The Enforcement Of Argentine Judgments In The United States

by Mercedes Ales

1. Problems and general issues presented by the enforcement of foreign country judgments. Structure of the analysis.

The recognition and effect of judgments rendered by the courts of a foreign country poses a major issue in the twenty first century of globalized commercial transactions. Actors involved in international trade and commerce seek the settlement and enforcement of disputes that may arise out of transactions involving more than one country jurisdiction.

It is crucial for an entity, corporation or private actor recurring to foreign courts on the course of a dispute arising from such operations to find a definite judicial solution that will have binding effect on both parties involved and on third parties whose interests may be affected. On a number of cases, the successful plaintiff will have to resort to a jurisdiction other than the one rendering a judgment to have that decision effectively enforced on those assets the defendant may posses on the foreign forum. Absent voluntary compliance, the successful plaintiff will find the court's decision virtually ineffective[1]. It has become a requisite of this century's justice demands that a judgment rendered in a foreign country court may be enforced in such jurisdiction as where the losing party has enough assets for that judicial decision to be given full effect.

At the same time, while some jurisdictions are quite reluctant to recognize foreign judgments, some others show a clear tendency to grant them effect. Certain exceptions such as that of public policy add even more concern to the matter[2]. And the lack of international conventions or even national statutes providing clear

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[1] Rosen, Mark D., *Should Un-American Judgments be enforced?,*88 Minn.L.Rev. 788, April 2004.

[2] Recognition and enforcement practices vary widely. One extreme is represented by the Dutch approach that rests on the principle of denying preclusive effects to foreign judgments With a few exceptions contemplating the need to avoid the successful litigant from judicial harassment of his previously unsuccessful counter party. On the other extreme can be placed the united States practices in which a state ordinarily recognizes and enforces foreign country judgments to the extent certain standards are met. See Von Mehren, Arthur T. & Trautman, Donald T., *Recognition of Foreign Adjudications: A Survey an a Suggested Approach*, 81 Harv. L. Rev. 1601, June 1968.

guidelines in certain countries contribute to creating great confusion and insecurity[3].

In the specific case of the United States, the Constitutional provisions dealing with the effects of Sister State judgments are not applicable to judgments rendered by the courts of foreign countries. So far, neither the Executive nor the Legislative branches have offered uniform and clear guidelines and the issue has been left to the courts to decide. Moreover, when the recognizing forum is a federal court exercising subject-matter jurisdiction through diversity of citizenship, the question arises of whether federal or state law should govern the preclusive effects of the judgment to be recognized[4].

The purpose of this study is to analyze several situations, both real and hypothetical, that a successful plaintiff seeking to enforce an Argentine judgment on the territory of the United States may encounter. The analysis will be limited to judgments of a Civil and Commercial matter and will draw from case law concerning the Republic of Argentina and other jurisdictions where a system of Civil Law is to be found. A summary introduction to the topic of the enforcement of foreign judgments will be followed by a survey of the requisites demanded by United States courts as applied to Argentine specific hypothesis.

2. POLICIES INVOLVED IN THE RECOGNITION OF FOREIGN COUNTRY JUDGMENTS.

A general overview of this area of Conflicts of Laws will present us with three sets of interests[5]. To begin with, the interests of the international system come into place, followed by those of the persons protected by the recognizing forum's law and also the interests of the party that has issued the request.

The desired effect of a "friendly intercourse between sovereignties"[6] facilitates the smoothness of international commerce and trade, and thus contributes to the

[3] The disparity and lack of uniformity amounts in part to the policy matters involved and to certain notions of sovereignty. In the case of the United States, it is partially due to the unclear nature of the United States' foreign judgment recognition and enforcement system confronted to the tendency of US courts to unilaterally recognize and enforce foreign judgments. See STEVENS, SUSAN L., *Commanding International Judicial Respect: Reciprocity and the recognition and enforcement of Foreign Judgments*, 26 HASTINGS INT'L & COMP. L. REV. 115.

[4] See BRUMMETT (JR.), JOHN D., *The Preclusive Effect of Foreign Country Judgments in the United States and Federal Choice of Law: The Role of the Erie Doctrine Reassessed*, 33 N.Y.L. SCH. L. REV. 83, 1998.

[5] ROSEN, Id. at 794.

[6] Hilton v. Guyot, 159 U.S. 113 (1985) at 165.

growth of international economy[7]. As for the parties involved, the prevention of unnecessary relitigation and judicial harassment play a major role. Judicial economy is favored by avoiding duplicative proceedings. In the case of the rendering state, the act-of-state doctrine amounts to the need for respect of nations sovereignty as reflected in the recognition of official acts of a different nation[8].

Not only the litigating parties, but also third parties are faced with questions regarding the effect of the rendered judgment. It is important to define what matters have or have not been definitely settled by the judicial decision and if those matters can be brought up again in a further suit. The successful litigant needs to know what defenses she may oppose to a subsequent trial. It is of great importance to third parties to know what issues have been definitely settled in the original claim and thus what effect that decision may have on their interests[9].

Throughout the history of western legal thought technical institutions have been created and developed to bar relitigation and to protect the stability of settled issues. *Res iudicata* is the legal concept that involves the merger of the plaintiff's cause of action in the judgment and the ban the successful defendant may interpose to further relitigation[10]. As to third parties, the *Collateral Estoppel* extends the effects of the settlement of certain issue to other claims, provided due process standards have been met[11].

These technicalities are concrete examples that arise out of the policy of preclusion, which is to insure that courts are not overburdened and that goal of law is attained: "rest and quietness". Preclusion is a policy that seeks to limit repetitive litigation of claims and issues: one trial of one issue is enough and parties can rely on what has been decided by a court for their ongoing negotiations[12].

The policy of preclusion can be broken down into at least five underlying reasons, namely[13]:

– A desire to avoid the duplication of effort and consequent waste involved in reconsidering a matter that has already been litigated[14];

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[7] ROSEN, Id. at 794.

[8] Id.

[9] See SCOLES, EUGENE F.; HAY, PETER; BORCHERS, PATRICK J. & SYMEON C. SYMEONIDES, *Conflicts of Law*, 3rd. Edition, Hornbook Series, West Group, St. Paul, Minn., 2000, p. 1140.

[10] Id. at 1141

[11] Id. at 1141

[12] Id. at 1142

[13] See MEHREN, ARTHUR T. & DONALD T. TRAUTMAN, DONALD T. *Recognition of Foreign Adjudications: A Survey and a Suggested Approach*, 81 HARV. L. REV. 1601, June 1968.

[14] Id.

– A related concern to protect the successful litigant from harassing or evasive tactics on the part of his previously unsuccessful opponent[15];

– A policy against making the availability of local enforcement the decisive element, as a practical matter, in the plaintiff's choice of forum[16];

– An interest in fostering stability and unity in an international order in which many aspects of life are not confined to any single jurisdiction[17];

– A belief that the rendering jurisdiction is a more appropriate forum than the recognizing jurisdiction, on grounds such as the convenience of the forum or because an issue is brought up that is of particular concern to the rendering jurisdiction[18].

3. DOCTRINES BEHIND THE ENFORCEMENT OF FOREIGN JUDGMENTS

3.A. THE CONCEPT OF COMITY:

Historically, the block of Conflict of Laws jurisprudence dealing with enforcement of foreign judgments has developed the concepts of "res iudicata", "sovereignty" and "comity". These concepts have sprung from the raise of the modern state and the increase of international trade and commerce[19].

The rise of the Feudal system in Europe introduced the idea of sovereignty and absolute control over the political subdivision, and official acts of other political entities were regarded as potential threats to the absolute dominion of the sovereign over his territory[20]. Commerce, nevertheless, was maintained between political entities and the parties to transactions required a system to deal with the conflict that arose between subjects of different feudal states[21]. But it was not until the XVIIth Century that the Dutch scholar, Ulrich Huber to meet the requirements of a legal framework for trade, elaborated the doctrine of Comity.

[15] Id.
[16] Id.
[17] Id.
[18] Id.
[19] See STEVENS, SUSAN L., *Commanding International Judicial Respect: Reciprocity and the Recognition and Enforcement of Foreign Judgments",* 26 HASTINGS INT'L &COMP. L. REV. 116, Fall 2002.
[20] See PAUL, JOEL R., *Comity in International Law,* 32 HARV. INT'L L.J.1, note 2 at 12-13.

According to Huber, a nations' sovereignty extended purely to that nation's territory and the judicial, legislative and executive acted were only enforceable within that territory. Comity was a notion of "courtesy among political entities…involving recognition of"[22] such acts outside the territory of the rendering state. Comity was not a rule of law, but a rule of international courtesy, aimed at achieving judicial economy and promoting mutual concession of economical, commercial and diplomatic benefits and building up trust[23].

In the United States "a foreign country judgment, under common law, is not entitled to conclusive "full faith and credit" as are judgments of sister states under the United States Constitutions; but is entitled to comity"[24]. The general practice in this country is that a judgment is recognized if comity's factors are met, with the exception of public policy considerations, penal and tax decisions[25].

The leading case in this matter is the Supreme Court Decision Hilton v. Guyot[26]. This case involved an action brought by a French resident, G.B. Guyot, liquidator of Charles Fortin &Co., against H. Hilton and W. Libbey, citizens of New York. The action required a New York Court to enforce a French judgment in the Tribunal of Commerce in Paris for the recovery of merchandise sold to the defendants. The American Federal court granted relief and the defendants appealed to the United States Supreme Court.

