INSOL INTERNATIONAL

COST ASSESSMENT FOR DEBT COLLECTION ABROAD

INSOL INTERNATIONAL

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PRESIDENTS INTRODUCTION

In an increasingly digital economy that extends across borders and where globalisation continues to accelerate in both pace and intensity, there has been a significant growth in cross-border insolvency matters in recent years.

What this means is that, upon being appointed, an insolvency practitioner will often need to consider collecting and distributing assets across multiple jurisdictions, whether as part of formal recognition proceedings or otherwise. This will often involve the resolution of complex creditor claims, and an insolvency practitioner must assess whether it is economically viable to commence debt recovery proceedings in light of the costs involved and the expected return to creditors.

In this new title, Costs Assessment for Debt Collection Abroad, INSOL International is proud to publish 17 country chapters – ranging from Australia, Brazil, BVI, Cayman Islands, Croatia, France, Germany, Hong Kong, India, Mexico, Russia, Singapore, South Africa, Spain, The Netherlands, United Kingdom, & United States of America – which consider the means and costs of recovering debts from creditors in foreign jurisdictions.

The focus is on how an insolvency practitioner can go about both pursuing third party debt claims and seeking recognition abroad of a foreign enforcement order, and in each case what the typical costs of doing so will be and how a practitioner may seek to obtain funding for those costs.

This publication is a valuable resource for our members and the broader insolvency and restructuring industry in collating – in a single place – the different debt collection and costs principles and practical challenges that exist for insolvency practitioners in multiple jurisdictions. The publication will also enable practitioners and their advisors to make an assessment of whether the pursuit of debt recovery options is viable, depending on the nature and quantum of the claim involved, for the purpose of enhancing the return for creditors as part of the conduct of a fair and efficient insolvency process.

This project has been led by INSOL International's Small Practice Group. We are particularly grateful to Dr. Robert Hänel of Anchor Rechtsanwälte, Munich, Germany for his leadership, guidance and commitment in enabling INSOL International to publish this new title to such a high standard.

I would also like to thank each of the country contributors for sharing their time and considerable expertise in support of this project.

I hope you enjoy reading the book and benefit from the insights shared.

Scott Atkins
President
INSOL International

FOREWORD

The practical question that led to this publication is a common situation that occurs in most corporate insolvency proceedings.

It is indeed surprising that some of the information that we gathered from the respective country reports touch fundamental questions that could stimulate a discussion about the understanding of and access to justice. At its best, therefore, this publication will not only be a practical guide, but also an inspiration to question and expand one's own horizons.

Often, insolvency office holders have to deal with the complex issue of determining the expected costs of debt collection measures as well as the possibilities of how costs may be reduced where possible. The chapters also cover the issue of costs incurred by foreign insolvency practitioners when they have to enforce foreign judgments.

To highlight this cost issue, each of the country chapters is based on two scenarios. Based on a situation where an insolvency estate includes a (potential) claim against a (third party) debtor who is domiciled abroad, the court-appointed insolvency practitioner (IP) is required to assess the costs for pursuing the claim in order to decide whether it is affordable and economically reasonable to try recovery abroad. In scenario 1 the claim has not yet been subject to a court proceeding; and in scenario 2 an executory title already exists and would have to be enforced abroad.

From the 17 country chapters that were written for this publication, it appears that there are very different views about what it may or should cost to gain access to the courts to enforce a claim, and what flexibility plaintiffs and litigators should have with regard to financing the costs of litigation, in particular lawyers' fees. An interesting finding was that a few countries like Mexico and South Africa in principle offer free access to justice by not charging court fees. Most of the other jurisdictions covered in this report charge court fees and in many cases a prepayment is required in order to start proceedings. Surprisingly, whether court fees are charged and the quantum of fees charged does not seem to have an influence on the average duration of court proceedings.

With respect to professional litigation financing, in countries like in the USA, India and Germany parties that do not have sufficient funds are able to gain access to the court system and this has been a long-established practice. In some countries however like Croatia, Mexico and the Caymans litigation financing is not available. There seems to be a tendency, though, that this possibility becomes increasingly widespread, and it is now starting to get established in countries like Brazil, France and Spain.

An interesting issue is the admissibility of contingency fee agreements: While some countries consider restrictions on lawyers' freedom of contract to be problematic, the majority of countries provide for prohibitions or restrictions on contingency fee arrangements, probably because of concerns that those arrangements would impair objectivity.

Another financial obstacle for litigation can be the fact that in some countries the principle of the losing party bears all costs does not apply. Particularly in the USA and the UK, where the basic principle applies that each party bears its own costs, the question of whether it is worth taking legal action in view of the probable costs – insofar as these can be estimated in the first place – becomes a game of calculation

or chance. Even with the prospect of at least partial reimbursement for the winner, the lawyer's fees usually represent the most problematic factor in forecasting costs, because very few countries have regulations for statutory fees like in Germany, which allow a fairly accurate calculation based on the value in dispute.

Each contributor was asked for an economic conclusion as to the amount in dispute at which it would make sense to commence litigation in their jurisdiction. These conclusions are one of the most significant results of this project, because they range from an amount equaling 5,000 EUR to 500,000 EUR. This leads back to the fundamental questions hinted at the beginning: What's the price of justice? At what point do barriers to accessing a justice system affect its acceptance as an effective means of law enforcement? There's a lot of room for discussion and further investigation.

The country reports in this publication are only supposed to provide insights into the different systems and hopefully help practitioners, who have to assess and maybe explain to courts and creditors whether it makes sense to try collecting debts abroad. It is planned to add more country reports over time to broaden the spectrum even further.

I would like to thank very much all the authors for putting a lot of time and effort to prepare excellent reports in order to share their expertise with the entire INSOL community. Especially, however, I must thank the INSOL team, who endured the editor's chaotic and slow work with infinite patience and kindness. I owe you!

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AUSTRALIA

This country report is written based on a situation where an insolvency estate includes a (potential) claim against a (third party) debtor who is domiciled abroad. The court-appointed insolvency practitioner (IP) has to assess the costs for pursuing the claim in order to decide whether it is affordable and economically reasonable to try recovery abroad. Two scenarios are considered. In scenario 1 the claim has not yet been subject to a court proceeding; in scenario 2 an executory title already exists and would have to be enforced abroad.

SCENARIO 1: CLAIM HAS NOT YET BEEN SUBJECT TO COURT PROCEEDINGS

1.1 Recognition proceeding and costs

1.1.1 What is the proceeding and what are the estimated costs for the recognition of the foreign insolvency proceeding and the IP's power to pursue a claim?

Firstly, there is no impediment to a foreign insolvency practitioner (IP) regularly commencing litigation in an Australian court on behalf of the foreign insolvency proceeding against a third-party debtor domiciled in Australia. Normal private international law choice of law considerations apply as in any case, with the likelihood, however, of the foreign IP also being required to provide security for the defendant debtor's costs. As with all litigation, the costs of such an action will depend on the complexity and length of hearing of the claim.

The situation will be different where the foreign IP desires to take advantage of recognition of the foreign insolvency proceeding under the United Nations Commission on International Trade Law (UNCITRAL) Model Law, particularly where the foreign insolvent entity has carried on business in multiple jurisdictions including Australia or has assets in Australia which the foreign IP wishes to protect or realise.

Australia adopted the Model Law in 2008 by the Cross-Border Insolvency Act (Cth) 2008 (CBIA). It applies where the debtor carries on a business in Australia (satisfying the definition of "establishment" in Article 2(f) of the Model Law) and the foreign proceeding can be classified as the "foreign main proceeding". The CBIA applies to both companies and individuals.

It is not proposed to review in this paper the various provisions of the Model Law – they are well known and familiarity with it is presumed. Australia has adopted the Model Law with only minor variations. Reciprocity is not required in order for the foreign IP to apply for recognition of the foreign proceeding in Australia as a foreign main proceeding and to seek recognition and relief against the debtor as a foreign non-main proceeding under Articles 15 to 27. Thus, it does not matter where the insolvency proceedings are opened – the foreign IP and the foreign proceeding can be located anywhere. There have now been nearly 100 recognition cases in Australia under the CBIA, almost all conducted in the Federal Court of Australia. The Australian approach to recognition is consistent with those in the United Kingdom (UK and the United States US).

Where the debtor carries on a business in Australia, and thus has an establishment here, it is usual for the foreign IP, upon recognition of the foreign insolvency proceeding as a foreign main proceeding, to be entrusted in his or her own name with the administration of the debtor as a foreign non-main proceeding and with

the realisation and distribution of all its assets in Australia and for the foreign IP to be given all the powers usually available to a liquidator or trustee in bankruptcy, as the case may be, in Australia. There have also, however, been occasions where the foreign IP has sought a joint appointment of a local IP with himself or herself, or even the appointment of a local IP alone. If a local IP is appointed, the foreign IP will not be able to take control of the debtor's estate or become the registered owner of his / her / its property. To date, a foreign IP has not been required, as a condition of appointment, to take out professional indemnity insurance in relation to administration of the foreign non-main proceeding in Australia.

The advantages of recognition in Australia of the foreign insolvency proceeding as a foreign main proceeding include the automatic stay of proceedings and stay of execution under Articles 20 and 21 and the power to conduct examinations and obtain evidence under Article 21.

Apart from recognition under the CBIA, it sometimes happens that the debtor, especially if an individual, does not carry on a business in Australia but has assets within the jurisdiction, such as land or a valuable chose in action or a chattel. In that case, the letter of request procedure may be available. Based on the UK practice, section 581 of the Corporations Act 2001 provides that the court, in an external administration matter, must act in aid of, and be auxiliary to, a court of a prescribed country, and may act in aid of courts of other countries. Prescribed countries include the UK, US, New Zealand, Canada, Singapore, Switzerland, Malaysia, Jersey and Papua New Guinea. Section 29 of the Bankruptcy Act 1966 is to similar effect and has been utilised by a South African bankruptcy trustee to obtain the assistance of an Australian court.

The letter of request procedure has most often been applied in Australia where the debtor, often a bankrupt individual, owns land in Australia but does not carry on a business or have its centre of main interests here (following the approach in Bear Stearns).

Its application is consistent with the "modified universalism" approach generally applied in Australia. The cost of the letter of request procedure is generally equivalent to that of a Model Law recognition application under the CBIA.

1.2 Financing

The general position in Australia is that, unlike the US, lawyers are not permitted to enter into contingency fee agreements (an exception being recent legislation in the state of Victoria in relation to class actions). A contingency fee agreement would not normally be available to or be recognised in the case of a foreign IP.

Legal aid for civil litigation is generally not available for commercial litigation in Australia and would not be available to a foreign IP.

Litigation financing and / or insurance for litigation costs is, however, available to the foreign IP. The litigation financing industry is well established in Australia, which is at the forefront of the regulation of litigation funding worldwide. Again, it is beyond the scope of this chapter to review all the legislation and case law in Australia in relation to regulation of litigation funding. Suffice it to say that it is a competitive market with a number of players, both local and international. Generally, funders require claims to be from AUD1 million upwards, although

there have been some instances of claims as small as AUD500,000 being approved. More often in bankruptcy cases, a creditor will fund the trustee in return for a priority for his or her own debt should the action be successful.

1.3 Obtaining an enforcement order

The only ways to obtain an enforcement order in Australia are those referred to in section 1.1 above. There are no easier and cheaper ways to obtain an enforcement order.

1.4 Lawyers' fees

In Australia, legal fees as between lawyers and their clients (solicitor / client costs) are generally not regulated by any scale and are a matter for negotiation between the lawyer and the client. The states of New South Wales and Victoria have enacted legislation, the Legal Profession Uniform Law 2014, which governs the disclosures that the lawyer is required to make to the client, and the other states have similar regimes. Disclosure is not, however, required to be made to a range of "sophisticated" entities, including an Australian lawyer (but, oddly, not a foreign lawyer), a foreign company or its subsidiary, or a liquidator, administrator or receiver appointed in Australia.

The market for the provision of legal services in Australia is quite competitive. Rates are generally around AUD650 to AUD850 per hour for a principal. The rate may vary if payment is conditional upon a successful outcome and recovery.

Similar to the position in the UK, but unlike that in the US, it is normal in Australia for the unsuccessful party to be ordered to pay the costs of the successful party. When a costs order is made, the Federal Court and each state has its own procedures for assessment and determination of these costs, known as party / party costs. Some processes are entirely conducted and supervised by the court; others are conducted privately but remain ultimately reviewable by the court.

The general rule is that approximately two-thirds of the successful party's solicitor / client costs are recoverable as party / party costs. In less common cases, usually where there has been unmeritorious conduct or where a reasonable offer of settlement has been refused, an award of indemnity or solicitor / client costs may be made, in which case 100% of the successful party's own costs would be recoverable.

In bankruptcy there is a compulsory realisation fee payable to the government, currently 7% of the value of assets realised by the bankruptcy trustee.

1.5 Court fees

As mentioned above, if a foreign IP regularly commences litigation in Australia, it is very likely that he or she will be required to provide security for the defendant debtor's costs, either under the Corporations Act 2001 or as a consequence of the foreign IP's residence overseas. The court will determine the amount of security to be provided by reference to its assessment of the likely quantum of the defendant's party / party costs should it be successful, often, however, applying a discount of approximately 20% to 30% to that amount. Such security for costs in

commercial matters is usually payable in tranches leading up to the hearing, and it is often provided by way of bank guarantee or insurance policy.

For a recognition application under the CBIA, however, it is not usual for security for costs to be ordered. As a matter of practice, most recognition applications are conducted ex parte and the debtor is usually already under the de facto control of the foreign IP.

All courts, both federal and state, require filing fees to be paid on the initiating process commencing proceedings. Most also require hearing fees to be paid if a contested hearing becomes necessary.

1.6 Refund of legal costs and expenses

See section 1.4 above in relation to the recovery by the successful party of its legal fees and expenses from the unsuccessful party. Recovery is, of course, always dependent upon the capacity of the debtor or its assets to meet the costs order.

1.7 Examples of legal costs and expenses

The costs of a recognition application can vary considerably from case to case, depending for instance upon whether or not the recognition application is opposed and the extent of ancillary relief that is sought. An unopposed ex parte application could cost around AUD20,000 to AUD30,000, irrespective of the amount of the claim, but this could increase to AUD50,000 to AUD80,000 if opposed. It would not usually be economic for claims less than EUR50,000 to be litigated.

1.8 Average duration of litigation

Recognition applications are generally dealt with expeditiously in the Federal Court of Australia. If unopposed, which is the norm, the application takes around six to eight weeks from commencement to determination, allowing for due service and notice to be given to creditors. Interim relief under Article 19 can also be obtained on an urgent basis, often less than one week from commencement of proceedings.

If opposed, the duration of the dispute will depend upon the usual factors, including the length of the estimated hearing time, the complexity of the issues to be determined, the nature and availability of the relevant evidence and the other hearing commitments of the hearing judge. Nevertheless, in the Federal Court, a hearing date would usually be available within six months of commencement, with a reserved judgment being delivered within one to two months after that.

SCENARIO 2: ENFORCEMENT ORDER (JUDGMENT) EXISTS AND NEEDS TO BE ENFORCED ABROAD

2.1 Recognition proceedings and costs

If it is desired to obtain recognition of the foreign proceeding under the CBIA, there is no difference in the procedure described in section 1.1 above whether the foreign IP has already obtained a judgment against the debtor or not: it is the insolvency proceeding that is being recognised, not the judgment.

Where, however, the foreign IP desires to register his or her judgment in Australia, as distinct from obtaining recognition of the foreign proceeding under the CBIA, different procedures exist.

The Foreign Judgments Act (Cth) 1991 applies where the foreign country has a reciprocal treaty with Australia. Reciprocity is essential: without it, registration is not possible. Prescribed reciprocal countries include the UK, Germany, France, Italy, Switzerland, Poland, Israel, Hong Kong, Japan, Singapore, Republic of Korea, Sri Lanka, Canada (Alberta Colombia and Manitoba Provinces only), Fiji, Cayman Islands, British Virgin Islands and number of other Caribbean countries. The US is not a prescribed reciprocal country. New Zealand has its own separate arrangements with Australia.

The Foreign Judgments Act provides that, upon satisfaction of certain statutory requirements including that it be a final judgment of a superior court not subject to appeal and not be more than six years old, the judgment takes effect as a judgment of the court, federal or state, in which it is registered. Usually, the judgment will be for a monetary amount. The debtor then has a limited period in which to apply to set aside registration of the judgment. This is usually done in conjunction with an application to set aside the judgment in the foreign country.

If the registration application is unopposed, then the cost of it would normally be approximately AUD5,000 to AUD10,000, irrespective of whether it was for EUR50,000 or EUR500,000. A EUR5,000 judgment would not normally be registered. If opposed, however, the costs of registration could be considerably greater.

In July 2018, UNCITRAL adopted the Model Law on Recognition and Enforcement of Insolvency-Related Judgments (MLIRJ). Australia has yet to adopt the MLIRJ, and it is not presently known if or when or in what form that might occur. The complex question of the enforceability of a foreign insolvency judgment, absent reciprocity, will have to await that time, which is beyond the scope of this chapter to predict.

A judgment resulting from an arbitral award is dealt with separately under the New York Convention.

2.2 Obtaining information about the debtor

Where the debtor is a registered company or registered foreign company, any winding-up order or application to wind up the company will be recorded in the register maintained by the Australian Securities and Investments Commission (ASIC), which is available for public search on payment of a small fee. Searches at ASIC and of the Personal Property Securities Register will also record whether there are any charges that have been granted by the company to a secured creditor and whether a receiver has been appointed.

Where the debtor is an individual, a register is also maintained by the Australian Financial Security Authority, publicly searchable for a small fee, which records whether or not the debtor is a bankrupt or has any pending bankruptcy proceedings against him or her.

If a recognition order has been obtained under the CBIA, ancillary orders can also be obtained for the public examination of officers of the debtor and other relevant persons and for production of documents on proper cause being shown, in the same way as such procedures exist in relation to local companies in liquidation and bankrupt individuals.

If a foreign judgment has been registered, then an order for the examination of the debtor can be obtained in the same way as for a local debtor under a local judgment.

There are also local credit agencies that provide information on the credit worthiness of corporations and individuals for a fee.

2.3 Enforcement measures

Where the debtor is a company, the usual method of enforcement in Australia is an application to wind up the company based upon failure by it to comply with a 21-day statutory demand. If unopposed, the costs of a winding-up application are usually between AUD7,000 and AUD10,000, irrespective of the amount of the claim. The costs of an opposed application can, of course, be considerably greater. Procedures also exist for registering a writ upon the title to any property owned by the debtor (whether a company or an individual) if the debt exceeds AUD10,000, and also to garnishee its bank account or any debt owed to it.

Where the debtor is an individual, similarly a creditor's petition may be issued to have his or her estate sequestrated and a trustee to it appointed based upon failure to comply with a 21-day bankruptcy notice. Again, the costs, if unopposed, of obtaining a sequestration order are usually between AUD7,000 and AUD10,000 irrespective of the amount of the claim.

The 21-day statutory periods referred to above have been extended in Australia for up to six months during the current Covid-19 pandemic and may be extended yet further.

Where recognition under the CBIA has been obtained, the foreign IP has standing under Article 23 to initiate proceedings utilising the voidable transaction provisions in the Corporations Act 2001 and the Bankruptcy Act 1966. These provisions apply, with appropriate changes, in relation to an action for the purposes of the foreign proceeding in the same way as they would apply to a local company in liquidation.[1]

2.4 Alternatives to lawyers

As in many countries, as well as lawyers specialising in debt collection, a number of collection agencies also specialise in collecting judgment debts. Their fees are usually a percentage of the debt recovered, normally 33%, plus expenses. Some agencies may purchase the claim themselves, at a considerable discount.

[1] For a more detailed discussion, see F Assaf, B Shields and H Kincaid, Voidable Transactions in Company Insolvency (LexisNexis 2014) at [12.25], [12.30].

2.5 Insolvency proceedings

As in section 1.6 above, the costs involved, including lawyer and court, for commencing and participating in insolvency proceedings against the debtor are payable in the first instance by the foreign IP irrespective of whether recovery from the debtor ultimately occurs or not.

3. Economic conclusion

Taking into account the cost and expenses for a foreign IP, the minimum claim amount for which it would make sense to commence litigation or enforcement action in Australia would be not less than AUD100,000. Claims less than AUD100,000 are usually dealt with in the lowest court of the three-court tier system in Australia, and it would rarely be economical for the foreign IP to commence proceedings there.

As a matter of practice, claims of less than AUD1 million are rarely commenced in Australia's superior courts (the Federal Court and the state Supreme Courts). These are also the courts with jurisdiction under the Corporations Act 2001 and the Bankruptcy Act 1966 to entertain recognition applications under the CBIA, although there is no prescribed minimum amount for these.

The authors gratefully acknowledge the invaluable assistance provided by Stewart Maiden QC, INSOL Fellow, of 16 Owen Dixon Chambers West, Melbourne; Farid Assaf SC, INSOL Fellow, of Banco Chambers, Sydney; Emma Beechey, INSOL Fellow, Barrister of New Chambers, Sydney; and Sally Nash, Solicitor, of O'Neill Partners, Sydney.

BRAZIL

This country report is written based on a situation where an insolvency estate includes a (potential) claim against a (third party) debtor who is domiciled abroad. The court-appointed insolvency practitioner (IP) has to assess the costs for pursuing the claim in order to decide whether it is affordable and economically reasonable to try recovery abroad. Two scenarios are considered. In scenario 1, the claim has not yet been subject to a court proceeding; in scenario 2 an executory title already exists and would have to be enforced abroad.

SCENARIO 1: CLAIM HAS NOT YET BEEN SUBJECT TO COURT PROCEEDINGS

1.1 Recognition proceeding and costs

1.1.1 What is the proceeding and what are the estimated costs for the recognition of the foreign insolvency proceeding and the IP's power to pursue a claim?

Under the current Brazilian Bankruptcy Act (BBA), there are no provisions contemplating or addressing cross-border insolvency proceedings. In addition, Brazil has not adopted the United Nations Commission on International Trade Law Model Law on Cross-Border Insolvency, although recent Bills in both houses of Parliament intend to reform the current legislation to include it. Thus, Brazilian courts follow the principle of territoriality, under which they have exclusive jurisdiction over the debtor and its assets located in the country; and foreign decisions regarding such debtor and its assets have little to no effect.

In some specific cases, usually involving large multinational groups, local Brazilian courts have been able to provide *ad hoc* solutions to tackle cross-border insolvency and restructuring cases. However, those are exceptions to the general territoriality approach of the BBA.

For the prospective scenario provided, the insolvency estate – through its insolvency administrator – would have to retain a licensed Brazilian attorney to file and purse the claim against the debtor before a competent Brazilian court. The IP would act as the insolvency estate's representative, providing a power of attorney to the local retainer and demonstrate he or she is legally authorised to represent the bankrupt estate according to the rules applicable in the country of the insolvency proceeding. To be legally valid before a Brazilian court, the power of attorney only would need to be apostilled, if the Apostille Convention applies, or legalised and notarised before a Brazilian consulate, if not. Furthermore, documents written in a foreign language must be translated into Portuguese by a sworn translator in Brazil.

Considering the hypothesis above, estimated costs include the local attorney's fees and court fees, as well as the costs to legalise and notarise, or apostille, the documents. Besides, the IP would need to post a bond to guarantee the payment of court fees and attorney fees for loss of suit.

1.2 Financing

1.2.1 Does your jurisdiction allow or provide for the following?

- ***Contingency fee agreements***

  Under Brazilian Law attorneys are authorised to enter into contingency fee agreements with their clients within certain limitations. The Brazilian Bar Association Code of Ethics and Discipline forbids attorneys from receiving more than their clients, which imposes an indirect limitation of 50% for their total remuneration. Also, when faced with contingency fee agreements, courts tend to consider payments above 30% abusive, adjusting the fees' threshold accordingly.

- ***Is legal aid for litigation available for a foreign IP?***

  In Brazil, individuals and legal entities, either national or foreign, are entitled to claim legal aid, including the waiver, deferred payment, payment in instalments, and proportional reduction of court fees to parties under severe financial distress. Although not considered a "legal entity" *per se*, insolvency estates can also request this benefit.

  With regards to legal entities, which would also include insolvency estates, courts tend to analyse the severe financial distress requirement from an objective perspective, assessing the relevant financial statements for the total assets, liquid assets and other information. Note that, under Brazilian Law, the mere state of insolvency is not sufficient to automatically qualify the estate for legal aid. It is necessary to demonstrate the absence of resources, including liquid assets, and the potential impact of the fees on the estate's debts.

- ***Are litigation financing and / or insurance for litigation costs provided and, if so, starting at which amount?***

  Litigation finance is a relatively new trend in Brazil, being more prevalent for high-stakes arbitration, as the low and legally limited court fees discourage parties and law firms from seeking such services. Nonetheless, creditors can contract such services from certain private investment funds. Considering the few precedents pertaining to litigation financing, and the private nature of these agreements, it is difficult to provide a reasonably accurate estimative for the costs involved.

  Litigation insurance, in its turn, is not uncommon in certain areas of the law, notably for tax and labour law claims. Usually, insurance companies offer guarantees used as collateral, replacing the attachment of the debtor's assets or mandatory security deposits in certain labour proceedings. Although litigation insurance exists, there are no specific insurance policies for litigation costs exclusively.

  A foreign plaintiff might contract an insurance provider to cover the totality of the potential costs involved in a litigation (e.g., court fees, attorney's fees for loss of suit, and other expenses), but such arrangements are seldom financially attractive. Insurance underwriters often require yearly premium payments, which are in turn evaluated on the potential merit of the insured party's claim.

1.3 Obtaining an enforcement order

1.3.1 Besides commencing regular civil proceedings, are there easier and cheaper ways to obtain an enforcement order?

For certain situations regulated in the Code of Civil Procedure (CCP), the creditor could avoid the recognition proceeding or a regular litigation before a court in Brazil, instead directly commencing the enforcement proceeding, if the claim arises from a contract or other title that is fully enforceable in the creditor's jurisdiction.

The caveat here lies in the requirements provided in the CCP for such direct enforcement: (i) the contract or title to which the claim relates must be valid, binding and enforceable in the local jurisdiction; and (ii) the obligation provided in the contract or title to which the claim relates was to be executed in Brazil. Obviously, the second requirement reduces the practical application of this provision to extremely specific situations.

Finally, under the recent 2015 Brazilian Mediation Act, a mediated agreement executed by the parties becomes an executory title, fully enforceable according to the rules provided in the CCP. For the agreement to benefit from this provision, the mediation must be conducted within Brazil and in compliance with the provisions of the Mediation Act.

1.4 Lawyers' fees

1.4.1 What are the legal provisions for lawyers' fees, and are there compulsory statutory fees for some or all activities?

In civil proceedings, there are two forms of attorney's fees: namely, contractual and statutory attorney's fees for loss of suit. Whereas contractual attorney's fees are freely negotiable and represent the direct remuneration for the counsel's legal services; loss of suit fees are fixed by the court based on the monetary value of granted claims, the economic benefit perceived by the winning party, or the indexed claim value.

The CCP provides the parameters to be followed by courts when fixating loss of suit attorney's fees. In general, courts must fixate the fees between 10% and 20%, after assessing: the counsel's professional zeal to the case; the market where services were rendered; the claim's nature and importance; the services provided by the counsel; and the time spent by the counsel on the case.

1.5 Court fees

1.5.1 In order to take legal action, does a foreign plaintiff have to provide security and / or make a prepayment for court costs and, if so, how is the amount calculated?

Unless some form of legal aid was granted, any plaintiff filing a claim before a Brazilian court must advance the relevant court fees for the first instance proceeding. Any subsequent appeal will also require the advance payment of the respective appellate fees and costs. Furthermore, certain additional fees might be due in the course of the lawsuit, for instance, expert examination fees and cost of

rogatory letters. The amounts to be paid vary from state to state, as each state court has the discretion to establish its own fee schedule. In general, fees are a percentage of the total claim value (e.g., 1%), as indicated in the complaint, limited, in most states, to a maximum and minimum threshold.

According to the CCP, a foreign plaintiff must provide a security deposit to cover the estimated court fees plus the opposing party's estimated loss of suit fees. This provision is not applicable if the foreign plaintiff has sufficient assets in Brazil, particularly real estate property, to cover the combined amount of the security deposit. The CCP also provides that the deposit will not be necessary when the claim is solely based on the enforcement of an executory title, or if the plaintiff's home country has a valid international treaty with Brazil waiving or conflicting with this requirement.

If the security deposit or guarantee is deemed insufficient during the proceeding, the opposing party may petition to the court requesting a reinforcement. This petition must demonstrate the pertinence of the reinforcement (e.g., a substantial risk of credit if the foreign party claims are denied) and the depreciation of the original guarantee (e.g., inflation over the security deposit amounts or depreciation of assets given as collateral).

1.5.2 What are the legal provisions for court fees in civil proceedings?

Court fees are regulated directly by Articles 82 to 97 of the CCP. As a general rule, Article 82 provides that a party shall bear the costs of the acts he or she performs or requests in a civil proceeding, advancing their payment whenever necessary. Unless expressly stated otherwise, the plaintiff shall bear the costs of the acts determined by the court, to be reimbursed by the losing party at the end of the proceedings.

1.6 Refund of legal costs and expenses

1.6.1 Is the winner of a court proceeding entitled to reimbursement for the legal costs and expenses?

A decision ruling on the merits of the proceeding shall also order the losing party to reimburse the winning party for the costs it incurred, which include court fees, travel expenses, expert consultant fees and witness-related expenses. In addition, the court will also order the losing party to pay attorney's fees for loss of suit to the winning party's counsel.

The courts have the discretion to proportionally allocate the burden of costs and loss of suit fees according to each party's claims that were granted or denied. In cases of multiple winning or losing parties, the burden of costs shall be proportionally distributed among them. If the claim is settled, the burden of costs shall be equally distributed among the parties, unless the settlement agreement provides for a different allocation of costs.

Finally, in cases of acknowledgement, renunciation, or withdrawal of a claim, the burden of cost shall be borne by the party who acknowledged, renounced or withdrew such claim.

1.7 Examples of legal costs and expenses

1.7.1 What would be the roughly estimated litigation costs and expenses – first instance including lawyer and court – for a (simple) claim in the amount equivalent to EUR5,000, EUR50,000 and EUR500,000?

As provided in the section *1.5.1*, each state court has the discretion to set its own fee schedule. Therefore, the assessment should be conducted according to the fee schedule of the court with personal jurisdiction over the debtor. Moreover, court fees are assessed in local currency only, which would impose the conversion to Brazilian reais.

Considering a claim brought before a court in São Paulo and an exchange rate of EUR1.00 to BRL5.99,[1] the court fees would be as follows:

Claim value	Court fees
EUR5,000 (BRL29,940.07)	EUR50.12 (BRL 299.40)
EUR50,000 (BRL 299,400.71)	EUR501.25 (BRL2,994.00)
EUR500,000 (BRL2,994,007.06)	EUR5012.50 (BRL29,940.07)

Regarding attorney's fees for loss of suit, they could be fixated from 10% up to 20% of the granted claim value, based on the parameters provided in the CCP and analysed in section 1.4 above.

1.8 Average duration of litigation

The average duration of a dispute is influenced by many factors, such as the court's case backlog, the working speed of the judge, the number of parties, whether and which type of evidence will be necessary, and potential appeals filed against interlocutory and final decisions.

In general, a claim filed before a lower circuit court in São Paulo will take around 1.5 to 2 years to be fully litigated if no appeals are filed. In case of an appeal against the first instance's final decision, the appellate state court takes an average of 1 to 2 years to decide.

A decision rendered by an appellate court is final and binding on the merits, although subject to review on questions of law or constitutionality by the Superior Court of Justice (SCJ) and the Supreme Court (SC), respectively.

