulings concerning disputes and establish the rights and duties of the parties to an agreement."

COMMON LAW – US REGULATIONS

In order to recognise and enforce a foreign judgment in the US, four general principles of international law must be applied. It is necessary to determine:

- whether the foreign (in the example, English) court has jurisdiction to attend the case;
- whether the defendant company was properly served;
- that there is an absence of fraud in the proceedings; and
- that the judgment does not contradict the US's international public policy.

Different states have different procedures for the recognition and enforcement of foreign judgments, as set out in the table opposite.

Requirements

These pretty much mirror the requirements for the recognition and enforcement of a foreign judgment in the US.

Within certain guidelines, the Argentine courts will uphold foreign rulings concerning disputes and establish the rights and duties of the parties to an agreement. In order to be recognised without further investigation (s 517 of the CPCC):

- The judgment must be final and originate from a court with jurisdiction over the subject matter and personal jurisdiction over the defendant company according to Argentine law.
- The defendant company must have been personally served with the summons and, in accordance with the due process



- (1) A request and copy of the foreign judgment (translated, notarised and authenticated) is delivered in the form of a *letter rogatory* to the local court.

(2) All documents must be duly apostilled or authenticated by the Argentine consulate with jurisdiction over the country where the documents were issued.
- (3) All documents in a language other than Spanish must be translated into Spanish by a translator registered in Argentina in order to be admitted by a local court.

(4) An Argentine federal court judge performs a preliminary analysis of the judgment's compliance with the above formalities.
- A party can expect to wait from six to eight months from when the *letter rogatory* is filed until domestication by an Argentine court.

Pending the decision, the plaintiff (in the example, the English bank) may request and obtain protective remedies from a local court at the start of the proceedings or thereafter,

	CALIFORNIA	WASHINGTON (DC)	NEW YORK
LAWS AND RULES	Uniform Foreign Money Judgments Recognition Act ('UFMJR').	DC code, modelled on the: (1) Uniform Enforcement of Foreign Judgments Act ('UEFJ'); and (2) the UFMJR.	Civil Practice Law and Rules of New York ('CPLR').
EXTENT OF APPLICATION	Only applies to money judgments, which must be domesticated to be enforced (ie a further action on the judgment must be commenced in California).	(1) Applies to any foreign judgment. (2) Applies to money judgements only.	Section 53 of the CPLR refers to foreign money judgments but the New York court retains discretion to recognise and enforce a judgment non money related, based on the general principles of international law.
REQUIREMENTS	<div><div>(1) The foreign (in the example, English) court must have jurisdiction over the subject matter;</div><div>(2) The foreign court must have personal jurisdiction over the defendant company;</div><div>(3) the English judgment had to be rendered under a system providing impartial tribunals and procedures according to the law of <i>due process</i> meaning that:<div><div>(i) the defendant company received notice of proceedings in sufficient time to enable it to defend;</div><div>(ii) the judgment was not obtained by extrinsic fraud;</div><div>(iii) the judgment was not based on a cause of action or defence which is contrary to the public policy of California;</div><div>(iv) the English judgment did not conflict with another final and conclusive judgment;</div><div>(v) the proceeding did not oppose a prior agreement between the parties that agreed an alternative means of settlement;</div><div>(vi) the foreign court was not a <i>forum non conveniens</i>.¹</div></div></div></div>	According to s 15 of the DC Code, if a foreign judgment is duly authenticated and filed with the Clerk of the DC Superior Court, it can be enforced and treated as a DC Superior Court judgment.	<div><div>Section 53 of CPLR provides that foreign money judgments (except those about taxes, fines or penalties) can be enforced if they are:<div><div>(a) final;</div><div>(b) conclusive; and</div><div>(c) enforceable.</div></div></div><div><div>The CPLR also applies general principles of international law which require:<div><div>(1) That the foreign court had personal jurisdiction over the debtor and over the subject matter of the case;</div><div>(2) That the judgment was rendered under a system which provided impartial tribunals and proceedings compatible with the requirements of due process;</div><div>(3) That enforcing the foreign money judgment would not be unfair or contrary to public policy.</div></div></div><div><div>A New York court will also consider the reciprocity principle, ie whether the foreign tribunal would recognise a New York judgment.</div></div></div></div>

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Biog box

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which may consist of the seizure of assets or a general or specific injunction. In order to grant a protective remedy, a local court requires the petitioner to post a bond or guarantee for costs, expenses and/or legal fees.