Justice Gray delivered the opinion of the Court and stated that;

> "the law of one nation…shall [operate] within the dominion of another nation, [depending] upon what our greatest jurists have been content to call the comity of nations…Comity is…neither a matter of absolute obligation…nor of mere courtesy. But 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"[27].

For a foreign judgment to be entitled to any effect on the basis of comity, it must "have been rendered by a competent court, having jurisdiction of the cause and of

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[21] STEVENS at 117.
[22] Black's Law Dictionary (7th ed.1999).
[23] STEVENS at 117.
[24] See SIMEONE, JOSEPH S., *The Recognition and Enforceability of Foreign Country Judgments"*, 37 ST. LOUIS U.LJ. 348.
[25] See BRUMMETT (JR.), JOHN D., *The Preclusive Effect of Foreign Country Judgments in the United States and Federal Choice of Law: the Role of the Erie Doctrine Reassessed',* 33 N.Y.L. SCH. L.REV. 84, 1998.
[26] 159 U.S. 113 (1895)
[27] Id at 163-164.

the parties, and upon due allegations and proofs and opportunity to defend against them...[be] untainted by fraud...[28] and its proceeding be' according to the course of civilized jurisprudence"[29]. Under such conditions a foreign country judgment would be considered conclusive upon the merits, unless an objection were raised on the basis of fraud, prejudice or international or domestic comity forbidding it[30].

The underlying principle is that recognition and enforceability of foreign judicial decisions does not lie on statutory, conventional or constitutional rules, but on comity[31]. Comity is a rule of practice, convenience and expediency that should be upheld unless its acceptance would be challenging to the interests of the recognizing nation[32].

3.B. The Requirement of Reciprocity

In the development of the recognition of foreign country judgments and legislative acts, the requirement of reciprocity was elaborated as "the mutual concession of advantages or privileges for purposes of commercial or diplomatic relations"[33]. Most Civil Law countries required the existence of reciprocity, whereas English Common Law and United States statutory and early Common Law jurisprudence did not demand it[34].

In 1895, the Supreme Court in Hilton v. Guyot required reciprocity as condition for enforcing a foreign country judgment and, furthermore, as a condition for comity to be granted[35]:

> "there is a distinct and independent ground upon which...the comity of our country does not require us to give effect to the judgments of the court of [France]...is want of reciprocity, on the part of [France], as to the effects to be given to the judgments of this and other foreign countries"36.

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28 Id. at 166-167.
29 Id at 205-296.
30 Id. at 205-206.
31 Simeone at 344.
32 Id. at 345.
33 Black's Law Dictionary.7th ed. (1999)
34 Stevens at 117. See Smith v.Lewis, 3 Johns. 157, 169 3 Am. Dec.469 (NY1808)
35 Ibidem.
36 159 U.S. at 234.

Thus, comity was transformed in an imperfect sort of obligation of reciprocity on the rendering forum [37]. Where a United States judgment would be denied conclusive effect and reviewed on its merits, reciprocity was wanting.

It must be noted that the scope of Hilton v. Guyot is rather limited and has scarcely been followed by other Federal Courts. The ruling in Hilton v. Guyot was on federal common law, an area in which, as it was later settled in Erie Railroad Co. v. Tompkins[38], it was no longer competent to do so. The Court in this case acted as a Federal court sitting on diversity, and the issue presented was not of a federal nature[39]. The scope of the reciprocity requirement is limited to an action brought by a citizen of a foreign country against a non-citizen and is successful in the claim[40] Many state courts have rejected the requirement of reciprocity[41] and it is the current trend is to recognize foreign country judgments as sister state ones[42]. Judicial decision, statutes and Restatements generally reject the reciprocity requirement but adhere to all the other conditions set forth in the Hilton v. Guyot decision[43].

3.c. The Theory of Obligation

Even though the Supreme Court rested recognition on the basis of comity, some other courts resorted to the theory of obligation to explain the enforcement of a foreign country judgment. According to this theory, the decision created an obligation to be enforced everywhere[44], but is different to vested-rights theory in choice of law[45]. The recognizing court tests the rendering forum's jurisdictions by the originating standards of jurisdiction and supplies its own additional local

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[37] Stevens at 121.

[38] 304 U.S. 64 (1938)

[39] Ibidem.

[40] Scoles, Eugene F. & others, *Conflicts of Law,* 3rd. ed., Hornbook Series, West Group, St. Paul, Minn., 2000, pp. 1190.

[41] See Johnson v. Compagnie Generale Transatlantique 242 N.Y. 381 (1926). The court argued that authority of a judgment rests not on teh basis of rec iprocity, but upon its persuasiveness. See also Somportex, 453 F.2d 435 (3rd Cir. 1971), cert denied, 405 U.S. 1072.

[42] Stevens at 121.

[43] Simeone at 347.

[44] Id. at 1146.

[45] See Dicey & Morris, *Conflict of Laws* 461-67, 472-73 (12th ed. 1993 by Collins et al.), cited in Scoles, *Conflicts,* pp. 1146, δ24.3 note 4.

defenses (i.e.: fraud, public policy exceptions)[46]. There is a final decision that is binding on the parties and the judgment debtor must honor it[47].

4. Current Tendencies and Applicable Law in the United States.

In the United States, foreign country judgments do not enjoy the Constitutional benefit of "Full Faith and Credit" that is vested on sister state judgments. Even though the current tendency of courts is to extend this effect in absence of Constitutional imperatives, a unified body of Federal law is still lacking. Neither Congress nor the Executive branch has addressed this issue. No bilateral or multilateral treaty has been signed either.

In 1962, the Uniform Foreign Money-Judgments Recognition Act (the "1962 Act") was adopted by the National Conference of Commissioners on Uniform State Laws and the American Bar Association. It is a codification of common law dealing with the recognition of foreign decisions granting or denying recovery of a sum of money. Those decisions must be recognized and enforced as would sister state ones provided certain procedural guarantees are met[48], and no reciprocity requirement is demanded. The 1962 Act has been adopted by 28 states. Among others, Colorado, Massachusetts and Texas have reciprocity requirements amendments to the 1962 Act, and Florida recognizes reciprocity as a permissive ground for non-recognition.

The 1962 Act demands for the recognition of foreign country judgments that the following conditions be met:

- Impartiality of tribunals assured by the legal system.

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[46] Ibidem.

[47] See Johnston v. Compaigne Generale Transatlantique, 242 N.Y. 381, 152 N.E. 121 (1926).

[48] Stevens at 121.

– Due process requirements.

– Sufficient personal jurisdiction.

– Sufficient jurisdiction over the matter.

– Absence of fraud.

– Lack of conflict with other judgment rendered in the United States.

– No violation of public policy of recognizing forum.

Few of the states that have adopted the 1962 Act have introduced amendments to it to the effect of requiring reciprocity. And although the 1962 Act deals exclusively with money judgments, practice has extended its principles to other areas such as bankruptcy. Still, taxes and penal decisions are excluded from recognition. The 1962 Act grants foreign country judgments the full faith and credit effect conferred to sister state judgments. The Uniform Enforcement of Foreign Judgments Act of 1986 deals with the enforcement and registration of sister state judgments. Despite its scope being narrowed to sister state judgments, its principles have also been taken into account for the recognition of foreign country ones.

Although federal courts have followed the conditions for comity and the concept of comity itself, a large number of state and federal courts have refused to apply the reciprocity requirement. In the case of Erie Railroad Co. v. Tompkins[49], the Supreme Court held that federal courts sitting in diversity had to apply the law of the state in which they sat[50]. This doctrine was extended to conflicts of law in the Klaxon Co. v. Stentor Electric Manufacturing Co. case[51]. Scholars sustain the view that enforcement of foreign judgments in cases where federal courts do not sit on diversity is a matter of federal common law and thus the Erie doctrine does not apply[52]. However, the issue of whether this doctrine applies to the specifics of enforcement of foreign judgments is yet to be decided by the Supreme Court.

The Council for the American Law Institute (ALI) has been working on a project to give the United States a federal statute that deals with the enforcement of foreign country judgments in a uniform manner[53]. The Council presented the last Tentative Draft on "International Jurisdiction and Judgments Project" for discussion on April 14th, 2004 to the entire ALI. The aim of this project is to replace the state-

49 304 U.S. 64 (1938)
50 Scoles at 1191.
51 313 U.S. 487 (1941)
52 Brummet at 88-89.
53 Stevens at 121.

by-state current system and thus give uniformity and transparency to the Unites States practice of enforcement. It is the hope that in turn this will promote wider recognition and enforcement of United States judgments abroad.

The latest Tentative Draft limits its scope to judgments granting or denying sums of money and any final judgment deciding a legal controversy, rendered in any governmental unit outside the United States (δ1. Scope and Definitions). Certain types of judgments are excluded (δ1.a.), and the exceptions of taxes, fines and penal judgments are maintained, even though the court may decide to recognize and enforce them (δ2.b). A judgment that meets the Draft's requirements will be granted recognition on the determination of liability, damages and costs and interests (δ3.a) and will have a preclusive effect according to the rules of the rendering forum, unless this would be incompatible with interests of the American court (δ4.a).

Reciprocity is required on case-by-case basis, with the judgment debtor having to claim it and the creditor facing the burden of proving the existence of reciprocity (δ7). The Draft authorizes the Secretary of State to enter into agreements with other nations providing for reciprocity (δ7.e). In the case an agreement of this sort exists, the existence of reciprocity will be deemed proven, but the absence of such an agreement will not establish the lack of reciprocity (δ7.e).

