EXHIBIT 83
Part 2

sum which can be ascertained by a mere arithmetical calculation.[149] It also includes a judgment, not for a definite *single* sum of money, but for *definite sums to be paid periodically* as ordered. An order for the payment of a sum which is subject to the deduction of an amount for costs which has yet to be determined is not enforceable.[150]

If the foreign judgment orders the defendant to do something other than pay a definite sum of money, it is not enforceable. Thus, a decree granting an injunction or specific performance or restitution of a chattel will not be enforced.

The existing rule is an anomalous survival from the days when the forms of action were all important and the appropriate form of action on a foreign judgment was in *indebitatus assumpsit.* It is difficult to see why a foreign judgment of this kind should not be enforced directly. *Wolff*[151] suggests that such a judgment can be recognised as *res judicata,* however, so that, if the plaintiff brings an action claiming damages for non-performance of the obligation established by the original judgment the defendant will probably not be allowed to set up the defence that this judgment was wrong.

Foreign Judgment Cannot Be Examined on Merits

Up to the middle of the last century foreign judgments were regarded as merely *prima facie,* and not conclusive, evidence of the existence of a debt between the parties,[152] so that the merits of the case could be re-examined when a foreign judgment was sued upon. However, it became established that, if the foreign court had jurisdiction in the international sense, the merits of the case could not be re-opened.[153]

The underlying reason for this position is to be found in the maxims *interest rei publicae ut sit finis litium* and *nemo debet bis vexari pro eadem causa* – it is "contrary to principle and expediency for the same questions to be again submitted to a jury in this country".[154] The proper recourse of a party seeking to allege that the foreign judgment was bad for a mistake of fact or of law is to take an appeal in the foreign country concerned. A court in this country cannot act as an appellate court over a judgment given by a foreign court of competent jurisdiction.

A foreign judgment is conclusive despite the fact that there was a defence available to the defendent in the foreign court which he failed to set up. For example, in *Ellis* v. *M'Henry*[155] judgment was given in a Canadian court for a debt against a person who had been made bankrupt in England but who failed to plead his discharge in the bankruptcy as a defence to the Canadian action. An action on the Canadian judgment in England was successful: to allow the defendant to set up the defence he could have pleaded to the original claim would impeach the propriety and correctness of the foreign judgment.[156]

[149] *Beatty* v. *Beatty,* [1924] 1 K.B. 807.

[150] *Sadler* v. *Robins* 1 Camp. 253, 170 E.R. 948 (1808); *Hutton* v. *Dant,* [1924] 1 D.L.R. 401; *Taylor* v. *Begg* [1932] N.Z.L.R. 286.

[151] *Wolff,* 265. See also *Dicey & Morris,* 1093.

[152] *Walker* v. *Witter* 1 Doug. 1 at 5-6 (1778); *Houlditch* v. *Donegal,* 2 Cl. & F. 470, at 477–478, 6 E.R. 1232, at 1234–1235 (1834); cf. the remarks of Lord Plunket, L.C., in the same case; see also *Smith* v. *Nicholls,* 5 Bing. N.C. 208 at 221 (1839), *Otway* v. *Ramsey,* 2 Stra. 1090 (K.B., 1736). See further *Anon., Comment: Reciprocity and the Recognition of Foreign Judgments,* 36 Yale L.J. 542, at 543 (1927).

[153] *Bank of Australasia* v. *Nias,* 16 Q.B. 717 (1851); *De Cosse Brissac* v. *Rathbone,* 6 H. & N. 301 (1861) *Godard* v. *Gray,* L.R. 6 Q.B. 139 (1870); *Vadala* v. *Lawes,* 25 Q.B.D. 310, at 316 (1890). See also *La Societe Anonyme La Chemo–Serotherapie Belge* v. *Dolan (Dominick A.) & Co. Ltd.,* [1961] I.R. 281, *Maubourquet* v. *Wyse,* I.R. 1 C.L. 471, at 490 (Exch., *per* Pigot, C.B., 1867).

[154] *Bank of Australasia* v. *Nias,* 16 Q.B. 717, at 736, 107 E.R. 1055, at 1063 (1851).

[155] L.R. 6 C.P. 228 (1871).

[156] *Id.,* at 238–239. See also *Henderson* v. *Henderson,* 6 Q.B. 288 (1844); *De Cosse Brissac* v. *Rathbone, supra.*

In *La Societe Anonyme la Chemo–Serotherapie Belge* v. *Dolan (Dominick A.) & Co. Ltd.*,[157] the plaintiff, a Belgian company, obtained final judgment in Belgium against the defendants, an Irish company, on foot of an agreement to compromise the plaintiff's claim. The claim was for a sum of money which the defendants had undertaken to pay as a royalty on a product in respect of which the plaintiffs had given them the wholesale selling rights in Ireland. The defendants had contested the proceedings in Belgium but, when judgment was given against them there, they did not appeal.

When the plaintiffs sought to enforce the judgment in Ireland, the defendants resisted on the basis that they were entitled to a set–off, for a sum exceeding the amount of the judgment, to compensate them for income tax paid by them in respect of the royalties in Ireland. They argued[158] that, since their original indebtedness to the plaintiffs had not merged in the Belgian judgment, and that as it was thus still open to the plaintiffs to sue the defendents on foot of the original cause of action, the defendants ought not to be precluded from raising all the defences which were open to them to that cause of action, including the defence regarding the income tax payment.

Teevan, J. agreed that the original cause of action survived. This was "so well established that it is not unnecessary to cite authority for the proposition."[159] He also agreed that defences to the original claim similarly survived so far as that claim was concerned. But beyond that, he was unwilling to concur with the defence arguments. He said:

> "The plaintiffs had a choice of two courses of action. They could have sued here on the original claim as it arose under the compromise agreement – using, if they wished, the Belgian judgment as proof of the amount of indebtedness; or they could have sued on the Belgian judgment itself, which they did. As I understand [defence counsel]'s contention it is that, by reason of the distinction between final judgments of our own Courts and those of foreign Courts, the latter are devoid of force save as evidence of the pre–judgment debt. At least, I think, his argument must logically be pushed that far. He says, if the plaintiffs' claim had been simply for the amount due under the compromise agreement, he would have been entitled to deduct the tax; as there is no merger, his right of deduction remains and he can now deduct from the amount of the Belgian judgment — at least from so much of it as is made up of debt.[160]
>
> This is clearly contrary to authority. That this is so may not appear explicitly from the authorities on which he grounded his arguments, but it follows from them. Otherwise why is it permitted to sue on foreign judgments as themselves causes of action?"[161]

The fact that the foreign court made a mistake as to its own law will not prevent its judgment from being conclusive.[162] Indeed, even the fact that the foreign court made a mistake as to *Irish* law will not avail the defendant.[163] In *Godard* v. *Gray*[164]

[157] [1961] I.R. 281 (High Ct., Teevan, J.)
[158] *Id.*, at 283.
[159] *Id.*, at 286.
[160] The judgment also included amounts for costs and interest under Belgian law: [1961] I.R., at 282.
[161] *Id.*, at 286–287.
[162] Cf. *Scott* v. *Pilkington*, 2 B. & S. 11 (1862). See also *Henderson* v. *Henderson supra.* There is some uncertainty as to the position where the defendant, after the foreign judgment has been handed down, discovers new evidence which he could not reasonably have known about beforehand and which shows that the decision was wrong. In *De Cosse Brissac* v. *Rathbone, supra*, such a plea was held bad, but some of the commentators are of the view that this holding can be explained on its special facts and that a plea on these lines should be admitted: see *Dicey & Morris*, 1074–1075, *McLeod.* 601.
[163] Cf. Graveson, *Comparative Aspects of the General Principles of Private International Law*, [1963] – II Recueil des cours 1, at 149.
[164] L.R. 6 Q.B. 139 (1870). See also *Castrique* v. *Imrie*, L.R. 4 H.L. 414 (1870).

a French court, acting on an erroneous view of English law, treated a penalty clause in a charterparty governed by English law as fixing the amount of damages payable in the event of breach. The French judgment was sued upon in England and the defendant pleaded the mistake as to English law. It was held that the defendant could no more set up an excuse that the judgment had proceeded on a mistake as to English law then he could set up as an excuse that there had been a mistake as to the law of some third country incidentally involved or as to any other question of fact.[165]

We must now consider an aspect of this subject on which the judicial authorities are far from clear. Accepting that the foreign court had jurisdiction in the international sense, what should be the effect of showing that it lacked *internal* jurisdiction? For example, if a divorce were obtained by a spouse domiciled in a foreign country, and resident there for six months, that divorce would comply with the jurisdictional requirements, in the international sense,[166] but it would not necessarily comply with the internal jurisdictional requirements of the foreign state – as would be the case where the law of that state required a minimum period of residence of one year and paid no attention to the petitioner's domicile.