The SCJ, the final appellate court for non-constitutional federal law matters, does not provide a *de novo* review of the case, as the appellate state court would, but merely reviews the application and interpretation of federal law in such court's decisions. An appeal to the SCJ, also called a "special appeal", generally takes 2.5 to 3.5 years to be decided.

The SC is the final and highest court in Brazil, hearing only selected cases involving constitutional questions. The SC also does not provide a *de novo* review of the case, but only the interpretation, application and potential violation of

[1] The same exchange rate will be used to convert Brazilian reais into euros throughout this text.

constitutional rights on appellate judgments, including decisions rendered by the SCJ on special appeals. An appeal to the SC, also called an "extraordinary appeal", generally takes 4 to 5 years to be decided.

SCENARIO 2: ENFORCEMENT ORDER (JUDGMENT) EXISTS AND NEEDS TO BE ENFORCED ABROAD

2.1 Recognition proceeding and costs

2.1.1 What is the proceeding and what are the roughly estimated costs – including lawyer and court – for the recognition of the foreign enforcement order for a claim in the amount equivalent to EUR5,000, EUR50,000 and EUR500,000?

In Brazil, the general rule provides that a final decision rendered by a foreign court or authority will be subject to a recognition procedure before the SCJ, the final appellate court for non-constitutional federal law matters. To be subject to a recognition proceeding, a foreign decision must satisfy certain requirements established in Articles 960 to 965 of the CCP, and in Articles 216-A to 216-X of the Internal Rules of the SCJ (SCJ Rules), which can be summarised as follows:

(i) the court or authority which rendered the decision must have, according to its own law, the jurisdiction over the decision's subject matter;

(ii) the parties must have been duly and properly served, even in cases of default judgment;

(iii) the decision must be valid and enforceable in the foreign jurisdiction (the SCJ Rules require the decision to have become *res judicata* in the foreign jurisdiction);

(iv) the decision must not violate a Brazilian decision involving the same matter and parties which has become *res judicata*; and

(v) the contents of the decision must not violate Brazilian public policy, national sovereignty and the dignity of the human being.

The recognition proceeding shall be started by a petition, directed to the Chief Justice of the SCJ, which must demonstrate in writing the fulfilment of the elements listed above. The petition must also be presented together with the original or a certified copy of the decision whose enforcement is being sought, as well as a certified translation to Portuguese duly authenticated by a Brazilian consular authority.

The relevant costs to be incurred for the recognition of a foreign decision are indicated in the chart below, including initial court fees and attorney's fees[2]

[2] Attorney fees estimated in this text consider that the work would be performed by a full-service law firm. The use of solo practitioners or small or specialised firms that work with thousands of similar cases and provide low-cost services, as well as certain particularities of each case, might impact the estimates.

Claim value	SCJ court fees	Attorney's fees
EUR5,000 (BRL29,940.07)	EUR33 (BRL194.12)	EUR888–1,776 (BRL5,000–10,000)
EUR50,000 (BRL299,400.71)	EUR33 (BRL194.12)	EUR4,442–10,016.69 (BRL25,000–60,000)
EUR500,000 (BRL2,994,007.06)	EUR33 (BRL194.12)	EUR8,884–25,041.73 (BRL50,000–150,000)

Note that under Brazilian law recognition and enforcement are different proceedings, subject to different procedural rules. Once the SCJ recognises the foreign decision, it becomes a fully enforceable executory title akin to a final decision rendered by a Brazilian court, which must then be subject to a proper enforcement action. Moreover, there is a caveat to be considered in the execution of recognised foreign decisions. Whereas common executory titles are usually subject to enforcement before a state court, Article 965 of the CCP provides those foreign decisions are within the exclusive jurisdiction of federal courts.

The enforcement action itself follows the same provisions universally applicable to all judicial executory titles, regulated in Articles 523 to 527 of the CCP. Once requested by the creditor, the competent court will summon the debtor to pay the debt plus court fees within 15 days (Article 523). If the debt is not paid voluntarily, a fine equal to 10% of the debt plus an additional 10% as loss of suit attorney's fees shall be added to the defaulted amount (Article 523, paragraph 1).

The relevant costs to be incurred with the enforcement of recognised decisions before federal courts are regulated by Law No 9.829, of 4 July 1996, and by the Ordinances issued by each court. Currently, the court fees charged by federal courts for enforcement proceedings are equivalent to 1% of the debt, limited to a minimum of BRL10.64 (EUR1.83) and to a maximum of BRL1,915.38 (EUR330).

Brazilian attorneys retained will often charge a separate amount for the enforcement proceedings, with approximate values described in the chart below:

Claim value	Attorney's fees
EUR5,000 (BRL29,940.07)	EUR888–1,776 (BRL5,000–10,000)
EUR50,000 (BRL299,400.71)	EUR3,553–8,347.24 (BRL20,000–50,000)
EUR500,000 (BRL2,994,007.06)	EUR7,107–16,694.49 (BRL40,000–100,000)

2.2 Obtaining information about the debtor

2.2.1 Are there any sources of information about whether a debtor of a claim is without means or subject to an insolvency proceeding?

Brazil has several companies that maintain credit scores, along with outstanding debts and indebtedness databases of both legal entities and individuals. Access to such databases is usually restricted to contractual partners, albeit most companies provide one-time reports on paid request.

Aside from private creditworthiness certification services, the Federal Government maintains publicly accessible databases for issuers of bad cheques[3] (CCF); outstanding debts with governmental entities[4] (CADIN); and outstanding tax liabilities.[5] Similar services are offered at state and municipal levels.

Creditors can also verify the existence of protested negotiable instruments before the Protest Offices and available real estate before the Land Registers, both of which are maintained by the states. Although available to the general public, these services offer some disadvantages, as they are paid for and limited to only one jurisdiction. Considering Brazil's continental size and internal subdivision, research on a debtor's real estate property and protested titles can become a hefty expense without previous information.

Finally, local courts offer free certificates attesting the existence of ongoing actions, including insolvency and bankruptcy proceedings, and court collection of taxes against a debtor. It is important to recall, as noted in section *1.1.1*, that insolvency and bankruptcy proceedings, under the principle of territoriality adopted by the BBA, are within the exclusive jurisdiction of the state court at the debtor's main place of business or, in case of a foreign company's local subsidiary, at the subsidiary's headquarters.

2.3 Enforcement measures

2.3.1 What main enforcement measures are available and what are the costs – including lawyer and enforcement authority – for enforcing a claim in the amount equivalent to EUR5,000, EUR50,000 and EUR500,000?

The main non-judicial enforcement measures available in Brazil for a creditor are the protest of the executory title before a Protest Office and the submission of the debtor's information to private creditworthiness companies. In both cases, the debtor will be informed about the protest and instructed to pay the debt within a certain period. The costs incurred with the Protest Office are determined by each state, but usually range from BRL150 (EUR25.84) to BRL1,600 (EUR275.61).

As for judicial measures, courts can determine the attachment of money in bank or investment accounts, titles of public debt and stock, as well as the attachment of real estate property, chattels and earnings. The CCP establishes an order of preference, with money and liquid assets as the preferred asset, followed by vehicles and real estate.

Courts have access to a digital system connected directly to the Central Bank of Brazil, which allows the attachment of money in bank or investment accounts, titles of public debt and publicly traded stock to be performed easily. The court will then provide the transfer of the attached amounts to a bank account under its responsibility, until the enforcement proceeding is finalised, and the amounts are paid to the creditor.

[3] For CCF, see: https://www.gov.br/pt-br/servicos/obter-relatorio-de-cheque-sem-fundo#anchor1.
[4] For CADIN, see: https://receita.economia.gov.br/interface/lista-de-servicos/certidoes-e-situacao-fiscal/certidao-de-regularidade/consultar-pendencias-inclusao-no-cadin-sisbacen.
[5] Available at: https://receita.economia.gov.br/interface/lista-de-servicos/certidoes-e-situacao-fiscal/certidao-de-regularidade.

The attachment of chattels and real estate property are followed by receivership and forced sale, with the proceeds used to cover the outstanding debt, auction expenses, court fees and attorney's fees. After all the payments and reimbursements, remaining amounts are returned to the debtor.

Aside from regular court fees, covered in section 1.5, creditors may have to advance the auction expenses and the auctioneer's fees, which will be reimbursed through the proceeds of the forced sale. The costs and expenses related to the auction are determined based on the total value of the debt and are set by each court.

2.4 Alternatives to lawyers

2.4.1 Do you have specialised debt collection agencies (or equivalent) which buy claims or work more cost-effectively than lawyers?

The acquisition of claims by third parties is not uncommon or unheard of in Brazil, as there are debt collection companies, banks and investment funds that acquire certain types of claims. Usually, these entities only negotiate claims with substantial values and charge a significant discount, sometimes superior to the estimated costs and expenses to be incurred by the plaintiff during the regular collection proceedings. For the enforcement proceeding before court, however, the third parties will have to hire a lawyer.

2.5 Insolvency proceedings

2.5.1 What costs are involved – including lawyer and court – for commencing and participating in insolvency proceedings against the debtor of a claim in the amount equivalent to EUR5,000, EUR50,000 and EUR500,000, if the debtor is not able to pay?

The BBA requires a minimum claim of 40 minimum-wages for the filing of bankruptcy proceedings against an insolvent debtor. The current minimum-wage, effective for 2020, is equal to BRL1,045 (EUR185), which bars bankruptcy requests for debts inferior to BRL41,800 (EUR7,439), in which case a creditor must pursue and enforce his or her claim to regular litigation and enforcement actions, attaching the debtor's assets whenever possible. The law allows creditors to combine their claims in order to fulfil the monetary threshold to request the debtor's bankruptcy.

Regarding court fees, as provided in Section 1.5 above, each state court has its own fee schedule. Therefore, the assessment should be conducted according to the fee schedule of the court with personal jurisdiction over the debtor. Moreover, court fees are assessed in local currency only, which would impose the conversion from euros to Brazilian reais.

Apart from that, the participation in an insolvency proceeding only triggers a court fee in case of late lodgement of an insolvency claim. Fees in this case, as stated above, are subject to the discretion of each state court. Taking São Paulo's fee schedule as an example, the fees applicable to late lodgement of an insolvency claim are similar to a regular civil claim, including both the minimum and the maximum amounts charged.

Considering a claim brought before a court in São Paulo and an exchange rate of EUR1 to BRL 5.99, the court fees and attorney's fees would be as follows:

Claim Value	Court Fees	Attorney's Fees[6]
EUR50,000 (BRL299,400.71)	EUR501.25 (BRL2,994.00)	EUR3,338.89–8,347.24 (BRL20,000–50,000)
EUR500,000 (BRL2,994,007.06)	EUR 5012.50 (BRL29,940.07)	EUR5,008.34–13,355.59 (BRL30,000–80,000)

3. Economical conclusion

3.1.1 Taking into account the costs and expenses for a foreign IP, what is the minimum claim amount at which it makes sense to start litigation or enforcement?

Court fees in Brazil are relatively low when compared to other jurisdictions, specially to foreign plaintiffs with resources in dollars or euros. Also, court fees are proportional to the claim's value and are limited to a maximum threshold. In this sense, the more uncertain amounts to be incurred are the attorney's fees, which will escalate according to the claim value.

The time and effort to be spent by the foreign plaintiff's attorney must also factor in the assessment of costs. Pursuing a regular civil litigation is naturally a more complex and longer process, with the potential of several appeals and deviations, which would progressively increase the expenses incurred. On the other hand, the recognition and enforcement of a foreign decision is usually a more straightforward process, providing less room for discussions and unnecessary delays, and can usually be accomplished within two to three years.

Therefore, in the case of a civil litigation, claims with a total value equal to or less than approximately EUR40,000 are financially impractical when factoring in all the variables. The recognition and enforcement of decisions around EUR25,000 or more are still economically viable.[7]

[6] These figures do not take into consideration cases where the creditor has a claim of a significant amount, which would allow him or her to exert influence in the negotiations of a recovery plan, in such circumstances there would be more work to be done and the attorney fees would be bigger.

[7] See note 2 above.

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This country report is written based on a situation where an insolvency estate includes a (potential) claim against a (third party) debtor who is domiciled abroad. The court-appointed insolvency practitioner (IP) has to assess the costs for pursuing the claim in order to decide whether it is affordable and economically reasonable to try recovery abroad. Two scenarios are considered. In scenario 1 the claim has not yet been subject to a court proceeding; in scenario 2 an executory title already exists and would have to be enforced abroad.

SCENARIO 1: CLAIM HAS NOT YET BEEN SUBJECT TO COURT PROCEEDINGS

1.1 Recognition proceeding and costs

1.1.1 What is the proceeding and what are the estimated costs for the recognition of the foreign insolvency proceeding and the IP's power to pursue a claim?

- Background

  The important background for this article is the consideration of the corporate structures that we typically see in the British Virgin Islands (BVI) and the reasons why people choose the BVI to establish their group entities. Some advantages of incorporation in the BVI include tax neutrality, foreign exchange efficiency and a developed legal system – the BVI is considered to be adaptable to the modern business environment. Many types of structures, with global reach, often have a BVI link. Typically, we see a holding company or special purpose vehicle incorporated, with parent companies elsewhere (offshore and onshore), operating subsidiaries lower down in the structure.

  Typically, therefore, insolvencies of BVI entities are often very different from those onshore as they will rarely be 'operating' in the traditional sense so have none or few arm's-length / external creditors. The types of recovery and enforcement actions that we often see will be intergroup or shareholder disputes, challengeable transactions or other claims which would be, or would be akin to, fraudulent claims. The reason that this is so important for the purposes of considering debt collection and enforcement of judgments (foreign or domestic) is that, often, the BVI debtor entity will have limited, if any, assets located within the BVI. So, the traditional debt recovery approach is not the norm here.

  The characteristics we regularly see in the BVI entity are that it would be a holding company (holdco), possibly owning shares and investments in other group companies. We also see asset-holding companies (assetcos), but the physical assets are often elsewhere. It is commonplace, for example, for a BVI company to own UK property, by and large for privacy reasons, as the tax efficiencies once gained from this structure have been eroded by changes in the UK tax regime.

- **Research**

  A first step for any foreign office holder will always be research into what assets (and potentially which officers of the entity) are located (or resident) in the BVI, a step which can be fraught with challenges. The information available publicly about the officers of the entity and its ultimate beneficial owners and their

assets is extremely limited. In the absence of a court order, you are unlikely to be able to obtain any material information about BVI entities.

- **Pre-litigation**

  As such, a pre-litigation research strategy is critical to devise a way to obtain disclosure about the possible assets over which you ultimately may want to enforce. For this step, BVI lawyers are essential.

  Norwich Pharmacal (NP) applications and freezing orders are obvious tools for identifying and protecting assets.

  The primary criteria for an NP application, which must be proved, are:

  (1) an arguable case that there has been wrongdoing;

  (2) that the disclosure sought is necessary to enable the applicant to seek redress for the wrongdoing; and

  (3) that the respondent has the information and is more than a mere witness (i.e., the respondent is "mixed up" in the wrongdoing, innocently or otherwise).

  There have been some recent decisions that raised questions as to what options are available in this sphere, particularly in the use of free-standing freezing injunctions, often referred to as the *Black Swan*.[1] Thankfully, the recent judgments in the case of *Broad Idea International Limited v Convoy Collateral Limited*[2] from the Court of Appeal during 2020, has clarified the current position, namely that such relief is still available but the willingness of the Court to grant such relief will turn on the specific facts of each case. A critical factor in deciding to grant relief will be whether the company with assets sought to be frozen by an applicant in the BVI Courts, is a party to substantive proceedings either in the BVI or elsewhere.

  All of which would be down to a factual assessment by the court in making the decision whether to grant the order sought.

- **Recognition**

  In all cases where a foreign IP is considering taking action outside of their own jurisdiction, the question of obtaining recognition will be a critical one. But the merits and costs of seeking court recognition of the foreign IP's appointment and authority should be considered in light of the value of the claim and the cost of seeking recognition, which could be tens of thousands of dollars.

  The domestic legislation governing restructuring and insolvency matters in the BVI, as an overseas British territory, is essentially based on the same legal principles as England & Wales (hereinafter English). The Insolvency Act 2003 (Act) and the Insolvency Rules 2005 (Rules), together with the various amendments and supplementary pieces of law, such as the Insolvency Code of

[1] *Black Swan Investments ISA - v - Harvest View Limited* (Claim No BVIHCV 2009/399) (Black Swan).
[2] BVICMAP 2019/0026.

Practice and Insolvency Practitioners Regulations, are the key pieces of legislation governing the insolvency regime.

The Act has provisions that govern cross-border assistance and incorporates the United Nations Commission on International Trade Law (UNCITRAL) Model Law.

Part XIX of the Act gives powers to the court to make orders in respect of foreign proceedings in certain designated territories / countries (namely, Australia, Canada, Finland, Hong Kong, Japan, Jersey, New Zealand, United Kingdom (UK) and United States). These powers include facilitating the co-ordination of the BVI and foreign insolvency proceedings, granting a stay of execution against debtor property in the BVI and delivering up property to the foreign representative.

When choosing to apply these provisions, the BVI court must have due consideration for the fair treatment of the stakeholders in the foreign proceedings, the protection of parties in the BVI who have a claim against the debtor and the principle that the distributions in the foreign proceedings must be substantially aligned with the expected distribution waterfall under the BVI proceedings. Fundamentally, this part contains an express provision that the assistance afforded by the BVI courts cannot interfere with the rights of a secured creditor under their security.

The assistance available is therefore broad and flexible, particularly as the BVI court will have to decide whether to apply the law of the BVI or those of the foreign proceedings.

Part XVIII of the Act contains provisions based upon the UNCITRAL Model Law, but this has not yet been brought into force.

The interplay between Parts XIX and XVII and the relevant common law principles has been considered in a number of cases. The current position is that Part XIX should be applied, and a general common law right does not override the statutory provisions, thus causing a lacuna for those non-relevant foreign countries – which do not have a statutory right to apply for assistance. This current situation is said to be under review.

A key question will be, therefore: where is the foreign IP from? As that will determine the route to obtain recognition or seek alternative methods to obtain relief. Clearly, if the foreign IP is from one of the designated territories / countries, Part XIX of the Act gives powers to the court to make orders in respect of foreign proceedings. Obviously, to someone outside of this list, the available relief is more difficult to obtain and consequently more costly. In addition, the BVI court will consider the appropriate forum and whether the claim is better determined by the foreign court.

1.2 Financing

1.2.1 Does your jurisdiction allow or provide for the following?

- ***Contingency fee agreements***

For an overseas office holder in an asset-poor insolvency estate, the viability and availability of contingency / conditional fee arrangements would be a critical issue.

The matter of contingent and conditional fees arrangements is a grey area in the BVI. Both contingent and conditional fee arrangements are available, but they are prohibited in reference to "contentious business", and there are no formal rules or procedure on the area, so common law rules apply.

Generally, the approach has been one of a commercial engagement between the IP and lawyers, as to what the appropriate level of deferral of payment, premium / uplift on rates, or success fee might be, and a matter of interpretation and construction as to what "contentious business" means. However, the overriding principle needs to be borne in mind that the agreement needs to be fair, reasonable and proportionate. Regardless of the country that the foreign IP is from, the practitioner must be content with the terms of the agreement, to the extent that, if applicable, the domestic creditors or court would sanction the terms, and the IP should be willing to stand by them if the point was raised in the BVI proceedings. Whilst it is common practice to keep the details of funding agreements confidential, it is possible that the respondent in the proceedings or the BVI court may review the terms of the fee agreement as part of the substantive proceedings.

Until very recently, in many jurisdictions third-party funding was commonplace when it would previously have been prohibited in the BVI. Common law and statutory rules against "maintenance" and "champerty" still stood. These were historically in place to protect against unfairness and injustice where unconnected third parties would become involved in a legal case, to fund it and benefit themselves without lawful justification. These protections stemmed from times when wealthy landowners would use their fortunes to back baseless claims and prosper as a result of a weak and easily corruptible legal system.

Of course, times have changed, but these fundamental principles were still entrenched in the legal system.

English courts have, over time, shown willingness to sanction third-party funding within certain parameters, and a key criterion has been that funders should not be in control of the proceedings. This has been seen as a way for an unfunded claimant to pursue justice.

The BVI courts have recently approved third-party funding for litigation and other liquidation costs where it was essential to ensure access to justice.

- ***Is legal aid for litigation available for a foreign IP?***

  There is limited legal aid available in the BVI for residents (natural persons), and it is not likely that this scarce resource would extend to commercial litigants, certainly not overseas claimants.

- ***Is litigation financing and / or insurance for litigation costs provided and, if so, starting at which amount?***

  Litigation funding is permitted and available in the BVI. Again, however, there is no set regime as such, and there are no reported authorities that confirm the position. It is at the discretion of the IP, subject to consultation with the estate stakeholders, for example the liquidation committee, and entering into arrangements often would require the sanction of the court.

  For foreign IPs, the situation is similar; the rules on borrowing funds for litigation will be governed by the domestic legislation. The IP must follow overriding principles to ensure that the terms are fair, proportional etc. In addition, most courts will consider the level of control that the funders have, as the IP's authority and independence should not be fettered. The process of entering a litigation funding agreement can be time-consuming and involve a large investment from the IP and team of advisors. Therefore, the work and costs involved in getting the funding agreed often means that the level of the substantive claim would need to be significant.

  The BVI court may consider the creditor profile of the estate and look at other information that is submitted as evidence. It is unlikely that the court will look to the terms of the underlying funding agreement, but it is always a possibility if, for example, the respondent raises arguments about the conduct of the IP.

  In the same way, insurance for costs is a commercial transaction, and the IP needs to weigh up the risks associated with the proceedings that are being initiated.

  Litigation funding is a global business in itself. Therefore, the discrete rules of various jurisdictions are overlaid with generally accepted principles for ensuring that the agreement is fair, is in the benefit of the creditors of the estate, and the funder is not in a position that it retains excessive control over the litigation – the IP must be able to make unfettered decisions, including to walk away from the proceedings.

1.3 Obtaining an enforcement order

1.3.1 Besides commencing regular civil proceedings, are there easier and cheaper ways to obtain an enforcement order?

Alternative dispute resolution (ADR) should be considered by an IP before commencing traditional legal proceedings, but the viability of this would be dependent on many factors.

The BVI is open to ADR. The BVI Arbitration Act of 2013 that came into effect in 2014, came into full force (in a practical sense) in 2016 with the opening of the BVI International Arbitration Centre, promoting the very best of modern practice in

international arbitration[3] and establishing the BVI as an international centre for the settlement of commercial disputes.

In addition, foreign arbitration awards can be registered in the BVI in accordance with the New York Convention, and the BVI courts have also made orders for the winding-up of companies on the basis of a foreign arbitral award that was not registered under that method. Every case is considered on its own merits, but the jurisdiction has shown itself to be flexible and practical in its consideration of commercial disputes.

1.4 Lawyers' fees

1.4.1 What are the legal provisions for lawyers' fees and are there compulsory statutory fees for some or all activities?

Legal fees would be paid in accordance with the agreement entered by the IP. There is no prescriptive regime covering fees, and it would be the domestic insolvency legislation that would determine the position. There are overriding provisions relating to fairness and proportionality of costs, as with many regimes, and challenges to costs are possible.

In the BVI, for example, the use of and recoverability of the fees incurred by foreign lawyers is determined by the services that are being offered. It is not possible for overseas lawyers to be paid from the assets of the estate if they are doing work that would constitute practising law in the BVI. It is therefore the responsibility of the IP to ensure work is carried out by appropriate advisors. The IP exposes their to the risk of personal liability for fees of lawyers if they have been instructed to do work that would fall within the remit of what should be carried out by a BVI practising lawyer. A practical example would be in the event that an IP has a number of different legal teams working on a case, that the instructions are clear, the parameters of the mandate are set, and that invoices and time reports submitted for payment are reviewed carefully. In the event of any overlap in the work carried out between the teams, the duplicative costs of this must be marshalled appropriately.

1.5 Court fees

1.5.1 In order to take legal action, does a foreign plaintiff have to provide security and / or make a prepayment for court costs, and, if so, how is the amount calculated?

The BVI court system sits within the jurisdiction of the Eastern Caribbean Supreme Court for the operation of the Eastern Caribbean States (Antigua and Barbuda, the Commonwealth of Dominica, Grenada, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines and three British Overseas Territories (Anguilla, the BVI and Montserrat)).

The Supreme Court, commonly referred to as the High Court, deals with commercial disputes and insolvency cases, and is a court of unlimited jurisdiction. The Commercial Division of the High Court is commonly known as the Commercial Court.

[3] See: http://www.bviiac.org/Dispute-Resolution-Services.

The minimum value of a claim to be brought in the Commercial Court is USD500,000. This therefore creates a barrier for claimants whose claims are smaller than this. However, as mentioned above, the types of claims that arise in relation to BVI entities and associated disputes are often substantial, and therefore this threshold is often exceeded.

Security for costs is an issue that is determined on the specific facts of each case, and there is no standard approach. It can be said that the BVI court will take the stance that the starting point is that no security for costs would be requested. However, turning on the facts of each case, the court does have discretion to award security for costs against a claimant, even one who is ordinarily resident outside of the BVI.

1.5.2 What are the legal provisions for court fees in civil proceedings?

Court fees are paid to the Accountant General on the filing of claims. The costs vary depending on the court in which the matter is filed and what type of claim is being instigated. Court fees change fairly regularly, and it is always best to check with a local lawyer when assessing the costs of possible action in the BVI.

1.6 Refund of legal costs and expenses

1.6.1 Is the winner of a court proceeding entitled to reimbursement for the legal costs and expenses?

The general principle is that, yes, the court must order the unsuccessful party to pay the costs of the successful party, and the court has some discretion to take into consideration the conduct of the parties in the proceedings, including the conduct of any pre-litigation matters.

There are guidelines in the Civil Procedural Rules for prescribed costs (excluding claims in
the Commercial Division), working to operate a cap for costs incurred relating to a fixed claim, i.e., if the claim is USD1 million, a costs recovery level of USD75,000 would be set.

1.7 Examples of legal costs and expenses

1.7.1 What would be the roughly estimated litigation costs and expenses – first instance including lawyer and court – for a (simple) claim in the amount equivalent to EUR5,000, EUR50,000 and EUR500,000?

The costs involved in commencing a claim in the BVI courts mean that the threshold is fairly high. It would not be economically viable, or even possible in the context of the Commercial Court, to commence a claim less than USD500,000.

The costs would also vary significantly, in the event that the action was defended for example. Legal costs between firms also vary, and it is therefore recommended to seek specialist BVI advice at an early stage so the costs can be accurately estimated.

1.8 Average duration of litigation

The substance of the proceedings, the approach by the parties and scheduling of the hearings by the registrar will all impact the possible duration. It is therefore very difficult to estimate.

SCENARIO 2: ENFORCEMENT ORDER (JUDGMENT) EXISTS AND NEEDS TO BE ENFORCED ABROAD

2.1 Recognition proceeding and costs

2.1.1 What is the proceeding and what are the roughly estimated costs – including lawyer and court – for the recognition of the foreign enforcement order for a claim in the amount equivalent to EUR5,000, EUR50,000 and EUR500,000?

See section 1.7 above.

2.2 Obtaining information about the debtor

2.2.1 Are there any sources of information about whether a debtor of a claim is without means or subject to an insolvency proceeding?

See section *1.1.1* above regarding Norwich Pharmacal.

2.3 Enforcement measures

2.3.1 What main enforcement measures are available and what are the costs – including lawyer and enforcement authority – for enforcing a claim in the amount equivalent to EUR5,000, EUR50,000 and EUR500,000?

See section 1.7 above.

2.4 Alternatives to lawyers

2.4.1 Are there specialised debt collection agencies (or equivalent) which buy claims or work more cost-effectively than lawyers?

There are debt collectors who operate on the islands, but this is an informal profession and is not a regulated service or industry. Certain operators offer no-win-no-fee options, which would assist the recovery efforts of an overseas IP, but rates and costs are variable.

There is no association of debt collectors in the BVI as one would expect to see in onshore jurisdictions that have arisen as a result of the prevalence of consumer finance, more sophisticated trade finance and, generally, the high numbers of operational businesses that work on credit terms.

In reference to the explanation about how BVI entities are often structured, and due to the reasons set out above, the benefit of on-island debt collectors is limited, as the traditional methods of pressuring payment and arresting physical assets, coupled with threats of legal action, do not have the same impact.

2.5 Insolvency proceeding

2.5.1 What costs are involved – including lawyer and court – for commencing and participating in insolvency proceedings against the debtor of a claim in the amount equivalent to EUR5,000, EUR50,000 and EUR500,000, if the debtor is not able to pay?

See section 1.7 above.

3. Economical conclusion

3.1 Taking into account the costs and expenses for a foreign IP, what is the minimum claim amount at which it makes sense to start litigation or enforcement?

The BVI is open to practical solutions that the IP may come up with in an effort to pursue assets for the benefit of the estate creditors. The objective is to maximise returns for those stakeholders who have lost out as a result of the insolvency and access to justice is an overriding principle in the BVI as it is in most other developed jurisdictions.

Having said that, however, the level of claim is a critical consideration before an IP should think about coming to the jurisdiction. It may not be practically possible or sensible to consider taking action in respect of claims below USD500,000. Particularly if the costs of enforcing any judgment obtained need to be borne on top of the legal costs already incurred, and especially if the debtor's assets are located outside of the BVI.

CAYMAN ISLANDS

This country report is written based on a situation where an insolvency estate includes a (potential) claim against a (third party) debtor who is domiciled abroad. The court-appointed insolvency practitioner (IP) has to assess the costs for pursuing the claim to decide whether it is affordable and economically reasonable to try recovery abroad. Two scenarios are considered. In scenario 1 the claim has not yet been subject to a court proceeding; in scenario 2 an executory title already exists and would have to be enforced abroad.

SCENARIO 1: CLAIM HAS NOT YET BEEN SUBJECT TO COURT PROCEEDINGS

1.1 Recognition proceeding and costs

1.1.1 What is the proceeding and what are the estimated costs for the recognition of the foreign insolvency proceeding and the IP's power to pursue a claim?

Whilst the Cayman Islands have not adopted the United Nations Commission on International Trade Law Model Law and are not signatories to any international treaties regarding insolvency, the Cayman Islands have a well-developed statutory regime and body of common law establishing the commitment of the Cayman Islands and its judiciary to international co-operation in respect of insolvency proceedings. The primary statutory framework for international co-operation and recognition of foreign bankruptcy proceedings (referred to as bankruptcy proceedings in the legislation but which will be referred to below as insolvency proceedings) is the Companies Act (as amended) (Companies Act), part XVII – International Co-operation.

Given the nature of business that flows through the Cayman Islands, the Grand Court of the Cayman Islands (Grand Court) is often asked to recognise and provide assistance to foreign insolvency proceedings and foreign representatives (i.e., trustee, liquidator or officials appointed in respect of a debtor for the purposes of a foreign insolvency proceeding) which includes foreign restructuring, reorganising and rehabilitation proceedings.

Section 241 of the Companies Act permits the Grand Court to grant recognition and potentially ancillary relief to appointed foreign representatives in the course of insolvency proceedings, including recognising the right of a foreign representative to act in the Cayman Islands on behalf of or in the name of a debtor (which could be for the purpose of commencing litigation against a Cayman Islands-based company or individual). Section 240 of the Companies Act defines a debtor as "a foreign corporation or other foreign legal entity subject to a foreign bankruptcy proceeding in the country in which it is incorporated or established". The Grand Court can also make ancillary orders for the purpose of:

- enjoining the commencement or staying the continuation of legal proceedings against a debtor;
- staying enforcement of any judgment against a debtor;
- requiring a person in possession of information relating to the business or affairs of a debtor to be examined by and produce documents to its foreign representative; and

- ordering the turnover to a foreign representative of any property belonging to a debtor.