5. The Basic Requirements for Enforcing a Foreign Country Judgment Applied to Argentine Judgments

Throughout the different sources mentioned in the first part of this analysis a series of general common requisites can be found. The following sections will deal with each of those requisites as applied to the Argentine legal system and to the judicial decisions rendered within its framework.

5.a. The Reciprocity Requirement

The requirement of reciprocity has been widely neglected by courts in subsequent cases following the Hilton v. Guyot dissent's opinion[54]. The 1962 Act does not include reciprocity as a requirement but, nevertheless, eight of the states to adopt it have included provisions demanding reciprocity. The states of Florida, Idaho, Maine, North Carolina, Ohio and Texas have included reciprocity requirement as

[54] See Silberman, Linda, *Enforcement and Recognition of Foreign Country Judgments in the United States*, 624 PLI/Lit 323 (February 2000) at 324. See for example Johnston v. Compaigne Generale Transatlantique, 242 N.Y. 381, 152 N.E. 121 (1926).

grounds for discretionary refusal to enforce, whereas Georgia and Massachusetts have established it as mandatory[55].

The ALI Council Draft has included the lack of reciprocity as grounds for refusing the enforcement of a foreign judgment when a court of the rendering jurisdiction would refuse enforcement of a comparable United States judgment (δ7). In order for this provision to operate, the judgment debtor must raise a credible defense on the grounds of absence of reciprocity and the burden then shifts to the party seeking recognition (δ7(a)). This party must prove that the courts of the rendering jurisdiction would recognize and enforce American judgments in comparable circumstances (δ7 (b)).

A party seeking enforcement may prove that reciprocity exists by ways of expert testimony or judicial notice (δ7 (b)). The Federal Rules of Civil procedure should govern this matter, as set in FED. R.CIV.P. 44.1. The court shall determine whether the defense will prosper inquiring into the existence of prejudice or bias against citizens or judgments of the United States, the recognition by the rendering forum's law of compensatory damages and statutory claims (δ7 (c.iii)). The non-recognition of punitive damages shall not constitute grounds for denial (δ7 (c.iv)).

In the case of Mc. Cord v. Jet Spray International Corp[56]., it was held that the even if a foreign court allows limited inquiry into substance of action, in which defendant bears burden of proof in establishing that the judgment is not entitled to recognition, this amounts to the official recognition of a cause of action based on an American Judgment[57]. The suit involved an action brought by a Belgian resident against a Massachusetts corporation seeking compensation for breach of an employment contract. The court examined the relevant Belgian procedural rules regarding the enforcement of foreign judgments, for under the Massachusetts version of the 1962 Act, reciprocity is a mandatory requirement. The Belgian *Code Civil*, art. 570 (Belg.) grants Belgians and foreigners an action before the civil courts of first instance "for the purpose of having foreign judgments declared enforceable in Belgium"[58]. The Belgian court must briefly examine the merits of the action according to guidelines similar to those of the 1962 Act[59]. The Massachusetts court found that "the Belgian procedures for enforcement of American

[55] See 26 HASTINGS INT'L & COMP. L. REV. 123, ft 85. Also, Uniform Foreign Money Judgments Recognition Act, 13 U.L.A. 261 (1962)
[56] 874 F.Supp. 436_(Mass. Dist. Ct., 1994)
[57] Id at 440
[58] Id at 440.
[59] Id at 440

judgments amount to "recognition" of these judgments within any reasonable definition of the term"[60].

In order to determine whether, if required, the reciprocity requirement would be met, it is necessary to examine the Argentine procedural means that allow for the enforcement of foreign judgments and American judgments in particular. Argentine law provides for the recognition of foreign country judgments on the National Code of Civil and Commercial Procedure. (Cod. Proc. Civ. Y Com.). The applicable procedural regulations are those at the National or Federal level and not the local laws of provinces for the enforcement of a foreign country judgment would be considered a federal issue to be brought up before federal tribunals. Articles 517 to 520 of the Cod. Proc. Civ. Y Com. set two different alternatives for the enforcement of a foreign judgment. The first alternative is that established in a bilateral or multilateral treaty to which both Argentina and the rendering state are party. This is not the case of the United States and the party seeking enforcement of an American judgment must then recur to the exequatur (Art. 518 Cod. Proc. Civ. Y Com).

The first procedural step a party must follow is the legalization of the judgment to be recognized. Legalization is a diplomatic and administrative procedure aimed at guarantying the authenticity of the document containing the judgment. If the judgment was rendered in a language other than Spanish, a translation done by an official translator must also be presented. Once the administrative process has been effectively completed, the judge of the competent lower federal court shall enforce the judgment[61]. The procedure to be followed is that of the *incidents* (Art. 186 Cod. Proc. Civ. Y Com.), or shorter written debates over matters pertaining to the principal subject of a lawsuit[62].

The exequatur allows the Argentine judge whose required to enforce the foreign judgment to verify the compliance with jurisdiction and competence standards, due process, fulfillment of legal requirements and respect for public policy[63]. The judgment must be final on the rendering forum and concern an *in personam* suit or an *in rem* action over a mobile asset (Art. 517, I Cod. Proc. Civ. Y Com.). The defendant must have been given adequate notice and sufficient time to exercise his defense (Art. 517, II Cod. Proc. Civ. Y Com.). The judgment must meet all requirements of the rendering forum to be considered as such (Art. 517, III Cod. Proc. Civ. Y Com.) and must not oppose Argentine public policy (Art. 517, IV Cod. Proc.

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[60] Id at 440

[61] Ibidem.

[62] See ARAZI, ROLAND, *Derecho Procesal Civil y Comercial,* T. II, Rubinzal-Culzoni, Buenos Aires, 1999, pp. 205.

[63] ARAZI at 205

Civ. Y Com.) or be incompatible with a sentence rendered before or simultaneously by an Argentine court (Art. 517, V Cod. Proc. Civ. Y Com.).

The description given by the court of the Belgian procedure is substantially similar to that provided by the Argentine National Code of Civil and Commercial Procedure. The requisites demanded by the Argentine law are substantially similar to those listed under the 1962 Act. Therefore it may be asserted that an American judgment that complies with the requisites enumerated in the pertinent sections of the Code will be granted *res iudicata* effect in the same way an Argentine judgment would be entitled to it.

5.B. CONCLUSIVENESS OF THE FINAL JUDGMENT

One of the conditions required by the 1962 Act is that the judgment be final and conclusive and enforceable where rendered. Even if an appeal is pending, enforcement may be sought. However, the required court may stay the proceedings until the appeal has been settled[64]. The law of the rendering forum shall determine whether a judgment is final and conclusive and, if enforced, this same law shall determine the scope of such effect[65]. The Restatement (Second) Conflicts of Law subjects the scope of the effects granted by foreign country laws to constitutional limitations[66].

In Ingersoll Milling Machine Co., v. Granger[67], it was held that when all appellate review in the rendering forum has been completed and the judgment is considered final, conclusive and enforceable in the rendering jurisdiction, it could be enforced under the 1962 Act[68]. This case involves the enforcement of a foreign judgment rendered in Belgium. The parties to the Belgian suit had exhausted all levels of appeal and thus the judgment could be enforced within the rendering forum's jurisdiction[69]. Similarly, a judgment rendered in Argentina where both parties have exhausted all means of ordinary appeal before the corresponding Civil and Commercial Courts of Appeals (as provided in Arts. 242 to 253 Cod. Proc. Civ Y Com.) should be enforceable in the United States.

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[64] SILBERMAN at 324.
[65] SCOLES at 1144.
[66] Restatement (Second) Conflicts of Laws δ 95, comment (g) (1971), cited in SCOLES at 1144, δ 24.2, ft 4
[67] 833 F.2d 680, (7TH Cir., 1987)
[68] Id at 686
[69] Id at 683

In Argentina, it is the applicable Code of Civil and Commercial Procedure that establishes the conclusiveness, finality and enforceability of a court decision. A final judgment is the one that closes a procedural stage, be it the first instance (Art. 163 Cod. Civ. Y Com.) or the appellate level (Art. 164 Cod. Proc. Civ. Y Com.). A judgment may then be final, but not conclusive for in the case of a first instance decision the way of appeal is still open and thus the procedure is still open[70].

A judgment will be deemed conclusive and thus enforceable when it acquires the quality of "res iudicata" (*cosa juzgada)*[71]*. Res Iudicata* is a quality granted to those judgments that cannot be appealed any further (*unimpeachable*) and the merits of which cannot be modified by a subsequent trial *(immutable)*.

The Argentine procedure system recognizes two main types of trial procedures: cognition procedures (Arts.319 to 498, Parte Especial, Libro Segundo Cod. Proc. Civ Y Com.) and executive procedures (Arts. 520 to 605, Libro Tercero, Titulo 2, Cod. Proc. Civ. Y Com.) Cognition procedures allow for full discussion of the issue and the defendant can oppose a series of defenses based on both formal and substantive qualities of the rights discussed in the suit. A final judgment rendered on the course of a cognition process in which all ordinary means of appeal have been exhausted is deemed conclusive and therefore enforceable[72]. The res iudicata effect extends to the issues, including the rights discussed, facts settled and defenses opposed as well as the cause of action and are effective towards the parties and their privies[73]. *Collateral estoppel* extends to third parties whose interests were linked to the issues brought before the court and who had sufficient opportunity to defend their interests[74].