When a foreign judgment has been proven to fulfil all local requirements for recognition and to comply with all formalities, the local court is not permitted to reopen a case that has been previously tried by a foreign court.

Enforcement expenses and legal fees

In order to obtain recognition of a foreign money judgment, a court tax must be paid. The current tax in the federal courts of Argentina or the courts of the City of Buenos Aires is 3 per cent of the stated amount of any foreign judgment sought to be enforced, including accrued interest.

The amount of this tax is added to the amount stated in the foreign judgment, if enforcement is granted by the Argentine court. Accordingly, the successful plaintiff can recover from the defendant company both the amounts stated in the judgment and any amounts paid as legal fees, other costs and expenses and, if applicable, court taxes.

Although there are exceptions, in general, Argentine law allows the successful plaintiff to recover attorney's fees, costs and expenses, as determined by the court, from the defeated party.

Upon filing a claim, a foreign plaintiff who does not have either a domicile or real estate in Argentina may be required to post a bond or guarantee (which amount will be determined by the court) to cover fees and expenses incurred by the defendant in connection with its defence of the action, as a condition to

further pursuance of the action.

CONCLUSIONS

In today's globalised world where parties located in different countries select business-friendly jurisdictions to submit their respective cases, the case for a standardisation of requirements for enforcing foreign judgments is strong. The work done so far is not sufficient. This century demands a unified piece of legislation to help build and develop a business-friendly environment for the recognition and enforcement of foreign judgments. ■

- 1 *Forum non conveniens*, means that the forum had a slight contact with the subject matter, being other jurisdictions with more reasonable connections more suitable to take over the subject matter.

PREFERENTIAL CREDITORS AND FLOATING CHARGES

Re Oval 1742 Ltd (in creditors voluntary liquidation) Revenue & Customs Commissioners v The Royal Bank of Scotland plc [2007] EWCA Civ 1262 CA (Civ Div) (Smith LJ, Wilson LJ, Sir John Chadwick) (29 November 2007)

BACKGROUND

The Royal Bank of Scotland plc (the 'Bank') held a debenture (the 'Debenture') issued by Oval 1742 Ltd (the 'Company'). The Revenue & Customs Commissioners (the 'Commissioners') were preferential creditors of the Company in respect of unpaid value added tax.

In August 2002, in contemplation of the Company's subsequent winding up, the Company hived down its business and assets to two subsidiaries (the 'Subsidiaries'). The Company then sold its shares in the Subsidiaries to a third party. Consideration for the sale comprised an immediate payment by the Subsidiaries to the Company and an amount of deferred consideration over the following months as book debts of the Company were collected. Payments were to be made to the Company's solicitors who in turn paid on these amounts to the Bank. In return for these payments and also in August 2002, the Bank executed a deed of release (the 'Deed of Release') in respect of the assets transferred to the Subsidiaries. The Subsidiaries later assigned to the Bank their interests in the book debts which then remained uncollected, as part of the deferred consideration due to the Company under the sale agreements (the 'Assignment') and the Bank received a further sum.

CONCLUSION

The first instance decision was upheld. The hive down agreements imposed obligations on the Subsidiaries. The new

debts became owing from the Subsidiaries to the Company and fell within the description of book debts in the Debenture. The assumption was that the charge created by the Debenture was, as created, a floating charge. Therefore the interest of the Company in these moneys was subject to the Bank's charge. The moneys then paid by the solicitors to the Bank were subject to that charge.

The Bank did take possession, for the purposes of the Companies Act 1985 s 196, of the consideration paid to it by the solicitors before the winding up. The payments were acts by which the Bank realised its security over moneys held by the solicitors subject to that security.

The deferred consideration paid after the Company went into winding up fell within the Insolvency Act 1986 s 175(2)(b). The moneys received pursuant to the Assignment could not be moneys realised from assets that were subject to a charge immediately before the Assignment, since the uncollected book debts had been released from the Debenture by the Deed of Release. ■

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