Should the recognition of the foreign insolvency professional not fall within the statutory recognition mechanism of part XVII of the Companies Act, recognition can be sought pursuant to common law principles (for example, in the case of recognition of foreign court-appointed receivers).

Over the past few years, the Cayman judiciary has reaffirmed the commitment to international co-operation by adopting the use of the Judicial Insolvency Network (JIN) Guidelines for Co-operation in Cross-Border Insolvency Matters and the American Law Institute / International Insolvency Institute Guidelines via implementation of Practice Direction No 1 of 2018; as well as adopting the JIN Modalities for Court-to-court Communications via the implementation of Practice Direction No 2 of 2019.

The Foreign Bankruptcy Proceedings (International Co-operation) Rules 2018 (FBPR 2018) provide procedures which allow a foreign representative to seek assistance from the Grand Court (Financial Services Division) (FSD) in order to be recognised. The FBPR 2018 applies to every application made or notice filed pursuant to part XVII of the Companies Act. The Grand Court Rules (GCR) generally apply, save for where they are inconsistent with the Companies Act. However, the FBPR 2018 specifically exclude the application of GCR Order 102, rule16, which relates to service out of jurisdiction without leave of the court.

Ultimately, the IP's power to pursue a claim will be set out in the IP's foreign appointment order. The Grand Court has routinely recognised a foreign IP's power to conduct legal proceedings on behalf of a debtor subject to foreign insolvency / receivership proceedings.

The estimated costs involved in the recognition of a foreign insolvency proceeding varies depending on the law firm used, the complexity of the proceedings and whether the recognition proceedings are opposed.

Costs of the recognition proceedings are generally costs within the foreign insolvency proceeding, save for certain circumstances including where recognition is opposed by another party – in which case the increased costs associated with the opposition of the recognition may be ordered to be payable by the party opposing the recognition.

1.2 Financing

1.2.1 Does the Cayman Islands allow or provide for the following?

- ***Contingency fee agreements***

  Litigation has typically been funded by the parties to the action itself or their companies.

  Until recently the Cayman Islands were governed by the doctrines of maintenance and champerty which prevented contingency fee agreements in litigated cases as they were illegal (contrary to Cayman Islands public policy – therefore void and unenforceable). The Grand Court could approve

contingency fee agreements in situations where a company was in official liquidation and the official liquidators sought the sanction of the Grand Court to retain foreign legal counsel to engage in litigation in a foreign court provided that:

1. the contract was governed by Cayman Islands law; and

2. the contract would be performed wholly in a foreign country where its performance would be lawful and where the applicable local laws and rules of professional conduct permit the use of contingency fee agreements.[1]

The Grand Court also approved (in appropriate circumstances) conditional fee agreements whereby the Cayman law firm / attorney charges hourly rates (either at a discount or at their regular rate) that are subject to an uplift if successful or a decrease if not successful. The Grand Court has found that third-party litigation funding in fact plays a crucial role in promoting access to justice and permission is more common in specific circumstances. Justice Segal, sitting in the FSD in the unreported case of *A Company and A Funder* in November 2017, provided guidance in relation to what constitutes lawful funding agreements (discussed in further detail below). In September 2019, the Cayman Islands Law Reform Commission explored litigation funding and possible amendments to a draft Bill that was introduced in 2015, entitled the Private Funding of Litigation Bill 2015. In late 2020, the Cayman Islands Parliament considered a revised version of the Bill, then entitled the Private Funding of Legal Services Bill 2020.

The Private Funding of Legal Services Act, 2020 (the Act) came into force on 1 May 2021, abolishing the archaic doctrines of champerty and maintenance and introducing a statutory framework for contingency fee agreements and litigation funding agreements in the Cayman Islands. The Act encompasses both conditional and contingency fee structures but defines both as 'contingency fee agreements' (CFAs). CFAs can be used in a wide range of matters, except for where an attorney is retained for proceedings under the Penal Code (2019 Revision), as amended, any other criminal or quasi-criminal proceeding, or where legal services are provided relating to the care of a child or any order under the Children Act (2012 Revision), as amended.

- ***Is legal aid for litigation available for a foreign IP?***

  No, there is no availability in an insolvency context. Legal aid is generally reserved for civil, criminal and some family matters.

- ***Are litigation financing and / or insurance for litigation costs provided and, if so, starting at which amount?***

  Despite the illegality of third-party litigation funding, litigation financing was permitted in official liquidations pre-1 May 2021 due to a special statutory exemption. In two fairly recent cases – (1) *A Company v A Funder*[2] and (2) *The Trustee v The Funder*[3] –the Grand Court was asked to and, in fact, did make declarations that the litigation funding agreements in relation to litigation

[1] *Re ICP Strategic Credit Income Fund Ltd* [2014] 1 CILR 314.
[2] *A Company v A Funder*, FSD 68 of 2017 (unreported, 23 November 2017).
[3] *The Trustee v The Funder*, FSD 98 of 2018 (unreported, 26 July 2018).

outside of the liquidation context did not constitute or involve maintenance or champerty. This position has now been given a statutory footing, following the introduction of the Act on 1 May 2021.

Within official liquidation proceedings, official liquidators can seek court sanction to approve litigation funding for the purposes of conducting the liquidation which can include suing (countersuing) and defending lawsuits involving third parties. Litigation financing within the official liquidation setting was permissible because official liquidators are provided with statutory authority to sell a company's property and to raise or borrow money. This statutory authority can only be exercised by an official liquidator once the court sanctions the official liquidator to enter into the litigation funding agreement.

In addition to the ordinary criteria which the Grand Court considers in a typical sanction application within an official liquidation, the court will likely continue to scrutinise the terms of the litigation funding agreement to ensure that the litigation funder is not provided with any right to interfere in the conduct of the litigation or indirectly place the litigation funder in the practical position to exert undue influence or control over the litigation; and to ensure that the funding agreement is in the commercial best interests of the company (which generally requires the official liquidator to consider funding proposals from stakeholders of the company in liquidation and from other third-party funders).

Litigants are permitted to obtain after-the-event insurance for litigation costs; however, this is not a common source of funding.

The minimum claim amount at which litigation funding becomes available is generally at the business discretion of the litigation funder. Given the costs and risks associated with litigation, it is unlikely for a litigation funder to provide financing in the Cayman Islands on claims less than EUR50,000. The largest litigation funders typically use the criteria that the anticipated judgment / award amount should be 10 times the amount of the funding to be provided.

1.3 Obtaining an enforcement order

1.3.1 Besides commencing regular civil proceedings, are there easier and cheaper ways to obtain an enforcement order?

In order to proceed with enforcement in the Cayman Islands, the party has to either commence proceedings and, once judgment is obtained, is permitted to enforce; or, if the party has a foreign judgment, the procedure will involve applying for recognition of that foreign judgment before the party can seek to enforce. There are no other alternatives in the Cayman Islands.

1.4 Lawyers' fees

1.4.1 What are the legal provisions for lawyers' fees, and are there compulsory statutory fees for some or all activities?

Lawyers' fees are governed by the contractual relationship as between the attorney and client and are not subject to any compulsory statutory rates, nor are they limited by any law or regulations.

Membership in the Cayman Islands Legal Practitioners Association (CILPA) requires applying members to agree that they will abide by the Code of Conduct for Cayman Islands Attorneys-At-Law (Code of Conduct). It is important to note, however, that admission as a practising attorney-at-law in the Cayman Islands does not require membership in the CILPA. Attorneys who are not members of CILPA are not automatically bound by the Code of Conduct.

Rule 1.10 of the Code of Conduct stipulates that attorneys should have regard to the provisions of the International Principles on Conduct for the Legal Profession (International Principles) promoted by the International Bar Association (IBA) and act in the spirt in which it calls upon all lawyers to act, except in cases where provisions conflict with the Code of Conduct, in which case the Code of Conflict provisions will prevail.

Rule 3.01 of the Code of Conduct stipulates that: "Any attorney may charge a client for his services no more than that charged on a prior agreed basis, or which otherwise is fair and reasonable for the work done, having regard to the interests of both client and practitioner", taking into account all relevant factors including:

(a) the skill, specialised knowledge, and responsibility required;

(b) the importance of the matter to the client and the results achieved;

(c) the urgency and circumstances in which the business is transacted;

(d) the value or amount of any property or money involved

(e) the complexity of the matter and the difficulty or novelty of the questions involved

(f) the number and importance of the documents prepared or perused

(g) the time and labour expended; and

(h) the reasonable costs of running a practice.

The general principle set out in the IBA's International Principles is that: "Lawyers are entitled to a reasonable fee for their work and shall not charge an unreasonable fee. A lawyer shall not generate unnecessary work."

1.5 Court fees

1.5.1 In order to take legal action, does a foreign plaintiff have to provide security and / or make a prepayment for court costs and, if so, how is the amount calculated?

Prior to the FBPR 2018 there had been some uncertainty regarding security for costs when making an application for recognition under section 241 of the Companies Act. The FBPR 2018 specifically provide that there will be no order for security for costs made against a foreign representative on any application pursuant to section 241.

Notwithstanding the aforementioned circumstance, the Grand Court has the inherent jurisdiction to make an order for security for costs upon an application by a defendant pursuant to GCR O.23. A foreign registered company will likely find that security for costs may be required in order to take legal action in the Cayman Islands outside of the recognition context. Section 74 of the Companies Act gives a statutory basis to order an impecunious company to provide security for costs where that company is a plaintiff in any action, suit or other legal proceedings. However, section 74 does not apply to foreign-registered companies.

Any amounts required to be paid for security are generally confined to the amount of money it will cost to enforce a costs award in the foreign plaintiff's home jurisdiction. However, there are circumstances where the court might order security for the entirety of the recoverable costs in circumstances where there is a real risk that enforcement of the costs award in the foreign jurisdiction might fail.

1.5.2 What are the legal provisions for court fees in civil proceedings?

In Cayman, the Court Fees Rules 2009 (as revised) (CFR 2009) generally set out the details relating to court fees in civil proceeding and in the FSD, the latter being the normal forum in Cayman for insolvency-related proceedings.
In summary, for the FSD the fees are as follows:

1. Originating process	Cayman Islands dollars (KYD)
Upon issuing any originating summons governed by GCR Order 102, rule 2	KYD5,000
Upon issuing any originating notice of motion or petition governed by GCR Order 102, rules 3 or 4	KYD5,000
Upon issuing any originating application governed by GCR Order 102, rule 17	KYD200
Upon issuing an originating application governed by GCR Order 85, rule 8	KYD200
Upon issuing every other writ, petition, originating summons or originating notice of motion	KYD5,000
2. Appeals	
Upon issuing every written application for leave to appeal	KYD5,000
Upon issuing every notice of appeal	KYD10,000 (plus a nominal fee of KYD50 as security for costs of the appeal, subject to a court order for further security)

The fees in part 1 of the table are payable by the party seeking to issue an originating process and in part 2 by the party seeking to commence an appeal against a judgment or order made in connection with the FSD of the Grand Court. There are some limited situations where some further court fees may become applicable. For example, where a hearing or series of hearings in the FSD last more than three days, the parties shall be liable to pay a court hearing fee of KYD750 for each additional day or part thereof. There are also limited circumstances where fees are permitted to be deferred, and, where there is

multiplicity of applications, a judge may permit them to be treated as consolidated so only one set of fees is payable. Further, there are "special hearings" in the FSD that attract a fee of KYD2,500 per day or part thereof.

1.6 Refund of legal costs and expenses

1.6.1 Is the winner of a court proceeding entitled to reimbursement for the legal costs and expenses?

Section 24 of the Judicature Act (2017 Revision) provides that the costs of and incidental to all civil proceedings in the Court of Appeal and the Grand Court shall be in the discretion of the relevant court. The general overriding rule for the recovery of costs in the Cayman Islands is that the court shall order costs to follow the event – and that the successful party should recover their reasonable costs from the opposing party (GCR O.62, rule 4). With that said, the court has broad discretion to make an order as to costs or make no order for costs.
For the purposes of this paper, we will focus solely on costs awarded in respect of proceedings in which the GCR apply (i.e., proceedings before the Grand Court / Court of Appeal, and not the Summary Court). The amount of costs a successful party may recover from another party can be determined as follows:

(1) the fixed costs prescribed by GCR O.62, rule 7 (i.e., the sum of KYD50 where the principal liquidated claim does not exceed KYD2,000; the sum of KYD250 where the principal liquidated claim is between KYD2,001–10,000; the sum of KYD500 where the principal liquidated claim exceeds KYD10,000);

(2) the amount assessed by the judge per O.62, rule 8 (i.e., costs to be assessed by the judge shall not exceed KYD1,000 where the order relates to the costs of an interlocutory application and not exceed KYD10,000 where the order relates to the costs of an entire proceeding);

(3) the amount allowed after taxation on a standard basis (although the court has broad discretion, costs on a standard basis can typically fall within the 60%–75% range of the costs incurred by the successful party, but may be increased in certain enhanced circumstances); or

(4) the amount allowed after taxation on an indemnity basis (if the court is satisfied that the paying party conducted the proceedings improperly, unreasonably or negligently).

The Grand Court issued Practice Direction No 1/2011 on the Guidelines Relating to the Taxation of Costs which deals with maximum allowable hourly rates for a taxation on a standard basis with a distinction between proceedings in the Civil Division / Family Division and the FSD / Admiralty Division, as follows:

Civil Division / Family Division

- More than 20 years — Up to KYD443 or USD540
- Between 15 and 20 years — Up to KYD426 or USD520
- Between 10 and 15 years — Up to KYD361 or USD440
- Between 5 and 10 years — Up to KYD308 or USD375
- Fewer than 5 years — Up to KYD230 or USD280
- Articled clerks and paralegals — Up to KYD156 or USD190

FSD / Admiralty Division

- More than 20 years — Up to KYD738 or USD900
- Between 15 and 20 years — Up to KYD705 or USD860
- Between 10 and 15 years — Up to KYD599 or USD730
- Between 5 and 10 years — Up to KYD513 or USD625
- Fewer than 5 years — Up to KYD377 or USD460
- Articled clerks and paralegals — Up to KYD262 or USD320

The court has jurisdiction to order a party to pay, *inter alia*, costs incurred before proceedings have begun, a proportion of another party's costs, interest on costs, costs from or until a certain date only, and costs relating to particular steps within a proceeding. In instances where there is split success amongst the parties, the court may make no order as to costs, and each party will have to bear their own costs.

1.7 Examples of legal costs and expenses

1.7.1 What would be the roughly estimated litigation costs and expenses – first instance including lawyer and court – for a (simple) claim in the amount equivalent to EUR5,000, EUR50,000 and EUR500,000?

Firstly, the general rule dictates that any civil claim commenced that is under KYD20,000 (approximately converts to EUR20,300) must be commenced in the Summary Court, and any claim over KYD20,000 must be commenced in the Grand Court.

The CFR 2009, as referred to above, sets out the court fees requirements for the Grand Court or any appeal court. The Summary Court does not fall under the auspices of the CFR 2009. The general reasoning being that this lower court is essentially designed to deal with simpler, smaller claims. The Summary Court, by restricting the amount of costs which can be recovered, discourages attorney involvement and promotes litigants to represent themselves.

	EUR5,000	EUR50,000	EUR500,000
Court fees and costs	*Summary Court* Filing plaint: KYD25 Fixed costs: KYD150 Costs are summarily assessed and cannot exceed KYD1,000 for a claim for this amount	*Grand Court* See table below (civil) CFR 2009, rule 4 (*ad valorem*) sets out instances when *ad valorem* is payable. Costs are generally taxed if not agreed	*Grand Court* See table below (civil) CFR 2009, rule 4 (*ad valorem*) sets out instances when *ad valorem* is payable Costs are generally taxed if not agreed

In the Grand Court, whether a claim is issued for EUR50,000 or EUR500,000, in the Civil Division the court fees are as follows:

1. Originating process Upon issuing every writ, petition, originating summons or originating notice of motion	KYD200
2. Appeals: Upon issuing every written application for leave to appeal Upon issuing every notice of appeal or any notice of motion in a pending appeal	KYD200 KYD200
3. Interlocutory process Upon issuing every summons or notice of motion	KYD100
4. Pleadings Upon filing every statement of claim, defence, counterclaim, reply or other pleading	KYD200
5. Affidavits Upon filing every affidavit	KYD25
6. Order Upon filing every judgment or order	KYD25

In relation to attorney fees, reference is made back to the Grand Court Rules cited in section *1.6.1* which apply in the Grand Court and above. Whilst these recoverable amounts of fees charged by attorneys vary considerably and whilst some attorneys charge more than the amounts set out in Practice Direction No 1/2011, not all may be recoverable from the other losing party: they may still be required to be paid by a client to their attorney, depending on the details of any terms of engagement or retainer.

There are also costs related to service of court orders which must be personally served. The range of these fees vary but are between KYD100–200 per service. It is of importance to note that the Summary Court Rules 2004 (SCR 2004) do not provide for costs to be taxed if not agreed. According to the SCR 2004, costs are generally summarily assessed, where not fixed, and are very restrictive in terms of what is permitted to be recovered. In general, the most a party can recover is KYD2,000.

Further, as with most litigation, if the proceedings are not defended and default judgment is obtained, then the costs are much lower. Should the proceedings be defended, then naturally legal fees and other expenses will increase.

1.8 Average duration of litigation

Usually, the duration of any litigation is dependent on many variables and can be anywhere from a few months, if the matter is not defended, to many years. It very much depends on the amounts involved and the complexities and subject matter, as well as any multi-jurisdictional elements.

SCENARIO 2: ENFORCEMENT ORDER (JUDGMENT) EXISTS AND NEEDS TO BE ENFORCED ABROAD

2.1 Recognition proceeding and costs

2.1.1 What is the proceeding and what are the roughly estimated costs – including lawyer and court – for the recognition of the foreign enforcement order for a claim in the amount equivalent to EUR5,000, EUR50,000 and EUR500,000?

The Cayman Islands enacted the Foreign Judgments Reciprocal Enforcement Act (1996 Revision) (FJRE) as the legislative framework for enforcing foreign judgments. However, at present, the Cayman Islands have only extended this reciprocity to Australia and its external territories. Under this regime, an application would be made pursuant to section 4 of the FJRE to register the foreign judgment, which is essentially a simplified enforcement procedure. A foreign judgment can be enforced under the FJRE if:

- it is final and conclusive;
- the judgment is for the payment of a sum of money;
- registration is sought within the six-year limitation period;
- the foreign judgment was given after the FJRE came into effect;
- the foreign judgment has not been satisfied; and
- the foreign judgment remains enforceable in the country where it was originally issued.

Should the registration go unchallenged and is confirmed, the registered judgment is treated as if it were a domestic judgment for enforcement purposes. The FJRE provides a mechanism for setting aside the registration of foreign judgments on grounds including but not limited to the following:

- the court issuing the original judgment had no jurisdiction;
- the judgment debtor did not receive notice of the original proceedings in sufficient time to defend the proceedings and did not appear;
- the judgment was obtained by fraud; and
- the enforcement of the judgment would be contrary to public policy in the Cayman Islands.

In all other cases, Cayman has a well-developed common law regime for the enforcement of foreign judgments. A foreign money judgment is enforceable in the Cayman Islands if the judgment is:

- made by a court of competent jurisdiction;
- for a debt or definite sum of money;

- final and conclusive; and
- not impeachable based on fraud or contrary to public policy or principles of natural justice.

Foreign non-money judgments are enforceable by way of equitable remedies in the Cayman Islands if the judgment:

- is final and conclusive;
- the principles of comity require the enforcement; and
- the integrity of the Cayman judicial system is not jeopardised.

Under the common law, fresh proceedings must be issued with the foundation of that action essentially founded on the foreign judgment. The matter must be issued and served on the defendant in the normal way (a further application may be necessary if the defendant resides outside the Cayman Islands). Once the defendant has been served and relevant timeframes have elapsed for a response, then an application can be made for a default judgment or, if an acknowledgment is filed by the defendant, then the plaintiff can make an application for summary judgment. The court will not usually hear any arguments made in relation to the dispute in these types of matters. Once judgment has been obtained in respect of the foreign judgment, the plaintiff can pursue enforcement action (see section 2.3 for enforcement measures).

Based on the relevant legislation and public policy grounds, the Grand Court will not enforce foreign judgments which relate to fines, penalties and taxes or other charges of a like nature. Subject to certain conditions, the Grand Court will not recognise or enforce a foreign judgment purporting to find that Cayman Islands-governed trusts or dispositions of property by trusts thereof are void, voidable or liable to be set aside.[4]

Foreign arbitral awards were originally able to be recognised in the Cayman Islands in accordance with the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention) for signatory jurisdictions. Operation of the New York Convention was extended to the Cayman Islands by the UK Government with effect from 24 February 1981. Section 72(5) of the Arbitration Act (2012 Revision) permits foreign arbitral awards (for both convention and non-convention jurisdictions) to be enforced in the Cayman Islands subject to sections 6 and 7 of the Foreign Arbitral Awards Enforcement Act (1997 Revision) (FAAE).

The procedure to enforce foreign arbitral awards involves the filing of an initial *ex parte* originating summons to seek leave from the court to enforce an award, together with an affidavit exhibiting the arbitration agreement and foreign arbitral award. The foreign arbitral award and / or agreement, if in a foreign language, must be translated to English and certified by an official or sworn translator or by a diplomatic or consular agent. The order granting leave must then be served on the respondent who has 14 days (or as directed by the court if served outside of the Cayman Islands) following service of the order to apply to set aside the order.

[4] Trusts Act (2020 Revision), sections 90–93.

Section 7 of the FAAE stipulates that the enforcement of a foreign convention award (which also includes non-convention awards as per section 72(5) of the Arbitration Act (2012 Revision)) shall not be refused unless:

- a party to the arbitration agreement was (under the law applicable to him or her) under some incapacity;
- the arbitration agreement was not valid under the law to which the parties subjected it or, failing any indication thereon, under the law of the country where the award was made;
- the respondent was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his or her case;
- 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 beyond the scope of the submission to arbitration;
- the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, with the law of the country where the arbitration took place;
- 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, it was made; or
- the award relates to a matter which is not capable of settlement by arbitration, or if it would be contrary to public policy to enforce the award.

Once leave is granted – and the order granting leave is not set aside – a party can proceed to enforce the foreign arbitral award as if it were an original judgment granted by the Grand Court (see section 2.3 for enforcement measures).

Any action for the enforcement of a foreign judgment or foreign arbitral award must be commenced in the FSD (GCR O.72, rule1). The relevant court fees are set out in section *1.5.2* (i.e., a filing fee of KYD5,000).

Parties that are successful in seeking to enforce foreign judgments and arbitral awards are generally entitled to their reasonable costs of and occasioned by / incidental to the registration and enforcement of the foreign judgments and arbitral awards, including associated legal fees, court fees and disbursements (see sections *1.5.2* and 1.6).

The process for the enforcement of foreign judgments and arbitral awards involving claims equivalent to EUR5,000, EUR50,000 and EUR500,000 is the same. The legal fees associated with the enforcement procedures are difficult to predict and vary depending upon the complexity of the issues and the degree of opposition, if any. It is highly likely that a claim equivalent to EUR5,000 would not be a financially viable option given the procedures required and associated costs, regardless of whether the enforcement is opposed. However, it may be worthwhile to pursue a claim for EUR25,000–50,000 in the circumstances where there are identifiable / viable recourses for enforcement (i.e., valuable assets or substantial

income for attachment / garnishment) and if it is unlikely that the claim would be contested.

2.2 Obtaining information about the debtor

2.2.1 Are there any sources of information about whether a debtor of a claim is without means or subject to an insolvency proceeding?

There are no large private credit reporting agencies as there are in other jurisdictions such as Canada or the United States, and there is no public bankruptcy registry that could help with assessing whether a debtor of a claim is without means and subject to an insolvency proceeding. However, the Cayman Islands Judicial Administration provides limited free public access to search the Register for Originating Processes (which includes bankruptcy petitions and other insolvency proceedings such as liquidations and restructurings) and for unreported judgments.[5] A user can pay a subscription fee for more complete access to obtain reported judgments and the ability to access / download complete copies of originating documents and unreported judgments.

There are also a number of other useful registries to search for property ownership and company information, including the following.

- *Cayman Islands Land Registry*:[6] the Land Registry is open for public inspection for a fee and can be accessed online by registered users. Publicly available information includes current and historical land / lease registers, executed instruments (i.e., deeds, charges), powers of attorneys and so on. This information can be used to determine ownership and conveyances of real property.

- *Department of Vehicle Registry*:[7] this is open for public inspection for a fee. A request can be made to the Department of Vehicles for a "system search" to determine vehicle ownership.

- *Cayman Islands Shipping Registry*:[8] all information held on the Cayman Islands Shipping Register is open for public inspection for a fee. Records may be inspected in person and are also available for purchase in the form of a Transcript of British Registry.

- *Cayman Islands Aircraft Registry*:[9] an active aircraft register is available online for public inspection and includes information on the name of the registered owner, date of registration, serial number, model and manufacturer.

- *Companies Register*:[10] this is open for public inspection for a fee and the information available is limited to general information about the company, including name, formation date, company type, place of incorporation, registered agent and address. The Companies Register can also be used to

[5] See: https://judicial.ky/court_search/.
[6] See: https://www.caymanlandinfo.ky/.
[7] See: http://www.dvdl.gov.ky/.
[8] See: https://www.cishipping.com.
[9] See: https://www.caacayman.com/aircraft-registry.
[10] See: https://www.ciregistry.ky/companies-register.

determine whether a company still exists or if it has been struck and to search the names of a company's directors. Certain companies are required to keep a register of beneficial ownership that is not publicly available.

- *Cayman Islands Monetary Authority*:[11] limited information is available for public access on certain companies registered with this authority.

Assets located within these various registries may be registered in the name of a company or other entity, which may require a court application to determine the ultimate beneficial owner.

Once a judgment is obtained / properly enforceable within the Cayman Islands, the party can proceed with a judgment debtor examination which is an in-court process where the judgment creditor and court can compel a judgment debtor to provide information / documentation as to their assets and ability to satisfy a judgment. The judgment creditor and court can ask questions while the judgment debtor is under oath.

2.3 Enforcement measures

2.3.1 What main enforcement measures are available and what are the costs – including lawyer and enforcement authority – for enforcing a claim in the amount equivalent to EUR5,000, EUR50,000 and EUR500,000?

A whole range of domestic enforcement procedures are available, as follows:

- attachment of earnings (usually applies to working individuals);
- charging order (charging / securing e.g., shares or other company assets);
- stop notice (to temporarily prevent dissipation of assets);
- garnishee order (judgment debtor owed monies from a third party – court can compel the third party to pay the creditor directly);
- writ of *fieri facias* (fi fa) (using fi fa the Court Bailiff can seize / sell assets / goods).
- bankruptcy / winding-up petition (bankruptcy petition against an individual / winding-up petition against a company);
- receivership by equitable execution (application to appoint a receiver of a debtor through equitable execution); and
- committal proceedings (contempt of court).

Enforcement action costs and court fees vary depending on the enforcement procedure used. Attorneys' costs will vary quite a lot depending on the firm used. The more expensive enforcement actions usually stem from utilising winding-up petitions and receivership by equitable execution. The extent of any opposition to

[11] See: https://www.cima.ky/search-entities-cima.
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enforcement will also be a factor. A judgment creditor is generally entitled to a costs award in relation to their enforcement measures and / or pays for the costs of enforcement out of the proceeds obtained as a result of the enforcement.

Some enforcement measures may require the involvement of the court bailiff. The CFR 2009 lists the various fees charged / levied by the court bailiff as:

Sale of levies: For the sale of levies including advertisements, catalogues and commission, and delivery of goods	10% of the net proceeds of sale
Sale by bailiff in cases other than levies: In cases other than levies, where the bailiff, by order of the court, acts as auctioneer to conduct any sale of property, real or personal, ordered by the court to be sold, including advertisements, catalogues and commission	5% on the first KYD1,000 net proceeds 3% on any sum in excess of KYD1,000
Receipt by bailiff of money instead of levy: Upon receipt of money instead of levy	5% of money received

2.4 Alternatives to lawyers

2.4.1 Do you have specialised debt collection agencies (or equivalent) which buy claims or work more cost-effectively than lawyers?

There may be smaller debt collection agencies operating from time to time in the Cayman Islands. However, unlike in North America and Europe, there are no specialised debt collection agencies (or equivalent) which buy claims or work more cost-effectively than lawyers.

2.5 Insolvency proceedings

2.5.1 What costs are involved – including lawyer and court – for commencing and participating in insolvency proceedings against the debtor of a claim in the amount equivalent to EUR5,000, EUR50,000 and EUR500,000, if the debtor is not able to pay?

We refer to sections 1.5 and 1.6 in respect of legal fees and court fees (filing fee of KYD5,000) associated with commencing and participating in insolvency proceedings against a debtor of a claim, which will generally be the same regardless of the amount of the debt (EUR5,000, EUR50,000 and EUR500,000). Again, the legal fees will vary depending on a number of factors, including the firm used, the complexity of the proceedings and the extent of opposition.

The Companies Winding Up Rules 2018 (CWR) O.24, rules 7 11, provide the general rules as regards the conduct of and participation in liquidation proceedings. The taxation of costs, if required, is governed by GCR O.62. The general rule is that the costs incurred by a party who successfully presents a creditor's (or contributory's) winding-up petition are to be paid out of the assets of the debtor company subject to the winding-up petition, to be taxed on an indemnity basis unless agreed with the official liquidator. The court is required to make costs orders in accordance with the general rules set out in the CWR unless the court is satisfied that there are exceptional / special circumstances justifying some other order or no order as to costs.

CWR O.24, rule 9, deals with the costs associated with sanction applications within liquidation proceedings, with the general rule being that a creditor who is successful in making or opposing a sanction application is entitled to their costs to be taxed on an indemnity basis and payable out of the assets of the debtor company. A creditor will generally not be subject to a costs award if they are unsuccessful in presenting a winding-up petition or in making / opposing a sanction application unless the court finds that the creditor acted unreasonably.

3. Economical conclusion

3.1 Taking into account the costs and expenses for a foreign IP, what is the minimum claim amount at which it makes sense to start litigation or enforcement?

As noted above, it is difficult to predict the costs associated with commencing litigation or enforcement proceedings within the Cayman Islands. Given the degree of variability and risks, it may not be economically feasible for a foreign IP to pursue claims in the Cayman Islands for less than EUR25,000–50,000 unless there are identifiable / viable recourses for enforcement (i.e., valuable assets or substantial income for execution purposes) and if it is unlikely that the claim would be contested. With that said, each claim should be assessed on a case-by-case basis to determine the viability of the claim.

CROATIA

This country report is written based on a situation where an insolvency estate includes a (potential) claim against a (third party) debtor who is domiciled abroad. The court-appointed insolvency practitioner (IP) has to assess the costs of pursuing the claim in order to decide whether it is affordable and economically reasonable to try recovery abroad. Two scenarios are considered. In scenario 1, the claim has not yet been subject to a court proceeding; in scenario 2, an executory title already exists and would have to be enforced abroad.

SCENARIO 1: CLAIM HAS NOT YET BEEN SUBJECT TO COURT PROCEEDINGS

1.1 Recognition proceeding and costs

1.1.1 What is the proceeding and what are the estimated costs for the recognition of a foreign insolvency proceeding and the IP's power to pursue a claim?