On the contrary, executive judgments are based on certain executive tittles recognized by substantive law, such as the Civil Code and the Commercial Code (Art. 520 Cod. Proc. Civ Y Com.). These titles are meant to grant the creditor a speedy recovery of his patrimonial rights, such as those rights embedded in a promissory note or check. The defenses that can be opposed by the defendant are few and limited to the formal requirement of extrinsic validity of the executive title and the jurisdiction of the court (Art. 544 Cod. Proc. Civ. Y Com.). The substantive issues concerning the rights claimed are left to cognition procedure that the unsuccessful

[70] ARAZI at 9.
[71] Ibidem.
[72] Ibidem.
[73] ARAZI at 19-25.
[74] Id. at 26.

party must initiate within the time indicated by the Code: every issue that could not be discussed in depth can be brought up in the second procedure[75].

Only judgments rendered in the framework of a cognition process that allows for full discussion of the issues can be entitled to recognition abroad. Once the ordinary means of appeal have been exhausted, the judgment creditor can seek enforcement of the decision over assets that the judgment debtor may possess in the United States. If the successful plaintiff seeks enforcement before the appeal has been settled, the defendant may require that the action be stayed until the outcome of the appeal is certain[i]

Nevertheless, Argentine procedural law provides other means of terminating the suit: the "abnormal" ways of termination of a procedure (Arts. 304 to 318, Cod. Proc. Civ. Y Com). These ways are the result of either the parties will or of procedural contingencies. Some of them are entitled to *res iudicata* effect for they both settle the issue and a must be homologated by a judge[76].

Desisting of either the procedure or the cause of action, conciliation and settlement are among the voluntary ways of termination. The plaintiff in a suit can desist of either the suit or the cause of action itself. In the first case, the plaintiff must pay for all judicial costs and fees but the cause of action remains untainted and there is a possibility of a new trial based on this very cause of action[77]. Contrariwise, when the plaintiff desists of the cause of action, the judge must intervene and homologate this decision, thus barring any further claims arising from the desisted cause of action[78]. The defendant may successfully oppose any relitigation for the homologated decision to desist has *res iudicata* effects over the issue.

Conciliation and settlements are agreements struck by the litigating parties in order to reach a mutual compromise. Both sorts of agreements must be homologated by the judge and thus acquire res iudicata effect equal to that of a final judgment[79]. The only difference that exists between the two is that the conciliation must be carried out in the courtroom with the mediation of the judge, whereas the settlement is done in an extrajudicial manner[80].

The court in Sangiovanni Hernandez v. Dominicana de Aviacion[81], held that when defendant in good faith entered into and fully complied with the settlement

75 ARAZI at 17.
76 ARAZI at 31.
77 Id. at 32.
78 Ibidem.
79 Id. at 34
80 Ibidem.
81 556 F.2d 611 91st Cir. , 1977)

approved by the courts of the foreign jurisdiction, the plaintiff's cause of action is barred by the *res iudicata* effect of the settlement of the action between the same parties and on the same cause of action[82]. The plaintiff had settled compensatory damages within the framework of a judicial settlement the validity of which had been examined by the intervening court in Santo Domingo and had been granted *res iudicata* effect by the rendering forum's law. Accordingly, a settlement reached within the framework of a civil procedure and under the review of a competent judge in an Argentine Court should be final and conclusive and thus enforceable in the United States.

The Argentine institution of the "*caducidad de instancia"* is a procedural contingency that ends the procedure at the stage where the plaintiff has allowed it to paralyze (Art.310 Cod. Proc. Civ. Y Com.). The Code fixes maximum time spans during which the court will tolerate the inactivity of the parties. The plaintiff must promote each stage of the process in Argentine Civil and Commercial procedure. The judge cannot take the issue into his hands and act on behalf of the parties, but he can declare *ex officio* that a legal right of privilege to do something during the trial has been lost by failing to do it within a certain time[83].

This Certain time is of six months on first instance and three months at the appellate level (Art. 310 Cod. Proc. Civ. Y Com.). If the time elapses while at the appellate level, the right to appeal again is lost and the first instance decision becomes final, conclusive and enforceable (Art. 318 Cod. Proc. Civ. Y Com.)[84]. The plaintiff can also loose his right to continue litigating and to relitigate a claim if the time of prescription for his substantial claim elapses while his procedural inactivity is maintained. In this case, the judicial declaration of *"caducidad de instancia*" has the same res iudicata effects as a final and conclusive judgment. However, if the plaintiff's inaction is due to lack of legal capacity to act on his own behalf (such as a minor whose parents have died and has to wait for a legal guardian to be appointed to act on his behalf), the period of time during which this situation persists is not taken into account (Art. 314 Cod. Proc. Civ. Y Com)

The "*caducidad de instancia*" poses questions as to its enforceability abroad. Can the defendant successfully oppose the plaintiff's claims in a new suit brought up in the United States? It may be argued that this depends on which grounds were considered in order to declare the existence of *caducidad de instancia*.

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82 Id at 616.
83 ARAZI at 36
84 Ibidem.

If the "*caducidad de instancia*" was declared because of the prescription of the cause of action that is determined by substantive law, then the plaintiff has certainly lost not only a procedural right but also a substantive one. There no longer exists a cause of action and thus there is no possibility for litigation whether in Argentina or abroad. As for the prescription based solely on the procedural inactivity, it is necessary to distinguish between the first instance and the appellate. The lose of the right to litigate during the first instance of a trial does not bar relitigation of it and the plaintiff can file a new suit without the defendant being able to oppose this as a defense. On the contrary, the inactivity at the appellate level causes the permanent loss of the right to appeal. Thus a successful defendant may oppose further litigation of the same issue by the same plaintiff. However, if the plaintiff simply abandoned the procedure before a first instance judgment was issued, then the defendant will not be able to stop relitigation of the issue.

When seeking enforcement in the United States, a defendant may successfully interpose the *caducidad de instancia* that occurred after the first instance judgment was reached but before the appellate level was settled or the renouncement; of the plaintiff to his cease of action. However, he may not relitigation if the plaintiff simply abandoned the first instance trial, for the plaintiff did not loose his cause of action.

5.C. IMPARTIAL TRIBUNALS AND PROCEDURES COMPATIBLE WITH DUE PROCESS OF LAW. ADEQUATE NOTICE TO DEFENDANT.

The Uniform Foreign Money Judgments Act (1962) counts due process as one of the requirements for enforcing a foreign judgment. Failure to comply with the requirements of impartiality of the tribunals and of procedures compatible with due process will result in a denial to enforce the foreign judicial decision[85]. All states that have adopted the 1962 Act have included this requirement without adding any modifications.

The ALI Council's Tentative Draft in (δ5) has included the grounds for "Non-recognition of a Foreign Judgment". Among these (δ 5.a) excludes a judgment that was rendered under a system lacking impartiality or procedures compatible with fundamental principles of fairness. A judgment rendered without actual notice or notice calculated to inform the defendant of the pendency of proceedings will not be enforced either (δ 5. a. iv).

[85] LIBERMAN at 325

It is widely accepted in case law as well as in author's work that non substantial differences between the foreign system and the American one, such as the absence of jury trial, different rule governing evidence, even the absence of testimony under oath or cross examination do not constitute grounds for non recognition[86]. The Supreme Court in the Hilton v. Guyot case identified the core elements of fair procedure:

> "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 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..."

In Browne v. Prentice Dry Goods, Inc.[87] it was held that a party seeking to frustrate the recognition and enforcement of foreign judgment has the burden of establishing the basis for non-recognition and that celebrating a contract governed by the laws of the rendering forum implies a voluntary subjection to these laws. Action was commenced by an Argentine attorney seeking to recover legal fees awarded in Argentine proceedings for his successful representation of the defendant in a trial conducted in Argentina. The defendant, among other grounds pleaded lack of impartiality of the Argentine tribunals for Argentina was at the time under a military government. Plaintiff submitted an affidavit by expert witness stating the impartiality of the Argentine tribunals on civil and commercial matters. The court found that the defendant had not submitted sufficient evidence proving the lack of impartiality of the Argentine courts.

Another case involving the fairness of the Argentine litigation system is Hidrovia S.A. v. Great Lakes Dredge & Dock Corporation[88]. In Hidrovia the court held that timing and scope differences in the foreign forum's evidence gathering tools do not render that forum inadequate when the laws of that forum recognize the cause of action. The Argentine procedure allows for deposition of witnesses and parties, court orders for the production of documents and subpoena witnesses[89]. Thus, a forum will only be held to be inadequate if it "does not permit litigation of the

[86] ALI, *International Jurisdiction and Judgments Project,* Tentative Draft (April 14, 2004), comment to δ 5, pp. 5.
[87] No. 84 Civ. 8081, 1986 U.S. Dist Lexis 24632 (S.D.N.Y., 1986)
[88] No. 02 C 5408 (N.D.I, decided April 25, 2003).
[89] Id at 5.

subject matter of the dispute"[90]. The issue to be considered is not the dissimilarity of procedures but whether the foreign procedures allow for basic fairness[91].

It may be concluded that a defendant opposing the enforcement of an Argentine judgment before a United States Court must present concrete and detailed evidence demonstrating the actual lack of impartiality of the courts with jurisdiction over the matter. Speculations based on the political or economic situation of the country as a whole will not suffice unless it can specifically proven that the civil and commercial courts do not provide parties with adequate fair treatment.

Certain principles are embedded in the Argentine procedural system in order to guarantee a fair trial and adequate exercise of the rights of both parties. The Argentine Constitution demands (art. 18 Const. Arg.) that these principles be applied throughout the procedural stages of a trial so that both parties are afforded a "due process" and an impartial judge[92].