The English decisions on this general issue are "at first sight in a state of some confusion",[167] and attempts[168] to reconcile them have proved difficult. Some of the cases[169] appear to support the view that the judgment should be upheld regardless of the lack of jurisdiction under the internal law of the foreign country. The problem with this approach is that it would treat as valid a judgment which had no validity in the foreign country itself and which thus created no rights in the plaintiff.[170]

It is possible to mitigate the full effect of this rule by restricting it to cases where the foreign court had jurisdiction under its internal law but erred in its own rules of procedure,[171] or cases where the judgment, though irregular according to the internal foreign law, was voidable rather than completely null.[172]

Gaffney v. *Gaffney*[173] is a difficult case to interpret in this context. The judgments in the Supreme Court, when considering the question of the English divorce court's jurisdiction, never clearly distinguished between jurisdiction in the international sense and jurisdiction for the purposes of English divorce law. There was an overlap in that domicile would support jurisdiction in both senses, but the husband's (alleged) residence in England could also have supported jurisdiction for the purposes of English divorce law but not for the purposes of jurisdiction in the international sense. Griffin, J.'s quotation[174] of a relevant passage from Lindley, M.R.'s judgment in *Pemberton* v. *Hughes*[175] suggests that Griffin, J. did not dissent from the view that jurisdictional incompetence under the foreign internal law should be ignored; but there is nothing in the remainder of his judgment, or the judgments of the other members of the Court, which throws light on what the position would have been where the English court had jurisdiction in the international sense but not in terms of the requirements of its own divorce law.

[165] L.R. 6 Q.B. at 150 (1870).
[166] Cf. *supra*, pp. 588-589.
[167] *Dicey & Morris*, 1080.
[168] Cf. *Cheshire & North*, 653–655, *Dicey & Morris*, 1080–1081.
[169] Cf. *Pemberton* v. *Hughes*, [1899] 1 Ch. 781, at 791 (C.A., *per* Lindley, L.J.), quoted by Griffin, J., in *Gaffney* v. *Gaffney*, [1975] I.R. 133, at 159–160 (Sup. Ct). See also *Merker* v. *Merker*, [1963] P. 283 (Sir Jocelyn Simon, P., 1962) *Contra, Bater* v. *Bater*, [1906] P. 209, at 232–234 (C.A. *per* Romer, C.J.), *Papadopoulos* v. *Papadopoulas*, [1930] P. 55 (Sir Jocelyn Simon, P., 1970).
[170] *Cheshire & North*, 653–654.
[171] *Id.*, 654, explaining *Pemberton* v. *Hughes*, *supra*, and *Vanquelin* v. *Bouard*, 15 C.B.N.S. 341, 143 E.R. 817 (1863). This strategy, of course, involves difficult issues of characterisation.
[172] *Read*, 100, explaining *Vanquelin* v. *Bouard*, *supra*.
[173] [1975] I.R. 133 (Sup. Ct., 1975, aff'g High Ct., Kenny, J., 1973).
[174] *Id.*, at 158–159.
[175] L.R. 2 P. & D. 435, at 442 (1872).

Estoppel per rem judicatam

To what extent does the doctrine of estoppel *per rem judicatam* apply to a foreign judgment? We have already seen that a foreign judgment is not *res judicata* inasmuch as the original cause of action is not merged in the judgment and extinguished. The plaintiff has the option of either suing on the original cause of action in Ireland or suing on the foreign judgment.[176] But, while this ultimate degree of conclusiveness is denied to foreign judgments, they are otherwise conclusive on the merits. In domestic law there is a rule of evidence whereby an unsuccessful party to litigation is estopped from questioning in any subsequent proceedings the merits of a final decision in that litigation. This species of estoppel is known as estoppel *per rem judicatam* or estoppel by record.[177]

Estoppel *per rem judicatam* applies both to judgments *in personam* and judgments *in rem*, the former being conclusive only as between the parties or their privies, the latter being conclusive as against the whole world.

So far as conflicts of law aspects of estoppel *per rem judicatam* are concerned, a person who successfully defended foreign proceedings where the judgment was final and conclusive and given on the merits, cannot later be sued in Ireland by the same plaintiff on the same cause of action. The plaintiff is estopped from denying the conclusiveness of the judgment. Moreover, where a plaintiff suing abroad has had judgment satisfied there, albeit of an award more modest than he could have obtained in Ireland, he may not later proceed against the same defendant in Ireland in respect of the same injury, looking for further compensation.[178]

Defences Available Against Recognition and Enforcement

The fact that a foreign judgment is regarded as conclusive and unimpeachable as to the merits of the dispute does not mean that a defendant to an action for enforcement of such a judgment is entirely without recourse. We have already seen that he may resist recognition and enforcement on the ground that the foreign court lacked jurisdiction over the subject matter or the parties. There are a number of other defences that he may also raise.

Fraud vitiating the foreign judgment[179]

A purely domestic judgment may be set aside upon the ground of fraud or collusion[180] since it is an abuse of the process of the Court.[181] The jurisdiction to set aside such a judgment does not depend on rules of court[182] but is part of the inherent jurisdiction of the Court.[183] Whether the judgment is by default or consent, or otherwise, is immaterial.[184] Fraud must be clearly alleged and clearly proved.[185] In the clearest of cases, judgment may be set aside on motion; otherwise there should

[176] *Carl Zeiss Stiftung* v. *Rayner and Keeler (No.2)*, [1966] 2 All E.R. 536, at 564, citing Spencer Bower on *Res Judicata*, p.3.
[177] Cf. *Cheshire & North*, 656. See, e.g. *Harris* v. *Quine*, L.R. 4 Q.B. 653 (1869).
[178] *Cheshire & North*, 656.
[179] See Graveson, *Fraud in Foreign Judgments*, 12 Modern L. Rev. 105 (1949).
[180] *Duchess of Kingston's Case* 2 Sm. L.C. (13th ed.) 644, 20 State Tr. 619, [1775–1802] All E.R. Rep. 623; (1776); *McLaffey* v. *McLaffey* [1905] 2 I.R. 292; *Nixon* v. *Loundes* [1909] 2 I.R. 1 (K.B. Div., 1908), *Dennis* v. *Leinster Paper Co.*, [1901] 2 I.R. 337, at 340 (K.B. Div., Kenny, J., aff'd by C.A.). See Gordon, *Actions to Set Aside Judgments*, 77 L.Q.R. 358, 533 (1961), and cf. *Denman* v. *O'Callaghan*, 31 I.L.T.R. 141 (C.A., 1897).
[181] *Nixon* v. *Loundes*, [1909] 2 I.R., at 10–11 (K.B. Div., *per* Dodd, J., 1908).
[182] See the Rules of the Superior Courts 1986, Order 13, rule 11, Order 27, rule 14, Order 36, rule 33. Cf. *Fitter & Co.* v. *Tuke*, 40 I.L.T.R. 1 (C.A., 1905).
[183] [1909]2 I.R. at 6 (*per* Gibson, J.).
[184] *Id.*
[185] *Id* at 11 (*per* Dodd, J.)

be an issue to try the question of fraud.[186] The plaintiff must produce evidence of new facts discovered since the former judgment which raise a reasonable probability of the action succeeding.[187] Those facts must be so evidenced and so material as to make it reasonably probable that the action will succeed.[188]

A foreign judgment also may be impeached for fraud. In such circumstances, enforcement of it will be refused in Ireland.[189] The fraud may have been perpetrated by the foreign court itself, as in *Price* v. *Dewhurst*,[190] where some members of a Danish court were shown to have had an interest in the property that was affected by their decision. Normally, of course, the fraud will have been perpetrated upon the foreign court by one or more of the parties.[191]

What sort of evidence is required to invalidate a foreign judgment? Must there, as in the case of domestic judgments, be evidence of new facts discovered since the foreign judgment or may the merits of the foreign judgment be examined by consideration of the same evidence as was given in the foreign court? And is the position different where if the allegation of fraud was considered by the foreign court and rejected by it? Fraud as to the jurisdiction occurred in *Gaffney* v. *Gaffney*[199] where a divorce had been obtained in England on the basis of the common domicile of the spouses there, even though they were in reality domiciled in Ireland at the material time. The husband by means of the threat of physical violence had forced his wife to petition for divorce. The Supreme Court, affirming Kenny, J., held that the divorce decree was ineffective as the English Court had lacked jurisdiction. Henchy, J. said:

> "I fail to see why, although the decree seems good on its face, evidence should not be received to show that its facade conceals a lack of jurisdiction no less detrimental to its validity than if it had been written into the order. To hold otherwise would be to close one's eyes to the available truth and to give effect instead to a spurious divorce which the English court was deluded by sworn misrepresentations into making."[200]

And Griffin, J. said:

> "The decree in the present case was obtained by duress and by fraud going to the point of jurisdiction ... [T]he duress and fraud were those of the husband, but even where a petitioner[201] has obtained a decree in a foreign court which had no jurisdiction