- **Bankruptcy opened in EU member states**

  Since Croatia is a member of the European Union (EU), the effects of an insolvency proceeding opened in a member state of the EU will be automatically recognised in Croatia, namely in accordance with the European Insolvency Regulation (Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings) (hereinafter the EIR Recast), as will the position of the IP (in Croatia, insolvency administrator) as the person authorised to initiate the proceeding. In accordance with the EIR Recast, this applies to all EU member states except Denmark.

  In that sense, besides a certified and translated copy of the original decision appointing him or her or any other certificate issued by the court which has jurisdiction, there are no other requirements for the recognition of the position of an insolvency administrator or of the status of an insolvent debtor as a party in a proceeding in the Republic of Croatia.

  At this stage of the proceeding, the costs of a certified translation of the decision are the only costs there are.

  As a requirement for initiating a proceeding, it is sometimes necessary to register changes in public registers for the insolvent debtor, where additional costs are possible.

  The very issue of initiating a proceeding always entails the issue of knowledge of the law (i.e., of the legal system of the country where the proceeding is to take place) which usually entails additional costs pertaining to consultations with legal experts regarding the expected outcome and the costs of said proceeding.

- **Bankruptcy opened in non-EU member states**

  If an insolvency proceeding is opened in a country outside the EU, i.e. if does not fall under the provisions of the EIR Recast, in Croatia, the effects of opening foreign insolvency proceedings will be looked at through the provisions of the

Private International Law Act:[1] that is, it will be necessary to initiate the procedure of recognising that foreign decision.

The procedure shall take place in accordance with the provisions of the Croatian Insolvency Act, 2015 (amended 2017)[2] and it shall begin with the submission of a proposal to the court for the recognition of a foreign court decision. The proposal may be submitted by the insolvency administrator or the creditor of a foreign debtor. The proposal shall be accompanied by a foreign decision, its certified translation and a confirmation by the foreign body that the decision is enforceable.

1.2 Financing

1.2.1 Does your jurisdiction allow or provide for the following?

- ***Contingency fee agreements***

Pursuant to the Lawyers Act[3] and the Lawyers' Tariff (Tariff on Lawyers' Remuneration
and Fees),[4] a party may conclude a written remuneration agreement with their lawyer, with the remuneration depending on the outcome of the dispute. The highest contracted percentage in accordance with the aforementioned regulations may amount to 30% of the amount earned for the party.

The agreement itself will have no effect on the court's decision on the costs of the proceeding, which, in civil proceedings, will be covered by the unsuccessful party, either in full or in a proportional amount. The costs include the lawyer's fees, as well as other costs (court fees, advances for expert reports, etc.).

- ***Is legal aid for litigation available for a foreign IP?***

In Croatia, legal aid is provided by lawyers registered in the Register of Lawyers of the Croatian Bar Association.[5]

Natural persons of lower financial status shall have the right to free legal aid. That is assessed by local state administration offices based on a request of an applicant for such aid. In case said aid is approved, the applicant shall have the right to contact a lawyer of their choosing, who shall be paid by the Government in accordance with the Tariff on Lawyers' Remuneration and Fees, but in a reduced amount. The parties shall also have the option of contacting the Croatian Bar Association for free legal aid, in which case the lawyer closest to their place of residence shall be appointed upon receipt of a positively assessed request.

This type of government free legal aid is not available to legal entities.

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1 Full text available at: https://www.zakon.hr/z/947/Zakon-o-me%C4%91unarodnom-privatnom-pravu.
2 Full text available at: https://www.zakon.hr/z/160/Ste%C4%8Dajni-zakon.
3 Full text available at: https://www.zakon.hr/z/176/Zakon-o-odvjetni%C5%A1tvu.
4 Full text available at: http://www.hok-cba.hr/hr/vazeca-tarifa.
5 List available at: http://www.hok-cba.eu/imenik/.

In domestic cases, the financial situation of the debtor / insolvency estate is in fact irrelevant. If the IP is proposing legal action to be taken and there are no funds to cover the costs, the IP will ask creditors to make advanced payment for these costs. If such payments are not forthcoming, there will be no legal action.

Thus, as per free legal aid for litigation, there is no prospect for a foreign IP to apply for it.

- ***Is litigation financing and / or insurance for litigation costs available and, if so, starting at which amount?***

  There is no financing or insurance system for litigation costs in Croatia, nor is such practice common.

1.3 Obtaining an enforcement order

1.3.1 Besides commencing regular civil proceedings, are there easier and cheaper ways to obtain an enforcement order?

The initiation of the procedure for the collection of monetary claims by legal entities usually begins with a request for the issuance of an enforcement order based on an authentic document at a notary public's office (however, this does not exclude an action in court where applicable).

The procedure essentially consists of presenting authentic documents (an invoice, a delivery note, a certified excerpt from company accounts, etc.) to the notary public, who will then issue an enforcement order to the other party for comments. In other words, the other party will also have the opportunity to object. If the debtor does not lodge an objection, the order will become final and enforceable. Such a document is suitable for further collection procedures pertaining to monetary assets, namely through the state Financial Agency (known as FINA),[6] or to other assets of the debtor through court collection proceedings.

If an objection is lodged, the parties will be referred to a court proceeding.

It should be pointed out that amendments to the Enforcement Act[7] are underway. Said amendments should further facilitate this procedure as far as electronic submission of requests is concerned.

1.4 Lawyers' fees

1.4.1 What are the legal provisions for lawyers' fees and are there compulsory statutory fees for some or all activities?

Lawyers' representation fees in Croatia are regulated by the aforementioned Tariff on Lawyers' Remuneration and Fees.

[6] A public institution that, among other things, keeps records of all bank accounts and participates in out-of-court enforcement procedures over monetary assets (collection requests will be submitted to FINA), as well as in the sale of real estate during enforcement through electronic public auctions.

[7] Full text available at: https://www.zakon.hr/z/74/Ovr%C5%A1ni-zakon.

In civil and enforcement proceedings, it regulates the fees based on specific tasks pertaining to the proceedings (bringing an action or proposal, representation at a hearing etc.), depending on the amount constituting the subject matter of the dispute or the amount of the claim charged. Said amount is referred to as "VPS" – the value of the subject matter of the dispute.

In that sense, the table referred to in Tariff No 7 of the Tariff on Lawyers' Remuneration and Fees will be applied as the basic table for determining the amount of remuneration, with the fee for each specific task being determined in accordance with this table.

VPS, from (approx. EUR)	VPS, to (approx. EUR)	Points
0.00	330.00	25
330.01	660.00	50
660.01	1320.00	75
1320.01	13,210.00	100
13,210.01	33,025.00	250
33,025.01	66,050.00	500

If the value of the dispute amounts to between EUR66,000 and EUR660,000, in addition to the remuneration for 500 points, the lawyer will have the right to charge 1 point for every EUR130. If the value of the dispute amounts to between EUR660,000 and EUR1.32 million, for each EUR260, the lawyer will have the right to charge 1 point. If the value of the dispute exceeds EUR1.32 million, for every EUR660, the lawyer will have the right to charge 1 point, but not more than 10,000 points.

In certain proceedings (e.g., pertaining to family, employment, eviction), a maximum collective fee in the amount of 200 points will apply.

The fee will be calculated by multiplying the predicted number of points by the current value of a point. The value of 1 point currently amounts to EUR1.32 (HRK 10.00). The total amount will be increased by value-added tax (VAT) if the lawyer is a taxable person for the purposes of VAT.

For each court proceeding, the lawyers' tasks will be charged according to the above table – the rule stating that the cost of each task will be charged according to the above table can be applied as a guide (with certain corrections in some cases).

Examples of the expected / average number of required tasks in individual proceedings are:

- enforcement over monetary assets – two tasks if there is no objection by the debtor; if they file an objection, further court procedures will take place;
- enforcement over real estate – three to five tasks;

- civil proceedings for the purpose of collecting a claim – three to five tasks until the first instance judgment; appeal proceedings – two tasks (appeal / response to the appeal).

As mentioned earlier, it is possible to enter into a written agreement with a lawyer, specifically regarding the manner of calculating their fee, but that is not mandatory for the court when determining court fees.

The lawyer will also be entitled to reimbursement of material expenses (usually travel expenses).

1.5 Court fees

1.5.1 In order to take legal action, does a foreign plaintiff have to provide security and / or make a prepayment for court fees, and, if so, how is that amount calculated?

In accordance with the Private International Law Act,[8] the defendant may request the payment of security for legal costs from a plaintiff who does not have Croatian citizenship or the citizenship of an EU member state, i.e. if they are not exempt from paying costs based on an international agreement.

Security for legal costs will be determined by the court at the proposal of the defendant, taking into account the expected litigation costs.

1.5.2 What are the legal provisions for court fees in civil proceedings?

Court fees for civil proceedings will be determined in accordance with the Regulation on the Court Fees Tariff.[9]

For an action, counterclaim, objection against a payment order and objection against an enforcement order, the following fees will be paid based on the aforementioned value of the subject matter of the dispute, in accordance with the following table:

Amount from (EUR)	Amount to (approx. EUR)	Court fee (EUR)
0.00	400	15
400.01	790	27
790.01	1200	40
1200.01	1580	55
1580.01	2,000	66

For amounts exceeding EUR2,000, a fee in the amount of EUR66 plus another 1% for the difference above EUR2,000 will be paid, but not more than EUR660.

If court fees are paid through the electronic system when submitting a request, they will be further reduced.

[8] Full text available at: https://www.zakon.hr/z/947/Zakon-o-me%C4%91unarodnom-privatnom-pravu.
[9] Full text available at: https://narodne-novine.nn.hr/clanci/sluzbeni/2019_05_53_1015.html.

The fee will also be paid for court decisions according to the above table.

1.6 Refund of legal costs and expenses

1.6.1 Is the winner of a court proceeding entitled to reimbursement for legal costs and expenses?

In civil proceedings, the losing party shall reimburse the other party for litigation costs. The decision on the amount to be paid shall be adopted by the court. If a party has been partially successful in a dispute, their litigation costs shall be proportional to their success in the dispute.

In addition to said lawyers' fees and court fees, litigation costs may also include the fees of experts and the fee for court actions performed outside court premises, as well as the costs pertaining to witnesses and to the obtaining of documentation where necessary.

In non-contentious proceedings, the general rule is that each party will bear their own costs.

1.7 Examples of legal costs and expenses

1.7.1 What would be the roughly estimated litigation costs and expenses (first instance, including lawyers' and court fees) for a (simple) claim in the amount equivalent to EUR5,000, EUR50,000 and EUR500,000?

Civil proceedings, first instance	Claim amount (EUR)		
	5,000	50,000	500,000
Court fee	150	1,100	1,320
Lawyers' fees (claimant)	660	3,300	25,000
Lawyers' fees (defendant)	660	3,300	25,000
Total	1,470	7,400	51,320

1.8 Average duration of litigation

The duration of court proceedings in Croatia up to the stage of adoption of a final decision / judgment on the basis of which collection can take place leaves a lot of room for improvement.

The current situation is that for an average dispute (the term "average" here refers to most proceedings), we are talking about three to five years of proceedings until the final judgment (the decision of a higher court regarding a possible appeal) is reached in simpler proceedings, while further proceedings pertaining to the means of redress (which do not delay enforcement) can last for another three years.

Here we are referring to proceedings at municipal and commercial courts.

SCENARIO 2: ENFORCEMENT ORDER (JUDGMENT) EXISTS AND NEEDS TO BE ENFORCED ABROAD

2.1 Recognition proceeding and costs

2.1.1 What is the required proceeding and what are the roughly estimated costs – including lawyers' and court fees – for the recognition of a foreign enforcement order for a claim in the amount equivalent to EUR5,000, EUR50,000 and EUR500,000?

For recognition and enforcement of public documents of EU member states adopted in proceedings initiated between 2 July 2013 and 9 January 2015, the Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I Regulation) shall apply.

For public documents adopted in the proceedings initiated after 10 January 2015, the 2012 Brussels I Regulation Recast shall apply (Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters).

Accordingly, no separate costs for recognition are incurred in the target state, and there is no *exequatur* procedure.

For the recognition of a foreign court decision outside EU member states, it is necessary to initiate the procedure for the recognition of a foreign court decision. Representation costs and court fees will be based on the table below, and an additional fee in the amount of EUR15 will also be paid:

Expenses	Claim amount (EUR)		
	5,000	50,000	500,000
Court fee	150	660	660
Lawyers' fees (claimant)	150	825	6,360
Total	300	1,485	7,020

2.2 Obtaining information about the debtor

2.2.1 Are there any sources of information about whether a debtor of a claim is without means or is subject to an insolvency proceeding?

There are at least two methods available on the internet for verifying whether a debtor has the status of an insolvent legal entity. The first pertains to the consultation of the court register where there is a field in which the status of a legal entity as an insolvent debtor or a debtor in pre-insolvency proceedings is recorded.[10] It should be pointed out that the above entry is made with a certain time delay which varies depending on when the decision on the initiation of insolvency / pre-insolvency proceedings is delivered to the court register, as well as on the time required for entering it.

[10] See: http://sudreg.pravosudje.hr.

Another source of said information is the Insolvency Register, which is set up in accordance with the EIR Recast, and where said data should be available earlier.[11]

A third source of information about the debtor would be a search of the electronic bulletin board page by inserting the personal identification number (OIB) of the debtor, which will show the published decision on the initiation of insolvency proceedings (and this is where it will be available first).

In addition, there are commercial services that provide said information for a fee, either on request or upon subscription. Those services provide their customers with information on their debtor's status.

The data on assets kept by government services (regarding real estate, vehicles, vessels, shares / securities) can be obtained on request provided that the applicant proves that they have an interest regarding said data (a court decision ordering the debtor to pay).

It is still not possible to search the data on real estate ownership at the state level, but the search based on the debtor's personal data will be carried out on request at each individual municipal court competent to keep land registers. There is also a record of real estate in the land register, which contains data on real estate ownership, and it can be a good starting point for a search, given that said record is set up at the level of the entire country.

Also, there are commercial services that obtain data on financial indicators for a debtor / legal entity for a fee, based on published annual financial statements.

2.3 Enforcement measures

2.3.1 What main enforcement measures are available and what are the costs – including those pertaining to lawyers and enforcement authorities – for enforcing a claim in the amount equivalent to EUR5,000, EUR50,000 and EUR500,000?

The quickest way to collect a claim through enforcement (assuming the debtor has sufficient monetary assets) is an enforcement over monetary assets, which will take place out of court, at the state institution FINA. After receiving the request for collection, FINA will electronically submit an order to the banks, specifically for the seizure of funds as there is an existing debt. Thus, unless the debtor is successful in suspending the enforcement, the funds will be transferred to the creditor's account 60 days later.

The second most efficient means for the collection of a claim (apart from the duration of the proceeding, which is estimated at two to four years) is enforcement over real estate.

In this respect, there are:

- costs pertaining to out-of-court enforcement over monetary assets;

[11] See: https://nesolventnost.pravosudje.hr/registar.

Expenses	Claim amount (EUR)		
	5,000	50,000	500,000
Administrative fee, FINA	130	280	660
Lawyers' fees (claimant)	75	410	3150
Total	205	690	3,810

- approximate cost of enforcement over real estate, with the average number of lawyer's tasks (three)

Expenses	Claim amount (EUR)		
	5,000	50,000	500,000
Court fee	150	1,100	1,320
Lawyers' fees (claimant)	440	2,470	18,750
Total	590	3,570	20,070

In the case of enforcement over real estate, it is also necessary to add the costs of real estate valuation (i.e., an average amount of EUR650).

The debtor will bear all the necessary costs of enforcement if their assets can be monetised.

2.4 Alternatives to lawyers

2.4.1 Are there specialised debt collection agencies (or equivalent) which buy claims or work more cost-effectively than lawyers?

The development of the banking and insolvency industry and law has brought companies dealing primarily with the purchase of claims to the Croatian market (which later also deal with the collection of said claims on their own behalf). Although it is possible for them to arrange the purchase of any claim, they are mostly interested in business arrangements with banks, which in this way deal with a part of their "bad" / risky assets.

2.5 Insolvency proceedings

2.5.1 What costs are involved – including lawyer and court fees – in the commencement of and participation in insolvency proceedings against a debtor for a claim in the amount equivalent to EUR5,000, EUR50,000 and EUR500,000, if they are not able to pay?

Insolvency proceedings can be initiated by the debtor or the creditor. The court fee amounts to EUR15.

If, according to the information the court has, the debtor does not possess sufficient assets to cover the costs of the proceedings, the court will invite the creditor to pay an advance for the costs of the proceedings, and, if the creditor fails to do so, the proceedings will (if the insolvency reason exists) be opened and closed immediately, and the debtor will be erased from the court register.

The fees for the representation by a lawyer in insolvency proceedings are as follows:

Lawyers' tasks in insolvency proceedings	Claim amount (EUR)		
	5,000	50,000	500,000
Lodging a claim (only)	165	825	6,375
Representing the creditor in:			
- preliminary insolvency proceedings – court hearing	165	825	6,375
- (final) insolvency proceedings – court hearing	165	825	6,375
- insolvency proceedings – court hearing	165	825	6,375

3. Economical conclusion

3.1 Taking into account the costs and expenses, what is the minimum claim amount for which it makes sense for a foreign IP to start litigation or enforcement?

Bearing in mind the expected costs of civil proceedings or enforced recovery procedures, the decisions on their initiation will depend in part on the type of proceedings with regard to their expected duration, i.e. the expected number of actions required for their completion.

Thus, the initiation of a collection procedure (depending on the assets from which collection is expected) seems opportune even in cases of lower amounts – from EUR1,000 above, depending on how likely it can reasonably be expected that the claim will be collected from monetary assets. Collection over other assets requires an additional assessment. There are also certain restrictions regarding the enforcement against natural persons, so the collection of a claim through the enforcement over real estate pertaining to a natural person will not be possible if the principal does not exceed the amount of approx. EUR5,300.

In civil proceedings, the situation is somewhat different, as their costs can be significant, and the expected duration certainly does not help. Consequently, the initiation of said proceedings is not economically viable for a foreign insolvent debtor as a party if the amount is lower than EUR5000. As there is the risk that a proceeding will last for a long time, the collection might become impossible, as by the end of the proceeding the debtor may no longer have sufficient assets to cover even the costs of said proceeding.

FRANCE

This country report is written based on a situation where an insolvency estate includes a (potential) claim against a (third party) debtor who is domiciled abroad. The court-appointed insolvency practitioner (IP) has to assess the costs for pursuing the claim in order to decide whether it is affordable and economically reasonable to try recovery abroad. Two scenarios are considered. In scenario 1 the claim has not yet been subject to a court proceeding; in scenario 2 an executory title already exists and would have to be enforced abroad.

SCENARIO 1: CLAIM HAS NOT YET BEEN SUBJECT TO COURT PROCEEDINGS

1.1 Recognition proceeding and costs

1.1.1 What is the proceeding and what are the estimated costs for the recognition of the foreign insolvency proceeding and the IP's power to pursue a claim?

France has two regimes for the recognition of the effects of foreign insolvency proceedings and the powers of a foreign court-appointed IP. Which regime is applicable depends on where insolvency proceedings are opened, i.e., within or outside the scope of the European Insolvency Regulation (EIR)?[1]

(1) The EIR applies to each member state of the European Union (EU) (except Denmark which opted out) and the UK after BREXIT). According to Article 19(1) EIR, insolvency proceedings opened by the competent court in one of the member states are automatically and immediately recognised in all other member states. The court-appointed IP may exercise in another member state all the powers conferred upon him / her by the law of the state at the opening of insolvency proceedings, unless insolvency proceedings have been opened in another state or conservatory measures (i.e. seizure of goods etc.) have already been taken following a request for the opening of insolvency proceedings in that state.[2] In exercising their powers, IPs have to comply with the law of the state in which they intend to take action and may not exercise coercive measures without the involvement of a competent local court.[3]

The IP should evidence his / her appointment by providing a certified copy of the relevant judgment or any other relevant certificate issued by the court which has jurisdiction (Article 22 EIR). The IP may be asked to provide a translation of the judgment or certificate without any other formality.

Within the frame of the EIR, the costs an IP needs to take into account are thus limited to possible fees for certified copies of the appointment judgment or certificate and translation costs.

Further costs may arise if the IP seeks local assistance (e.g., lawyer fees) and / or if the foreign insolvency judgment should be filed to public registers (e.g., land register in case of real estate located in France or commercial court register in case a branch of the debtor is located in France or in case of group coordination proceedings).

[1] Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings.
[2] Article 21 (1) EIR.
[3] Article 21 (3) EIR.

(2) In contrast to German law, for example, there is no automatic recognition in France of insolvency proceedings opened outside the scope of the EIR. In this case, namely, insolvency proceedings commenced by a court located in a state that is not an EU member state, their recognition in France requires the formal procedure of *exequatur*.

The *exequatur* is a procedure allowing the beneficiary of a foreign ruling to make such court decision enforceable in France. As a consequence, without *exequatur*, a debtor company subject to foreign insolvency proceedings shall not be considered as insolvent in France.

In the frame of *exequatur* proceedings, the French Court verifies in particular:

(i) if the foreign court having issued the insolvency judgment had jurisdiction;

(ii) if the judgement acquired the force of *res judicata* (claim preclusion);

(iii) the compliance with substantive and procedural international public policy; and

(iv) the absence of legal fraud.

The *exequatur* procedure must be carried out before the competent civil court (*Tribunal judiciaire*), by means of a writ of summons, and necessarily requires the involvement of a lawyer for representation. It will thus incur lawyer fees (see section *1.4.1* below) as well as fees for the bailiff who notifies the *exequatur* order.

1.2 Financing

1.2.1 Does your jurisdiction allow or provide for the following?

- ***Contingency fee agreements***

Under French Law, the general rule is that lawyers are not allowed to enter into contingency fee arrangements (also called *pacte de quota litis*), directly or exclusively involving the lawyer in the fortunes of the trial or the outcome of the deal. Any agreement that would determine the fees solely on the basis of the result or outcome of the trial is null and void.

The exception to this rule is that a contingency fee is allowed as an additional fee, in conjunction with the fixed fees agreed between the lawyer and the client, either on a time-spent or on a flat-rate basis.

- ***Is legal aid for litigation available for a foreign IP?***

In France, individuals are eligible for legal aid for litigation (*aide juridictionnelle*), if due to their personal and economic situation they cannot afford the costs of the proceedings.

Such legal aid is granted by the French state to pay the costs of legal proceedings (lawyer, bailiff etc.) and is subject to strict income requirements. For instance, in 2020, legal aid covered all costs if the beneficiary had earned

less than EUR1,031 per month in 2019. It covered partial costs, if the beneficiary had earned between EUR1,031 and EUR1,546 per month in 2019.

The request for legal aid must be made to the court in charge of the case before or after the initiation of the procedure to be financed.

The benefit of legal aid is in principle limited to natural persons of French nationality and citizens of member states of the EU (except Denmark). Legal aid for litigation may be granted in connection with the enforcement in France of a court decision or any other enforcement order, even if such decision or order was issued by a member state of the EU.

There is no legal provision preventing a foreign IP from applying for legal aid, although it may be in practice very unlikely to be granted, unless the IP represents a debtor–natural person.

- ***Are litigation financing and / or insurance for litigation costs provided and, if so, starting at which amount?***

As in many other jurisdictions, insurance for legal expenses is common in France. In general, they are included in multi-risk home, car or credit card insurance policies, but specific insurance coverage for future potential litigation costs may be agreed.

Moreover, litigation financing is permitted in France, although it is rather new and not yet well established. However, large third-party finance companies are currently actively developing the French market in this field.

Litigation is financed in particular when the litigation involves high amounts in dispute. The conditions for financing vary and depend on the amount of the claim and the risk of litigation, which the financier checks in advance. Usually, a draft statement of claim must be submitted with the application for financing, but sometimes the financiers arrange for law firms to examine the prospects of litigation.

The minimum amount of the claim for which funding can be obtained varies between the different providers. In France, it would be unusual to find a financier who would fund litigation for a claim below EUR100,000. The revenue share for the litigation financier is higher for low amounts or for high litigation risk but will generally be at least around 20%.

1.3 Obtaining an enforcement order

1.3.1 Besides commencing regular civil proceedings, are there easier and cheaper ways to obtain an enforcement order?

(1) As an alternative to a regular legal action in court, an order for payment (*injonction de payer*) can be launched by the creditor.

The order for payment is a simplified procedure by which a creditor seeks the recovery of his / her claim. It is a simple, fast and inexpensive way to obtain payment of an invoice, which can be initiated by a judge or directly by a bailiff.

- The order for payment procedure before a judge

  The creditor must file a request[4] at the competent court, i.e., before the civil (*Tribunal judiciaire*)[5] or commercial court[6] (*Tribunal de commerce*) depending on the case and the parties.[7] The order for payment procedure is free of charge, except when the order is rendered by the commercial court (the request implies the payment of a fee of approximately EUR35 to the clerk's office within 15 days following the filing).

  If the application is valid, the competent court will render an order for payment, which has to be notified by the bailiff to the debtor within six months of its issuance. The notification of the order for payment by bailiff triggers costs of approximately EUR90 at the charge of the creditor (for a claim exceeding EUR2,000).

  If the debtor does not object within one month after having been served with the order for payment, the creditor shall apply to the clerk's office of the court within a month, this time requesting an enforcement order.[8] The decision can no longer be appealed by the debtor. In case the debtor does not directly pay the due claim, the creditor must notify the enforcement order by bailiff (for a fee amounting approximately EUR90).

  If the debtor objects to the order for payment in due time, it is left to the creditor to transfer the dispute to regular civil proceedings.

  At the civil court, the order for payment procedure does not require the assistance of a lawyer for claims up to EUR10,000.

  The creditor may request of the judge that the costs of the procedure (court's fees, lawyer fees, bailiff fees) should be charged to the debtor (see sections. 1.4 and 1.5).

  For a cross-border debt, the judge can also issue a European order for payment.

- The order for payment procedure by bailiff

  A simplified procedure for the recovery of small claims can be implemented by a bailiff at the request of the creditor for the payment of a claim arising out of a contract (in practice often simply unpaid invoices) and not exceeding an amount of EUR5,000.

[4] The filing of the request must be supported by documents showing the validity of the claim (invoices, agreements etc.).
[5] Law No 2019-222 of 23 March 2019 created the new court (*Tribunal judiciaire*) that merges the former *Tribunal d'instance* and the former *Tribunal de grande instance*.
[6] Judges of commercial courts are not professional judges but are elected from members of the commercial community.
[7] According to Law No 2019-222 of 23 March 2019, the order for payment procedure will be completely "dematerialised" by 1 April 2021 at the latest. Request for order of payment will therefore be sent to the competent national civil court by electronic means.
[8] According to Article 1422 of the French Code of Civil Procedure.

The bailiff sends the debtor a registered letter with acknowledgment of receipt inviting the latter to proceed to payment. The corresponding fees charged by the bailiff amount to approximately EUR15.

The debtor is requested to respond within one month after having been notified by the bailiff.

As soon as the bailiff is informed about the agreement reached by the creditor and the debtor, he / she renders an enforcement order and charges a flat fee of approximately EUR30, plus a fee calculated on the recovered amount.[9]

In the event the debtor refuses to pay the requested amount or does not respond to the registered letter within one month, the creditor may request a payment order at court.

(2) Another alternative to regular proceedings in civil or commercial matters are fast-track proceedings (*procedures de référé*).

Recourse to fast-track proceedings is limited to the following cases:

(i) measures which must be taken urgently, and which are either not seriously challenged or are justified by the relevant dispute (*référé d'urgence*);

(ii) remedial measures necessary to prevent damage or to put an end to an obviously unlawful disturbance (for example, suspension of the distribution of a publication that obviously infringes an individual's privacy) (*référé conservatoire ou de remise en état*); and

(iii) the granting of an advance payment of a claim that is not seriously disputable (*référé provision*).

In case of extreme emergency, "from hour to hour" fast-track proceedings (*référé d'heure à heure*) can be initiated in order to obtain a very quick solution (within 48 hours to a week), even during public holidays, at the court or at the judge's residence (doors opened).

Fast-track proceedings can be opened by the court after the due filing of a writ of summons which must first be notified by bailiff to the defendant.[10] Such notification triggers fees amounting to approximately EUR90 for a claim exceeding EUR2,000, plus additional fees in case of urgent notification.

The judge shall render an interim court order which does not have the authority of *res judicata* on the merits but is, however, provisionally enforceable.

[9] Up to EUR125 (11.61 % of the recovered amount), up to EUR610 (10.64% of the recovered amount), up to EUR1,525 (10.16% of the recovered amount), up to EUR52,400 (3.87% of the recovered amounts), exceeding EUR52,400 (2.98% of the recovered amount).

[10] *The filing of the writ of summons is free of charge, except when the fast-track procedure is filed before the commercial court (the writ of summons implies the payment of a fee of approximately EUR45 (for two parties) to the clerk's office).*

As for any judgment, the interim court order has to be notified by bailiff (for a fee amounting to approximately EUR90).

1.4 Lawyers' fees

1.4.1 What are the legal provisions for lawyers' fees, and are there compulsory statutory fees for some or all activities?

In France, the main rule is free determination of lawyer's fees between the lawyer and the client. French law does not provide for a fee scale linked to the value of the matter (or the amount in dispute) or the type of advice. There is also no difference between out-of-court legal advice and court representation.

Consequently, lawyers determine their fees in mutual agreement with their clients, in accordance with the French deontological code and the French national rules of conduct of the legal profession. The latter state that, while defining the applicable fees to the case, the lawyer should take into account the financial situation of the client, the complexity of the case, the lawyer's own reputation, but also possibly the location[11] of the office, etc.

French law requires the execution of a written fee agreement detailing the billing terms and conditions – in practice fees on a time-spent basis or flat-rate fees. In addition to these fees (on a time-spent basis or flat-rate fees), the lawyers and their clients may provide for a contingency fee (see section *1.2.1*).

Moreover, the lawyer may charge travel or other expenses and absence allowance for travel time. Lawyers' fees are subject to value-added tax (if applicable), currently 20 %.

Disputes regarding lawyers' fees shall be brought before the President of the French Bar Association (so-called *Bâtonnier*) in the first instance, the first President of the Court of Appeal in case of appeal, and, if relevant, the supreme court (*Cour de cassation*).

1.5 Court fees

1.5.1 In order to take legal action, does a foreign plaintiff have to provide security and / or make a prepayment for court costs and, if so, how is the amount calculated?

In France, the plaintiff – foreign or domestic – does not have to make any prepayment to the court or provide security.

1.5.2 What are the legal provisions for court fees in civil proceedings?

In France, access to justice is free of charge.

The costs which are triggered for the functioning of the courts are divided into two categories:

(i) judicial costs and expenses (*dépens*); and

[11] *Due to bar taxes and own costs, lawyers in Paris are often more expensive than in other cities in France.*

(ii) so-called irrecoverable costs (*frais irrépétibles*).

- Expenses (*dépens*) are the costs indirectly linked to the proceedings. According to Article 695 of the French Code of Civil Procedure, these costs include duties, taxes, fees or emoluments collected by the courts,[12] costs of translation and printing of documents and remuneration of technicians, as well as bailiff fees.

- Irrecoverable costs (*frais irrépétibles*) mostly cover the costs not included in the expenses, such as lawyer's fees, travel expenses incurred for the need of the trial, or fees incurred for amicable expertise.

1.6 Refund of legal costs and expenses

1.6.1 Is the winner of a court proceeding entitled to reimbursement for the legal costs and expenses?

As a general rule, in French civil proceedings, the loser of a court proceeding is supposed to bear all legal costs, including the expenses (*dépens*)[13] and the irrecoverable costs (*frais irrépétibles*).[14] The lawyer's fees may be significant, whereas the court expenses are of minor importance.

The judge determines the amount to be awarded to the winning party by taking (normally) into account the fairness and resources of the loser. The allocation of this compensation is left to the judge's discretion and no scale applies.