The principle of equality before the law (Art. 34, inc. 5, c, Cod. Proc. Civ. Y Com.) demands that a party may not be granted benefits or prerogatives that are not afforded to the counter party, unless there is an objective reason provided by the law[93]. Congruence between the final judgment and the issues set forth by the litigants, the object of their claims and the cause of action is another essential requirement for a fair trial in Argentine (Arts. 34, inc. 4 and 163, inc. 6, Cod. Proc. Civ. Y Com.)[94]. Finally, the principle of contradiction or bilateralism demands that both parties be granted the right to make their allegations before the court before the judge makes any decision in the course of the trial[95]. This is know under the Latin adagio of *audiatur et altera pars* and is made effective by the different means of judicial communication provided by the Code (Arts. 133 to151 Cod. Proc. Civ. Y Com.).

In Julen v. Larson[96], it was held that documents in a language foreign to the defendant and that are not notified to the defendant in accordance with the Convention on the Service Abroad of Judicial and Extrajudicial Documents on Civil

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[90] Id at 6.

[91] Ingersoll at 687 (Belgian Judicial Code allows the right to call witnesses and also take testimony outside of Belgium).

[92] See ARAZI, ROLAND, *Derecho Procesal Civil y Comercial,* t. I, ROBINZAL CULZONI ED., Buenos Aire,s 1999, pp 178-179.

[93] ARAZI at 80.

[94] Ibidem.

[95] ARAZI at 181.

[96] 25 Cal. App.3d 325, 101 Cal.Reprt.796 (1972) at 326

and Commercial Matters"[97] do not give the defendant sufficient notice of the pending foreign action and thus the foreign court never acquired personal jurisdiction over the defendant. In Argentina the Convention's mechanisms and the Apostille must be used, thus avoiding lack of sufficient notice and subsequent inability to defend himself of a foreign litigant.

The National Code of Civil and Commercial Procedure establishes different means of judicial communication, according to the relevance of the procedural act to be notified as related to the issue at stake (Arts. 133 to 151 Cod. Proc. Civ. Y Com.). The plaintiff's claim must be notified to the defendant by means of a *cedula*, a written document signed by the judge and the judge's clerk containing a brief description of the suit brought up and the identification of the court that will intervene in the dispute (Arts. 135, inc. 1 and 137 Cod. Proc. Civ. Y Com.). The *cedula* must have a copy of the plaintiff's claim attached and must be delivered to the defendant's domicile as denounced by the plaintiff. If a plaintiff is proven to have supplied a false domicile for notification, every act carried out in the trial will be declared void and the plaintiff will be liable for all judicial costs and fees (Arts. 345 and 149 Cod. Proc. Civ. Y Com.).

As for the impartiality of the courts, the Code provides litigants with the power to exclude a judge from the trial if they can prove any of the circumstances presumed by the law to constitute evidence of impartiality (Arts. 14 to 33). Those circumstances include family or commercial bonds with either party or their attorneys, existence of a pending trial between the judge and either party, being the judge a debtor of either party, manifest and clear friendship or enmity with either litigant or having received any token from either litigant, among others (Art. 17 Cod. Proc. Civ. Y Com.). This partial judge can be excluded at the off set of the trial or else during the trial if these circumstances become known to either party. However, if the party does not seek to exclude the judge within five business days of gaining knowledge of the circumstances affecting impartiality, he is precluded from doing so.

The Argentine legal system provides formal safeguards against prejudice or bias of the courts and certain remedies to damages suffered by litigants. However, whether a particular instance of bias or partiality against a foreign party has occurred, is a matter of fact that will have to be settled in a subsequent suit and proven.

[97] Effective 10 Feb. 1969, 20 U.S.T. pt. I, pp. 361-373 (1969)

5.C.1. DEFAULT JUDGMENTS

The Argentine Code of Civil and Commercial Procedure contemplates the possibility of the trial being conducted without the actual intervention of the defendant who has been adequately notified of the plaintiff's suit and yet voluntarily refuses to appear in court or make any defence, that is a defendant who is declared to be "in contempt of Court" (*en rebeldia)* (Art. 59 Cod. Proc. Civ. Y Com.). For a defendant to be declared in contempt, his domicile must be known and the plaintiff's suit must have been duly notified[98]. A defendant can also be declared in contempt and the trial continued without his intervention if he voluntarily ceases to act within the course of the trial even after he has appeared before court and answered the plaintiff's claim (art. 59 Cod. Proc. Civ. Y Com.). It is nevertheless necessary that the plaintiff ask the judge to declare the defendant in contempt (Art.59 Cod. Proc. Civ. Y Com.).

To declare a defendant in contempt implies two effects. The defendant will be notified of any further decisions taken within the course of the trial on the court's domicile (Art. 133 Cod Proc. Civ. Y Com.). The facts asserted by the plaintiff on his suit will be held *prima facie* truth but will nevertheless need to be confirmed by sufficient evidence[99]. The defendant in contempt may appear before the court at any stage of the process before the final judgment is rendered (Art. 64 Cod. Proc. Civ. Y Com.) but, unless the contemptuous defendant can probe his absence from the trial was due to some circumstances that voids all previous procedural acts, the stages of the process that have concluded will not be re opened (Art. 170).

The trial carried out against a defendant in contempt can be problematic when it comes to the personal jurisdiction of the rendering court over the defendant. U.S. courts, nevertheless, can enforce a foreign judgment rendered in default even though a more strict level of scrutiny will be applied to the foreign court's jurisdiction, procedural protections and the like[100].

The practice between sister states in the United States is that a judgment debtor may challenge the rendering forum's jurisdiction[101]. By analogy, a judgment debtor in a default judgment rendering by a foreign court may oppose lack of personal jurisdiction of the rendering court[102]. This defence will generally be

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[98] ARAZI at 292-293.

[99] Id at 296.

[100] See GARY B. & DAVID WESTIN, DAVID, *International civil Litigation in United States Courts: Commentary and Materials,*2nd ed., Kluwer, Boston 1999, pp. 757.

[101] LIBERMAN at 330.

[102] Ibidem.

precluded if the defendant had sufficient opportunity to challenge the jurisdiction and was proven unsuccessful or if he resorted to defence on the merits without challenging the jurisdiction first. Baldwin v. Iowa State Travelling Men's Ass'n[103]. This rule also applies to foreign country judgments as from Somportex Ltd. V. Philadelphia Chewing Gum. Corp[104]. On the contrary when the defendant has neither challenged the merits of the decision nor the jurisdiction of the rendering forum, it is possible that the challenge will be received and that the American court will verify the jurisdiction of the rendering forum against United States and international standards. See Hunt v. BP Exploration Co. (Lybia) Ltd.[105]

To conclude, a judgment rendered in default when the defendant has not made an appearance before court to defend himself on grounds of lack of jurisdiction or on the merits, is likely to be subject to revision by the recognizing court. A judgment rendered in default when the defendant has appeared before the court and later abandoned the trial and has pleaded on the lack of jurisdiction is, on the other hand, likely to be held *prima facie* enforceable.

5.D. THE RENDERING COURT MUST HAVE SUFFICIENT JURISDICTION OVER THE DEFENDANT AND THE SUBJECT MATTER.

It is a constant request when the recognition of a foreign judgment is sought that the rendering court had sufficient adjudicatory jurisdiction[106]. This requirement stems in turn from the need to assure a fair trail for it assure that the parties had to litigate in that forum which was objectively adjudicated to the issue at stake[107]. No argument for judicial economy or for the prevention of relitigation may outweigh the inappropriateness of the forum and justify a decision by a court lacking jurisdiction[108]. It may also be added that a fair adjudication of jurisdiction may suggest a fair and impartial conduction of the subsequent trial[109].

The jurisdictional test requires a preliminary analysis of issues, starting with the acceptable criteria for recognizing a forum's jurisdiction. However, it is necessary to determine which standards, the issuing forum's or the recognizing forum's, will

[103] 283 U.S. 522 (1931)
[104] 453 F.2d 435 (3rd Cir. 1971).
[105] 492 F. Supp. 885 (N.D. Texas)
[106] VON MEHREN & TRAUTMAN, at 1606.
[107] Ibidem.
[108] VON MEHREN & TRAUTMAN at 1606.
[109] Ibidem.

apply. Once this has been settled, the recognizing court will be able to determine whether the issuing court had sufficient jurisdiction over the parties.

The United States law limits the circumstances in which judicial jurisdiction can be exercised, and thus some reasonable relationship can be established between the U.S. forum and the parties or their property[110]. Courts in the United States recognize all three jurisdictions: *in rem, in personam* and *quasi in rem*. In order for a court to have judicial jurisdiction, there must be a statutory authorization and this authorization must be consistent with Constitutional due process[111]. Jurisdiction can be divided into general jurisdiction and specific jurisdiction. General jurisdiction permits a court to adjudicate any claim against a defendant and specific jurisdiction permits only the adjudication of claims related or arising out of a defendant's contacts with the forum state[112].

General jurisdiction can be established on the basis of nationality; domicile; residence; incorporation or continuous and systematic activities within the forum. These are considered "permanent" connections with the forum and thus consistent with the due process clause[113].

The nationality of a person generally subjects him to the judicial jurisdiction of the state of which he holds that nationality[114]. The individual must be a national at the time jurisdiction was asserted. It is assumed that a national litigating before the courts of his state will benefit from a convenient forum and will not be the object of biased or prejudice[115]. As for corporations it is the principle of incorporation and registration to do business that applies. It is widely accepted that being incorporated in a state is a sufficient point of connection with that states' forum that authorizes litigation of any claim[116]. A third standard that applies to individuals and corporations alike is the continuous and systematic activity within the forum. Thus " if a defendant is found to have continuously and systematically engaged in business activities within the forum, then it will generally be subject to the forum's personal jurisdiction with respect to all claims against it"[117].