[186] *Id.*
[187] *Birch* v. *Birch* [1902] P. 130 at 136 (C.A., *per* Vaughan Williams, J.).
[188] *Id.*, at 136-137.
[189] *Gaffney* v. *Gaffney* [1975] I.R. 133 (Sup. Ct., 1975, aff'g. High Ct., Kenny, J., 1973), *L.B.* v. *H.B.*, [1980] I.L.R.M. 257 (High Ct., Barrington, J.).
[190] 3 Sim. 279, 59 E.R. 111 (Shadwell, V.C., 1837).
[191] Cf. *Gaffney* v. *Gaffney, supra* (fraud on English court, to the knowledge of both parties, brought about by duress exerted by one party over the other).
[192] *Vadala* v. *Lawes* 25 Q.B.D. 310, at 316 (1890).
[193] *Aloulaff* v. *Oppenheimer*, 10 Q.B.D. 295 (1882), *Vadala* v. *Lawes*, 25 Q.B.D. 310 (1890); *Syal* v. *Heyward*, [1948] 2 K.B. 443. See also *Ellerman Lines* v. *Read*, [1928] 2 K.B. 144.
[194] 10 Q.B.D. 295, at 306 (1882).
[195] See *Read*, 272–281; *Castel*, vol 1 488–499.
[196] *Svinskis* v. *Gibson*, [1977] 2 N.Z.L.R. 4 at 10 (C.A.).
[197] *Jacobs* v. *Beaver*, 17 O.L.R. 496 (C.A., 1908).
[198] *Read*, p. 273.
[199] [1975] I.R. 133 (Sup. Ct., 1975, aff'g High Ct., Kenny, J., 1973). See also *Biggar* v. *Biggar*, [1930] 2 D.L.R. 940.
[200] [1975] I.R., at 154–155.
[201] In fact the wife had been the petitioner in the English divorce proceedings, acting under duress imposed by her husband. What Griffin, J. appears to have in mind is a case where there is fraud by the petitioner without any duress being exerted on him or her.

> to pronounce it, by deceiving the court into believing it had jurisdiction the Court will treat it as invalid ...''[202]

Some distinctive aspects of the effect of fraud in respect of nullity decrees[203] have been considered earlier. So far as divorce decrees[204] are concerned we have already noted Barrington, J.'s decision on *L.B.* v. *H.B.*,[205] where the parties had presented a factually untrue case to obtain a divorce in France, the country of their domicile. Barrington, J. considered that he should not recognise the divorce decree, not on the basis of fraud, but of a ''substantial defeat of justice ...'' The decision has implications far wider than the specific context of divorce. It suggests that recognition may be denied to a foreign judgment based on false evidence as to any facts (rather than specifically the question of jurisdiction) where that evidence was knowingly tendered by both, or perhaps one, of the parties.

Foreign judgment contrary to natural or constitutional justice

It is well recognised that foreign decrees contrary to ''natural justice''[206] or ''substantial justice''[207] may not be recognised here. If a foreign judgment was ''obtained in a proceeding conducted in a manner contrary to natural justice then, although it may have been conformable to the law of the country in which it was pronounced, it cannot be legally enforced''[208] in an Irish Court. The precise scope of the defence is not altogether clear. The expression ''contrary to natural justice'' does not mean that the foreign judgment was merely unjust in the sense of being wrong or mistaken.[209]

The defence may be applicable where there was a failure on the part of the foreign court to observe the maxim *audi alteram partem.* In *Maubourquet* v. *Wyse*,[210] Pigot, C.B. observed that the foundation of this maxim was:

> ''laid in the general principles of all jurisprudence which deserves the name. It is a rule of reason and justice, which from very early times the law of England appears to have regarded as of universal application ...''

One type of case where the maxim has been held to have been infringed is where the defendant was not given notice of the action before the foreign court and had not been summoned before it.[211] The maxim *audi alteram partem* may also be

[202] [1975] I.R., at 159, citing *Bonaparte* v. *Bonaparte,* [1892] P. 402, and *Middleton* v. *Middleton,* [1967] P. 62 (P.D.A. Div., Cairns, J., 1965).

[203] Cf. *supra*, p. 263.

[204] Cf. *supra*, pp. 282-284.

[205] [1980] I.L.R.M. 257 (High Ct., Barrington, J.).

[206] *Maubourquet* v. *Wyse*, I.R. 1 C.L. 471, at 481 (Exch., *per* Pigot, C.B., 1867) and at 497 (*per* Fitzgerald, B.). See also *Denman* v. *O'Callaghan,* 31, I.L.T.R. 141, at 142 (C.A., *per* Ashbourne, C., 1897).

[207] *Pemberton* v. *Hughes* [1899] 1 Ch. 781 at 790, *per* Lindley, M.R., cited with approval in *Gaffney* v. *Gaffney* [1975] I.R. 133 at 140–141 and 158–159. See also *L.B.* v. *H.B., supra.*

[208] *Maubourquet* v. *Wyse* I.R. 1 C.L. 471, at 481 (Exch., *per* Pigot, C.B. 1867). See also *Dennis* v. *Leinster Paper Co.,* [1901] 2 I.R. 337, at 340–341 (K.B. Div., Kenny, J., aff'd by C.A.).

[209] Cf. *Robinson* v. *Fenner* [1913] 3 K.B. 835 at 842 (Channell, J., 1912):
> ''It is not enough to say that a decision is very wrong, any more than it is merely to say that it is wrong. It is not enough, therefore, to say that the result works injustice in the particular case, because a wrong decision always does.''

[210] I.R. 1 C.L. 471 at 481 (Exch., *per* Pigot C.B., 1867).

[211] *Ferguson* v. *Mahon*, 11 Ad. & El. 179, 113 E.R. 382 (1839) (Irish judgment obtained ''behind the back of the defendant'' denied recognition in England; Lord Denman considered that ''when it appears, as here, that the defendant has never had notice of the proceedings, or been before the Court, it is impossible for us to allow the judgment to be made to the foundation of an action in this country''.) See also *Schisby* v. *Westenholz*, L.R. 6 Q.B. 155 (1870), *Shaw* v. *Att. Gen.*, L.R. 2 P. & D. 156 (1870), *Rudd* v. *Rudd,* [1924] P. 72; *Gray* v. *Formosa,* [1963] P. 259; *Lepre* v. *Lepre,* [1965] P. 52; *Macalpine* v. *Macalpine* [1958] P. 35 (P.D.A. Div., Sachs, J., 1957). Cf. *Maubourquet* v. *Wyse,* I.R. 1 C.L. 471 (Ex., 1867), *Cowan* v. *Braidwood,* 1 Man. & G. 882, 133 E.R. 589 (1840). See also Duncan, *Collusive Foreign Divorces — How to Have Your Cake and Eat It.* 3 D.U.L.J. 17, at 19 (1981).

infringed if the defendant, though given adequate notice of the proceedings, was not given a fair hearing at them, as for example where his right to present his case was denied or severely curtailed. But it seems that it is only in a very clear case that a plea to this effect will be allowed. It is clearly not sufficient if the defendant failed to raise a defence in the foreign court which might have been available to him. In *Sims* v. *Thomas*[212] the defendant sought to resist enforcement of a judgment obtained in England upon a bond in which the defendant had joined as one of the sureties. He alleged that no memorial of the bond containing the names of the witnesses to it had been enrolled, with the result that the bond was technically void under a certain English statute. The Irish court considered whether the English judgment was against natural justice and decided that it was not.

Richards, B. said:

> "I assume that the defendant, or some other person for whom he became responsible, got £3000 from the plaintiff, or the person she represents. But, in consequence of an omission or mistake in the names of the witnesses to the memorial, the defendant might have relied on a certain English statute which would have enabled him, perhaps, to keep his money in his pocket, and to defeat the plaintiff in her action. Such a defence was, no doubt, open to him by the law of England; but by that law such a defence must have been put upon the record, and relied on in due season; that was not done; the defendant pretermitted his opportunity of doing so, and the plaintiff obtained a judgment against him. Is that judgment, then, against natural right and justice; or ought we to aid the defendant in his efforts to deprive the plaintiff of the fruits of it when she seeks to enforce it here? In my opinion, we ought not to do so."[213]

The fact that evidence has been excluded in the foreign court pursuant to a rule whereby neither party to the litigation can be called as a witness on his own behalf will not render the foreign judgment contrary to natural justice.[214] Neither will the fact that there was some defect in the evidence before the foreign court if that defect could have been and was brought to light in the foreign proceedings themselves.[215]

We need not here recount[216] the circumstances in which Barrington, J., in *L.B.* v. *H.B.*[217] denied recognition to a French divorce decree on the basis that there had been a "substantial defeat of justice for which the parties, and not the court, b[ore] the responsibility." Suffice it here to note that the exact dimensions of this concept have yet to be filled in. It is difficult to see why it would not also extend to cases involving unilateral fraud by one of the parties as to the grounds presented to the court. Conceivably it could also extend to cases where, without deception by either spouse, vital evidence had been suppressed. At some point, however, our courts are likely to call a halt to extension of this concept on the basis that they are being asked, in effect, to do what they ought not, namely, to become an ultimate court of appeal from the foreign proceedings.