However, in practice, it is rare that the amount awarded by the judge with respect to the irrecoverable costs will cover the actual costs incurred in the course of the trial, including the lawyer's fees.

Indeed, although it is up to each party to request the benefit in their submissions, the sum related to the irrecoverable costs finally awarded by the court is often far less than the one requested and actually paid by the winning party.[15]

1.7 Examples of legal costs and expenses

1.7.1 What would be the roughly estimated litigation costs and expenses – first instance including lawyer and court – for a (simple) claim in the amount equivalent to EUR5,000, EUR50,000 and EUR500,000?

As France does not have a scale for lawyer's fees, it is not possible to give an estimate.

Indeed, the final costs will depend on the jurisdiction involved, the complexity of the case and the fee-billing method.

[12] For example, with respect to the appeal procedure, the parties to the proceedings must pay a tax stamp amounting to EUR225, requested in practice at the filing of the appeal.
[13] Article 696 of the French Code of Civil Procedure.
[14] Article 700 of the French Code of Civil Procedure.
[15] If possible, the parties should provide the court with the invoices related to the irrecoverable costs.

1.8 Average duration of litigation

The duration of a legal dispute depends on many factors, e.g., whether and to what extent evidence is taken, but also on the respective workload and individual working speed of the judges. For instance, the duration of a dispute can be greatly extended if technical expertise has to be employed.

According to standard statistics, a first-instance procedure takes on average about one to two years, whereas a procedure before the courts of appeal takes around two years. Altogether, in general, in France a litigation case can take between three and five years.

SCENARIO 2: ENFORCEMENT ORDER (JUDGMENT) EXISTS AND NEEDS TO BE ENFORCED ABROAD

2.1 Recognition proceeding and costs

2.1.1 What is the proceeding and what are the roughly estimated costs – including lawyer and court – for the recognition of the foreign enforcement order for a claim in the amount equivalent to EUR5,000, EUR50,000 and EUR500,000?

The proceeding and the costs for the recognition of a foreign enforcement order (judgment) depend on whether the order was issued by a court within or outside the EU.

(1) Under Article 39 of the Brussels Regulation,[16] a court decision rendered in a member state of the EU and enforceable in that member state is automatically enforceable in the other member states without the need for a declaration of enforceability or *exequatur* in the target state. The sole requirement is a duly certified copy of the judgment to be enforced and the certificate of enforceability issued by the court of origin in accordance with the form set out in Annex I of the Brussels Regulation.[17]

Accordingly, no separate costs for recognition are incurred in the target state.

(2) A judgment issued by a court outside the EU may only be enforced in France after *exequatur* by a French civil court (see section *1.1.1*(2) above).

The procedure of *exequatur* triggers court fees corresponding to the filing of the writ of summons, as well as the notification by bailiff of the *exequatur* order. The lawyer's fees are those of regular civil proceedings (see section *1.4.1* above).

Once the time period available for appealing the *exequatur* order has expired and the enforcement order is final, the foreign judgment can be immediately enforced in France, in the same way a French judgment would be.

(3) Although France is a signatory of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards signed in New York in 1958 (the New

[16] Regulation 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.
[17] As provided by Article 42 of the Brussels Regulation.

York Convention), an arbitral award cannot be directly enforced without the assistance of the French local courts.

Enforcement of foreign arbitral awards is obtained through an application for *exequatur* to the *Tribunal judiciaire* of Paris (see section *1.1.1*(2)).

In accordance with Article IV of the New York Convention and Article 1515 of the French Civil Code, the application to enforce a foreign arbitral award must be supported by:

(i) an authenticated original of the arbitral award or a duly certified copy;

(ii) a copy of the arbitration agreement and, where applicable;

(iii) a translation of these documents; an

(iv) a EUR35 stamp.

2.2 Obtaining information about the debtor

2.2.1 Are there any sources of information about whether a debtor of a claim is without means or subject to an insolvency proceeding?

There are various private credit agencies that collect information on the creditworthiness of corporations and individuals. The quality of information provided depends largely on the provider.

Private detective agencies may deliver more detailed information about the debtor, e.g., if 'non-declared' assets exist and where they are located.

Moreover, public, almost cost-free, sources of information exist in France which are useful for an initial research at a glance.

- *Bulletin officiel des annonces civiles et commerciales* (the so-called *BODACC*):[18] the French official gazette for civil and commercial announcement publishes notice of the judgment opening insolvency proceedings as well as the IP appointed.

- *Infogreffe*: the electronic commercial register contains information about the existence of companies, corporations and merchants, as well as their current managing directors and legal representatives, share capital, financial accounts (if published), the seat of business, changes to the articles of association etc. In particular, the commercial register indicates if insolvency proceedings have been opened, which IP has been appointed and the time frame of the observation period. It also contains a list of pledges and registrations of liens taken by public and private creditors on the debtor's assets (*état des inscriptions et nantissements*).

[18] The creditor can access the BODACC via the following link: https://www.bodacc.fr.

Such detailed information and company documents can only be accessed online by registered users for a (small) fee[19] or requested as hard copy at the court clerk's office.

- *FICOBA*: bailiffs holding an enforcement order against a debtor have direct access to the national file at the Banque de France, listing all the bank accounts opened by natural or legal persons in France (*relevé Ficoba*) (see section *2.3.1*(2) below).

2.3 Enforcement measures

2.3.1 What main enforcement measures are available and what are the costs – including lawyer and enforcement authority – for enforcing a claim in the amount equivalent to EUR5,000, EUR50,000 and EUR500,000?

Under French law, two different types of approach are available for enforcement measures over the assets of a debtor: either (1) conservatory measures or (2) definitive enforcement measures.

(1) Conservatory asset-preserving measures

In the absence of an enforceable title, the creditor can request an authorisation from the court[20] to proceed to conservatory asset-preserving measures over his / her debtor's assets. The fact that the debtor remains unaware of the procedure until the assets are effectively attached guarantees the efficiency of such measures, i.e., preventing the disappearance of the relevant assets. Following the attachment, the debtor is notified about the conservatory measure by a bailiff and can challenge it in court.

There are two kinds of conservatory measures:

- Conservatory / freezing seizures (*saisies conservatoires*) – these are the most common asset-preserving interim measures. As a result of the court order to freeze assets[21] (i.e., movable assets, e.g., stock, vehicles, bank accounts, shares, claims of the debtor etc.), the assets can no longer be removed from the debtor's estate, either in the debtor's own possession or, as the case may be, in the possession of a third party. The conservatory seizure may be granted by court prior to any judgment and even prior to any court action, provided, however, that a court action is initiated within 30 days following the conservatory seizure measure.[22] If the creditor is in the end successful and obtains a final judgment, he / she will be able to convert the conservatory seizure into a final order for the definitive seizure of assets (*saisie-attribution* or *saisie-vente* as the case may be).

[19] On the website: https://www.infogreffe.com.
[20] Conservatory measures are, in principle, ordered by the enforcement judge (*juge de l'execution*) at the competent civil court (*Tribunal judiciaire*). By way of exception, in commercial matters and prior to the filing of judicial proceedings, the President of the commercial court has concurrent jurisdiction. However, prior authorisation from the court is not required when the creditor's claim concerns a judgment which is not yet enforceable or a default of payment of a bill of exchange, of a cheque or of rent based on a written contract.
[21] The creditor cannot conservatory seize assets which are subject to an inalienability clause or belong to an undivided co-ownership.
[22] Article R 511-7 of the French Code of Civil Execution Procedure.

- Judicial encumbrance / securities (*sûretés judiciaires*) – this is a type of encumbrance that is ordered by a judge over assets such as buildings, businesses, securities or other property, either tangible or intangible, which is enforceable against third parties after publication and notification by bailiff. It does not prevent the sale of the assets by the debtor, in which case the creditor is, however, entitled to receive a part of the sale price.[23]

  In practice, it is necessary to satisfy two requirements to be granted conservatory measures by the court:

  - a well-grounded claim (*créance fondée en son principe*) – the creditor shall submit to the judge all the material evidence supporting his / her claim, so that the judge can assess the prospects of success;

  - circumstances that jeopardise the creditor's chances of debt recovery – for instance, there may be evidence that the debtor is facing financial difficulties. In practice, the failure of the debtor to respond to a notice requesting payment of the claimant sent by the creditor evidences that there is a risk jeopardising the debt recovery.

(2) Enforcement measures

The launch of any enforcement measure requires the creditor to have previously obtained an enforceable title (*titre exécutoire*). An enforceable title is either a court decision which has acquired the force of *res judicata* or notarial acts that are certified enforceable. Seizure is a writ for which the use of a bailiff is mandatory.[24]

In France, in particular, three kinds of seizure measures for movable property are used in practice.

- Seizure of bank accounts – the initiation of the seizure of bank accounts requires a bailiff who is locally competent for the area where the relevant bank is located. Most of the banks in France have their registered seat in Paris and surroundings so that a Parisian bailiff is often able to launch the seizure measure at the bank's seat which has the effect of seizing all the bank accounts opened in France at this particular bank, while a seizure launched locally at a bank agency will be limited to seizing the funds sitting on the bank account at this particular agency.

  French bailiffs have access to a national register known as the FICOBA, which contains all information relating to the bank accounts held by individuals and corporations in France. In 2020, the cost of a request for a FICOBA extract was EUR51.48. While launching a seizure on a debtor's bank accounts at the request of a creditor, the bailiff is responsible for drawing up the writ of seizure on the relevant bank account that will then be served to the bank. The bailiff must then inform the debtor about the seizure measure within eight days of the service to the bank.

[23] Article L 531-2 of the French Code of Civil Execution Procedure.
[24] Under Article L 122-1 of the French Code of Civil Execution Procedure, a bailiff is the sole authority entitled to proceed to enforcement measure or conservatory seizure over assets.

In case the debtor is a natural person, it should be noted that a minimum amount of EUR564.78 remains unseizable, i.e., the unseizable bank balance (*solde bancaire insaisissable*).

- Wage seizure – a certain proportion of wages and similar income of a debtor may be seized. To this end, after having been served with a seizure order, the debtor's employer is compelled to allocate part of the employee's remuneration to the pursuing creditor, the remainder of the salary, which must not be less than the amount declared by government as an unseizable bank balance (see previous paragraph), being paid to the employee.

  The wage seizure requires a prior court proceeding, launched at the request of the creditor. The parties will be summoned to a court hearing, triggering lawyer's fees (see section 1.4 above). The judge will try to reach an agreement between the parties, in particular by proposing to the creditor payment extensions or instalments. In the event of non-conciliation, the judge indicates the amount of the claim for which a seizure order would be rendered by the clerk office of the court (*secretariat greffe*).

  Within eight days following the hearing, a writ of seizure shall be sent by registered letter with acknowledgment of receipt to the debtor's employer. The debtor shall receive a copy of the writ of attachment sent by the clerk office of the court.

- Seizure of movable assets – the seizure of movable assets is used to first freeze and then sell the assets of a debtor. The goods are seized by way of a bailiff notification and are then sold either by out-of-court procedure or by public auction. To this end, the creditor holding an enforceable title must appoint a bailiff who is locally competent, i.e., in the area where the assets to be seized are located.

  The costs of the bailiff will depend on a wide range of factors, including in particular the nature of the enforcement measure, how easy it is to determine the debtor's assets, and the nature and location of those assets.

  First, the bailiff issues to the debtor a writ of summons to pay. Within a period of eight days from the service of such writ of summons, the bailiff then proceeds physically to the seizure of the assets if the debtor has still not paid the claim.

  The remuneration of bailiffs is governed by an order of 28 February 2020 that establishes the sum due to them for each enforcement measure. The remuneration scale for bailiffs comprises a fixed amount and a proportional amount based on the value of the case and, in addition, where appropriate, a special charge for serving the proceedings.
  This scale of charges includes:

  (i) for each measure, a fixed charge, which is a sum set at a fixed rate by the order of 28 February 2020; based on the amount of the claim, this fixed charge is multiplied by 0.5 (for claims of no more than EUR128), by 1 (claims of between EUR128 and EUR1,280) or by 2 (claims of more than EUR1,280);

(ii) a charge for initiating proceedings that may be levied only once per enforceable title; this is EUR4.29 when the claim is less than EUR76; above that, it is proportional to the amount of the claim,[25] up to a limit of EUR268.13 (Article A. 444-15 of the Commercial Code);

(iii) a recovery and collection charge; this is a proportional sliding-scale charge[26] that the bailiff charges only when he or she has recovered or collected all or part of the claim; in any case, part of this charge remains payable by the creditor (Article A 444-32 of the Commercial Code);

(iv) case management fees, travel expenses and so on – for example, the minimum amount for enforcement measures is as follows:

- for a recovered claim of EUR5,000: EUR215 + EUR355 (recovery and collection charge), i.e., a global amount of EUR570;

- for a recovered claim of EUR50,000: EUR370 + EUR2,450 (recovery and collection charge), i.e., a global amount of EUR2,820;

- for a recovered claim of EUR500,000: EUR460 + EUR6 648 (recovery and collection charge), i.e., a global amount of EUR7,108.

2.4 Alternatives to lawyers

2.4.1 Are there specialised debt collection agencies (or equivalent) which buy claims or work more cost-effectively than lawyers?

Debt collection and recovery agencies are in fact extremely common in France and may be useful and economically beneficial for the recovery of simple claims which are outside a complicated legal context.

2.5 Insolvency proceedings

2.5.1 What costs are involved – including lawyer and court – for commencing and participating in insolvency proceedings against the debtor of a claim in the amount equivalent to EUR5,000, EUR50,000 and EUR500,000, if the debtor is not able to pay?

As a general initial observation, it has to be noted that French insolvency law has been assigned the aims of:

(i) continuing the business of the debtor;

(ii) safeguarding jobs; and

(iii) satisfying creditors' claims.

[25] Up to EUR304 (5.60 % of the claim amount), up to EUR912 (2.80% of the claim amount), up to EUR3,040 (1.40% of the claim amount), exceeding EUR3,040 (0.28% of the claim amount).
[26] Up to EUR125 (11.61 % of the recovered amount), up to EUR610 (10.64% of the recovered amount), up to EUR1,525 (10.16% of the recovered amount), up to EUR52,400 (3.87% of the recovered amounts), exceeding EUR52,400 (2.98% of the recovered amount).

The priorities are set in this specific order which means that creditors' interests are subordinated to the first aims, namely the continuation of business and the protection of jobs.

As a result, for creditors there is, in general, no advantage to pursuing their claims in the framework of insolvency proceedings, but rather in a pre-insolvency situation where the creditor keeps control. Once the insolvency proceedings have commenced, the creditor will lose control and will have to endure the extended proceedings monitored by an IP whose priority will be, roughly speaking, the rescue of the business and jobs. The situation will be no different if the creditor benefits from pledges or mortgages on debtor's assets since they will only be realised at the end of the proceedings in the context of an asset sale (in court) in the best case, unless the relevant assets are included in a continuation plan[27] of the debtor's business, which will be imposed on all – including secured – creditors.

However, French law does permit the filing of insolvency proceedings against a debtor at the request of a creditor. In practice, the filing of insolvency proceedings against a third party is not easy as the plaintiff must evidence to the court that the debtor is cash-insolvent. The cash test, which is the sole legal condition for the commencement of insolvency proceedings in France, thus requires that the creditor is in possession of the debtor's relevant figures.

Moreover, the chances for a non-secured creditor to obtain satisfaction of his or her claim, or part thereof, after long proceedings, in the best case two years as from the filing, are in practice rather low.

If nevertheless the creditor decides to file insolvency proceedings against his / her debtor, the filing specifically incurs the creditor's own lawyer's fees, either flat fees or calculated on a time-spent basis, as negotiated between the creditors and the lawyer (see section 1.4) and minor court fees.

In addition, once the insolvency proceedings have commenced, the creditor must file his or her claim to the creditor's representative (*mandataire judiciaire*) as appointed by court, within two months (as from the publication in the BODAAC) if the creditor is French resident and within four months if the creditor's residence is located abroad. The declaration of claim does not incur costs and can be done without a lawyer, via an internet platform opened by the creditor's representative or by registered letter. In absence of a declaration, the claim will be disregarded in the further distribution process.

If the declaration of claim is challenged by the debtor or by the creditor's representative, the matter will be deferred to the court before a sole insolvency judge (*juge-commissaire*). The judgment could be challenged in the court of appeal.

These proceedings do not trigger costs other than lawyer's fees, which are respectively borne by each party, i.e., the creditor and the debtor's estate.

[27] Which has in general a duration of 10 years.

3. Economical conclusion

3.1 Taking into account the costs and expenses for a foreign IP, what is the minimum claim amount at which it makes sense to start litigation or enforcement?

Because in France lawyers' fees are not set and are instead defined between the lawyer and his / her client, it is difficult to state a minimum claim amount at which is makes economic sense to start litigation against a debtor.

However, as a general rule, it can be worthwhile for the foreign IP to involve debt-collecting agencies for "smaller" undisputed claims and mandate a lawyer for claims with higher amounts at stake or which are disputed or complicated from a legal point of view. In practice, it is worth noting that the lack of a fee scale causes lawyers' fees to mount up very quickly.

As a result, a precise and individual cost / risk analysis should be carried out on a case-by-case basis.

GERMANY

This country report is written based on a situation where an insolvency estate includes a (potential) claim against a (third party) debtor who is domiciled abroad. The court-appointed insolvency practitioner (IP) has to assess the costs for pursuing the claim in order to decide whether it is affordable and economically reasonable to try recovery abroad. Two scenarios are considered. In scenario 1 the claim has not yet been subject to a court proceeding; in scenario 2 an executory title already exists and would have to be enforced abroad.

SCENARIO 1: CLAIM HAS NOT YET BEEN SUBJECT TO COURT PROCEEDINGS

1.1 Recognition proceeding and costs

1.1.1 What is the proceeding and what are the estimated costs for the recognition of the foreign insolvency proceeding and the IP's power to pursue a claim?

Germany has two regimes for the recognition of the effects of foreign insolvency proceedings and the powers of a foreign court-appointed IP. Which regime is applicable depends on where insolvency proceedings are opened, i.e., within or outside the scope of the European Insolvency Regulation (EIR).[1]

(1) The EIR applies to every member state of the European Union (EU) (except Denmark which opted out; the UK is not a member anymore). According to Article 19(1) EIR insolvency proceedings opened by the competent court in one of the member states are automatically and immediately recognised in all other member states. Following that basic rule of automatic recognition, Article 32(1) EIR states the additional recognition of that competent court's judgments which concern the course and closure of insolvency proceedings, and Article 21(1) EIR rules that the IP appointed by the competent court may exercise all the powers conferred on him or her by the law of the state of the opening of proceedings in another member state, as long as no other insolvency proceedings have been opened there and no preservation measures to the contrary have been taken further to a request for the opening of insolvency proceedings in that state. According to Article 21(3), in exercising his or her powers, the IP only has to comply with the law of the state in which he or she intends to take action and may not exercise coercive measures without the involvement of a court in the target state.

Within this regime of automatic recognition, all an IP has to do to act in another member state of the EU is to evidence the appointment, which, according to Article 22 EIR, only requires a certified copy of the original decision appointing him or her or any other certificate issued by the court which has jurisdiction. The IP may be asked to provide a translation of the decision or certificate, but apart from that no legislation or other similar formality shall be required.

Without the requirement to pass a recognition proceeding, the only inevitable costs an IP needs to take into account for recognition in another EU member state are possible costs for the certified copy of the appointment decision or other certificate and the costs for its translation (which should be attested to avoid authenticity discussions). Of course, further costs may arise if the IP – which is usually the case – needs the assistance of a domestic "guide" and if the

[1] Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings.

opening and, where appropriate, appointment decisions have to be published or registered in public registers (e.g., the land or commercial register). But recognition of the IP and his or her powers are not conditional on any publication or registration.

It is worth mentioning that if the court order opening insolvency proceedings in another EU member state has an enforceable content – in particular, if it allows enforcement of restitution against the debtor or realisation through execution – enforcement may be carried out without *exequatur* in accordance with Article 39 of the Brussels Regulation.[2]

(2) For the recognition of insolvency proceedings opened outside the scope of the EIR, the autonomous German international insolvency law applies. Its regulations are not an implementation of the United Nations Commission on International Trade Law Model law. Complaints about this fact, which are sometimes uttered, ignore that the autonomous German regulations mostly replicate the EIR-concept described above and thus tend to make the recognition of foreign proceedings and IP powers easier and less costly.

Similar to the respective EIR regulations, section 343 of the German insolvency code (InsO) states the automatic recognition of the opening of foreign insolvency proceedings, of decisions which concern the course and closure of such proceedings and of preservation measures taken further to a request for the opening of insolvency proceedings. Besides the public policy (*ordre public*) clause, the only exception from automatic recognition of a foreign proceeding is if, according to German law, the courts of the state in which proceedings are opened do not have jurisdiction.

For foreign IPs, this means that even outside the scope of the EIR there is no formal recognition proceeding and the only requirement for exercising their powers in Germany is evidencing the appointment by a certified copy of the respective decision or any other certificate issued by the competent court. Similar to the requirements of the EIR regulations, the IP may be asked to provide a translation.

Thus, the inevitable costs in connection with recognition or the exercising of IP powers in Germany are broadly similar to the situation under the EIR. They are the possible costs for the certified copy of the appointment decision or other certificate and for its translation. The only difference is that under German law an attested translation is mandatory.

If the court order opening insolvency proceedings in a jurisdiction outside the EU or any other judgment handed down in such proceedings has an enforceable content, enforcement may only be carried out in Germany after its admissibility is established by an enforcement judgment, which can only be obtained by a formal action according to section 722 of the German Code of Civil Procedure (ZPO).

[2] Regulation (EU) 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

1.2 Financing

1.2.1 Does your jurisdiction allow or provide for the following?

- ***Contingency fee agreements***

  Under German law the general rule is that lawyers are not allowed to enter into contingency fee arrangements. In particular, lawyers may not act as or similar to a litigation financier. The German legislator's aim is to prevent competition among lawyers on price in order to ensure the quality of legal services. However, there is one exception.

  Section 4a of the German Lawyers' Fees Act (RVG) permits the agreement of a contingency fee in individual cases, if the client's economic circumstances would, if considered reasonably, prevent him or her from pursuing legal action without agreeing a contingency fee. In court proceedings, it may be agreed that no fee or a lower fee than the statutory fee is to be paid in the event of failure, if an appropriate surcharge on the statutory fee is agreed in the case of success. The agreement on a contingency fee must be in writing – like any fee agreement – and it must contain the anticipated statutory fee and, if applicable, the non-performance-related contractual fee at which the lawyer would accept the assignment and an indication of what fee should be earned on the occurrence of which conditions. The agreement must also state the main reasons that determine the amount of the contingency fee. Furthermore, it must contain a note that the agreement has no influence on any court costs, administrative costs and the costs of other parties to be reimbursed by the client.

- ***Is legal aid for litigation available for a foreign IP?***

  In Germany, individuals are eligible for legal aid for litigation if, due to their personal and economic circumstances, they cannot bear the costs of the proceedings, or can only do so partly or only in instalments, and if the intended litigation (including defence) appears promising and not vexatious.

  A party by office – such as an insolvency administrator – or a corporation or association may also apply for legal aid to prefinance litigation costs, if refraining from legal action or defence would be contrary to the public interest and two more conditions are met. Firstly, the applicant's assets – in the case of an insolvency administrator, the insolvency estate – must be insufficient to finance the litigation costs; and, secondly, it must be unreasonable for the potential beneficiaries to bear these costs. In the case of insolvency proceedings, those are the creditors of uncontested, not fully covered claims who would benefit sufficiently from successful enforcement. Even though the outcome of the litigation may influence the insolvency administrator's fee, he or she is never regarded as a potential beneficiary of whom financing could reasonably be expected. Public creditors are also exempt from financing obligations, and for the other creditors it depends on their economic capacity and the relation between expense, risk and potential return.

  The aforementioned possibilities and conditions also apply for corporations or associations which are established or domiciled in another EU member state or in another contracting state to the Agreement on the European Economic Area. Individuals domiciled in another member state of the EU can obtain legal aid for

litigation similar to German residents according to the Council Directive 2002/8/EC of 27 January 2003.

The statutory provisions are not clear with regard to the question of whether a foreign insolvency administrator can receive legal aid. However, it stands to reason that the provisions for natural persons and corporations or associations also apply to their insolvency administrators because otherwise they might find ways to establish the debtor as applicant. Therefore, court-appointed IPs from EU member states and other contracting states to the Agreement on the European Economic Area may try to obtain legal aid with the prospect of success; IPs from other jurisdictions may not.

It is worth mentioning that litigating on the basis of legal aid is not particularly attractive for the mandated lawyer because payment is by way of a reduced fee if the lawsuit is not successful, or if the losing party is not able to reimburse the regular statutory fee.

- ***Are litigation financing and / or insurance for litigation costs provided and, if so, starting at which amount?***

  Insurance to cover legal expenses is not uncommon in Germany, but such policies usually only cover certain areas of law. Insolvency administrators may take out debtor's legal expenses insurance if that is worthwhile (e.g., insurance for labour disputes), but there is no specific insurance for insolvency-related litigation costs.

  Litigation financing for insolvency administrators, on the other hand, is permitted and occurs on a regular basis. Several insurance companies have their own departments or subsidiaries for litigation financing, and some of them are now specialising in litigation financing for insolvency administrators. Litigation is financed in particular when the conditions for legal aid are not met and / or the litigation involves high amounts in dispute. The conditions for financing vary and depend on the amount of the claim and the risk of litigation, which the financier assesses in advance. A draft statement of claim must usually be submitted with the application for financing, but sometimes financiers arrange for law firms to examine the prospects of success of the litigation.

  The minimum amount of the claim for which funding can be obtained varies among the different providers. On the whole, however, it would be unusual to find a financier who funds litigation for a claim below EUR50,000. The revenue share for the litigation financier is higher for low amounts or high litigation risk but will generally be at least 20%.

1.3 Obtaining an enforcement order

1.3.1 Besides commencing regular civil proceedings, are there easier and cheaper ways to obtain an enforcement order?

As an alternative to a regular legal action, a judicial dunning procedure can be initiated. For this purpose, the claim is specified in a form that signature card holders can fill out and submit online. The court will then send the debtor an order for payment. If the debtor does not object within two weeks, the creditor can apply for a writ of execution. After it has been served, the debtor again has two weeks to

object. If he also allows this period to elapse, the creditor has an enforcement order.

If the debtor objects to either the order for payment or the writ of execution in due time, it is left to the creditor to transfer the dispute to regular civil proceedings.

Regardless of the amount in dispute, no lawyer needs to be engaged for the judicial dunning procedure. The court fee, which must be paid in advance, depends on the amount in dispute and is derived from a table in appendix 2 to the Court Costs Act (GKG).[3] It amounts to 0.5 of the regular fee (at least EUR32) – compared to a 3.0 court fee for regular civil proceedings of first instance. There is an official online calculator for the costs of a judicial dunning procedure (including the statutory fee for an optional lawyer).[4] If the order for payment procedure is transferred to regular civil proceedings, the court fee will be credited.

1.4 Lawyers' fees

1.4.1 What are the legal provisions for lawyers' fees, and are there compulsory statutory fees for some or all activities?

As already mentioned, (under section *1.2.1* above), the German legislator wishes to prevent competition among lawyers on price in order to avoid price dumping and thus ensure the quality of legal services. For this reason, the fees that lawyers can charge for their work are extensively regulated by law in the RVG. For out-of-court activities, the law motivates the conclusion of fee agreements – in practice usually time fees or flat-rate fees – and an agreement deviating from the statutory fees can also be concluded for activities in court. However, a contractually agreed fee for activities in court may not be less than the statutory fee.

There are two main factors that determine the amount of the statutory fees: the value of the matter (or amount in dispute) and the type of activity. Similar to the court fees there is an appendix to the RVG which shows the 1.0 fee for different amounts in dispute.[5] The maximum amount for the statutory fee is EUR30 million.

For out-of-court activities, the law provides for a fee scale ranging from 0.5 to 2.5. Lawyers determine their fee on a case-by-case basis at their reasonable discretion, taking into account all circumstances, in particular the scope and difficulty of the work, the importance of the matter and the income and financial circumstances of the client. In the event of a dispute about the fee, the court obtains an opinion from the Bar Association.

The fees for one party's lawyer in regular civil proceedings with one client are as follows:

[3] Available at: https://www.gesetze-im-internet.de/gkg_2004/anlage_2.html.
[4] Available at: https://www.mahngerichte.de/de/kostenrechner.html.
[5] Available at: https://www.gesetze-im-internet.de/rvg/anlage_2.html.

	First instance	Second instance	Third instance
General fee for proceeding	1.3	1.6	2.3
Fee for court hearings (no matter how many)	1.2	1.2	1.5
Fee for settlement (if applicable)	1.0	1.3	1.3
Lump sum for expenses	EUR20	EUR20	EUR20

In addition, the lawyer may charge travel or other proven expenses and absence allowance for travel time and (currently) 19% value-added tax (if applicable).

If the lawyer was already mandated with the assertion of a claim out of court, there is a partial imputation of the fee for this activity on the fee for the court proceedings.

It must be mentioned that lawyers' organisations are currently engaged in intensive lobbying in order to achieve an increase in statutory fees, which could actually happen in the coming years.

1.5 Court fees

1.5.1 In order to take legal action, does a foreign plaintiff have to provide security and / or make a prepayment for court costs and, if so, how is the amount calculated?

In order to initiate proceedings before the civil court, the plaintiff – foreign or domestic – must pay the court costs as an advance, unless the plaintiff is granted legal aid. The amount to be paid in advance is a 3.0 court fee (i.e., the full fee for the civil procedure of first instance).

At the request of the defendant, applicants who are not habitually resident in an EU member state or in a state party to the Agreement on the European Economic Area shall provide security for the costs of proceedings, in particular with regard to a potential claim for reimbursement of costs by the defendant. There are some exceptions to the obligation to provide security, for example, if international treaties conflict with it or if the plaintiff has sufficient secure assets (in particular, real estate) in Germany.

The court may, at its discretion, determine the nature and amount of the security to be provided. If the court has not made a provision and the parties have not agreed otherwise, security shall be provided by means of a written, irrevocable, unconditional and unlimited guarantee of a bank authorised to conduct business in Germany or by depositing money or certain security papers.

1.5.2 What are the legal provisions for court fees in civil proceedings?

Court fees in civil proceedings are regulated by the GKG. The procedure costs a 3.0 fee in the first instance, a 4.0 fee in the second instance, and a 5.0 fee in the third instance (Supreme Court). The court fee is reduced, if the legal dispute is settled without a full verdict, for example: if there is a default judgment; if the claim is acknowledged; or if a settlement is reached. The reduced fee is a 1.0 fee in the first instance, a 2.0 fee in second instance and a 3.0 fee in third instance.

As already mentioned above (section 1.3), the court fee depends on the amount in dispute and is derived from a table in appendix 2 to the GKG.[6] The minimum 1.0 court fee is EUR15 and the maximum amount in dispute for the calculation is EUR30 million, which corresponds to a 1.0 court fee of EUR109,736.

Besides the court fees, expenses may be incurred, as well as costs for experts or the examination of witnesses.

1.6 Refund of legal costs and expenses

1.6.1 Is the winner of a court proceeding entitled to reimbursement for the legal costs and expenses?

In civil proceedings the loser bears all legal costs, including, in particular, the opponent's lawyer's fees. However, the liability for those is limited to the statutory fees; the loser does not have to reimburse contractually agreed fees that exceed the statutory fee.

Where each party partially succeeds and fails, the costs are set off against each other or apportioned by the court according to the ratio of success and failure.

In any case, the court has to decide as to which party has to bear what proportion of the costs, and on application the court calculates the costs and issues an enforceable payment order for the amount payable plus interest.