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[110] BORN & WESTIN, at 27.
[111] Id at 30
[112] Id at 34.
[113] Id at 35.
[114] See Balckmer v. United States, 284 U.S. 421 (1932)
[115] BORN & WESTIN at 36.
[116] Id. at 39.
[117] Id. at 41. See Perkins v. Baguet Consolidated Mining Co., 342 U.S. 437 (1952) AND Helicopteros Nacionales de Colombia v. Hall, 466 U.S. 408 (1984).

The "continuous and systematic" contacts test as developed in Helicopteros Nacionales de Colombia [118] is more rigorous that the mere "minimum contacts" [119]. Normally, the presence of a branch office will permit general jurisdiction[120]. However, courts have held that "mere solicitation" [121], or the shipment of products or agents into the forum[122], will not suffice to meet this standard. The plaintiff's claims against the defendant must arise out of and be related to the defendant's activities within the forum[123].

The other two bases for recognizing jurisdiction are domicile and residence. In Milliken v. Meyer[124] it was held that "domicile in the sate is sufficient to bring a defendant within the reach of the states' jurisdiction"[125]. An array of elements is taken into account in order to determine a person's domicile, such as the person's activities, attitudes, intentions and generally the person' ties and attachment to the place[126]. According to the Restatement (Second) Conflicts of Laws, "home is the place where a person dwells and which is the center of his domestic, social and civil life"[127]. Residence is very similar to domicile and is defined as a place where the defendant spends considerable periods of time[128]. It is an acceptable basis for jurisdiction as long as the defendant has remained within the state when the claim is filed[129].

Additional source for recognition of jurisdiction can be found in the Foreign Money Judgments Recognition Act (1962). Section 5 (a) of the 1962 Act provides a list of grounds that shall not be refused when recognition is requested. The Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters (The Hague, 1999) also enumerates acceptable bases for the adjudication of jurisdiction of a court dealing with a Civil or Commercial suit.

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[118] 466 u.s. 408 (1984)

[119] BORN & WESTIN at 46.

[120] See Cipriari v. Servicios Aereos Cruzeiro do Sul, S.A., 232 F.Supp. 433(S.D.N.Y. 1964), cited in Born at 46, δ 2.

[121] See Heller & Co. v. Novancor Chemicals Ltd. , 726 F.Supp. 49 (S.D.N.Y. 1988) cited in BORN & WESTIN at 46

[122] See E.g., Complaint of Damodar Bulk Carriers, Ltd., 903 F.2d 675 (9th Cir. 1990), cited in BORN &WESTIN at 46

[123] 466 U.S. at 415, cited in Born at 48.

[124] 311 U.S. 457 (1940) cited in BORN & WESTIN at 37.

[125] Milliken, 311 U.S. at 462.

[126] BORN &WESTIN at 38.

[127] Restatement (second) Conflicts of Laws δδ 11-12 (1971), cited in BORN & WESTIN at 38.

[128] BORN & WESTIN at 38.

[129] Id. at 39

Section 5 (a) of the 1962 Act admits jurisdiction over the defendant if the defendant was either served personally in the foreign state, if as an individual he was domiciled in that state or incorporated in it or had his principal place of business there or simply conducted his business in the foreign nation and the claim arose out of business done in that state. Similarly, the Preliminary Draft Convention, in art. 3, II, admits that a defendant may be sued in the courts of the State where he is a habitual resident or has his statutory seat or central administration or was incorporated.

The Argentine legal system adjudicates jurisdiction based on the nature of the claim as determined by substantive and procedural laws (Art. 5, Cod. Proc. Civ. Y Com.). The criteria are thus objective and not subjective and according to the cause of action brought before the court. The court must determine whether it possesses sufficient jurisdiction over the matter before deciding on the merits of the claim (Art. 7; 346 & 347 Cod. Proc. Civ. Y Com.). The issues presented by the plaintiff in his suit shall determine which court will settle the matter both of the existence of jurisdiction and also the merits or lack of them[130].

In the so called "personal" claims, jurisdiction is recognized to the forum in which the credit had to be fulfilled (Art. 5, 3 Cod. Proc. Civ. Y Com.). When no special domicile had been stipulated, then the creditor's permanent domicile shall determine the jurisdiction (Art. 5, 3 Cod. Proc. Civ.Y Com.). If the claim is of a corporate nature pertaining to the incorporation, nullity or dissolution of a corporation within territory of the Argentine Republic or pertaining to the rights of corporate members of an Argentine incorporated company, the corporation's legal domicile shall be the adjudicating factor for the jurisdiction (Art. 5, 11 Cod. Proc. Civ. Y Com.). A foreign company carrying on continuous and systematic activities within the territory of the Republic of Argentine will be subject to Argentine law in everything pertaining to those activities (Art. 118 to 124, law 19.550).

In sum, it may be concluded that Argentine standards for adjudicating jurisdiction can be assimilated to United States categories for adjudicating jurisdiction and are an acceptable basis under due process standards. There is no sticking contradiction between standards applied by Argentine law and those elaborated in United States case law. Therefore, a judgment settled in Argentina where the issuing forum had sufficient jurisdiction would probably be recognized and enforced within the United States.

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130 ARAZI at 53.

5.E. THE JUDGMENT MUST NOT CONTRADICT THE PUBLIC POLICY OF THE RECOGNIZING FORUM

The public policy exception is one of the most frequently resorted to when it comes to opposing the enforcement of a foreign country judgment. Even though this exception may be easily abused, U.S. courts have construed it narrowly so that it may proceed on very few occasions[131]. For a foreign country judgment to be found unenforceable, it must contravene an essential public policy that affects a core interest of the forum[132].

A leading case in this area is "Ackermann v. Levine"[133], involving a judgment for recovering of attorney fees in Germany. The court in Ackerman held that "judgment is unenforceable as against public policy to the extent that it is repugnant to fundamental notions of what is decent and just in the State where enforcement is sought"[134]. The standard is thus high and infrequently met[135]. It does not suffice either that the foreign practice does not fulfil domestic practice or policy. Furthermore, in "Gau Shan Co. v. Bankers Trust Co."[136], it was held that only the evasion of a national policy might outweigh principles of international comity. Therefore, it is not the public policy of the state where recognition is sought that govern the issue, but those at a national level.

In Southwest Livestock and Trucking Company, In.c, v. Ramon[137], the Fifth District held that in order for the public policy exception to proceed, it is the cause of action that must be offensive to public policy. The judgment involved the recovery in Mexico of interests accrued from a promissory note signed by Texas incorporated company under an interest rate not allowed by Texas Law. The Mexican judgment was based on an action for the collection of a promissory note, an action that is not repugnant to Texas policy. The fact that a judgment itself may offend public policy of the rendering forum does not allow the court to refuse recognition of such judgment if the cause of action is not offensive[138].

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[131] See MINEHAN, KAREN E., *The Public Policy Exception to the Enforcement of Foreign Judgments: Necessary or Nemesis?*, 18 LOY.L.A. INT'L & COMP. L.J, 795, September 1996.
[132] Id. at 796.
[133] 788 F.2d 830 (2d Cir. 1986)
[134] See also Tahan v. Hodgson, 662 F.2d 862, 864 (D.C. Cir. 1981), in Ackerman, 788 F.2d at 834. Also McCord v. Jet Spray International Corp., 874 F.Supp. 436 (Mass.Dis.Ct. 1994), at 439.
[135] Ackerman, 788 F.2d at 834
[136] Gau Shan Co. v. Bankers Trust Co., 956 F.2d 1349 (6th Cir. 1992), at 1358.
[137] 169 F.3d 317 (5th Cir. 1999)
[138] Southwest Livestock, 169 F.3d at 322.

Also, in Sangiovanni Hernandez [139], the Circuit Court considered that a difference in method in procedures that seek to safeguard the same core interests do not contravene public policy[140]. In Sangiovanni Hernandez plaintiff argued that the lack of a second revision by independent observers of the judicial settlement involving rights to compensation of a minor contravened public policy of recognizing forum for the safekeeping of minors' rights. The court considered the minor's rights and interests had been sufficiently protected under the issuing forum's procedures.

To present, it has proved very difficult to issue a clearly defined standard for using the public policy exception. However, in a number of specific cases, U.S. courts have consistently refused to accept this exception even when the underlying causes of action either do not exist in the U.S. or vary from U.S. recognized causes of action[141].

In Browne [142] the plaintiff sought to enforce an Argentine judgment granting attorney fees. The defendant claimed that attorney fees award was repugnant to the public policy of New York where enforcement was sought. The plaintiff was seeking recovery of attorney fees originated in the successful representation of the defendant in litigation before Argentine courts. The court, citing Ackermann determined that variations in local public policy do not suffice to bar the claim from prospering[143]. The fact that the defendant had willingly submitted himself to Argentine laws and regulations when commencing the legal proceedings in Argentina was not consistent with the defence opposed[144]. The court considered that the defendant was placing himself in the "quite unenviable position of trying to take the good without the bad, the sweet without the bitter" [145].