Foreign judgment contrary to public policy

A foreign judgment that is contrary to Irish public policy will be refused recognition and enforcement here. This issue has been examined in detail in Chapter 9.[218]

[212] 3 I.L.R. 415 (1841).
[213] *Id.*, at 421.
[214] *Scarpetta* v. *Lowenfeld* 27 T.L.R. 509 (1911). See also *Robinson* v. *Fenner* [1913] 3 K.B. 835 (Channell, J., 1912).
[215] *Jacobson* v. *Frachon* 138 L.T. 386 (C.A., 1927).
[216] Cf. *supra*, pp. 285-286.
[217] *Supra*.
[218] *Supra*, pp. 207-208.

Direct Enforcement of Foreign Judgments by Statute

At common law a foreign judgment can be enforced in Ireland only by bringing an action here on the obligation which it creates. The common law does not allow for direct enforcement by a process of registration or otherwise. However, statute may provide for a simpler, more direct form of enforcement in the case of certain foreign judgments.

Judgments Extension Act 1868 no longer applicable

The Judgments Extension Act 1868 provided for a just such simplified method of enforcement of judgments as between England, Wales, Scotland and Ireland.[219] Under the Act a judgment obtained in one of those countries "for any debt, damages or costs" could be "extended" to one of the other countries by registering in the appropriate court a certificate to the effect that a judgment had been obtained. The registered certificate was of the same force and effect as if the judgment certified by it had been originally obtained in the court in which it was registered.[220] Courts in England[221] and Northern Ireland[222] regarded the 1868 Act as never having applied to the Irish Free State, though the Irish[223] and Scottish[224] courts took a different view. The 1868 Act was eventually repealed by the Courts of Justice Act 1936.[225]

Administration of Justice Act 1920 not applicable

The Administration of Justice Act 1920, which provided for reciprocal enforcement of judgments by registration as between the United Kingdom and Commonwealth counties, has never applied in or to this country.

Maintenance Orders Act 1974

The Maintenance Orders Act 1974, makes provision for the enforcement on a basis of reciprocity of maintenance orders made in the State, in Northern Ireland, England and Wales and Scotland. The Act is "largely modelled"[226] on the provision of the European Convention on Jurisdiction and Enforcement of Judgments

[219] See *Anon., The Judgments Extension Act 1868*, 2 Ir. L.T. & Sol. J. 441 (1868), *Anon., Reciprocal Enforcement of Judgments*, 62 I.R. L.T. & Sol. J. 39 (1928), *Anon., Reciprocal Enforcement of Judgments and Decrees, Part I*, 2 N. Ir. L.Q. 189 (1938), *Part II*, 3 N. Ir. L.Q. 91, at 92 (1939), also Articles in 57 Ir. L.T. & Sol. J. 269 (1923), 58 Ir. L.T. & Sol. J. 279 (1924), 59 Ir. L.T. & Col. J. 181 (1925). Decisions considering aspects of the Act, prior to Independence, include *Booth* v. *Egan*, 6 L.R. Ir. 282 (Q.B. Div., 1880), *Johnstone* v. *Bucknall*, [1898] 2 I.R. 499 (Q.B. Div., Gibson, J.), *Boss* v. *O'Connor*, I.R. 9 C.L. 478 (Consol. Cham., 1875), *Part* v. *Scannell*, I.R. 9 C.L. 426 (Com. Pleas, 1875), *Bailey* v. *Welply*, I.R. 4 C.L. 243 (Com. Pleas, 1869) and *Brookes* v. *Harrison*, 6 L.R. (Ir.) 332 (C.A., 1880), aff'g 6 L.R. (Ir.) 85 Ir. 1 (C.A., 1908) aff'g Wylie, J., 1908).

[220] Section 1 of the Act.

[221] *Wakely* v. *Triumph Cycle Co.* [1924] 1 K.B. 214 (C.A., 1923), *Banfield* v. *Chester*, 94 L.J. K.B. 805, 59 I.L.T.R. 118 (C.A., 1925).

[222] *Callan* v. *McKenna*, 63 I.L.T.R. 16 (N.I. High Ct., K.B. Div., Moore, L.C.J. 1928).

[223] *Gieves* v. *O'Conor*, [1924] 2 I.R. 182. And see *Read*, 297. Yntema, *The Enforcement of Foreign Judgments in Anglo-American Law* 33 Mich. L. Rev. 1129, at 1152 (1935).

[224] Cf. *Anton*, 594, *Doohan* v. *National Coal Board*, 1959 S.C. 310, *Harley* v. *Kinnear Moodie & Co.* 1964 S.C. 99.

[225] Section 3, Sch. 1, Pt.1. See *The State (Dowling)* v. *Kingston (No.2)*, [1937] I.R. 699, at 757–758 (Sup. Ct., *per* Meredith, J.) The Scottish decisions referred to at fn. 224 above would appear to have been based on lack of awareness of the repeal effected by the 1936 Act.
It is worth also noting section 180 (1) of the Companies (Consolidation) Act 1908 (repealed by the Companies Act 1963), under which any order made by the Court in England in the winding up of a company could be enforced here "in the same manner in all respects" as if the order had been made by the Irish Court; see further *In re The Bank of Egypt Ltd.*, [1913] 1 I.R. 502 (Barton, J.), and *supra*, pp. 485-486. As to the enforcement of foreign (and, specifically, British) adjudications in respect of bankruptcy, see *supra*, ch. 25.

[226] Terry, *Convention of Accession of Denmark, Ireland and the United Kingdom to the Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters*, 4 J. of Irish Soc. for Europ. L. 26, at 40 (1980).

in Civil and Commercial Matters.[227] The Act is analysed in detail in the chapter on maintenance obligations.[228]

European Community Judgments

Under Articles 187 and 192 of the E.E.C. Treaty,[229] which are part of the domestic law of the State by virtue of the European Communities Act 1972,[230] judgments of the Court of Justice of the European Communities and decisions of the Council or of the Commission which impose a pecuniary obligation on persons other than the States are enforceable. Enforcement is governed by the rules of civil procedure in force in the State in the territory of which it is carried out.[231] The order for enforcement is appended to the judgment or decision, without formality, other than verification of the authenticity of the decision, by the national authority which the Government of each member State must designate for this purpose.[232] The European Communities (Enforcement of Community Judgments) Regulations 1972[233] designate the Master of the High Court as the national authority for this purpose. On application duly made by the person entitled to enforce a community judgment, the Master must make an order for the enforcement of the Community judgment and append the order of it.[234]

A Community judgment to which an enforcement order has been appended is, for all purposes of execution, of the same force and effect as if the judgment had been a judgment or order given or made by the High Court.[235] Where a sum of money is payable under the Community judgment, the enforcement order must provide that the amount payable is to be such a sum in Irish currency as, on the basis of the rate of exchange prevailing at the date on which the Community judgment was originally given, is equivalent to the sum payable.[236] If the Community judgment has been partly satisfied when enforcement is sought, the enforcement order must be made only in respect of the balance.[237] If the Community judgment is partly or wholly satisfied after the Master has made an enforcement order, he must vary or cancel his order accordingly.[238] Enforcement of a Community judgment may be suspended only by a decision of the European Court of Justice,[239] for the period and on the conditions, if any, stated in the order.[240]

[227] Cf. *infra*, pp. 612-616.
[228] *Supra*, pp. 310-317.
[229] See also Articles 180, 159 and 164 of the Euratom Treaty and Articles 44 and 92 of the ECSC Treaty.
[230] Section 2.
[231] Article 192 of the EEC Treaty.
[232] *Id.*
[233] S.T. No. 331 of 1972, made under section 3 of the European Communities Act 1972.
[234] 1972 Regulations, Regulation 4(1).
[235] *Id.*, Regulation 5.
[236] *Id.*, Regulation 4(2).
[237] *Id.*, Regulation 4(3).
[238] *Id.*, Regulation 4(4).
[239] Article 192 of the E.E.C. Treaty.
[240] 1972 Regulations, regulation 6.