1.7 Examples of legal costs and expenses

1.7.1 What would be the roughly estimated litigation costs and expenses – first instance including lawyer and court – for a (simple) claim in the amount equivalent to EUR5,000, EUR50,000 and EUR500,000?

The statutory fees without expenses would be the following:

Civil procedure first instance without settlement	Claim amount (EUR)		
	5,000	50,000	500,000
3.0 Court fee	438.00	1,638.00	10,608.00
2.5 Lawyer's fees (claimant)	777.50	2,927.50	8,052.50
2.5 Lawyer's fees (defendant)	777.50	2,927.50	8,052.50
Total	1,993.00	7,493.00	26,713.00

[6] Available at: https://www.gesetze-im-internet.de/gkg_2004/anlage_2.html.

Civil procedure first instance with settlement	Claim amount (EUR)		
	5,000	50,000	500,000
1.0 Court fee	146.00	546.00	3,536.00
2.5 Lawyer's fees (claimant)	777.50	2,927.50	8,052.50
2.5 Lawyer's fees (defendant)	777.50	2,927.50	8,052.50
1.0 Lawyer-assisted settlement	303.00	1,163.00	4,175.60
Total	2,004.00	7,564.00	23,816.60

Using the search word *Prozesskostenrechner* leads to a number of online calculators which, when the amount in dispute is entered, display the statutory lawyer and court costs of a legal dispute at the civil court.

1.8 Average duration of litigation

The duration of a legal dispute naturally depends on many factors, e.g. whether and to what extent evidence is taken, but also on the respective workload and individual working speed of the judges.

According to the official statistics, a first-instance lawsuit takes on average about 5 months at the local courts (amount in dispute up to EUR 5,000) and about 11 months at the regional courts.

SCENARIO 2: ENFORCEMENT ORDER (JUDGMENT) EXISTS AND NEEDS TO BE ENFORCED ABROAD

2.1 Recognition proceeding and costs

2.1.1 What is the proceeding and what are the roughly estimated costs – including lawyer and court – for the recognition of the foreign enforcement order for a claim in the amount equivalent to EUR5,000, EUR50,000 and EUR500,000?

The proceeding and the costs for the recognition of a foreign enforcement order depend on whether the order was issued by a court within or outside the EU.

(1) Under Article 39 of the Brussels Regulation (see section *1.1.1*(1) above) a court decision given in a member state of the EU and enforceable in that member state is automatically enforceable in the other member states without the need for a declaration of enforceability in the target state. According to Article 42 of the Brussels Regulation, all that is required is a probative copy of the judgment to be enforced and the certificate of enforceability issued by the court of origin in accordance with Article 53 in conjunction with Annex I of the Brussels Regulation.

Accordingly, no separate costs for recognition are incurred in the target state.

(2) A judgment issued by a court outside the EU may only be enforced in Germany, after its admissibility is established by a domestic enforcement judgment (see section *1.1.1*(2) above).

The necessary legal action will trigger a court fee of EUR240.00. The statutory lawyer's fees are those of regular civil proceedings (see sections 1.4 and 1.7 above).

For foreign arbitral awards, the recognition proceeding underlies the New York Convention.[7] The basic court costs are at a 1.0 fee (see section 1.5 above) and the lawyer's fees are again similar to those of regular civil proceedings (see sections 1.4 and 1.7 above).

2.2 Obtaining information about the debtor

2.2.1 Are there any sources of information in your jurisdiction about whether a debtor of a claim is without means or subject to an insolvency proceeding?

There are various private – albeit large – credit agencies that collect information on the creditworthiness of corporations and individuals. Contractual partners of such credit agencies can access this information (and may have to contribute *vice versa*). It is not usually worthwhile to become a contractual partner for the sake of one or even a few credit reports, but larger law firms, for example, often have access to one or more credit agencies and are thus able to provide such credit rating information.

Apart from this there are also official (with some restrictions) cost-free sources of information, but carrying out research through these portals is, however, less straightforward or worthwhile.

In order to find out whether a debtor is already in insolvency proceedings, individuals can search the official website on which all court decisions in insolvency proceedings that are subject to publication requirements are published.[8] However, the interface is not very user-friendly, and some entries are deleted after a relatively short time.

In the electronic commercial register,[9] one can at least find out – even without registration – whether a company still exists or whether a merchant is (still) registered. More detailed information and company documents can only be accessed by registered users for a (small) fee.

Each local court keeps a register of debtors. This registers all persons in a district of a local court who have had to disclose their financial circumstances in the course of a compulsory execution or who are or were in insolvency proceedings. The entries will be deleted after three years and can only be viewed if a legitimate interest is proven. Such an interest may be proven with an enforcement order and consist in the fact that the applicant would like to check the prospect of enforcement proceedings. The disadvantage of debtors' registers is that they are not connected.

With the proof of a legitimate interest – for which the position as creditor is sufficient – It is also possible (with some restrictions) to inspect the land register, which is kept at the local courts. Again, the disadvantage is that land registers are

[7] United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 10 June 1958.
[8] See: www.insolvenzbekanntmachungen.de.
[9] See: www.handelsregister.de.

not connected, which means that without a reference point the search is only possible on a trial-and-error basis.

For certain enforcement measures, the court has jurisdiction; for others it is the bailiff (see also section 2.3 below). Bailiffs are public officials. If their enforcement measures are not successful, the debtor must disclose his or her financial circumstances to them at the request of the creditor. If the debtor does not comply with this obligation, the bailiff may obtain information from various authorities in order, for example, to find out whether the debtor is receiving a pension or is in an employment relationship and who the employer is.

2.3 Enforcement measures

2.3.1 What main enforcement measures are available in your jurisdiction and what are the costs – including lawyer and enforcement authority – for enforcing a claim in the amount equivalent to EUR5,000, EUR50,000 and EUR500,000?

With the exception of objects and funds which the debtor needs to secure his or her existence and that of his or her dependents, all assets are in principle attachable and possibly subject to enforcement measures. Enforcement measures for which the local courts have jurisdiction are, specifically, attachment of claims or real estate, as well as, following the latter, receivership and forced sale of real estate. The bailiff has jurisdiction for the attachment of movable property (including public sale) or cash, and the bailiff is also responsible for obtaining disclosure of the debtor's financial circumstances if previous enforcement measures have not been successful. If the debtor does not comply with his or her obligations, the judge may issue an arrest warrant at the request of the creditor.

Except for receivership and forced sale of real estate, where the costs are dependent on the outcome, execution measures where the statutory fees depend on the amount of the claim trigger the following costs:

Execution measures	Claim amount (EUR)		
	5,000	50,000	500,000
Enforcement authority's fee (per measure)	Bailiff 16.00–130.00 / court 20.00–60.00 depending on measure		
Lawyer's fees (per measure)	109.08	168.90	1,272.68

If obtainable, the debtor has to bear all the necessary costs of enforcement.

2.4 Alternatives to lawyers

2.4.1 Are there specialised debt collection agencies (or equivalent) which buy claims or work more cost-effectively than lawyers?

There is a whole range of bigger and smaller debt collection agencies, and some law firms also specialise in debt collection. In general, they charge the same fees as lawyers, but some of them also purchase claims or offer more favourable remuneration models, especially for large customers or big claim amounts.

2.5 Insolvency proceedings

2.5.1 What costs are involved – including lawyer and court – for commencing and participating in insolvency proceedings against the debtor of a claim in the amount equivalent to EUR5,000, EUR50,000 and EUR500,000, if the debtor is not able to pay?

The opening of insolvency proceedings requires, in addition to a debtor or creditor request and a reason for insolvency, that the costs of the proceedings are covered. Therefore, if proceedings are opened on a creditor's request, the creditor does not have to bear any court fee. If on a creditor's request the proceeding is not opened, the creditor may have to bear a 0.5 court fee (see section 1.5 above) calculated from the amount of the creditor's claim or, if lower, the estimated value of the assets involved in the insolvency proceedings. Apart from that, the participation in an insolvency proceeding only triggers a court fee in case of late lodgement of an insolvency claim, which is currently EUR25.

If the creditor is represented by a lawyer in the course of an insolvency proceeding, the statutory fees for the lawyer are:

Lawyer activity in insolvency proceedings	Claim amount (EUR)		
	5,000.00	50,000.00	500,000.00
Lodging claim (only)	171.50	601.50	2,107.80
Representing creditor in			
- preliminary insolvency proceedings	171.50	601.50	2,107.80
- (final) insolvency proceedings	323.00	1,183.00	4,195.60
- insolvency plan proceedings	323.00	1,183.00	4,195.60

3. Economical conclusion

3.1 Taking into account the costs and expenses, what is the minimum claim amount at which it makes sense for a foreign IP to start litigation or enforcement in your jurisdiction?

The costs of claim prosecution in Germany are relatively easy to calculate if the mandated lawyer works on the basis of the statutory fees, which are minimum fees. If a claim is not disputed and there is a strong probability that it will be possible to realise it at least partially, it may be economically justifiable to initiate legal proceedings or enforcement even for low claim amounts of a few thousand euros. Of course, the statutory fees for low claims are not attractive for the lawyer, at least not within the cost structure of bigger law firms.

Litigating a disputed claim involves a higher risk due to the basic rule that the loser bears all costs. Nevertheless, even for claims as low as about EUR5,000 the total statutory costs of a civil procedure of first instance may still just be about half of the claim amount and thus a calculable risk.

HONG KONG

This country report is written based on a situation where an insolvency estate includes a (potential) claim against a (third party) debtor who is domiciled abroad. The court-appointed insolvency practitioner (IP) has to assess the costs for pursuing the claim in order to decide whether it is affordable and economically reasonable to try recovery abroad. Two scenarios are considered. In scenario 1 the claim has not yet been subject to a court proceeding; in scenario 2 an executory title already exists and would have to be enforced abroad.

SCENARIO 1: CLAIM HAS NOT YET BEEN SUBJECT TO COURT PROCEEDINGS

1.1 Recognition proceeding and costs

1.1.1 What is the proceeding and what are the estimated costs for the recognition of the foreign insolvency proceeding and the IP's power to pursue a claim?

There are no statutory provisions in Hong Kong relating to recognition of foreign insolvency officeholders or providing assistance to them. Furthermore, Hong Kong is not a party to the United Nations Commission on International Trade Law Model Law on cross-border insolvency.

In the past, foreign liquidators had to pursue winding-up proceedings of the foreign company in Hong Kong pursuant to section 327 of the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap. 32) in order to have themselves appointed as liquidators in Hong Kong to avail themselves of statutory investigative powers available to liquidators in Hong Kong.

However, recent decisions of the Hong Kong courts have now developed a set of common law principles relating to the recognition of foreign insolvency officeholders and the granting of assistance in foreign insolvency proceedings.

In *Re The Joint Official Liquidators of a Company v B & Another*,[1] the Hong Kong court granted a recognition order in favour of Cayman Island-appointed liquidators based on a "letter of request" from the Grand Court of the Cayman Islands. The Hong Kong court said that it would grant the order provided that:

- the liquidator is properly appointed in the place of the company's incorporation;
- the letter of request is from a common law jurisdiction with a similar insolvency law regime;
- the order sought is available under Hong Kong law; and
- the order sought is in relation to seeking information and documents, rather than assets.

In that application, the foreign officeholders wished to avail themselves of the liquidators' investigative powers as set out in section 221 of the predecessor Companies Ordinance (Cap. 32) to enable them to properly investigate the affairs of the company. The court also noted that it was necessary to distinguish between information and assets.

[1] [2014] HKEC 1244.

In Hong Kong, where a foreign officeholder wants to gain control of a company's asset located in Hong Kong, that foreign officeholder must apply to the Hong Kong court for an order to the effect that title to that company's assets vest in the foreign office-holder.

Similarly, in *Re CEFC Shanghai International Group Ltd*,[2] the bankruptcy administrators of a company liquidated in Mainland China armed with a letter of request from the No 3 Intermediate People's Court of the Shanghai Municipality were granted recognition and assistance by the Hong Kong court so as to enable the foreign officeholders to prevent a third party from obtaining a garnishee order absolute in Hong Kong. This is the first case of the Hong Kong court granting recognition and assistance to bankruptcy administrators in Mainland China.

The two criteria which must be satisfied before recognition and assistance will be granted in Hong Kong are:

(i) the foreign insolvency proceedings are collective insolvency proceedings; and

(ii) the foreign insolvency proceedings have been opened in the company's country of incorporation.

The legal principles in Hong Kong on granting assistance to foreign officeholders include:

(i) the assistance must not enable the foreign officeholders to do something which they could not do under the insolvency regime of their home jurisdiction;

(ii) the power of assistance is available only when it is necessary for the performance of the foreign officeholders' functions; and

(iii) an order granting assistance must be consistent with the substantive law and public policy of the assisting court.

In a recent decision dated 29 June 2020, in *Re Rennie Produce (Aust) Pty Ltd (In Liquidation in Australia)*,[3] the Hong Kong court signalled a possible "new approach". In that case the court was unclear about whether the originating power of the home jurisdiction to grant an order for production and examination of parties was less than the reciprocating power available in Hong Kong. Therefore, the Hong Kong court decided that it may be more appropriate for the Hong Kong courts, being the courts rendering assistance, to first wait for the courts of the place of liquidation to make an order so that the Hong Kong courts would have the benefit of the reasoned judgment of the court of the place of liquidation before deciding whether to grant the order sought.

In summary, the ability under common law to grant assistance applies only to the extent that:

(i) the foreign insolvency regime is similar to the insolvency regime in Hong Kong; and

[2] [2020] 1 HKLRD 676.
[3] [2020] HKCFI 1500.

(ii) in granting any specific power sought, a substantially similar power is available in both regimes.

Recognition proceedings in Hong Kong involve issuing an originating summons, a letter of request for assistance from a foreign court, preparing the supporting affidavits and the exhibits, and attending the hearing before a company judge in the Court of First Instance of the High Court in Hong Kong. The estimated legal fees are likely to between HKD150,000 and HKD300,000, depending on whether counsel is required and whether the application is dealt with on papers or by way of oral hearings.

1.2 Financing

1.2.1 Does your jurisdiction allow or provide for the following?

- ***Contingency fee agreements***

  The doctrines of champerty and maintenance exist in Hong Kong. Therefore, in Hong Kong, solicitors may not enter into a contingency fee arrangement.

  Section 64(1) of the Legal Practitioners Ordinance (Cap. 159) provides that a solicitor's power to make agreements with his or her client as to remuneration in respect of any contentious business shall not give validity to

  > "*any agreement by which a solicitor retained or employed to prosecute any action, suit or other contentious proceeding stipulates for payment only in the event of success in that action, suit or proceeding*".

  This is further reinforced by Principle 4.17 of the Hong Kong Solicitors' Guide to Professional Conduct which stipulates:

  > *"A solicitor may not enter into a contingency fee arrangement for acting in contentious proceedings."*

- ***Is legal aid for litigation available for a foreign IP?***

  The Legal Aid Department in Hong Kong provides legal representation to eligible applicants in civil or criminal proceedings who satisfy the relevant means and merits tests.

  However, only a natural person, whether or not resident in Hong Kong, may apply for legal aid. Therefore, legal aid is not available to companies or directors of companies which by extension should include foreign insolvency practitioners who act as agents of the company.

- ***Are litigation financing and / or insurance for litigation costs provided and, if so, starting at which amount?***

  In relation to litigation financing the doctrines of champerty and maintenance exist in Hong Kong and as such third-party funding of litigation is generally not permitted in Hong Kong regardless of the amount.

However, one of the statutory exceptions to champerty and maintenance is litigation funding in the context of an insolvency matter.

The relevant legal considerations and the Hong Kong court's endorsement of third-party litigation funding arrangements were first made publicly available in the Hong Kong case of *Re Cyberworks Audio Video Technology Ltd*,[4] a liquidation which is administered by the authors' firm. That case involved a litigation funding arrangement where the liquidators were successful in assigning an insolvent company's right of action pursuant to section 199(2)(a) of the predecessor Companies Ordinance (Cap. 32) to a third-party litigation funder.

In the case of *Re Geoffrey L Berman v SPF CDO I, Ltd &Others*,[5] a foreign trustee appointed by the United States Bankruptcy Court for the District of Delaware had received the approval of that court to the terms of a deed of assignment involving the assignment of choses in action to a third-party litigation funder based in Hong Kong. In return, the trustees would share in the proceeds of the litigation if there were any recovery. The trustees then applied to the Hong Kong Court under Order 85 of the Rules of the High Court (Cap. 4A) asking the court to determine whether or not execution of the deed of assignment would constitute a criminal offence in Hong Kong by infringing the prohibition against maintenance and champerty. The court held that:

> *"the Deed of Assignment is not caught by the prohibition against champerty. I reach this conclusion because it clearly has a legitimate commercial purpose, namely, the funding of a claim that might otherwise not be capable of prosecution and it is the type of transaction that ought not to be stifled by the prohibition against champerty."*

There are now a number of litigation funders specialising in funding claims of Hong Kong insolvency matters. These litigation funders are typically interested in cases of at least HKD10 million.

In Hong Kong, insurance for litigation costs is not common other than those featured in professional indemnity insurance, directors' and officers' liability insurance and cyber risk insurance.

1.3 Obtaining an enforcement order

1.3.1 Besides commencing regular civil proceedings, are there easier and cheaper ways to obtain an enforcement order?

There are no alternatives in Hong Kong to obtain an enforcement order except commencing proceedings in the High Court.

[4] [2010] 2 HKLRD 1137.
[5] HCMP 1321/2010.

1.4 Lawyers' fees

1.4.1 What are the legal provisions for lawyers' fees, and are there compulsory statutory fees for some or all activities?

Some of the main legal provisions for solicitor's fees include:

- part VI of the Legal Practitioners Ordinance (Cap. 159) governs the remuneration of solicitors in contentious and non-contentious business;
- the Hong Kong Solicitors' Guide to Professional Conduct namely:
  - Chapter 4 – Fees
  - Chapter 17 – Solicitors (General) Costs Rules which apply to all solicitors' non-contentious business only
  - Chapter 18 – Solicitors' Practice Rules; and
- Order 62 of the Rules of the High Court (Amendment) Rules 2008.

  The scale of fees for non-contentious business is relatively standardised in Hong Kong.

  For contentious business, there are no statutory legal provisions limiting a solicitor's fees or governing the hourly rates of solicitors.

  The Law Society of Hong Kong maintains the Solicitors' Hourly Rates (SHR), but these only act as a guide to the hourly rates of solicitors for the purposes of the "party-and-party" taxation of legal costs in civil proceedings. The SHR does not affect the hourly rates or fees charged by solicitors to their clients which are agreed between the solicitors and their clients.

1.5 Court fees

1.5.1 In order to take legal action, does a foreign plaintiff have to provide security and / or make a prepayment for court costs and, if so, how is the amount calculated?

If a plaintiff is ordinarily resident outside of Hong Kong or where the plaintiff is an insolvent company, a defendant may apply for security for costs requiring the plaintiff to make a payment into court as security for the defendant's costs. The court will then exercise its discretion on whether to order that security be given and the quantum of security.

The quantum of security to be given varies enormously and will depend on the circumstances of the case and the statement of costs provided to the court enabling it to reach a view as to the quantum of security to be given.

1.5.2 What are the legal provisions for court fees in civil proceedings?

Court fees are set out in the High Court Fees Rules (Cap. 4D) and are payable at the time of submitting court filings.

Examples include fees for commencing a matter (HKD1,045 per case), setting down for trial in court (HKD1,045 per case), the court's service of documents (ranging from HKD110 to HKD1,045 per case), and sealing of execution orders (HKD1,045 per case).

1.6 Refund of legal costs and expenses

1.6.1 Is the winner of a court proceeding entitled to reimbursement for the legal costs and expenses?

In Hong Kong, civil proceedings costs are a matter of the courts' discretion but typically "follow the event", and a losing party is expected to be ordered to pay the winning party's costs which will include legal fees, charges, disbursements, expenses and other remuneration incurred.

The amount of the costs payable by the losing party may be an agreement with the winning party. If the parties cannot agree on the amount of the costs, there will be a taxation of the legal costs by a taxing master to determine the amount payable. In taxation, the winning party typically will only be able to recover a fraction of its costs from the losing party.

Unless the court has ordered taxation on some other basis, costs will normally be taxed on a party-and-party basis. Party-and-party costs are those deemed necessary and properly incurred by the winning party with any benefit of the doubt given to the losing party.

The taxing master would tend to allow a legal cost by applying SHR during the taxation when deciding on the amount to allow or disallow. As an illustration, for High Court matters, the SHR for solicitors with 15 years of experience is HKD5,800 per hour.

Upon taxation, the amount disallowed may represent as much as between 30% and 40% of the actual amount of costs incurred.

Other than a party-and-party costs order made by the court, the court would make a cost order on an "indemnity basis". An award of indemnity costs must be justified by reference to some special feature or circumstance, for example, the failure of the losing party to reach a settlement with the winning party where this can be made during the course of the proceedings or a winding-up petition which is considered an abuse of process and therefore dismissed. However, despite the label of "indemnity", it is still not an indemnity of all the costs incurred by the winning party, although it would result in the winning party receiving a higher proportion of the actual amount of costs incurred than in the case of taxation based on party and party.

The taxing master has the discretion to make orders as to the costs of the taxation, and these would then be reimbursed by the losing party upon completion of taxation and the issuance of a taxation certificate called an *allocatur*. The main cost associated with taxation is the taxing fee payable, which is calculated based on the amount of taxed costs allowed with the amount payable being 6% for the first HKD100,000 of taxed costs allowed, 4% for the next HKD150,000, 3% for the next HKD250,000 and 1% for the remainder.

1.7 Examples of legal costs and expenses

1.7.1 What would be the roughly estimated litigation costs and expenses – first instance including lawyer and court – for a (simple) claim in the amount equivalent to EUR5,000, EUR50,000 and EUR500,000?

The estimated legal fees (including expenses) and court fees are set out in the table below:

Civil procedure in the first instance (uncontested)	Claim amount (EUR)		
	5,000	50,000	500,000
Court fee HKD	0.00	1,045.00	1,045.00
Lawyers' fees (estimate) HKD	0.00	200,000.00	900,000.00
Total HKD	0.00	201,045.00	901,045.00

Note: (i) Monetary claims for a sum less than HKD75,000 are dealt with by the Small Claims Tribunal. No legal representation is allowed. However, a foreign officeholder can authorise a representative to appear at the Small Claims Tribunal, but the representative cannot be a solicitor.

(ii) Monetary claims over HKD75,000 but not more than HKD3 million are heard at the District Court. Monetary claims of all other sums are heard at the Court of First Instance of the High Court. Legal representation is allowed at the District Court and the High Court.

1.8 Average duration of litigation

The duration of the litigation depends on the complexity of the case.

Prior to Covid-19, straightforward cases took between 12 to 18 months from the date of the issue of writ to obtain judgment. Summary judgment cases were relatively quicker, taking about three months from date of the issue of writ to obtaining judgment.

During the General Adjourned Period (GAP), which started on 29 January 2020 and ended on 3 May 2020, the Hong Kong judiciary was closed except for urgent and essential hearings / matters. Post-GAP, straightforward cases are now estimated to take between about 18 and 24 months from the date of the issue of writ to obtain judgment due to the backlog of cases.

More complicated cases will take much longer, with some extreme cases taking as much as 5 to 10 years to obtain a judgment.

SCENARIO 2: ENFORCEMENT ORDER (JUDGMENT) EXISTS AND NEEDS TO BE ENFORCED ABROAD

2.1 Recognition proceeding and costs

2.1.1 What is the proceeding and what are the roughly estimated costs – including lawyer and court – for the recognition of the foreign enforcement order for a claim in the amount equivalent to EUR 5000, EUR50,000 and EUR500,000?

The foreign judgment can be registered in Hong Kong and enforcement proceedings can be commenced in Hong Kong against the assets of the debtor.

The estimated legal fees (including expenses) and court fees for the recognition of the foreign enforcement order are set out in the table below:

Civil procedure in the first instance (uncontested)	Claim amount (EUR)		
	5,000	50,000	500,000
Court fee HKD	1,045.00	1,045.00	1,045.00
Lawyers' fees (estimate) HKD	450,000.00	450,000.00	450,000.00
Total HKD	451,045.00	451,045.00	451,045.00

Note: all recognition of foreign enforcement orders are heard at the Court of First Instance of the High Court irrespective of the amount of the monetary claim.

2.2 Obtaining information about the debtor

2.2.1 Are there any sources of information about whether a debtor of a claim is without means or subject to an insolvency proceeding?

The Government of Hong Kong maintains records of companies in compulsory liquidation, individuals who are bankrupts or facing a bankruptcy petition, and individuals who are subject to an individual voluntary arrangement. Online searches can be conducted.[6]

To ascertain if a company is in voluntary liquidation, an online search can be carried out at the Companies Registry website.[7]

Notices of winding-up petitions, orders for winding-ups, bankruptcy orders, special resolutions passed for voluntary liquidations are required to be placed in the Government Gazette which is published once a week. An online version of Government Gazette is available.[8]

There are also service providers who provide web-based search facilities for High Court and District Court cases in Hong Kong.

To ascertain if a debtor has any means or assets, some publicly available information is available by conducting searches with the following government authorities in Hong Kong, namely:

[6] See: https://www.gov.hk/en/business/registration/deregistration/compulsory.htm.
[7] See: https://www.icris.cr.gov.hk/csci.
[8] See: https://www.gld.gov.hk/egazette.

(i) Land Registry[9] – for real estate property registration;

(ii) Companies Registry[10] – for companies and business registration;

(iii) Transport Department[11] – for vehicle registration;

(iv) Intellectual Property Department[12] – for trademarks, patents and designs registration; and

(v) Marine Department[13] – for yachts and vessel registration.

It may be possible to obtain information from law enforcement and regulatory agencies for use in civil proceedings by making a request in writing. Generally, these are protected by the Personal Data (Privacy) Ordinance (Cap. 486) though there are specific exemptions.

2.3 Enforcement measures

2.3.1 What main enforcement measures are available in your jurisdiction and what are the costs – including lawyer and enforcement authority – for enforcing a claim in the amount equivalent to EUR5,000, EUR50,000 and EUR500,000?

Apart from commencing insolvency proceedings, other main enforcement measures would include garnishee proceedings and charging orders (possibly with receivers to be appointed).

The estimated legal fees (without expenses) and court fees for enforcing a claim via garnishee proceedings or charging orders are set out in the table below:

Civil procedure in the first instance (uncontested and without use of bailiff)	Claim amount (EUR)		
	5,000	50,000	500,000
Court fee HKD	1,045.00	1,045.00	1,045.00
Lawyers' fees (estimate) HKD	400,000.00	400,000.00	400,000.00
Total HKD	401,045.00	401,045.00	401,045.00

Note: All enforcement proceedings are heard at the Court of First Instance of the High Court irrespective of their amount of the monetary claim.

2.4 Alternatives to lawyers

2.4.1 Are there specialised debt collection agencies (or equivalent) which buy claims or work more cost-effectively than lawyers?

There are a number of debt collection agencies in Hong Kong, and these agencies typically adopt contingency fee arrangements. Their fees are usually calculated as a percentage of the amount collected. Generally speaking, the percentage varies

[9] See: https://www.landreg.gov.hk/en/home/index.htm.
[10] See: https://www.cr.gov.hk/en/home/index.htm.
[11] See: https://www.td.gov.hk/en/home/index.html.
[12] See: https://esearch.ipd.gov.hk/nis-pos-view.
[13] See: https://www.mardep.gov.hk/en/home.html.

between 20% to 40% depending on the quality and age of debt. Debt collection agencies are a useful alternative in cases where the debtor has no known assets.

2.5 Insolvency proceedings

2.5.1 What costs are involved – including lawyer and court – for commencing and participating in insolvency proceedings against the debtor of a claim in the amount equivalent to EUR5,000, EUR50,000 and EUR500,000, if the debtor is not able to pay?

All petitions for the winding-up of a company or bankruptcy of an individual are heard in the Court of First Instance of the High Court.

The estimated legal fees and court fees for commencing winding-up proceedings against a company and bankruptcy proceedings against an individual in Hong Kong are set out in the table below:

Civil procedure in the first instance (uncontested)	Claim amount (EUR)		
	5,000	50,000	500,000
Court fee HKD	1,045.00	1,045.00	1,045.00
Official Receiver's Deposit HKD	11,250.00	11,250.00	11,250.00
Lawyers' fees (estimate) HKD	90,000.00	90,000.00	90,000.00
Total HKD	102,295.00	102,295.00	102,295.00

3. Economical conclusion

3.1 Taking into account the costs and expenses for a foreign IP, what is the minimum claim amount at which it makes sense to start litigation or enforcement?

Litigation costs in Hong Kong tend to be on the high side. Considering that the winning party in most cases does not recover its legal costs in full, it does not make sense for a foreign practitioner to pursue a claim in Hong Kong at or around under HKD1 million, but this also depends on the nature, merits and likelihood of succeeding in the underlying claim.

INDIA

This country report is written based on a situation where an insolvency estate includes a (potential) claim against a (third party) debtor who is domiciled abroad. The court-appointed insolvency practitioner (IP) has to assess the costs for pursuing the claim in order to decide whether it is affordable and economically reasonable to try recovery abroad. Two scenarios are considered. In scenario 1 the claim has not yet been subject to a court proceeding; in scenario 2 an executory title already exists and would have to be enforced abroad.

SCENARIO 1: CLAIM HAS NOT YET BEEN SUBJECT TO COURT PROCEEDINGS

1.1 Recognition proceeding and costs

1.1.1 What is the proceeding and what are the estimated costs for the recognition of the foreign insolvency proceeding and the IP's power to pursue a claim?

The extant cross-border insolvency provisions (sections 234 and 235 of the Insolvency and Bankruptcy Code 2016 (Code)) allow the Indian Government to enter into bilateral / reciprocal agreements with foreign countries, for enforcing the terms of the Code. If the assets of an Indian debtor are situated in a foreign country with which a bilateral agreement has been executed, the Indian insolvency administrator may request evidence or action relating to such assets through issuance of a letter of request by the jurisdictional bankruptcy tribunal (in India) to the competent court / authority of the foreign country. However, currently there are no such bilateral agreements in place, and there has been no instance of any such application having been made.

In October 2018, the Insolvency Law Committee (ILC) constituted by the (Indian) Ministry of Corporate Affairs published a report which recommended adoption of the United Nations Commission on International Trade Law Model Law on Cross-Border Insolvency 1997 (Model Law) (with modifications) as part of the Code since the abovementioned existing framework is not comprehensive. Towards this, the report provided draft rules (Draft Rules) that lay down a mechanism for co-operation between Indian bankruptcy tribunals, insolvency administrators, corporate debtors and other stakeholders, and courts and other competent authorities of foreign countries.

Note that the Draft Rules are yet to be notified and are not in force at the time of writing. In fact, on 23 January 2020, the Government of India referred the matter of implementation of these proposed cross-border insolvency provisions to another committee, which submitted its recommendations to the (Indian) Ministry of Corporate Affairs on 28 May 2020. However, the recommendations are not in the public domain as of now – therefore, for the purposes of this response, we have referenced the Draft Rules as proposed by the ILC.

The provisions of the Draft Rules are to apply, amongst others, when assistance is sought in India by a "foreign court" (a judicial or other authority competent to control or supervise a foreign proceeding) or "foreign representative" (a person or body authorised in a foreign proceeding to administer the reorganisation or liquidation of the corporate debtor's assets or affairs, or to act as a representative of the foreign proceeding) in connection with a "foreign proceeding" (a collective judicial or administrative proceeding in a foreign country pursuant to a law relating to insolvency, in which proceeding the assets and affairs of the corporate debtor are subject to control or supervision by a foreign court, for the purpose of

reorganisation or liquidation). Further, the Draft Rules extend only to countries that have adopted the Model Law or have been otherwise notified by the Government of India.