The Bankruptcy Court in In re Board of Directors of Multicanal S.A.[146], in a case ancillary to Argentine insolvency proceedings, held that the rights under the Trust Indenture Act (TIA) of members claiming to hold beneficial interests in notes did not preclude granting relief to the debtor under foreign laws. The δ304 of the Bankruptcy Code governing cases ancillary to foreign proceedings grants such relief

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139 556 F.2d 611 (1st Cir. 1977)

140 Sangiovanni Hernandez, 556 F.2d at 615.

141 MINEHAN at 798.

142 No. 84 Civ. 8081 9PKL), 1986 U.S. Dist. LEXIS 2432.

143 Browne, 1986 U.S. Dist. LEXIS 24632, * 4.

144 Ibidem.

145 Spann v. Compañía Mexicana Radiodifusora Fronteriza, 131 F.2d 609 (5th Cir. 1942), in Browne, 1986 U.S. Dist. LEXIS 24632, *4.See also Ackerman, 788 F.2d at 835 and also Canada Southern Ry. Co. V. Gebhard, 109 U.S. 527 (1883).

146 307 B.R. 384 (Bankr. S.D. New York)

even if the foreign proceedings are not identical to US ones[147]. The Argentine proceeding in question was an APE or extra judicial agreements aimed at restructuring certain outstanding debt in order to avoid bankruptcy. Plaintiffs asked the court to rule that rights of note holders under TIA can only be impaired only if foreign proceedings were identical to US ones.

Instead, the Bankruptcy court upheld the principle that an individual dealing with a foreign corporation subjects himself to the laws of the foreign government [148] and that public policy was not threatened in the case of bankruptcy proceedings as long as certain principles were respected: a. just treatment of all holders; b. protection of US claim holders against prejudice; c. prevention of preferential or fraudulent dispositions[149]. The court found that even the collective action permitted in an Argentine APE should be allowed to proceed for the δ 304 of the Bankruptcy Code was intended to allow great flexibility in handling foreign procedures and that the laws of a foreign country do not need to be identical to US procedures as long as the principles enumerated above are respected[150].

The court in Philadelphia Gear Corporation v. Philadelphia Gear De Mexico, S.A, endorsed the same principles governing the recognition of foreign bankruptcy proceedings. [151] It concluded that "a party seeking recognition of foreign bankruptcy proceedings must demonstrate:

a. the foreign bankruptcy court shares...policy of equal distribution of assets; and

b. the foreign law mandates the issuance or at least authorizes the request for the stay"[152].

Although the principle of equal distribution of assets is a core guideline in Argentine bankruptcy law, certain exceptions contemplated in bankruptcy legislation that spring from other public policy tenets provide exceptions to the principle. Equal treatment of creditors is not an absolute and this may poise obstacles to the recognition of Argentine bankruptcy judgments.

Once a reorganization procedure is commenced or bankruptcy is declared, all creditors are banned from commencing judicial proceedings separate from the reorganization or bankruptcy procedure (arts. 21 &132, law 24.522 as

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147 Multicanal, 307 B.R at 389.
148 Canada Southern, 109 U.S. at 537-38
149 Multicanal, 307 B.R at 391.
150 Id. at 392.
151 44 F.3d 187, (3RD Cir. 1994)

amended)[153]. Every creditor must subject himself to a judicial and accountable verification of his credit (*verificacion de creditos*) according to arts. 32 to 38 law 24.522 in which the validity, existence and quantity of his credit are examined. Those credits in a foreign currency will be converted to Argentine currency according to the official exchange rate of the day of verification, art. 19 law 24.522[154].

According to Argentine law, as a rule, every creditor must suffer in equal measure the effects of the reorganization agreement voted by the majority of creditors and be subject to equal reductions and delays[155]. If the process culminates in bankruptcy, each creditor will receive a portion of the liquidation procedure strictly proportional to his original credit[156]. However, there are certain exceptions to the rule, namely those creditors who secured their credits with a mortgage or chattel mortgage or are granted special privileges by the law.

Among the latter are those employees or former employees who hold credits against the corporation or individual going through the reorganization or bankruptcy proceeding (art. 16 law 24.522). These creditors have a legal right to perceive their credits before all other creditors are paid and to the fullest extent possible (art. 16 law 24.522). In this way, all other creditors come second to employment originated credits[157]. Creditors whose credits have been secured through mortgages or chattel mortgages have a right to recover their credits from the produce of the public auctioning of those assets on which the mortgages or chattel mortgages were fixed (arts. 126, 129 & 209 law 24.522)[158]. In addition to this, foreign creditors in order to participate of the produce of the bankruptcy liquidation must prove, unless their credit is secured by means of a mortgage or chattel mortgage, that an Argentine creditor would be able to recover her credit by means of the bankruptcy proceedings available in the country in which the foreign credit was originated (art. 4, law 24.522)[159].

In other words, although the equal treatment of creditors is an underlying guideline in Argentine bankruptcy law, there are classes of creditors who enjoy privileges that bear heavily on other credits. Employment creditors, mortgage and

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152 Philadelphia Gear, 44 F.3d at 193.

153 See RIVERA, JULIO CÉSAR, *Instituciones de Derecho Concursal,* t.I, Rubinzal-Culzoni, 2ª ed., Buenos Aires, 2003, p. 214.

154 RIVERA at 222.

155 RIVERA at 218

156 Id. at 218

157 Id. at 219-222.

158 Id. at 220

chattel mortgage creditors are able to recover their credits to a fuller extent. Holders of foreign originated credits are subject to a test of reciprocity unless those credits were secured by mortgages or chattel mortgages. Such differences in treatment may be considered unfair treatment by United States bankruptcy standards and result in denial of the enforcement of a bankruptcy or reorganization judgment rendered in accordance.

Summing up the public policy exception, though frequently invoked is seldom granted. In order for a foreign judgment to offend public policy, the cause of action must be contrary to a fundamental notion of what is decent, moral or just. Few rights rise to this level and those rights that do must not be limited to a state jurisdiction but have a national regard. Apart from the particular situations pertaining bankruptcy law, a general rule establishing which Argentine causes of action may be offensive to public policy cannot be drawn. Instead it is necessary to look into each case's facts and governing laws. Nevertheless, it is very unlikely that a defendant will successfully oppose a public policy claim.

5.F. LACK OF FRAUD IN OBTAINING THE JUDGMENT.

Fraud is also one of the most frequently raised defenses. Both statutory law and case law have recognized the existence of fraud as a basis for non-enforcement of a foreign country judgment[160]. It is seldom that U.S. courts will grant this exception, mainly out of respect for the foreign judicial system[161].

A defendant resisting the enforcement of a foreign judgment in a United States court will have to raise a collateral challenge pleading that the fraud was of an "extrinsic" type[162]. An extrinsic fraud is that fraud caused or induced by one of the parties in order to deprive the counter party of his procedural rights and thus render him defenseless. The defendant will find himself unable to fully expose his defenses or oppose the claim on its merits[163]. Extrinsic fraud is to be differentiated from "intrinsic" fraud, that is fraud committed within the process and in the presence of the foreign court[164]. A typical example of intrinsic fraud is the

159 RIVERA at 284.

160 See Hilton v. Guyot, 159 U.S. 113 (1895) and Uniform Foreign Money Judgments Enforcemetn Act (1962), δ4. (b). (2).

161 BORN & WESTIN at 778.

162 Ibidem.

163 See Alleghany Corporation v. Kirby, 333 F.2d 327 (2nd Cir. 1963); Scola v. Boat Frances R., Inc., 546 F.2d 459 (1st Cir. 1976); John Sanderson &Co. (Wool) PTY. Ltd v. Ludlow Jute Co., Ltd (1st cir. 1977) cited in Born at 778..

164 BORN at 778.

submittal of fraudulent evidence such as forged documents or perjurious witnesses. A party faced with intrinsic fraud must resort to local remedies within the rendering forum's procedural rules, for United States courts will not recognize such basis for resisting enforcement[165]. Nevertheless, it is usually difficult to distinguish between both cases.

Argentine procedural law allows procedural safeguards against both types of fraud, by means of the institutes of incidents (*incidents*), or summary processes within the larger process, and appellate resources (*recursos*). The incidents are used to claim extrinsic fraud, namely, misconduct by the other litigant leading to deprivation of the right to defense, and also to certain instances of intrinsic fraud. Appellate resources are granted against judgments in order to bridge formal defects that may have lead to deprivation of the right to defense of either party.

The nullity incident against a faulty service of defendant (*recurso de nulidad por citacion defectuosa*) is regulated in Arts. 74, 339 &172-173 Cod. Proc. Civ. Y Com. It proceeds when a plaintiff knowingly provides the court with a false domicile where to notify the defendant of the suit brought against him and as consequence of that the defendant does not appear before court and a judgment is rendered in default. The defendant must start the incident (Art. 172 Cod. Proc. Civ. Y Com.) ad if he is successful, the court will declare void every procedural act and impose all judicial costs and attorney fees on the malicious plaintiff (Art. 74 Cod. Proc. Civ. Y Com.).

Other instances in which a nullity incident may proceed include cases of false evidence or, generally any situation in which one of the parties knowingly deprives the counter litigant of her possibility to exercise her procedural rights (Art. 253 Cod. Proc. Civ. Y Com.) The judge may also declare the nullity of an act *ex officio* if that nullity is patently manifest (Art. 173).

The appellate resource aimed at declaring the nullity of a judgment has a limited scope: only formal defects of the judgment that may have caused lack of adequate defense can be pledged (art. 345 Cod. Proc. Civ. Y Com.)[166]. If the defendant wants a declaration of nullity of a judgment, he must start a new trial seeking based on an entirely new cause of action, namely the nullity of the sentence[167]. The appellate resource can be interposed against first instance judgments. A party seeking the nullity of an appellate judgment on the grounds of formal defects must

[165] Ibidem.
[166] ARAZI at 59.
[167] Id. at 60.

go before the Argentine Supreme Court of Justice by means of extraordinary appellate resource (*Recurso Extraordinario Federal*).