EEC Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters[241]

This Convention is concerned with judgments in civil and commercial matters[242] of the national Courts of Member States of the E.E.C. The Convention is a "double" one, laying down direct rules as to jurisdiction, which we have already examined.[243] On the assumption that these rules as jurisdiction are properly complied with, the Convention establishes rules for recognition and enforcement which are allowed to take place "virtually automatically".[244] Thus, any defendant who believes that the exercise of jurisidction over him is not permitted by the Convention should, in his own interests, contest the matter by challenging the jurisdiction initially, rather than by standing back and letting the action proceed to judgment, hoping to call the judgment into question when the plaintiff seeks to have it recognised or enforced.[245]

[241] For the English and Irish texts of the original Convention of 1968 and the English text of the 1978 Convention of Accession of Denmark, Ireland and the United Kingdom to the 1968 Convention, see the Official Journal of the European Communities, No. L. 304, vol. 21, 30 October 1978, which also contains a consolidated text of the two Conventions. The Irish text of the 1978 Convention is published in *Iris Oifigiúil na glomhphobal Eorpach — Eagrán Speisialta*, 31 Nollaig 1982, which also contains the texts of the Greek Accession Convention. For the Jenard Report on the 1968 Convention and the Schlosser Report on the Convention of Accession, see OJ, C59, Vol. 22 5 March 1979. See, generally, I. Fletcher, *Conflict of Laws and European Community Law, With Special Reference to the Community Conventions on Private International Law*,Ch. 4, esp. at 133–138 (1982), Terry, *Convention of Accession of Denmark, Ireland and the United Kingdom to the Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters*, 4 J. of Irish Soc. for European L. 26 (1980), Hauschild, *The European Communities Convention of 27 September 1968 on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters*, 4 J. of Irish Soc. for European L. 43 (1980). Hartley, *The Recognition of Foreign Judgments in England Under the Jurisdiction and Judgments Convention*, in K. Lipstein ed., *Harmonization of Private International Law of the EEC* 103, G. Droz, *Competence Judiciare et Effets des Jugements dans le Marche Commun* (1972), M. Weser, *Convention Communautaire sur la Competence Judiciare et l'Execution des Decisions* (1975), L. Collins, *The Civil Jurisdiction and Judgments Act 1982* chs. 1,2,3,5 (1983), Pointon, *The EEC Convention on the Recognition and Enforcement of Civil and Commercial Judgments and its Implications for English Law*, 1975–2 Legal Issues of European Integration 1, Moloney & Kremlis, *The Brussels Convention on Jurisdiction and the Enforcement of Judgments*, 79 Inc. L. Soc. of Ireland Gaz. 329 (1985), 80 Inc. L. Soc. of Ireland Gaz. 5 (1986).

[242] Article 1 of the Convention. Article 1 provides that the Convention does not apply to four specific matters which could otherwise have fallen within the scope of the words "civil and commercial matters. These are:

(1) the status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship, (cf. *De Cavel* v. *De Cavel* (No.1), [1979] E.C.R. 1055, [1979] 2 C.M.L.R. 547, *CHW* v. *GJH*, [1982] E.C.R. 1189, [1983] 2 C.M.L.R. 125) wills and succession;
(2) bankruptcy, proceedings relating to the winding–up of insolvent companies (cf. *Goudain* v. *Nadler*, [1979] E.C.R. 733, [1979] 3 C.M.L.R. 180) or other legal persons, judicial arrangements, compositions and analogous proceedings;
(3) social security; and
(4)arbitration.

In these four matters, Irish common law rules will continue to apply. What falls within the scope of the concept of "civil and commercial matters" (apart from these four matters) must be determined by an interpretation independent of the law of either the court giving the original judgment or of the country in which enforcement is sought; instead it "must be interpreted by reference, first, to the objectives and scheme of the Convention and, secondly, to the general principles which stem from the corpus of the national legal systems": *LTU GmbH & Co. K.G.* v. *Eurocontrol*, [1976] E.C.R. 1541, at 1551. The nature of the court charged with the task of hearing the proceedings does not determine whether the matter is or is not a "civil [or] commercial" one for the purpose of the Convention. In the *Eurocontrol* case, it was noted that "Article 1 shows that the concept 'civil and commercial matters' cannot be interpreted solely in the light of the division of jurisdiction between the various types of courts existing in certain States." *Collins*, 19–20 observes that "[t]he Convention will, therefore, cover civil and commercial claims in administrative tribunals [citing the *Jenard Report*, p. 9] and will not include public claims in commercial tribunals [citing *Eurocontrol*]."
See further *supra* p. 182.

[243] See *supra*, pp. 181-191.

[244] *Saunders*, 133.

[245] *Id.* See also Article 28.

There is no danger in contesting the jurisdiction at the initial stage: Article 18 protects the defendant from being held to have consented to the jurisdiction where his appearance was entered "solely to contest the jurisdiction."

The basic recognition and enforcement provisions of the Convention are to the effect that a judgment of a court of one E.E.C. Contracting State is to be given automatic recognition in another Contracting State without any special procedure being required.[246] Article 31 provides that a judgment given in a Contracting State and enforceable there is to be enforced in another Contracting State when, on the application of any interested party, the order for its enforcement has been issued there. If the recognition of a judgment is raised as the principal issue in a dispute, then the simplified procedure for enforcement of judgments that is provided for in the Convention may be applied.[247] Under Article 32, in the case of Ireland, the application is to be submitted to the High Court.

The Convention contains a number of grounds for refusing the application. Article 27 provides that a judgment will not be recognised:

> (1) If such recognition is contrary to public policy in the State in which recognition is sought;[248]
> (2) Where it was given in default of appearance, if the defendant was not duly served with the document that instituted the proceedings or with an equivalent document[249] in sufficient time to enable him to arrange his defence;[250]
> (3) If the judgment is irreconcilable with a judgment given in a dispute between the same parties in the State in which recognition is sought;[251]
> (4) If the court of the State in which the judgment was given, in order to arrive at its judgment, has decided a preliminary question concerning the status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship, wills or succession in a way that conflicts with a rule of the private international law of the State in which the recognition is sought, unless the same result would have been reached by the application of the rules of private international law of that State;[252]
> (5) If the judgment is irreconcilable with an earlier judgment given in a non–contracting State involving the same parties, provided that this latter judgment fulfills the conditions necessary for its recognition in the State addressed.[253]

Article 28 specifies the four cases in which it is permissible to refuse to recognise a foreign judgment on the ground that the court of the State of origin lacked jurisdiction. These are cases where a judgment conflicts with section 3, 4 or 5 of Title II, or in a case mentioned by Article 59. Section 3 deals with jurisdiction in

[246] Article 26(1). Cf. Hartley, *supra*, at 104;
"If the free movement of goods, labour, services, capital etc. are part of the concept of a common market, surely the free movement of judgments should also be regarded as an essential element: its commercial importance is indisputable."

[247] Article 26(2).

[248] Article 27(1). See *Collins*, 107–108.

[249] These words were added by the Accession Convention to harmonise the Convention with Irish and British procedure: see Terry, *Convention of Accession of Denmark, Ireland and the United Kingdom to the Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters*, 4 J. of Irish Soc. for European L. 26, at 41 (1980). The same change was made to Articles 20 and 46 of the Convention.

[250] Article 27(2), as amended by Article 13(1) of the Convention.

[251] Article 27(3).

[252] Article 27(4).

[253] Article 27(5), added by Article 13(2) of the Convention.

matters relating to insurance; section 4 with jurisdiction in relation to consume contracts; and section 5 with excessive jurisdiction. Article 59 envisages a situatio where a Contracting State may assume, in a convention, an obligation towards third State not to recognise judgments given in other Contracting States agains defendants domiciled or habitually resident in the third State, using rules of exhorbitan jurisdiction.[254]

Article 28(2) provides that, in its examination of the grounds of jurisdiction i any of these four cases, the court or authority to which application is made is boun by the findings of fact on which the court of the State in which the judgment wa given based its jurisdiction.[255] As has been pointed out, "[t]his may of course include a finding on the vital question of the facts relevant to any determination of the defendant's domicile in the eyes of the *forum*, or, *semble*, even of some other Contracting State".[256]

Apart from the four cases in which it is permissible to refuse to recognise a judgment based on lack of jurisdiction, the jurisdiction of the court of the State in which the judgment was given may not be reviewed.[257] Moreover, the test of public policy referred to in Article 27(1) may not be applied to the rules relating to jurisdiction.[258]

The cardinal principle underlying the rules for recognition is that under no circumstances may a foreign judgment be reviewed as to its substance.[259]

The Convention provides for a rapid and simple procedure for enforcement[260] of orders.[261] The procedure is based on *ex parte* application.[262] As has been mentioned, application for enforcement must be submitted, in the case of Ireland, to the High Court.[263] The procedure for making the application is governed by the law of the State in which enforcement is sought.[264] The 1986 Bill[265] which sought to give effect to the Convention adopted a procedure involving *ex parte* application to the Master of the High Court similar to that under the Maintenance Orders Act 1974.[266] In any event the decision on an application will have to be given without delay.[267] The party against whom enforcement is sought is not entitled to be heard at this stage.[268] The Convention does not even require that he have been

[254] Cf. *Fletcher*, 119-120, 135.

[255] But the Court in the State in which enforcement is sought "is not bound by the findings of the original court as to whether the case is within the scope of the Convention": *Morris*, 133, citing case 29/76 *L.T.U.* v. *Eurocontrol*, [1976] E.C.R. 1541.

[256] *Fletcher*, 135-136.

[257] Article 28(2).

[258] Article 28(3). See *Collins*, 108; cf. *Saunders*, 136.

> "This .... provision ensures that the potentially elastic notion of public policy cannot be used as a 'long stop' to enable recognition and enforcement to be resisted in cases where the proper course of action which the defendant ought to have pursued was to contest before the foreign court the propriety of its initial assumption of jurisdiction."

[259] Article 29.