Under the Draft Rules, a foreign representative can apply to the relevant Indian bankruptcy tribunal and seek recognition of a foreign proceeding in which the foreign representative has been appointed to avail appropriate relief in relation to such foreign proceeding. The application for recognition has to be accompanied with the prescribed documents and fees, including:

(i) a certified copy of the decision commencing the foreign proceeding and appointing the foreign representative; or a certificate from the foreign court affirming the existence of the foreign proceeding and the appointment of the foreign representative; or any other evidence prescribed, affirming the existence of the foreign proceeding and appointment of the foreign representative;

(ii) a statement identifying all foreign proceedings and proceedings under the Code in respect of the corporate debtor that are known to the foreign representative; and

(iii) translation of documents in support of the application for recognition in English (if applicable). Every recognition application must be decided by the bankruptcy tribunal within 30 days (extendable by an additional 30 days). Note that the bankruptcy tribunal may refuse to take any action if, in its opinion, the implementation of such action would be manifestly contrary to the public policy of India (in this respect, the tribunal can serve a notice to the Indian Government for inviting submissions on the matter).

A foreign proceeding may be recognised as a foreign main proceeding or a foreign non-main proceeding, based on the finding of:

(i) the "centre of main interests" (COMI), in case of recognition as a foreign main proceeding; and

(ii) existence of an "establishment" (i.e., any place of operations where the corporate debtor carries out a non-transitory economic activity with human means and assets or services), in case of recognition as a foreign non-main proceeding.

In the absence of proof to the contrary, the corporate debtor's registered office is presumed to be its COMI, provided that the registered office of the corporate debtor has not been moved to another country within the three-month period prior to the filing of an application for initiation of insolvency proceedings in such country. While determining the corporate debtor's COMI, the bankruptcy tribunal will assess where its central administration takes place, as is readily ascertainable by third parties (including its creditors). If COMI cannot be determined by the aforesaid factors, the tribunal may conduct an assessment of factors as prescribed by the Indian Government for this purpose.

Upon recognition of a foreign proceeding as a foreign main proceeding, the bankruptcy tribunal can declare a moratorium prohibiting actions in accordance with section 14 of the Code (which includes moratoria: on institution of suits

against the corporate debtor; on continuation of pending suits or proceedings against the corporate debtor; on transferring, encumbering, alienating or disposing of by the corporate debtor of any of its assets or legal right or beneficial interest therein; and on recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor).

Upon recognition of a foreign proceeding, whether main or non-main, the Indian bankruptcy tribunal may, at the request of the foreign representative, grant any appropriate relief, including entrusting the distribution of all or part of the corporate debtor's assets located in India to the foreign representative (or another person designated by the tribunal, subject to the tribunal's satisfaction regarding adequate protection of interests of creditors in India). Further, upon recognition of a foreign proceeding, the foreign representative shall be entitled to make an application to the bankruptcy tribunal for an order in connection with preferential transactions, undervalued transactions, extortionate transactions, transactions regarding fraudulent trading or wrongful trading.

In granting relief to a representative of a foreign non-main proceeding, the bankruptcy tribunal has to be satisfied that the relief relates to assets that, under the laws of India, should be administered in the foreign non-main proceeding or concerns information required in that proceeding.

In relation to costs, please note that the same court fee is applicable under the current regime to every person making an application before the relevant bankruptcy tribunals (costs incurred in court fees are provided under section 2.5). Therefore, as the law stands to date, it is fair to assume that, unless expressly provided for, the court fee would remain the same for foreign recognition proceedings as well. Needless to state, the lawyers' fee as well as other expenses may differ as the same is not regulated in India, and there is no objective criterion on the basis of which such fee and expenses may be ascertained. If the Draft Rules are implemented *as is*, it will be a sea change in the insolvency landscape in India and the first few cases will likely be more litigated, and so it is anticipated that costs will taper down as the Draft Rules settle into Indian law.

1.2 Financing

1.2.1 Does your jurisdiction allow or provide for the following?

- ***Contingency fee agreements***

  The Bar Council of India Rules 1975 (Bar Council Rules) expressly bar lawyers from entering into contingency fee agreements on the basis of litigation outcomes and from agreeing to share the proceeds of any litigation. This position has also been upheld by courts in India. Significantly, the High Court of Bombay has recently held that a law firm can enter into a contingency fee arrangement for providing consultancy services in an arbitration proceeding, given that arbitration proceedings cannot be considered as proceedings before a court.

- ***Is legal aid for litigation available for a foreign IP?***

  The National Legal Services Authority provides legal aid to weaker sections of society, in accordance with the Legal Services Authorities Act 1987 (LSA Act).

As per the LSA Act, persons eligible for legal aid include victims of trafficking in human beings, women or children; mentally ill or otherwise disabled persons; victims of mass disaster, ethnic violence, caste atrocity, flood, drought, earthquake or industrial disaster; industrial workmen; persons in custody; and persons in receipt of annual income less than the prescribed amounts. Several state-specific legal aid rules expressly bar the granting of legal aid to a person in representative or official capacity. Since a foreign representative cannot be included in the aforementioned list of eligible persons, such a person may not be entitled to legal aid under Indian laws.

- ***Are litigation financing and / or insurance for litigation costs provided and, if so, starting at which amount?***

  Under the Indian Bar Council Rules, lawyers are prohibited from financing their clients in litigation before courts – however, this restriction applies only to proceedings in which such lawyer has been engaged by the client. Third-party financing of litigation is not expressly barred or permitted but, to some extent, is recognised by the Supreme Court of India,[1] observing that third parties can fund the litigation and get repaid after the outcome. Significantly, Order XXV, rule 3 of the Code of Civil Procedure 1908 (CPC) (as enacted in the Indian states of Maharashtra, Gujarat, Karnataka and Madhya Pradesh) allows courts to consider the impleadment of a third-party financier to the dispute where it is bearing the plaintiff's costs, thereby implying permissibility of third-party financing in these states.

1.3 Obtaining an enforcement order

1.3.1 Besides commencing regular civil proceedings, are there easier and cheaper ways to obtain an enforcement order?

An enforcement order can only be obtained through court proceedings by filing an appropriate recovery suit in India, for which a decree is first required to be passed by a court of competent jurisdiction in India. However, under Order 37 of the CPC, there is also a stipulation of filing summary proceedings / summary suits for the purposes of recovery, in case of debts arising out of written contracts or guarantees. Defendants generally dispute the debt in question, and this results in significant delays in obtaining an enforcement order or a summary suit, oftentimes in excess of 18 months.

Alternatively, certain specified classes of creditors (noticeably excluding foreign banks) are entitled to faster remedy under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act 2002 (SARFAESI) for enforcing security. This is not a law for restructuring but for enforcing security interests. SARFAESI, which tries to exclude moving Indian courts, is generally a faster security enforcement remedy, particularly when it comes to hard asset security (such as an indenture of mortgage).

[1] *Bar Council of India v AK Balaji* (2018) 5 SCC 379; *In Re: Mr "G" A Senior Advocate of Supreme Court* (1955) 4 SCR 490.

1.4 Lawyers' fees

1.4.1 What are the legal provisions for lawyers' fees, and are there compulsory statutory fees for some or all activities?

Lawyers' fees are not regulated by any specific statute in India. However, under rule 38 of the Bar Council Rules, lawyers have been mandated not to accept a fee less than what is taxable when the client is able to pay the same.

While some guidance may be taken from the Supreme Court Rules 2013, which suggest fees payable to lawyers appearing before the Supreme Court of India (ranging from approximately EUR30 to EUR280 for different matters), in practice, the fees of lawyers are usually higher than the above prescribed limits.

1.5 Court fees

1.5.1 In order to take legal action, does a foreign plaintiff have to provide security and / or make a prepayment for court costs and, if so, how is the amount calculated?

In order to initiate proceedings before the civil court, the plaintiff – foreign or domestic – must pay the court costs as an advance. There can be an application seeking deference of payment of the court fee, but, as per the law, the court fee has to be paid at the earliest or as directed by the court.

1.5.2 What are the legal provisions for court fees in civil proceedings?

The Court Fees Act 1870 regulates the quantum of court fee to be charged in civil proceedings. The fee as charged for recovery action may be *ad valorem* on the basis of value of the subject matter of the suit on its institution.

Further, in the context of civil proceedings, if the court fee prescribed under law for any document has not been paid (in part or in full), then the court may still allow such a person to pay the fee, either in part or in full, at its discretion. In such a case, that document will have the same force and effect as it would have if the full fee had been paid originally.

1.6 Refund of legal costs and expenses

1.6.1 Is the winner of a court proceeding entitled to reimbursement for the legal costs and expenses?

Section 35 of the CPC provides that the costs in relation to any suit are awarded at the discretion of the court, which has full power to determine by whom, out of what property and to what extent these costs will be paid. Order 25 of the CPC specifically stipulates an arrangement where the plaintiff is required to provide security for payment of all costs incurred and likely to be incurred by any defendant, if it appears to the court that the plaintiff involved in the suit is residing outside of India and does not possess any sufficient immovable property within India other than the property in suit. Thus, the security for costs that a foreign plaintiff is required to provide in a civil suit is not fixed but is determined by the court.

As a general rule, the unsuccessful party is ordered to pay the costs of the successful party. However, the court has the discretion to deviate from this general rule by giving reasons in writing.

1.7 Examples of legal costs and expenses

1.7.1 What would be the roughly estimated litigation costs and expenses – first instance including lawyer and court – for a (simple) claim in the amount equivalent to EUR5,000, EUR50,000 and EUR500,000?

As lawyers' fees are not regulated in India, the estimation of costs involved is highly subjective, which may differ from lawyer to lawyer and client to client depending on the mutually agreeable fee quotation and payment structure that may be arrived at between the parties. A significant difference may also arise in lawyers' fees in making representation before different judicial fora. The incidental expenses that may be incurred by lawyers while representing also depend on actual amounts that they have to spend such as on travel (if representation is to be made in another city), the court fee payable, stamp duty charges etc. The court fee that may be charged in a civil proceeding in various courts has been specified in section *1.5.2* above. As for the court fee that may be chargeable for pursuing an insolvency litigation in India, this has is set out at section 2.5 below.

1.8 Average duration of litigation

On average it may take around two to five years for completion of all proceedings in civil court for recovery of amounts.

From an insolvency perspective, the corporate insolvency resolution process (including time spent on legal proceedings in relation to the resolution of the corporate debtor) is required to be completed within 330 days from the insolvency commencement date (which timeline can be extended in exceptional circumstances).

SCENARIO 2: ENFORCEMENT ORDER (JUDGMENT) EXISTS AND NEEDS TO BE ENFORCED ABROAD

2.1 Recognition proceeding and costs

2.1.1 What is the proceeding and what are the roughly estimated costs – including lawyer and court – for the recognition of the foreign enforcement order for a claim in the amount equivalent to EUR5,000, EUR50,000 and EUR500,000?

If a decree or judgment for a claim amount has been passed by a recognised superior court in a "reciprocating territory" (i.e., any foreign country or territory which has been notified as such by the Government of India under section 44A of the CPC), then courts in India will directly enforce such a decree or judgment as if it has been passed by a competent court in India. Note that "superior courts", with reference to any reciprocating territory, are courts that will be specified by the Government of India in the aforesaid notification. For enforcement of such a foreign decree or judgment, a certified copy of the said decree or judgment is to be filed before the relevant jurisdictional civil court.

Where the decree or judgment for a claim amount is not passed by a recognised superior court of a reciprocating territory, then a fresh suit, based on the decree, or a fresh cause of action, is required to be instituted in relevant Indian courts. In such cases, the foreign enforcement order for claim amount cannot be directly enforced and can only have evidentiary value.

In case of enforcement of a decree by a superior court in a reciprocating territory, the court fee payable is that of an action of enforcement proceedings which may range from approximately EUR3 to EUR11.5. Otherwise, the court fee that may be incurred in a civil proceeding has been discussed in section *1.5.2* above. As for the lawyers' fee, as it is not statutorily regulated in India, it may differ from lawyer to lawyer for all claim amounts.

2.2 Obtaining information about the debtor

2.2.1 Are there any sources of information about whether a debtor of a claim is without means or subject to an insolvency proceeding?

Under the Code, certain details in relation to insolvency resolution or liquidation of the corporate debtor, in insolvency proceedings, are required to be disclosed on the website, if any, of such corporate debtor (such as: list of creditors whose claims have been verified by the insolvency administrator; public announcement for submission of claims by creditors to the insolvency administrator; invitation by the insolvency administrator for submission of resolution plans for the corporate debtor; etc). It is also possible to ascertain whether an Indian debtor is subject to insolvency proceedings by accessing websites of the Insolvency and Bankruptcy Board of India (IBBI) (the regulatory authority established under the Code and responsible for implementation of the Code) and the bankruptcy tribunals (i.e., the jurisdictional National Company Law Tribunals (NCLTs)). The NCLT is the adjudicating authority for insolvency resolution / liquidation of corporate debtors in India and its website contains all orders passed in relation to the insolvency and liquidation of a corporate debtor. These orders are also made available on the IBBI website, along with other relevant information regarding insolvency of corporate debtors (such as the date of public announcement for invitation of claims, date of invitation of resolution plans from interested bidders etc.).

Further, authenticated financial information in relation to a person (including: records of its debt and liabilities; assets over which security interest has been created; instances of default against any debt; and balance sheet and cash-flow statements) are submitted to and recorded with Information Utilities that are established under the Code, in the manner prescribed thereunder. However, this information is accessible by certain persons only (such as parties to the concerned financial transaction, insolvency administrators, bankruptcy tribunals, the IBBI etc.).

Additionally, in the case of listed companies, details in relation to their insolvency (as prescribed in the Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations 2015) are required to be mandatorily disclosed by such companies to the stock exchanges on which securities of the company may be listed. Further, financial statements of and security interest filings made by companies can be accessed on the website of the (Indian) Ministry of Corporate Affairs by paying a nominal fee.

2.3 Enforcement measures

2.3.1 What main enforcement measures are available in your jurisdiction and what are the costs – including lawyer and enforcement authority – for enforcing a claim in the amount equivalent to EUR5,000, EUR50,000 and EUR500,000?

As stated in section 2.1 above, the ease with which a foreign decree or judgment for a claim amount can be enforced depends on whether the decree or judgment is from a superior court of a reciprocating territory. When such decree or judgment is passed by a superior court in a reciprocating territory and requires to be enforced in India, it can directly be executed under Indian civil law through the relevant jurisdictional courts by filing a certified copy of that decree or judgment, and that decree or judgment will be executed as if it had been passed by such Indian court itself. The court executing the decree or judgment will issue notice to the person against whom execution is applied, requiring them to show cause as to why the decree or judgment should not be executed against them, and the court will issue an order accordingly. The common modes of execution specified under Indian law include delivery of property, attachment and sale of property, appointment of a receiver, etc. However, this mode of execution of a foreign decree or judgment is available only for the decrees or judgments passed by superior courts in reciprocating territories, highlighted in section 2.1 above.

Where the decree or judgment is not passed by a recognised superior court of a reciprocating territory, then a fresh suit based on the decree or judgment, or a fresh cause of action is required to be instituted in the Indian courts. Thus, in such cases, a foreign enforcement order cannot be directly enforced, and the said order can only have evidentiary value.

The court fee that may be incurred in enforcement proceedings may range from approximately EUR3 to EUR11.5. As for lawyers' fees, as these are not statutorily regulated in India, they may differ from lawyer to lawyer for all claim amounts.

2.4 Alternatives to lawyers

2.4.1 Are there specialised debt collection agencies (or equivalent) which buy claims or work more cost-effectively than lawyers?

Asset Reconstruction Companies (ARCs) are the most prevalent entities buying claims in India. ARCs are registered with the Reserve Bank of India and acquire the "financial assets" of banks and financial institutions. They are not permitted to acquire other forms of claims from other persons, although their ambit to acquire financial assets is broad, so long as they are being acquired from Indian financial institutions.

As regards the cost-effectiveness of the above vehicles as against lawyers, please note that there is not much data available to make this assessment, but professional lawyers' fees are unlikely to differ. However, the advantage is likely to be related to scale and expertise in-house in such ARCs and trading intermediaries.

2.5 Insolvency proceedings

2.5.1 What costs are involved – including lawyer and court – for commencing and participating in insolvency proceedings against the debtor of a claim in the amount equivalent to EUR5,000, EUR50,000 and EUR500,000, if the debtor is not able to pay?

As per section 10(1) of the Draft Rules, a foreign creditor has the same commencement and participation rights as Indian creditors in corporate insolvency proceedings. Pending enactment of the Draft Rules in a formal manner, the courts of India have recognised the rights of foreign creditors (whether financial creditors or operational creditors) to bring insolvency actions in India under the Code. An insolvency action may be commenced against a corporate debtor on occurrence of a default amounting to a minimum of INR10,000,000 (approximately EUR115,000).

The NCLT has jurisdiction to adjudicate upon insolvency matters in India, and the court fee is governed by law and rules laid down in this regard. Accordingly, as per the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules 2016, court fees for commencing an insolvency action range from approximately EUR25 to EUR290 when the application is for initiation of a corporate insolvency resolution process against a corporate debtor. Further, it is to be noted that the court fee remains the same for every such action as long as the criterion of "default" has been fulfilled, irrespective of the amount of claim involved in the proceeding.

However, as lawyers' fees are not regulated for insolvency proceedings, any amount of money may be charged by lawyers on the basis of mutual agreement with the client.

3. Economical conclusion

3.1 Taking into account the costs and expenses for a foreign IP, what is the minimum claim amount at which it makes sense to start litigation or enforcement?

An ideal minimum claim amount for which litigation or enforcement may be pursued in India is not as yet ascertainable since:

(i) there is no floor or ceiling that has been set for lawyers' fees;

(ii) the court fee varies for different fora;

(iii) additional cost may be incurred due to an increased number of hearings on account of delays in the courts; and

(iv) variable recovery may be made even if successful.

Therefore, generally, India has a relatively "flat" cost structure which is agnostic to the size of the claim. For this reason, what matters is:

(i) the ease of initiating a claim;

(ii) the forum of the claim (e.g., Supreme Court of India, High Court, NCLT etc.); and

(iii) other aspects which may make the claim highly litigious.

For example, making claims in insolvency is relatively more cost-effective, and so trading of claims of debtors already in insolvency has been quite active since the Code was introduced. Trading of claims being enforced in SARFAESI is also reasonably prevalent since it is a faster recovery avenue. However, trading of claims which are to be enforced through civil courts has been quite rare in India, with more difficulty in anticipating cost (and time) for the reasons set out above.

MEXICO

This country report is written based on a situation where an insolvency estate includes a (potential) claim against a (third party) debtor who is domiciled abroad. The court-appointed insolvency practitioner (IP) has to assess the costs for pursuing the claim in order to decide whether it is affordable and economically reasonable to try recovery abroad. Two scenarios are considered. In scenario 1 the claim has not yet been subject to a court proceeding; in scenario 2 an executory title already exists and would have to be enforced abroad.

SCENARIO 1: CLAIM HAS NOT YET BEEN SUBJECT TO COURT PROCEEDINGS

1.1 Recognition proceeding and costs

1.1.1 What is the proceeding and what are the estimated costs for the recognition of the foreign insolvency proceeding and the IP's power to pursue a claim?

Regarding foreign insolvency proceedings, the Mexican Commercial Insolvency Law (*Ley de Concursos Mercantiles*) (*Concurso* Law) adopted most of the provisions of the United Nations Commission on International Trade Law Model Law on Cross-Border Insolvency. This subject-matter is foreseen under Title 12 of the Concurso Law (Cooperation in International Proceedings). Article 285 of the Concurso Law mandates that:

> "[i]n the interpretation of the provisions of [Title 12] the international origin, the need to promote an international uniformity in the application of such provisions and the observation of good faith shall be taken into consideration."

The Concurso Law only recognises two different foreign proceedings: (i) foreign main proceeding; or (ii) foreign non-main proceeding.

(i) *Foreign main proceeding*: a proceeding taking place in the state where the debtor has its centre of main interests (COMI). The COMI is presumed to be the place where the insolvent company has its registered office.

(ii) *Foreign non-main proceeding*: a proceeding taking place in a state where the debtor has an establishment (establishment is defined as a "place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services").

Pursuant to Article 292 of the Concurso Law, the foreign representative may request from a Mexican court the recognition of a foreign insolvency proceeding. The foreign representative shall have to apply for recognition under one of the two available hypotheses mentioned above: namely, a foreign main proceeding or a foreign non-main proceeding.

To request the recognition of the foreign insolvency proceeding, the representative must file:

(i) evidence of the opening or existence of the foreign proceeding and of the appointment of the foreign representative;

(ii) a statement with information on all foreign proceedings that have been opened, of which the foreign representative is aware; and

(iii) the domicile of the insolvent company.

All filed documents shall be translated into Spanish and are presumed valid, without the need of legalisation. Once these documents have been filed, the Mexican court shall open the recognition proceeding.

If the insolvent company lacks an establishment (as defined above) in Mexico, the court will open an ancillary proceeding.

However, if the insolvent company has an establishment in Mexico, the court will need to comply with the Mexican regulation on the "*visita*" or visit stage. In other words, if the insolvent company has an establishment in Mexico, the court will initiate a full-blown insolvency proceeding in which the court and an insolvency expert (visitor) shall verify if the company meets the Mexican insolvency standards (under Mexican law, "general default of the company's payment obligations") for the court to declare the company to be in *concurso*. The Concurso Law considers that a company is in general default of its payment obligations if it is in default regarding two or more creditors and meets the following requirements:[1]

- out of the company's overdue obligations, the obligations that have matured for at least 30 days, must represent 35% or more of all of the company's obligations; and

- the company will not have enough liquid assets and receivables[2] to support at least 80% of its total overdue obligations.

If the request for recognition of a cross-border insolvency proceeding does not meet the aforementioned requirements, a Mexican court would most likely not recognise a foreign proceeding. However, the court could co-operate with the foreign court in certain matters.

Besides the ability to request recognition of the foreign proceeding, the foreign representative will be able to request injunctions and other interim measures, as well as measures to defend the debtor's estate or the creditors' interests.

Regarding the costs for recognition of the foreign insolvency proceeding, Article 17 of the Mexican constitution foresees that all access to tribunals shall be free of costs. However, the recognition proceeding might imply certain external costs which could include the translation and certification of evidence required.

In cases where the insolvent company also has an establishment in Mexico, the company shall be responsible for the fees of the experts that aid in the insolvency proceeding (the visitor and, potentially, a conciliator or a receiver). (See section 2.5 below.)

Finally, it is always advisable to seek legal advice from a local counsel when seeking recognition in Mexico of a foreign proceeding.

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[1] If the debtor is the requesting party, only one requirement is needed.

[2] Liquid assets are defined by the Concurso Law as cash or deposits, deposits and investments payable within 90 days after filing for concurso, accounts receivable payable within 90 days after filing for concurso and securities of which sale and purchase are regularly carried out in the relevant markets and can be realised within a maximum of 30 days.

1.2 Financing

1.2.1 Does your jurisdiction allow or provide for the following?

- ***Contingency fee agreements***

  There is no specific regulation regarding contingency fee agreements in Mexico, nor any prohibition. It is common for parties to enter into a contingency fee agreement with their attorneys.

- ***Is legal aid for litigation available for a foreign IP?***

  In Mexico, the Federal Institute of Legal Aid (*Instituto Federal de Defensoría Pública*) is in charge of providing legal aid to people who require it. However, according to the Federal Public Defence Law, legal aid is preferably for:

  (i) unemployed or partially employed persons;

  (ii) pensioned or retired persons;

  (iii) indigenous persons; and

  (iv) persons who are in economical need, among others.

  The Federal Institute of Legal Aid will perform a social and economic study to confirm if the requiring party complies with these requirements.

  Therefore, although it is not prohibited under Mexican law for a foreign IP to receive legal aid, the insolvent company must be in one of the categories mentioned above, otherwise the Federal Institute of Legal Aid could deny the service.

  Also, for insolvency proceedings, Mexico has a specific administrative institute, the Federal Institute of Insolvency Practitioners (*Instituto Federal de Especialistas en Concursos Mercantiles*, IFECOM). IFECOM's main function is to authorise and manage the registry of any person who intends to act as an expert (i.e., visitor, conciliator and / or receiver) who provides aid to the court in insolvency proceedings (*concurso mercantil*). IFECOM also assists the court and the parties in certain cases with non-binding interpretations of the Concurso Law. However, IFECOM does not provide legal aid for litigation.

- ***Are litigation financing and / or insurance for litigation costs provided and, if so, starting at which amount?***

  In Mexico, litigation financing is not common but insurance for litigation costs is. The main insurance companies in Mexico provide insurance for litigation costs. The amount on the insurance for litigation costs can vary greatly and depends on the specific circumstances of the case at hand.

1.3 Obtaining an enforcement order

1.3.1 Besides commencing regular civil proceedings, are there easier and cheaper ways to obtain an enforcement order?

There are certain alternatives for obtaining an enforcement order apart from through regular civil proceedings. However, these alternatives do not exempt the parties from appearing in court to obtain enforcement.

One alternative is to obtain an enforceable document and file a summary civil or commercial proceeding. Enforceable documents include promissory notes, acknowledgment of debt before a court, private documents acknowledged before a notary public or in court, among others. Summary proceedings offer a shorter proceeding and the ability to seize assets at the moment of service of process (for more information, see section 2.3 below).

In addition, in Mexico City (as well as in certain states) another way to obtain an enforcement order is through a mediation agreement entered before a certified mediator, in terms of the Alternative Justice Act of the Superior Court of Justice for the Federal District. This agreement can be enforced under the same rules of enforcement of final and binding judgments.

1.4 Lawyers' fees

1.4.1 What are the legal provisions for lawyers' fees, and are there compulsory statutory fees for some or all activities?

In general, there are no provisions regarding lawyer's fees or compulsive statutory fees under Mexican law. However, certain states (e.g., Veracruz, Jalisco, Hidalgo, State of Mexico etc.) foresee non-binding provisions regarding lawyers' fees (see section 1.7 below).

In the case of class actions, the fees of the representative of the class are covered by Article 617 of the Federal Civil Proceedings Code, which provides that lawyer's fees for representing the parties in a class action have a cap determined by the amount of the dispute, which goes from 20% to 30%, depending on the amount of the dispute.

1.5 Court fees

1.5.1 In order to take legal action, does a foreign plaintiff have to provide security and / or make a prepayment for court costs and, if so, how is the amount calculated?

Under Mexican law, plaintiffs, whether Mexican or foreign, do not have to provide security nor make a prepayment for court costs in order to take legal action.

Pursuant to Article 17 of the Mexican Constitution,[3] court costs are prohibited, and court services are free of charge. The Plenary of the Supreme Court of Justice has

[3] Article 17: "Everyone has the right to have justice administered by tribunals which shall be expeditious in rendering judgment within such time and under such conditions as are established by law, and shall render their decisions promptly, completely and impartially. Their service shall be free of charge, and court costs shall therefore be prohibited."

established in a binding precedent that such prohibition only refers to fees for court services.[4] However, in general, reimbursement of legal costs and expenses made by the parties shall be permitted (see section 1.6 below).

1.5.2 What are the legal provisions for court fees in civil proceedings?

In Mexico there are no court fees (see section *1.5.1* above).

1.6 Refund of legal costs and expenses

1.6.1 Is the winner of a court proceeding entitled to reimbursement for the legal costs and expenses?

Reimbursement of legal costs and expenses depends on the applicable legislation and type of proceeding. Generally, the prevailing party in a court case is entitled to get reimbursed for the legal costs and expenses.

The reimbursement is generally based on non-binding statutory fees, or on amounts established discretionarily by the court, which are usually lower than the amounts that were actually disbursed. To obtain reimbursement of legal expenses, the prevailing party usually needs to prove that it was represented by an attorney.

Under the Commercial Code, the court will order payment of legal costs and expenses when expressly foreseen by law or when the court considers that one of the parties acted in bad faith. The court will always order the payment of legal costs and expenses against:

(i) a party that behaved recklessly or in bad faith during the trial;

(ii) a party that did not produce any evidence to justify its action or defences, if based on disputed facts;

(iii) a party that filed false documents, or put forward false or bribed witnesses;

(iv) the losing party in a commercial summary proceeding or anyone who attempted a commercial summary proceeding and did not prevail;

(v) the losing party by two consecutive judgments in first and second instance; or

(vi) a party that attempted inadmissible actions, defences or challenges.

Under the Federal Civil Proceedings Code, as a general rule, the losing party of a court proceeding must reimburse the prevailing party with legal costs and expenses. However, the losing party will not be ordered to pay such costs if the court considers that the losing party was not responsible for the lack of voluntary agreement between the parties and when it made filings to what was strictly necessary to reach a final judgment. Legal costs and expenses shall be determined by the tribunal, excluding the cost of any defence considered superfluous.

[4] Binding precedent, "COSTAS JUDICIALES. ALCANCE DE SU PROHIBICIÓN CONSTITUCIONAL", (Judicial expenses. Extent of its constitutional prohibition), Pleno de la Suprema Corte de Justicia de la Nación [Plenary of the Supreme Court of Justice of the Nation], Semanario Judicial de la Federación, Novena Época, Tomo X, Agosto de 1999, P/J 72/99, page 19, 193559 (MEX).

Mexico City and states' legislations usually follow a similar pattern. However, they may have different rules for the payment of legal costs and expenses.

Furthermore, certain states may subject payment of the cost of legal fees to non-binding statutory fees (see section 1.7 below).

1.7 Examples of legal costs and expenses

1.7.1 What would be the roughly estimated litigation costs and expenses – first instance including lawyer and court – for a (simple) claim in the amount equivalent to EUR5,000, EUR50,000 and EUR500,000?

It is difficult to establish an estimated fee for litigation costs and expenses, as these vary greatly depending on many circumstances, including the lawyers or law firm hired. However, there are certain states (e.g., Veracruz, Jalisco, Hidalgo, State of Mexico etc.) that establish non-binding statutory fees for lawyers. While these fees are non-binding for lawyers, they are sometimes used as a reference by courts when determining legal costs.

Such statutory fees provide that lawyers' fees may range from 10% to 25% of the value of the lawsuit, with a lower percentage applied as the value of the lawsuit increases. However, as already mentioned, such fees are non-binding provisions and lawyers seldomly use them.

Under these fees, an estimate for litigation costs for a claim of EUR5,000 could go from EUR500 to EUR1,250; for a claim of EUR50,000, the litigation costs could go from EUR5,000 to EUR12,250; and for a claim of EUR500,000, the litigation costs could go from EUR50,000 to EUR125,000. Expenses will greatly depend on the nature and complexity of the case and necessary evidence, among other factors.

As mentioned in section *1.5.1* above, court costs are not permitted in Mexico. Hence, the estimated costs and expenses previously stated are only for lawyers' fees and other expenses.

1.8 Average duration of litigation

The duration of litigation in Mexican proceedings may vary a lot depending on many factors (e.g., the amount of evidence offered by the parties, court workload, parties' attitude regarding the proceeding etc.).

According to different statistics, civil and commercial proceedings take on average 11 to 20 months to reach a final *res judicata* judgment.

Commercial oral proceedings are single-instance proceedings and take on average 148 days to reach a final judgment.[5] On the other hand, ordinary civil proceedings are generally comprised of two instances and take on average six months (167 working days) in first instance, and nine months (256.5 working days) in second instance.[6] Both of these proceedings are subject to a final constitutional "*amparo*"

[5] Comisión Nacional de Mejora Regulatoria (CONAMER), Juicios Orales Mercantiles: Diagnóstico Nacional, Recomendaciones y Certificación JOM, February 2020, pages 64–68. Available at: https://www.gob.mx/cms/uploads/attachment/file/537439/JOM_portal.pdf.