To sum up, it is very seldom that a United States Court will deny recognition of a foreign judgment on the grounds of extrinsic fraud. Argentine law provides for remedies against both extrinsic and intrinsic fraud. Again, just as in the case of the public policy exception, no general rule can be established and the decision will be made on a case-by-case basis.

5.G. CONSISTENCY OF PROCEEDING IN FOREIGN COURT WITH FORUM SELECTION CLAUSE

Forum selection clauses have become increasingly common in international transactions and are a key element when considering the overall economic advantages and costs of a contract[168]. They consist of contractual provision determining beforehand which forum shall decide issues arising out of a specific transaction. If two parties stipulate Argentina as the forum where disputes shall be litigated, in order to determine whether a judgment rendered in such forum will be enforceable in the United States it will be necessary to examine the validity of the agreement under the governing law.

Although it is not necessary, forum selection clauses are normally used in conjunction with choice of law clauses. The law of the state chosen by the parties will rule the validity of the choice of forum unless certain exceptions apply[169]. Most courts have refused to apply foreign law when that law would be contrary to a fundamental policy of the recognizing state or when there is no substantial relationship to the parties or the transaction[170]. In all other cases, the choice of law will be applied to issue that the parties have specifically included or even those that they have not[171]. Therefore, if United States law has been chosen it will be necessary to examine the standards of recognition within United States and if Argentine law has been chosen then it is that law that must be examined.

Several factors have been taken into account by United States courts: freedom of negotiation; fraud; reasonableness or fundamental fairness of the agreement; public policy. These factors have been developed mainly through case law. The

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168 BORN at 222.

169 Id. at 228

170 See Restatement (Second) Conflicts of Law δ187 (1971), cited in BORN, GARY B. & WESTIN, DAVID, *International Civil Litigation in United States Courts*: *Commentary and Materials*, 2nd ed., Kluwer, Deventer, Boston, 1999, pp. 228, ft. 30.

171 Id.

forum selection clause should be applied unless the resisting party can successfully resist it by showing the existence of any of the aforesaid factors[172].

The Supreme Court in the case of The Bremen v. Zapata Off-Shore Co[173], emphasized the prima facie validity of this kind of clauses as long as they were the off spring of "freely negotiated private international agreements, unaffected by fraud, undue influence, or overweening bargaining power"[174]. Even though this case was an Admiralty case, the scope of it has been extended beyond the limits of the admiralty context to all international contracts[175] and to federal law claims arising from international disputes in federal courts[176]. It is important to note that the Court required the resisting party to show that the forum selection clause would be unenforceable[177].

The exceptions related to fraud, undue influence and lack of bargaining power are substantially similar to common law principles governing proof and existence of such factors in private transactions[178]. The Court in Zapata stated that a clause product of fraud was not enforceable[179] and it can be argued that other exceptions relating to misconduct or breach of good faith negotiation are governed by the same principle. As for the bargaining power, this factor was minimized in the Supreme Court case of Carnival Cruise Lines, Inc. v. Shute[180]. The emphasis was placed on the fairness of the forum selection clause rather than on the bargaining power of the parties as long as both knew of the existence of such a clause[181]. The Court found no fundamental unfairness in the clause that determined the forum would be that where the defendant had its principal business[182]. In this way, the Supreme Court endorsed the use of such forum selection clauses even in consumer contracts where there is no power of negotiation whatsoever (adherence contracts)[183]. Still, it can be deduced from the holding of the Carnival Cruise case

[172] Id. at 235.
[173] 407 U.S. 1 (1972), cited in Born at 233.
[174] 407 U.S. 1, at 3.
[175] See National Equipment Rental, Ltd. V. Szuckhent, 375 U.S. 311 (1964); Stewart Organization, Inc. v. Ricoh Corp., 108 S.Ct. 2239 (1988), cited in BORN & WESTIN at 241.
[176] BORN & WESTIN at 241.
[177] Id. at 248.
[178] Id. at 249.
[179] Ibidem.
[180] 111 S.Ct. 1522 (1991)
[181] 111 S.Ct., at 1524.
[182] 111 S.Ct. 1532.
[183] BORN & WESTIN at 257.

that if a party is not sufficiently noticed of the existence of the clause such clause could be validly challenged on these grounds[184].

If in a particular case, United States law governs a forum selection clause adjoining jurisdiction to an Argentine tribunal, the party opposing enforcement of the judgment rendered by such Argentine tribunal should prove the existence of certain factors. If the clause was the product of fraudulent or similar misconduct, other than the lack of bargaining power, or if parties did not have sufficient notice of its existence or if they did, the clause was fundamentally unfair, then the clause would be rendered invalid.

However, if Argentine law governs the choice of forum, the clause must comply with the requirements set forth in the Argentine Code of Civil and Commercial Procedure. Forum selection clauses are allowed for purely patrimonial issues, even in favor of international or foreign judges or tribunals (Art. 1 Cod. Proc. Civ. Y Com.). The choice of forum can be either expressly agreed or tacitly accepted when the defendant does not oppose the lack of jurisdiction as a defense (Art. 2 Cod. Proc. Civ. Y Com.)[185]. The court cannot declare its lack of jurisdiction in patrimonial issues for parties can freely agree on this matter.

Substantial restrictions apply to the choice of law in certain claims closely related to public policy of the Argentine Republic and also to *in rem* actions over real estate[186]. Forum selection clauses are widely used in Argentina, especially for commercial and financial operations and a court will seldom refuse recognition of such agreements. Nevertheless, if the cause of action involves a claim other than a purely patrimonial issue, the judge will deny recognition of the choice of forum and declare its own lack of jurisdiction (Arts. 3 & 4 Cod. Proc. Civ. Y Com.). Although parties can waive the forum selection clause, the enforcing court will look not the agreement, if any and the law governing the validity of such express or tacit agreement.

Once more, the decision whether the proceedings have been coherent with the forum selection clause will rest on a case-by-case basis. The court will have to decide the governing law, analyze the formation of the clause and its inclusion on the contract and the jurisdiction or lack of the rendering forum.

CONCLUSIONS

184 Ibidem.
185 ARAZI at 51.
186 Id. at 52.

The preceding paragraphs have analyzed the requisites that have been elaborated by statute and case law and how they apply to the particularities of Argentine judgments. The following conclusions can be drawn:

The Argentine legal system meets the requirement of reciprocity for it regulates a procedure for enforcing foreign judgments that is fully applicable to United States judgments. Provided certain requisites are met, United States judgments would be granted *res iudicata* effect and be deemed enforceable within Argentine territory. Furthermore, those requisites demanded by the Argentine legal system are substantially similar to the requirements enumerated in the Foreign Money-Judgment Enforcement Act of 1962.

An Argentine judgment rendered within the framework of a cognition procedure –allowing for full discussion of the defenses and cause of action- once the appellate level has been settled, would be considered final and conclusive under Argentine law. Therefore, since the law ruling this issue is that of the rendering forum, such a judgment would meet the requirement of being final and conclusive.

Similarly, other ways of terminating the judicial procedure that, under Argentine law, extinguishes the cause of action and settle the issues, would be equaled to a final and conclusive judgment in Argentina and thus entitled to enforceability. A judgment debtor should not be able to successfully oppose the enforcement on the grounds of lack of finality and conclusiveness. Such alternative ways of terminating the process include a judicially homologated decision to desist the cause of action; a judicially homologated settlement, whether in court or out of court; and the *caducidad de instancia* on the grounds of the prescription of the cause of action or that occurs at the appellate level.

In the case of a default judgment, if the defendant has had the opportunity to defend himself on the merits, made use of it but abstained from further discussion on the merits, the judgment would be deemed enforceable.

Argentine standards for adjoining jurisdiction are substantially similar to those developed in statute and case law for general jurisdiction. Argentine basis for jurisdiction are based on the nature of the claim rather than on the nationality or any subjective consideration of the litigants. A minimum contact with the forum is required, either by the presence of commercial activity, the execution of an obligation, the location of fixed property or the domicile of the defendant at the time a claim is filed.

In the public policy exception, it is impossible to draw a tailored rule other than the general formula of what is contrary to fundamental notions of what is decent, moral or just. All of these are undetermined concepts that need be evaluated on a case-by-case basis. Certain principles embedded in the Argentine Reorganization

and Bankruptcy Law that grant a privilege to a class of creditors could be found to be in opposition to essential principles of United States bankruptcy regulations.

The exception of extrinsic fraud must also be constructed on a case-by-case basis and no general rule regarding Argentine judgments can be drawn. The issue of the existence of fraud is a matter of fact that has to be evaluated in each judgment whose enforcement is being sought.

In the case of a forum selection agreement, in order to verify the compliance with the parties' choice, the recognizing court will first have to examine the validity of the clause under governing law. The court will have to analyze the formation of the clause and its proper execution. If the formation is valid and the parties' will has been respected, then the judgment rendered by the chosen court will be considered enforceable.

To conclude, an Argentine judgment on a Civil or Commercial issue is likely to be enforced in the United States. Deference to comity will serve as reinforcement. Although a treaty would be desirable for it would grant clarity to international actors, it is unlikely that such an agreement between the United States and Argentina will be struck in the near future. Meanwhile, those standards contained in statute law and case law will serve as guidance.

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