[260] The enforcement procedure is exclusive; an action on the judgment at common law is not permitted. Cf. *De Wolf* v. *Cox*, [1976] E.C.R. 1759, [1979] 2 C.M.L.R. 43, Hartley, (1977) 2 E.L.R. 146.

[261] Provisional or protective orders are enforceable: (Case 143/78 *De Cavel* v. *De Cavel (No. 1)*, [1979] E.C.R. 1055); unless they are granted *ex parte* without giving the defendant an opportunity to be heard: Case 123/79 *Denilauler* v. *Couchet Freres*, [1980] E.C.R. 1553.

[262] See Article 31. See *Jenard Report*, p. 47.

[263] Article 32.

[264] Article 33(1).

[265] The *Explanatory and Financial Memorandum* published by the Department of Justice in December, 1986, accompanying the Bill, set out very clearly in paragraphs 19 to 20 how applications for recognition and enforcement would operate.

[266] Cf. *supra*, pp. 311-312.

[267] Article 34(1).

[268] *Id.*

informed of the fact that the application had been made, the intention being "to preserve the element of surprise and to prevent him from removing his assets out of the jurisdiction."[269]

Enforcement may be refused only on one of the grounds for refusal of recognition already referred to above[270] and again the foreign judgment may under no circumstances be reviewed as to its substance.[271]

The defendant[272] may appeal against an enforcement order within a month of being served notice of it[273] or within two months if he is domiciled in a Contracting State other than that in which the decision authorising enforcement was given.[274] The appropriate court in Ireland before which an appeal should be lodged is the High Court.[275] During the time specified for an appeal and until the appeal has been determined, no measures for enforcement "other than protective measures" may be taken against the property of the party against whom enforcement is sought.[276] The High Court may stay the proceedings if an ordinary appeal[277] or, so far as a British judgment is concerned, any form of appeal,[278] has been lodged against a decision authorising enforcement, or the time for lodging the appeal has not expired. A further appeal to the Supreme Court on a point of law is permitted by Article 41.[279]

As regards the enforcement process in general, it is worth noting Article 45 which reflects the Community ethos clearly. It provides that no security, bond or deposit, however described, is to be required of a party who in one Contracting State applies for enforcement of a judgment given in another Contracting State on the ground that he is foreign national or is not domiciled or resident in the State in which enforcement is sought.

One noteworthy feature of the Convention is that the exorbitant bases of jurisdiction in Contracting States, the application of which is prohibited by the Convention as against domiciliaries of E.E.C. Contracting States,[280] will remain available against defendants who are not such domiciliaries; and judgments given against such defendants on such basis of jurisdiction will be enforceable Community-wide under the Convention's simplified enforcement procedure. This has given rise to concern in countries such as Australia and the U.S.A.[281] The Convention enables a Contracting State to enter into a convention with a third country under which judgments given by the courts of other Contracting States on an exorbitant jurisdiction basis would not be enforceable against domiciliaries of the third country.[282]

The Convention entered into force, as between States that have ratified it, on 1 November 1986, which was the first day of the third month following the ratification by all of the original Contracting States and *one* new Contracting State.[283] For a Contracting State ratifying thereafter, the Convention enters into force for that

[269] *Morris*, 131.
[270] Article 34(2).
[271] Article 34(3).
[272] A party whose application for enforcement is refused also has a right of appeal: Article 40.
[273] Article 36(1).
[274] Article 36(2).
[275] Article 37.
[276] Article 39(1). Article 39(2) provides that the decision authorising enforcement carries with it the power to proceed to any such protective measures. Thus *Mareva*-type injunctions are not merely permitted but required: *Capelloni & Aquilini* v. *Pelkmans* [1986] I C.M.L.R. 388 (Eur. Ct. of Justice, 1985).
[277] Article 38(1).
[278] Article 38(2).
[279] As amended by Article 20 of the Convention of Accession.
[280] Article 3. See *supra*, p. 182.
[281] See Pryles and Trindade, *The Common Market (E.E.C.) Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters — Possible Impact upon Australian Citizens*, 42 Aust. L.J. 185, at 192-195 (1974).
[282] Article 59.
[283] Article 39 of the Accession Convention.

Contracting State on the first day of the third month following its ratification.[284] Although the 1986 Bill seeking to give effect to the Convention died with the fall of the last Government, it is probable that a Bill drafted in almost identical terms will shortly be published.

Arbitration[285]

In this section we will examine the conflicts rules in relation to foreign arbitral awards. The topic is of some considerable practical importance, in view of the increasing resort to arbitration as a mechanism for dispute resolution especially in commercial[286] matters.

A foreign arbitral award may be enforced in Ireland in a number of different ways: it may be sued upon in an action at common law or it may be enforced under the Arbitration Act 1954 or the Arbitration Act 1980.

Enforcement at common law

Enforcement by action at common law is always available, whether or not the arbitration award may also be enforced under the 1954[287] or 1980[288] Act. In *International Alltex Corporation* v. *Lawler Creations Ltd.*[289] Kenny, J. cited the following passage from *Cheshire*[290] with approval:

> "A foreign arbitral award is on the same footing as a foreign judgment in the sense that an action to recover the sum awarded may be brought in England. The essentials of success are proof that the parties submitted to arbitration, that the arbitration was conducted in accordance with the submission, and that the award is valid by the law of the country in which it has been made."

The first requirement is that the defendant must have validly submitted to arbitration, as, for example, by having contracted to submit to the jurisdiction of a foreign arbitrator.[291] The validity of any clause in a contract agreeing to submit any disputes to arbitration is governed by the proper law of the contract.[292] Where the parties enter into a contract containing an arbitration clause to cover future disputes that may arise under the contract, there is a strong presumption that the proper law is that of the country where the arbitration is to be held.[293] However, this presumption is rebuttable, since an arbitration clause is only one of a number of circumstances to be considered in determining the proper law of a contract.[294]

[284] *Id.* See Terry, *Convention of Accession of Denmark, Ireland and the United Kingdom to the Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters*, 4 J. of Irish Soc. for European L. 26, at 42 (1980).

[285] See generally C. Schmittohoff ed., *International Commercial Arbitration* (1979), *Symposium — International Commercial Arbitration*, 13 Int'l Law. 209 (1979), *A Symposium on the Enforcement of Foreign Judgments and Arbitral Awards*, 17 Va. J. Int'l L. 729 (1977), Mann, *State Contracts and International Arbitration*, in *Studies in International Law* 56 (1973), J. Wetter, *The International Arbitral Process*, (1979), Ehrenhaft, *Effective International Commercial Arbitration*, 9 L. & Pol'y Int'l Bus. 1191 (1977), *Shareholders and Arbitration Clauses*, 7 Int'l Bus. Law 129 (1979).

[286] It is of interest to note that arbitration has also played a growing role in respect of family disharmony in some countries: see Spencer & Zammitt, *Arbitration : A Proposal for Private Resolution of Disputes Between Divorced or Separated Parents*, [1976] Duke L.J. 911.

[287] Cf. the Arbitration Act 1954, section 59, which preserves the right of enforcement at common law.

[288] Cf. the Arbitration Act 1980, section 11, which also preserves the right of enforcement at common law.

[289] [1965] I.R. 264 at 270. For the facts of the case cf. *supra*, p. 594.

[290] 3rd ed., 1947, p. 768 (see now *Cheshire & North*, 10th ed., 1979, p. 680), citing *Norske Atlas Insurance Co. Ltd.* v. *London General Insurance Co. Ltd.*, 43 T.L.R. 541, at 542 (K.B. Div., MacKinnon, J. 1927).

[291] *International Alltex Corporation* v. *Lawler Creations Ltd.* [1965] I.R. 264, at 269.

[292] *Dalmia Dairy Industries Ltd.* v. *National Bank of Pakistan* [1978] 2 Lloyd's Rep. 223.

[293] *Dicey & Morris*, 1127, citing *Hamlyn* v. *Talisker Distillery* [1894] A.C. 202; *Spurrier* v. *La Cloche*, [1902] A.C. 466; *Norske Atlas Insurance Co. Ltd.* v. *London General Insurance Co. Ltd.*, *supra*, *Tzortzis* v. *Monark Line A/B* [1968] 1 All E.R. 949. See Hirsch, *The Place of Arbitration and the Lex Arbitri*, 34 Arb. J. 43 (1979).

[294] *Dicey & Morris*, 1127, citing *Dalmia Dairy Industries Ltd.* v. *National Bank of Pakistan*, *supra*.

Where the arbitration agreement relates to a dispute already in existence rather than one that may arise at some time in the future, the law of the country where the arbitration is to be held "is even more likely to be the proper law of the contract, because the arbitration is the sole object of the agreement."[295] The proper law will determine such questions as whether the arbitration agreement has been abrogated by subsequent illegality.[296]

The arbitration must also have been conducted in accordance with the submission. This raises the question of what law is to govern the actual arbitration proceedings themselves (as distinct from the agreement to arbitrate). The parties may, of course, expressly select the law which is to govern the arbitration proceedings. If they fail to make a choice, the arbitration proceedings will "almost certainly"[297] be governed by the law of the place of arbitration as being the place with which the proceedings are most closely connected.[298]

To be enforceable here, the award must be valid by the law governing the arbitration proceedings,[299] which will in most cases be the law of the country in which the arbitration is held.[300] That law will determine such questions as the failure by one party to appoint an arbitrator, and what law the arbitrators are to apply.[301] Once the award is valid by that law, the fact that it would not be in harmony with Irish law — on such a matter as ousting the jurisdiction, for example — will not render it unenforceable.[302]

The award must also be final and conclusive under the law governing the arbitration proceedings.[303] A foreign arbitration award that has been rendered enforceable by a court judgment in the country where it was given may be enforced by an action as a foreign judgment. Thus in *International Alltex Corporation* v. *Lawler Creations Ltd.*,[304] where contracts for the cotton goods by a United States company to an Irish purchaser contained terms specifying[305] that disputes arising from the contracts should be settled by arbitration in New York City in accordance with the rules of the American Arbitration Association, Kenny, J. held that this submission to the jurisdiction of the arbitrator in New York necessarily involved the submission to an order by the Supreme Court of the State of New York confirming the arbitrator's award.[306] On the other hand, a foreign award may be enforced even though it has not been so rendered enforceable by a court judgment in the country where it was given, regardless of whether even if the law of that country requires a court judgment to make the award enforceable.[307]

It appears that a foreign arbitration award, like a foreign judgment, will not be recognised or enforced if the arbitrator had not jurisdiction to make it,[308] or it was obtained by fraud,[309] or its recognition or enforcement would be contrary to public policy,[310] or the arbitration proceedings were contrary to natural justice.[311]

[295] *Morris*, 136.
[296] *Compagnie Tunisienne de Navigation S.A.* v. *Compagnie d'Arment Maritime S.A.*, [1971] A.C. 572.
[297] *Morris*, 136.
[298] *James Miller & Partners Ltd.* v. *Whitworth Street Estates (Manchester) Ltd.*, [1970] A.C. 583; *Dalmia Dairy Industries Ltd.* v. *National Bank of Pakistan, supra.*
[299] *Union Nationale des Co-opératives Agricoles et Céréales* v. *R. Catterall & Co. Ltd.* [1959] 2 Q.B. 44.
[300] *Morris*, 137.
[301] *Id.*
[302] *Addison* v. *Brown* [1954] 2 All E.R. 213.
[303] *Dalmia Dairy Industries Ltd.* v. *National Bank of Pakistan, supra*, at 246-250, *Morris*, 137.
[304] [1965] I.R. 264 (High Ct., Kenny, J.).
[305] As one of two options.
[306] Cf. [1965] I.R., at 269-270.
[307] *Union Nationale des Co-opératives Agricoles et Céréales* v. *R. Catterall & Co. Ltd., supra.*
[308] *Kionta Osakeyhtio* v. *Britain and Overseas Trading Co. Ltd.* 1 Lloyd's Rep. 247; *Dalmia Dairy Industries Ltd.* v. *National Bank of Pakistan, supra.*
[309] *Oppenheim & Co.* v. *Mahomed Haneef* [1922] 1 A.C. 482, at 487.
[310] *Hamlyn & Co.* v. *Talisker Distillery* [1894] A.C. 202 at 209, 214; *Dalmia Dairy Industries Ltd.* v. *National Bank of Pakistan, supra* at 267-269, 299-301.
[311] *Dalmia Industries Ltd.* v. *National Bank of Pakistan, supra*, at 269-270.

It has already been mentioned that a foreign arbitration award may be enforced by an action. An alternative method of enforcement may possibly be available under section 41 of the Arbitration Act 1954. This provides that an award on an arbitration agreement may, by leave of the Court, be enforced in the same manner as a judgment or order to the same effect, and that, where leave is so given, judgment may be entered in terms of the award.

Enforcement under the Arbitration Act 1954

Part V of the Arbitration Act 1954 provides for the enforcement of certain foreign arbitration awards. The awards in question are those that are governed by the 1923 Geneva Protocol on Arbitration Clauses[312] or the 1927 Geneva Convention on the Execution of Foreign Arbitral Awards.[313] The award must have been made in pursuance of an arbitration agreement to which the 1923 Protocol applies and between persons who are subject to the jurisdiction[314] of two different States which, on a basis of reciprocity, have been declared by Government order to be parties to the 1927 Convention; the agreement must also have been made in the territory of a State[315] party to the 1927 Convention.[316] The foreign award is enforceable in the State either by action or in the same manner as a domestic award may be enforced by virtue of section 41[317] of the Act.[318] Any foreign award that is enforceable under Part V of the Act must be treated as binding for all purposes on the persons as between whom it was made, and may be relied on by any of them by way of defence, set-off or otherwise in any legal proceedings in the State.[319]

To be enforceable the foreign award must have:

(a) been made in pursuance of an agreement for arbitration which was valid under the law by which it was governed,[320]

(b) been made by the tribunal provided for in the agreement or constituted in manner agreed upon by the parties,

(c) been made in conformity with the law governing the arbitration procedure,

(d) become final in the country in which it was made,[321]

(e) been in respect of a matter which may lawfully be referred to arbitration under the law of the State,

and the enforcement of the award must not be contrary to the public policy or the law of the State.[322]

A foreign award is *not* enforceable if:

(a) the award has been annulled in the country in which it was made, or

(b) the party against whom it is sought to enforce the award was not given notice of the arbitration proceedings in sufficient time to enable him to present his case, or was under some legal incapacity and was not properly represented, *or*

(c) the award does not deal with all the questions referred or contains decisions beyond the scope of the arbitration agreement.[323]

[312] See the 1954 Act, First Schedule.

[313] *Id.*, Second Schedule.

[314] The meaning of the expression "subject to the jurisdiction" has given rise to discussion.

[315] It should be noted that this State need not be one in which either party resides or of which either is a citizen.

[316] Section 54(2) of the Act.

[317] Discussed *supra*.

[318] Section 55(1).

[319] Section 55(2) of the Act.

[320] Cf. *Kianta Osakeyhtio* v. *Britain and Overseas Trading Co. Ltd.*, [1954] 1 Lloyd's Rep. 247.

[321] Cf. *Union Nationale des Co-operatives Agricoles* v. *Catterall*, [1959] 2 Q.B. 44. An award is not deemed final if any proceedings for the purposes of contesting the validity of the award are pending in the country in which it was made: section 58 of the Act.

[322] Section 56(1).

[323] Section 56(2).

The party seeking to enforce a foreign award must produce certain specified evidence,[324] including the original award or a duly authenticated copy and evidence proving that the award has become final.

In the next section we will consider the extent to which Part V of the 1954 Act has been superseded by the Arbitration Act 1980.

Enforcement under the Arbitration Act 1980

The Arbitration Act 1980 gives effect to two international Conventions on arbitration. The 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards[325] and the 1965 Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States.[326]

The New York Convention was drawn up under the auspices of the United Nations to replace the 1923 Geneva Protocol on Arbitration Clauses and the 1927 Geneva Convention on the Execution of Foreign Arbitral Awards. As we have noted, Part V of the Arbitration Act 1954 gave effect to the earlier Protocol and Convention. It has now been replaced by Part III of the 1980 Act *insofar as arbitration awards emanating from countries that are parties to the New York Convention are concerned.*[327] Part V of the 1954 Act continues to apply in relation to countries that are parties to the Geneva Protocol and Convention but not to the New York Convention.

The overall effect of the 1980 Act is to simplify and extend the scope of enforceable arbitration awards, as well as shifting onto the defendant the burden of resisting enforcement,[328] so that enforcement "can only be refused by the court in very limited circumstances".[329] An award is enforceable as a New York Convention award if it is made, in pursuance of an arbitration agreement in writing,[330] in the territory of a State, other than Ireland, which is party to the Convention.[331] The Act enables the Minister for Foreign Affairs to make an order declaring that any specified State is a party to the Convention and the order is to be evidence that that State is a party to the Convention.[332] It is worth noting that the definition of award under the New York Convention is far less demanding than that under the earlier Protocol and Convention.[333] It is not necessary that the parties be "subject to the

[324] Section 57(1).

[325] Cf. the First Schedule to the 1980 Act. See generally G. Gaja, *International Commercial Arbitration: New York Convention* (1978), Sanders, *A Twenty Years' Review of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards,* 13 Int'l Law. 269 (1979), Quigley, *Accession by the United States to the United Nations Conventions on the Recognition and Enforcement of Foreign Arbitral Awards,* 70 Yale L.J. 1049 (1961), Tooboff & Goldstein, *Foreign Arbitral Awards and the 1958 New York Convention: Experience to Date in the U.S. Courts,* 17 Va. J. Int'l L. 469 (1977), Springer, *The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards,* 3 Int'l Law. 320 (1969), Contini, *International Commercial Arbitration: The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards,* 8 Am. J. Compar. L. 283 (1959), Olson, *Note,* 16 Harv. Int. L.J. 705 (1975). Harnick, *Recognition and Enforcement of Foreign Arbitral Awards,* 31 Am. J. Compar. L. 703 (1983), Loftis, *Securing Arbitral Awards: Waiving Immunity under the Sovereign Immunities Act and Ensuring Equitable Remedy by Pre-Award Attachment under the New York Convention,* 9 Suffolk Transnat. L.J. 235 (1985).

[326] Cf. The Second Schedule to the 1980 Act. S.I. No. 195 of 1981 brought Part III of the 1980 Act in relation to the New York Convention into force with effect from 10 August, 1981; S.I. No. 356 of 1980 brought Part IV of the 1980 Act in relation to the Washington Convention into force with effect from 1 January 1981.

[327] Section 10 of the 1980 Act.

[328] *Morris,* 141.

[329] *Cremer GmbH Co.* v. *Co-Operative Molasses Traders Ltd,* [1985] I.L.R.M. 564, at 570 (High Ct., Costello, J. (aff'd by Sup. Ct.)).

[330] Including an agreement contained in an exchange of letters or telegrams: section 2.

[331] Section 6(1) of the 1980 Act.

[332] Section 6(2). Cf. S.I. No. 175 of 1981. See also section 6(3) of the 1980 Act.

[333] See *Morris,* 141.

jurisdiction'' of different Contracting States; nor is an arbitration agreement governed by Irish law excluded. Finally, it is worth noting that ratification of the New York Convention has had the incidental effect of enabling Ireland to fulfil the obligation imposed by Article 220 of the E.E.C. Treaty to simplify the formalities relating to the enforcement of arbitration awards throughout the E.E.C.

An award is enforceable either by action or in the same manner as a domestic arbitration award is enforceable by virtue of section 41 of the Arbitration Act 1954. The effect of an enforceable New York Convention award is that it is to be treated as binding for all purposes on the persons between whom it was made and may be relied on by any of them by way of defence, set off or otherwise in any legal proceedings in the State.[334]

As has been mentioned, the burden of proof on the person seeking enforcement of an award is easier than under the earlier Conventions. He must produce the duly authenticated original award or a duly certified copy, and the original arbitration agreement or a duly certified copy, and a certified translation if either of these is in a language other than English or Irish.[335] When he does this the award will be enforced, unless the defendant can establish one or more of the ''limited policy grounds''[336] specified on the 1980 Act, which are the only ones on which recognition and enforcement *may* be refused.[337] These are that:

> (a) a party to the arbitration agreement was (under the law applicable to him) under some incapacity, *or*
>
> (b) the arbitration agreement was not valid under the law of the country to which the parties subjected it or, failing any indication thereon, under the law of the country where the award was made, *or*
>
> (c) the defendant proves that he was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case, *or*
>
> (d) the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration or contains decisions on matters

The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 3 Int'l Law. 320 (1969), Contini, *International Commercial Arbitration: The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 8 Am. J. Compar. L. 283 (1959), Olson, *Note*, 16 Harv. Int. L.J. 705 (1975). Harnick, *Recognition and Enforcement of Foreign Arbitral Awards*, 31 Am. J. Compar. L. 703 (1983), Loftis, *Securing Arbitral Awards: Waiving Immunity under the Sovereign Immunities Act and Ensuring Equitable Remedy by Pre-Award Attachment under the New York Convention*, 9 Suffolk Transnat. L.J. 235 (1985).

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[327] Section 10 of the 1980 Act.

[328] *Morris*, 141.

[329] *Cremer GmbH Co.* v. *Co-Operative Molasses Traders Ltd*, [1985] I.L.R.M. 564, at 570 (High Ct., Costello, J. (aff'd by Sup. Ct.)).

[330] Including an agreement contained in an exchange of letters or telegrams: section 2.

[331] Section 6(1) of the 1980 Act.

[332] Section 6(2). Cf. S.I. No. 175 of 1981. See also section 6(3) of the 1980 Act.

[333] See *Morris*, 141.

[334] Section 7(2) of the 1980 Act.

[335] Section 8.

[336] Springer, *supra*, at 323.

[337] Section 9(1). Contrast the defences under section 56(2) of the 1954 Act which give the Court no discretion in the matter.

beyond the scope of the submission to arbitration,[338] *or*

(e) the composition of the arbitral authority or the arbitral procedure was not in accordance with what the parties had agreed or, failing an agreement, with the law of the country where the arbitration took place,[339] *or*

(f) the award has not yet become binding on the parties or has been set aside or suspended by a competent authority of the country in which, or under the law of which, the award was made.[340]

Enforcement of an award may also be refused if the award is in respect of a matter which is not capable of settlement by arbitration under the law of the State, or if it would be contrary to public policy to enforce the award.[341]

The Arbitration Act 1980 also gives effect[342] to the Washington Convention which was drawn up under the aspices of the World Bank to facilitate the settlement of disputes between States (including State agencies) and foreign investors, the object being to stimulate a greater flow of foreign private capital into countries needing it. The Convention provides for the establishment of an International Centre for the Settlement of Investment Disputes, for the setting up of panels of conciliators and arbitrators, for the regulation of conciliation and arbitration proceedings under the Convention and for the enforcement of the pecuniary obligations imposed by an arbitration award. The International Centre has jurisdiction over any legal dispute arising directly out of an investment, between a Contracting State and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre.[343]

The pecuniary obligations imposed by an award of the Centre are, by leave of the High Court, enforceable in the same manner as a judgment order of that Court to the same effect .[344] Where leave is so given, judgment may be entered for the amount due or outstanding under the award.[345] A person applying for enforcement must lodge with his application a copy of the award certified in accordance with[346] the Convention.[347] The Convention provides for a procedure whereby enforcement of an award may be stayed by a Tribunal of the International Centre.[348] If such a stay has been granted in any case before it, the High Court must stay enforcement of the pecuniary obligations imposed by the award and, if an application has been made which might result in such a stay, may stay enforcement of these obligations.[349]

[338] Section 9(2)(d). An award containing decisions on matters not submitted to arbitration may, however, be enforced to the extent that it contains decisions on matters which were submitted to arbitration and which can be separated from any decision on matters not submitted: section 9(4). Cf. *Cremer GmbH Co.* v. *Co-Operative Molasses Traders Ltd.*, *supra*, where the Supreme Court held that section 9(2)(d) had no application to a case where the appellants contended that there had been no binding agreement containing an arbitration clause. If matters were as the appellants claimed, said Finlay, C.J. (at 573), then there could be no submission to arbitration and thus no issue as to whether an award dealt with differences not contemplated by, or falling within, the terms of a submission.

[339] Section 9(2)(e). Cf. *Cremer GmbH Co.* v. *Co-Operative Molasses Traders Ltd.*, supra, at 573.

[340] Section 9(2).

[341] Section 9(3) of the 1980 Act.

[342] In Part IV.

[343] Article 25 of the Washington Convention.

[344] Section 16(1) of the 1980 Act.

[345] *Id.*

[346] Article 54(2) of the Convention.

[347] Section 16(2) of the 1980 Act.

[348] Articles 50-52 of the Convention.

[349] Section 17 of the 1980 Act.

Staying of Irish proceedings

Under section 12 of the Arbitration Act 1954 the position used to be that a court was required to stay proceedings where there was an arbitration agreement to which the Geneva Protocol on Arbitration Clauses applied unless the court was satisfied that the agreement or arbitration had become inoperative or could not proceed or that there was not in fact any dispute between the parties with regard to the matter agreed to be referred to arbitration. As far as domestic arbitration agreements were concerned, the court might stay proceedings if it was satisfied that there was not sufficient reason why the matter should not be referred to arbitration and that the party against whom proceedings had been instituted was ready and willing to proceed with arbitration.

The Arbitration Act 1980 has made an important change in the position. The effect of the 1980 Act is to put all written[350] arbitration agreements[351] on an equal footing as regards proceedings commenced in breach of them.

Section 5 provides that, if any party to an arbitration agreement commences any proceedings in any court against any other party to such agreement in respect of any matter agreed to be referred to arbitration, any other party to the proceedings may apply to the court to stay the proceedings. The application may be made at any time after an appearance has been entered and before the applicant delivers any pleadings or takes any other steps in the proceedings.[352] Unless the court is satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed or that there is not in fact any dispute between the parties with regard to the matter agreed to be referred to arbitration, it must make an order staying the proceedings.[353] However, the Court does have power to refuse to stay proceedings in relation to domestic arbitration where a question of lack of impartiality on the part of the arbitrator or a question of fraud on the part of any party arises.[354]

[350] Cf. section 2(1) of the Act.

[351] Whether domestic or foreign and, in the case of foreign agreements, whether covered by the Geneva Convention and Protocol, the New York Convention, the Washington Convention, or none of these international instruments.

[352] Section 5.

[353] Section 5(1) of the 1980 Act.

[354] Section 5(2) of the 1980 Act, preserving the power of the High Court in this regard under section 39(3) of the 1954 Act.