[6] Poder Judicial del Distrito Federal, Indicadores sobre el derecho a un juicio justo (2011), page 100. Available at: http://www.poderjudicialcdmx.gob.mx/estadistica/wp-

review, known as *amparo directo* or direct amparo, which takes on average four months or 167 days until the *res judicata* judgment.[7]

SCENARIO 2: ENFORCEMENT ORDER (JUDGMENT) EXISTS AND NEEDS TO BE ENFORCED ABROAD

2.1 Recognition proceeding and costs

2.1.1 What is the proceeding and what are the roughly estimated costs – including lawyer and court – for the recognition of the foreign enforcement order for a claim in the amount equivalent to EUR5,000, EUR50,000 and EUR500,000?

Recognition and enforcement of a foreign judgment can be governed by different statutes, depending on the case. Recognition and enforcement could be governed under the Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards, if the states are both parties to the convention. If the matter is commercial, the Commercial Code would apply. If the matter is civil, the federal or local codes of civil procedure would be applicable. However, rules for recognition and enforcement are generally very similar. Below, we will focus on the rules applicable to commercial matters.

Article 1347-A of the Commercial Code provides the requirements for recognition and enforcement of foreign commercial judgments:

(a) that the formalities of the conventions on the transmittal of letters rogatory that Mexico is part of are met;

(b) that the foreign judgment was not rendered as consequence of an *in rem* action;

(c) that the foreign court had jurisdiction under the rules pursuant to international law;

(d) that the defendant was personally summoned to guarantee its due process;

(e) that the foreign judgment is final;

(f) that there is no pending action before Mexican courts for the same matter;

(g) that the judgment is not against Mexican public order; and

(h) that the requirements to consider the foreign judgment as authentic are met.

Under Mexican law, both federal and state courts have jurisdiction over commercial matters. Therefore, the recognition and enforcement of a foreign commercial judgment can be sought before a federal district court or before a civil state court. Furthermore, recognition shall be sought at the domicile of the defendant and, lacking a domicile, at the location of the assets to be enforced.
Since the Commercial Code does not provide a specific procedure for recognising

content/uploads/Indicadores_juicio_justo_vol_II.pdf.

[7] Instituto Nacional de Estadística y Geografía, Censo Nacional de Impartición de Justicia Federal 2018 (2018), page 33. Available at: https://inegi.org.mx/contenidos/programas/cnijf/2018/doc/resultado_2018.pdf.

a foreign commercial judgment, the Federal Code of Civil Procedure governs supplementarily.

Article 574 of the Federal Code of Civil Procedure provides the following recognition requirements.

(a) Once a Mexican court receives a letter rogatory from a requesting court, the Mexican court shall summon the executing and the executed parties to appear before it. The letter rogatory must contain:

(i) a certified copy of the judgment;

(ii) a certified copy of the documents that prove the defendant was duly summoned and that the judgment to be enforced is final; and

(iii) Spanish translations of such documents.

(b) After being served, both parties shall have nine days to file any arguments they wish, including defences against the recognition and enforcement of the foreign award.

(c) If the parties offer evidence, the court will set a date for a hearing where it will receive and hear evidence offered by the parties.

The decision – either granting recognition and enforcement of the foreign judgment or denying it – can be appealed.

As mentioned above (see section 1.7 above), the costs for the recognition of a foreign enforcement order will depend on many factors. However, since the recognition of a foreign enforcement order is a shorter and simpler proceeding, the legal costs and expenses are likely to be lower than the legal costs and expenses for regular litigation (see section 1.7 above). Finally, as already mentioned (section *1.5.1* above), court costs are not permitted in Mexico.

2.2 Obtaining information about the debtor

2.2.1 Are there any sources of information about whether a debtor of a claim is without means or subject to an insolvency proceeding?

There is no way to be certain if a debtor of a claim in Mexico is without means. However, it is possible to search for immovable assets (e.g., real estate) in Mexico through the Public Registry of Property. Since the Public Registry of Property is subject to state law, this search would have to be performed in each state of Mexico. There are certain private agencies that perform searches in each Public Registry of Property.

Regarding insolvency proceedings, once a debtor is declared in insolvency – *concurso mercantil* – the judgment declaring the *concurso mercantil* shall be published by the court in the Federal Official Gazette. Furthermore, every debtor that is subject to *concurso mercantil* is announced on the IFECOM website, at the bankruptcy board (*pizarra concursal*). However, this information is not always up to date and might be unreliable.

2.3 Enforcement measures

2.3.1 What main enforcement measures are available and what are the costs – including lawyer and enforcement authority – for enforcing a claim in the amount equivalent to EUR5,000, EUR50,000 and EUR500,000?

The main enforcement measures in Mexico are ordinary and summary civil or commercial proceedings. The main differences between an ordinary and a summary proceeding are mainly that:

(i) the summary proceeding is generally faster than the ordinary proceeding;

(ii) in the summary proceeding, the plaintiff can seize defendant's assets when serving process; and

(iii) to file a summary proceeding, the plaintiff must have an enforceable document.

The estimated costs for enforcing a claim would be the similar to the costs mentioned above section 1.7 above.

As also mentioned above (section 1.7), the costs for the recognition of a foreign enforcement order will depend on many factors. Finally, as already mentioned (see section *1.5.1*), court costs are not permitted in Mexico.

2.4 Alternatives to lawyers

2.4.1 Are there specialised debt collection agencies (or equivalent) which buy claims or work more cost-effectively than lawyers?

While there are certain agencies and private parties that specialise in buying claims and seeking collections, this practice is not too widespread in Mexico and is often limited to extra-judicial collection, or collection of non-recoverable bank debt.

2.5 Insolvency proceedings

2.5.1 What costs are involved – including lawyer and court – for commencing and participating in insolvency proceedings against the debtor of a claim in the amount equivalent to EUR5,000, EUR50,000 and EUR500,000, if the debtor is not able to pay?

As mentioned in section 1.7 above, the costs for commencing and participating in insolvency proceedings vary a lot depending on many factors. While there are no specific parameters to measure attorney contingency fees to participate in insolvency proceedings, we estimate that these range from 1% to 20% of the total nominal value of the debt.

Furthermore, in Mexican insolvency proceedings, the participation of experts that aid the court and the insolvent and its creditors in the insolvency proceeding (visitors, conciliators and, in instances of liquidation, receivers) is mandatory. Unless the insolvency proceeding is commenced with a pre-package agreement, in the first stage of the *concurso*, a visitor – appointed to analyse the company's

books and records and then make a report for the court establishing whether the company meets the insolvency standards – shall be appointed. During the conciliation stage, a conciliator – in charge of the recognition of credits and reaching a settlement agreement – shall be appointed. Finally, during the liquidation stage, if applicable, a receiver – in charge of realising the debtor's assets – shall be appointed.

For the *concurso* request or demand to be admissible, the petitioning party – being either the debtor or a creditor – shall guarantee payment of the visitor's fees, for an amount of around EUR8,000. The First Chamber of the Supreme Court of Justice has held in a non-binding precedent that this admissibility requirement is unconstitutional, given that it limits the access to justice.[8] However, given the non-binding nature of the precedent, this does not relieve parties from paying the visitor's fees and those of other experts during the proceeding.

The tariffs for the visitor are of a fixed fee of around EUR400 plus an hourly fee of around EUR200, and there is a lower fee for the visitor's assistants. These fees shall be approved by the court.

Assuming the visitor had three assistants, and each worked from 10 to 30 hours, the total fees would be from around EUR3,000 to EUR8,000.

Regarding the conciliator, the amount of the fees shall be contingent on the approval of a settlement agreement. If a settlement agreement is approved, the conciliator shall receive payment for up to 100%; if not, up to 35%. This percentage is divided into different activities (e.g., filing the creditors' recognition list, monthly reports, negotiation with creditors etc.). The maximum available fees are based on a percentage of the debt of the company. These fees shall be calculated on a fixed fee plus a progressive basis, beginning at 3.3% regarding a debt up to around EUR200,000, up to 0.01% for a debt of around EUR13 million or more. These fees shall also be approved by the court.

Finally, the fees of the receiver shall be calculated based on the revenues for the sale of assets. Similarly, to those of the conciliator, these fees shall be paid depending on the activities performed. The maximum available fees shall be calculated on a progressive basis, beginning at 12% regarding a revenue of up to around EUR200,000, up to 0.01% for a revenue of around EUR13 million or more. These fees shall also be approved by the court.

Due to the amount that would need to be disbursed for the fees of legal counsel and the experts needed to aid in the proceeding, it would likely not be worthwhile to seek a *concurso mercantil* regarding companies with a debt of less or around EUR500,000.

Also, as mentioned in sections *1.5.1* and 1.7 above, court costs are not permitted in Mexico, therefore, the estimated costs and expenses previously stated are only for the fees of lawyers, experts and other expenses.

[8] Non-binding precedent, "CONCURSOS MERCANTILES. EL ARTÍCULO 24 DE LA LEY RELATIVA VIOLA LA GARANTÍA DE ACCESO A LA JUSTICIA.", (Concuso Mercantil [Insolvency Proceeding]. Article 24 of the applicable law breaches the right of access to justice), Primera Sala de la Suprema Corte de Justicia de la Nación [First Chamber of the Supreme Court of Justice of the Nation], Semanario Judicial de la Federación, Novena Época, Tomo XXVII, February 2008, 1a VI/2008, page 481, 170369 (MEX).

3. Economical conclusion

3.1 Taking into account the costs and expenses for a foreign IP, what is the minimum claim amount at which it makes sense to start litigation or enforcement?

Regarding ordinary or summary civil or commercial proceedings, the minimum claim amount for which it would make sense to start litigation or enforcement would greatly depend on the lawyer or law firm retained and the expected expenses. Hence, we do not consider that there is a minimum claim amount *per se* at which it would make sense to start litigation. In our experience, however, we would recommend our clients to seriously evaluate whether to litigate a claim below EUR500,000.

Moreover, for insolvency proceedings (*concurso mercantil*), we consider that, due to the complexity of the subject-matter, which requires specialised counsel, and the need for experts inside and outside of the proceeding, it would likely only make sense to begin a *concurso mercantil* regarding a debt beginning at around EUR500,000. This, of course, would depend on many circumstances.

RUSSIA

This country report is written based on a situation where an insolvency estate includes a (potential) claim against a (third party) debtor who is domiciled abroad. The court-appointed insolvency practitioner (IP) has to assess the costs for pursuing the claim in order to decide whether it is affordable and economically reasonable to try recovery abroad. Two scenarios are considered. In scenario 1 the claim has not yet been subject to a court proceeding; in scenario 2 an executory title already exists and would have to be enforced abroad.

SCENARIO 1: CLAIM HAS NOT YET BEEN SUBJECT TO COURT PROCEEDINGS

1.1 Recognition proceeding and costs

1.1.1 What is the proceeding and what are the estimated costs for the recognition of the foreign insolvency proceeding and the IP's power to pursue a claim?

To recognise foreign insolvency proceedings and the IP's power to enforce the claim in Russia, the following options are available.

- Option 1: Recognition of the insolvency proceedings

  The IP may obtain a decision of a Russian court recognising foreign insolvency proceedings. This will enable the IP to act under the said decision and enforce the claim against a local debtor.

  The recognition procedure for the foreign insolvency is governed by the provisions of the Federal Law on Insolvency (Bankruptcy) No 127-FZ (Insolvency Law), the Civil Code of the Russian Federation (RCC) and the Commercial Proceedings Code of the Russian Federation (CPC).

  According to Article 1(6) of the Insolvency Law, the decisions of foreign courts on insolvency cases are enforceable in Russia under international treaties or, in the absence of an international treaty, under the principle of reciprocity.

  As of today, Russia is not a member of any multilateral or bilateral treaties governing cross-border insolvencies and their recognition. Additionally, Russia is not a member of the European Union (EU), and, therefore, EU regulations on cross-border insolvency are not applicable in Russia. The United Nations Commission on International Trade Law Model Law on Cross-Border Insolvency 1997 has not been adopted in Russia. Thus, the enforcement of foreign insolvency proceedings will be subject to a reciprocity principle.

  The application of the reciprocity principle is governed by the RCC, namely Article 1189 on the principle of reciprocity limited by the public order rule (Article 1193 of the RCC). To meet the reciprocity requirement, a foreign IP will have to prove that courts, under the jurisdiction in which the insolvency proceedings are carried out, recognise Russian insolvency proceedings. From a practical standpoint, this means providing references to the specific orders of a foreign court on the recognition of Russian insolvency. Notably, court practice on the application of the reciprocity principle in insolvency cases lacks uniformity. In most cases, courts refuse to enforce foreign insolvency proceedings, referring to the lack of reciprocity.[1] However, there are certain

[1] See e.g. Resolution of the Arbitrazh (State Commercial) Court of North-Western District dated 14

cases where courts have established reciprocity between Russia and a foreign state.[2]

The procedure for foreign insolvency recognition will be the same as the procedure for recognition and enforcement of ordinary (non-insolvency) orders of foreign courts, regulated by Chapter 31 of the CPC.

To recognise a foreign court's decision, the IP will file a written application with the *arbitrazh* (state commercial) court at the debtor's place of residence or at the location of its assets. The application will be submitted with the certified and translated copies of the foreign court's decision and the evidence confirming that such decision has become final and binding. Before filing, the IP must also send a copy of the application to the debtor. After the IP files the application, the court accepts it for consideration and schedules a hearing, during which the court investigates only the grounds for the recognition set forth by the CPC, without reconsidering the case on the merits. Then the court issues a relevant ruling, which can be appealed within a month.

During the recognition proceedings, the IP's expenses will mainly comprise of the translation and notary fees, which are not fixed, as well as the mandatory state fee (RUB3,000 / approximately USD31).

- Option 2: Abstaining from the recognition procedure

The foreign IP may abstain from the recognition of the foreign insolvency proceedings in Russia. Instead, the IP may file a statement of claim against a Russian debtor with the local *arbitrazh* (state commercial) court, or the court of general jurisdiction if the claim is not of commercial nature (e.g., a claim under a personal loan, suretyship granted by the individual etc.). In the first case, the procedure will be governed by the CPC; in the second case, the Code of Civil Procedure of the Russian Federation (CCP) will apply.

To file a claim without prior recognition of the foreign insolvency proceedings, the IP will be obliged to confirm its authority to act on behalf of the foreign bankrupt party. From a practical standpoint, the IP can provide either an extract from the commercial register, which identifies the IP as an officer of the bankrupt company, or a decision of the foreign court on the IP's appointment. The local court will consider these documents as written evidence according to the provisions of the CPC / CCP.

This option is rather informal but allows foreign IPs to facilitate local recovery proceedings and avoid proving the reciprocity standard. Furthermore, this option is more suited to corporate insolvencies, rather than individual bankruptcies, because in the former case the IP's authority is often reflected in the companies register. There is a court practice that allows the foreign IP to act on behalf of the foreign bankrupt company without prior recognition of the

November 2016 No Ф07-9292/2016, case No А56-27115/2016; Resolution of the Arbitrazh (State Commercial) Court of North-Western District dated 6 July 2016 No Ф07-4266/2016, case No А56-71378/2015; Resolution of the Arbitrazh (State Commercial) Court of the Ural District dated 9 October 2019 No Ф09-6266/19, case No А60-29115/2019 and others.

[2] See e.g. Resolution of the Arbitrazh (State Commercial) Court of Moscow District dated 19 June 2019 No Ф05-4022/2019, case No А40-68312/2018.

insolvency proceeding.[3] Nevertheless, there is still a risk that the court will refuse to confirm the authority of the IP without prior recognition of the foreign insolvency proceedings. Should this be the case, Option 1 described above will apply.

The possible costs in connection with filing the claim against a Russian respondent are largely similar to the recognition of a foreign insolvency proceeding. They include the state fee, the amount of which depends on the size of the claim, as well as notary and translation fees with respect to the documents confirming the IP's appointment.

1.2 Financing

1.2.1 Does your jurisdiction allow or provide for the following?

- ***Contingency fee agreements***

In Russia, the issue of contingency fees remained unsettled for a long time. Court practice on this issue lacked uniformity. In most cases, courts found contingency fee arrangements unenforceable; whereas other courts admitted the possibility of such arrangements.

However, since 1 March 2020, the Federal Law No 63-FZ dated 31 May 2002, entitled "On Attorney's Activities and Practice of Law in Russia" (Law on Attorneys) was amended to permit contingency fees in agreements with attorneys (lawyers admitted to the bar). Moreover, not only attorneys but all individuals that have a legal degree are entitled to participate in court hearings in Russia (except for criminal proceedings, in which only attorney representation is allowed). Thus, at this stage, it remains unclear whether courts will expand the new contingency fee provisions of the Law on Attorneys to all practising lawyers. Nevertheless, despite the enforcement uncertainties, many local and international legal firms use contingency fee agreements.

- ***Is legal aid for litigation available for a foreign IP?***

The CPC and the Tax Code of the Russian Federation (Tax Code) allow for the following forms of legal aid available to a foreign IP: namely, deferral or payment by instalments of the state fee for consideration of a claim by court. Under Article 64, 333.41, of the Tax Code, deferral or payment by instalments is the postponement of state fee payment for a period not exceeding one year. Generally, deferral or payment by instalments is granted if the claimant is unable to pay the state fee due to an adverse financial condition.

In order to be eligible for deferral / payments by instalments, the IP must provide evidence that the bankruptcy estate is not sufficient to cover the amount of a state fee. Practically, to confirm this, local IPs provide bank account statements or inventory records. However, some courts adopt a very strict approach toward assessment of the financial condition: even lack of funds in the claimant's bank account can be regarded as insufficient evidence to grant deferral / payments by instalments.[4]

[3] See e.g. Resolution of the Arbitrazh (State Commercial) Court of Moscow District dated 25 March 2020 No Ф05-3879/2020, case No А40-312007/2018.

[4] See, e.g., Resolution of the Arbitrazh (State Commercial) Court the Moscow region dated 19 August

- ***Are litigation financing and / or insurance for litigation costs provided and, if so, starting at which amount?***

  While it is generally expected that the party itself pays the state fee and other litigation costs (or requests a deferral of such payment or payment in instalments), Russian law does not restrict payment of litigation costs by a third party (either a private funder, or by an insurance company). However, such mechanisms are not commonly used and have only just started to develop.

1.3 Obtaining an enforcement order

1.3.1 Besides commencing regular civil proceedings, are there easier and cheaper ways to obtain an enforcement order?

Apart from regular civil proceedings, there are two options for obtaining an enforcement order in cheaper and easier ways.

(a) Summary proceedings

Both the CPC (Chapter 29) and the CCP (Chapter 21.1) allow for summary proceedings. A summary proceeding is an expedited procedure for resolving disputes on the basis of written evidence without holding a hearing on the merits. Summary proceedings are designed to reduce litigation costs and facilitate the consideration of straightforward disputes. However, summary proceedings are applied only to limited types of cases, namely:

- cases where the amount of the claim does not exceed RUB800,000 (approx. EUR9,000) against companies; RUB400,000 (approx. EUR4,000) against individual entrepreneurs; or RUB100,000 (approx. EUR1,000) against individuals;

- cases with evidence confirming the acknowledgment of the debt by the respondent; and

- other administrative and tax cases that also involve a low-value claim.

During the summary proceedings, the court does not hold a hearing. Instead, the judge accepts the statement of claim and provides the respondent with a certain period of time to submit objections. Then the judge considers the case on the merits and issues a decision, which is subject to immediate enforcement. A summary decision may be further appealed.

(b) Writ proceedings

Writ proceedings are regulated by Chapter 29.1 of the CPC and Chapter 11 of the CCP. To initiate writ proceedings, the claimant files an application for writ proceedings. Then the judge resolves the case without a hearing on the merits and without summoning the respondent. If the judge grants the application, the claimant receives a judicial writ, which is of the same legal nature as the ordinary writ of execution. The judicial writ is issued within 10 days of the filing

2019 No Ф05-13730/2019, case No А41-31516/2019; Resolution of the Arbitrazh (State Commercial) Court of the Volgo-Vyatskiy District dated 2 August 2005, case No А43-5461/2005-18-180 and others.

of an application with the court by companies and within five days if the application is filed by an individual.

Similar to summary proceedings, the CPC allows writ proceedings only in certain types of disputes, namely:

- contractual disputes where the amount of the claim does not exceed RUB500,000 (approx. EUR5,500);
- disputes with a value that does not exceed RUB500,000 (approx. EUR5,500) that are based on a notary's protest of bills for non-payment, non-acceptance and for failure to date acceptance; and
- disputes over the recovery of tax payments and penalties not exceeding RUB100,000 (approx. EUR1,000).

The CCP sets forth a larger variety of non-commercial disputes subject to writ proceedings (see Article 122 CCP). Under the CCP, the main requirement for writ proceedings is the debtor's acknowledgment of the outstanding debt, as well as explicit evidence confirming the subject-matter of the claim.

1.4 Lawyers' fees

1.4.1 What are the legal provisions for lawyers' fees, and are there compulsory statutory fees for some or all activities?

Generally, lawyers' fees are not fixed by law and are negotiated in the agreement between the lawyer and the client. However, in some cases, lawyer's fees are determined by law. This applies to the appointment of an attorney by a court or another competent authority to comply with mandatory legal assistance requirements (e.g., in the course of criminal proceedings in accordance with Article 25 of the Law on Attorneys, or in the course of providing free legal services under Federal Law No 324-FZ dated 21 November 2011, entitled "On Free Legal Services in the Russian Federation").

If the investigating officer or court appoints an attorney, the latter has the right to receive remuneration from RUB900 (approx. EUR10) to RUB3,350 (approx. EUR35) per working day depending on the complexity of the case, number of defendants, working time (daytime or night-time) etc. As for civil or administrative proceedings, the lawyer appointed by the court has the right to receive remuneration from RUB550 (approx. from EUR6) to RUB2,400 (approx. EUR26) per working day also depending on the complexity of the case and working time (daytime / night-time or working / non-working day etc.).

1.5 Court fees

1.5.1 In order to take legal action, does a foreign plaintiff have to provide security and / or make a prepayment for court costs and, if so, how is the amount calculated?

Russian law has no mechanism for security of the respondent's costs. The respondent may not apply for the court to issue an order obliging the claimant to provide security for costs.

In order to initiate proceedings before the court, the plaintiff – foreign or domestic – must pay the state fee for consideration of the case in court in advance, unless they are granted a deferral of such payment or payment by instalments.

1.5.2 What are the legal provisions for court fees in civil proceedings?

The CPC and CCP set forth a claimant's obligation to pay the state fee for consideration of the case in court. The exact amount of the state fee subject to repayment by the claimant is governed by the Tax Code and depends on the type and the amount of claim. For instance, the state fee for consideration of the monetary claim by the *arbitrazh* (state commercial) court may range from RUB2,000 (approx. EUR21) to RUB200,000 (approx. USD2,100).

1.6 Refund of legal costs and expenses

1.6.1 Is the winner of a court proceeding entitled to reimbursement for the legal costs and expenses?

The general rule of the CPC and CCP is that the prevailing party is entitled to recover its legal costs from the losing party. A court either allocates litigation costs in its final decision or issues a separate ruling on the issue pursuant to the application of the prevailed party.

The court has no power to control attorney fees during court proceedings; however, it has full discretion to reduce attorney fees to a reasonable level when a winning party applies for costs compensation. In absence of any statutory guidelines, what amount is reasonable and what is not is decided on a case-by-case basis. However, court practice[5] indicates some criteria that courts take into account, namely:

- complexity and duration of the case;
- amount of work done;
- reasonable amount of work necessary for the case – here, fees for drafting memoranda, doing research and conducting internal discussions are not usually compensated;
- qualification of a representative, which is not a decisive factor *per se*; and
- procedural strategy of the opponent in court (e.g., deliberate suspension of court hearings etc.), as well as at a pre-trial stage.

[5] See Ruling of the Plenum of the Supreme Court of the Russian Federation No 1 dated 21 January 2016 "On Application of Legislation on Compensation of Expenses relating to the Court Trial".

1.7 Examples of legal costs and expenses

1.7.1 What would be the roughly estimated litigation costs and expenses – first instance including lawyer and court – for a (simple) claim in the amount equivalent to EUR5,000, EUR50,000 and EUR500,000?

Exact estimations may be drawn only for the state fees, as they depend directly on the amount of claim. To file a claim in the amount equivalent to EUR5,000, EUR50,000 and EUR500,000, the foreign IP must pay the following amounts of state fees:

- EUR5,000 – approx. RUB11,640 (approx. EUR135)
- EUR 50,000 – approx. RUB44,587 (approx. EUR500)
- EUR 500,000 – approx. RUB200,000 (approx. EUR2,300), which is the maximum state fee amount.

The attorney's fees may vary depending on the region, the complexity of the case, and the status of the law firm. However, the foreign IP may refer to the statistics of lawyers' fees, prepared by VETA Expert group for different regions of the Russian Federation based on the costs of foreign and local law firms.[6] For example, the average compensation for the recovery of debt in the first *arbitrazh* (state commercial) court of Moscow varies from RUB100,000 (approx. EUR1,150) to RUB850,000 (approx. EUR10,000).

1.8 Average duration of litigation

The CPC and the CCP set forth different terms of litigation depending on the court instance. For example, the trial period in the first instance *arbitrazh* (state commercial) court must not exceed six months (Article 152 of the CPC) and two months in the court of general jurisdiction (Article 154 of the CCP). From a practical standpoint, duration of litigation depends on many factors, such as the quantity of evidence, appointments of expert examination, the schedule of the presiding judge etc. Thus, statutory litigation terms are often extended. For instance, the average legal dispute in the trial court may take from three to 18 months.

SCENARIO 2: ENFORCEMENT ORDER (JUDGMENT) EXISTS AND NEEDS TO BE ENFORCED ABROAD

2.1. Recognition proceeding and costs

2.1.1 What is the proceeding and what are the roughly estimated costs – including lawyer and court – for the recognition of the foreign enforcement order for a claim in the amount equivalent to EUR5,000, EUR50,000 and EUR500,000?

If a foreign IP is willing to recognise and enforce the judgment of a foreign court, the provisions of international treaties of the Russian Federation or the relevant federal laws will apply (Article 241 of the CPC and Article 409 of the CCP).

[6] To access all reports prepared by VETA Expert group, see: https://veta.expert/projects/research/.

However, if there is no effective treaty or applicable federal law, the enforcement of a foreign judgment will be subject to the reciprocity principle.

The foreign IP will make an application to recognise and enforce a foreign judgment to the *arbitrazh* (state commercial) court if the judgment was rendered in a commercial case, or to the court of general jurisdiction if the dispute is not of a business nature. The IP can file an application either at the registration / residence of the defendant or at the location of its assets (Article 242 of the CPC and Article 410 of the CCP). All documents attached to the application, including the foreign judgment, must be accompanied by a Russian translation certified by a Russian notary and containing an apostille or consular legalisation, where appropriate (see section 1.1 above).

Costs estimates for the recognition and enforcement procedure may be drawn only for state fees. To file a claim for the recognition of the foreign enforcement order, the IP must pay the amount of RUB3,000 (approx. EUR32) (for commercial disputes). Other expenses may include costs for translation and certification, which are not fixed.

The duration of the recognition and enforcement proceedings depends on the region, the complexity of the case and the status of the law firm. Therefore, it is very difficult to estimate the approximate amount for the costs of local lawyers' services. Nevertheless, based on an analysis of court practice, the amount of legal costs varies from RUB50,000 (approx. EUR600) to RUB850,000 (approx. EUR10,000).

2.2 Obtaining information about the debtor

2.2.1 Are there any sources of information about whether a debtor of a claim is without means or subject to an insolvency proceeding?

In Russia, there are numerous public registers that allow one to assess the financial condition of the debtor.

The primary source of information is the Federal Corporate Register.[7] This register contains general information, such as the details of the company, its management and charter capital. Additionally, the register contains information on notifications of intentions to commence insolvency proceedings (for most cases, an obligatory stage of any insolvency proceedings).

To track the pending insolvency proceedings, the IP may also address the Federal Insolvency Register.[8] Information on decisions of creditors' meetings, updates on trades and reports on the revealed assets are published in the said register.

Both *arbitrazh* (state commercial)[9] and general jurisdiction courts[10] administrate publicly available sites, which are helpful to assess the scope of litigations involving the target company / individual.

[7] Available in Russian via the link: https://fedresurs.ru/.
[8] Available in Russian via the link: https://bankrot.fedresurs.ru/?attempt=1.
[9] Available in Russian via the link: https://kad.arbitr.ru/.
[10] For instance, the official website of the Moscow general jurisdiction court is available in Russian via the link https://www.mos-gorsud.ru/.

Additionally, the foreign IP may use the following registers:

(a) the Real Estate Register, which contains information on real estate and mortgage holders;[11]

(b) the Public Register of Legal Entities, which contains basic corporate information;[12] and

(c) the Trademark Register, which contains information on trademark owners.[13]

Unfortunately, the foregoing registers are maintained in Russian. Thus, the IP will need to engage a local attorney / paralegal to collect information on the target company.

Alternatively, the IP may engage a private investigator to collect information on the financial standing of the debtor.

2.3 Enforcement measures

2.3.1 What main enforcement measures are available and what are the costs – including lawyer and enforcement authority – for enforcing a claim in the amount equivalent to EUR5,000, EUR50,000 and EUR 500,000?

Once the foreign IP obtains the order on recognition and enforcement of the foreign judgment, the trial court will issue a writ of execution. Then, under the Federal Law on Enforcement Proceedings No 229-FZ (Enforcement Law), the IP may either:

(a) send the writ of execution to the bank (Article 8 of the Enforcement Law) – this option suggests that the IP knows the bank account details of the debtor, and, in this case, the authorised bank will transfer the funds in the debtor's account to the account designated by the foreign IP; or

(b) make an application to the federal bailiff service to commence enforcement proceedings (Article 30 of the Enforcement Law) – after the commencement of the enforcement proceedings, the bailiff can undertake a variety of actions to locate and foreclose on the debtor's assets, ranging from imposing injunctive relief over the debtor's assets to issuing a prohibition from leaving the territory of Russia.

As mentioned in section 2.1 above, to file a claim for recognition and enforcement of the foreign court's act the creditor must pay approximately RUB3,000 (approx. EUR32) (for commercial disputes) in state fees. The cost of lawyers' fees varies according to the region, the complexity of the case and the status of the law firm.

The Enforcement Law sets forth no state fee for commencement of enforcement proceedings. The bailiff services are paid from the federal budget. Additionally, should the debtor refuse to repay the debt voluntarily upon the request of the bailiff, the latter has the right to receive from the debtor an enforcement charge, usually amounting to 7% of the claimed amount.

[11] Available in Russian via the link: https://rosreestr.gov.ru/site/.
[12] Available in Russia via the link: https://www.nalog.ru/rn77/.
[13] Available in Russian via the link: https://rospatent.gov.ru/ru/sourses.

To facilitate the enforcement proceedings, the foreign IP may engage a local attorney to supervise and assist the bailiff. In this case, the fees will depend on the region, the complexity of the case and the status of the law firm.

2.4 Alternatives to lawyers

2.4.1 Are there specialised debt collection agencies (or equivalent) which buy claims or work more cost-effectively than lawyers?

The activities of debt collection agencies in Russia have been strictly regulated since 2016 when Federal Law No 230-FZ dated 3 July 2016, entitled "On Protection of Rights and Legitimate Interests of the Physical Persons while Collecting the Overdue Debts and on Amending the Federal Law 'Microfinance Activities and the Microfinance Agencies'" (Collection Agencies Law) was adopted.

All collection agencies must be included in the state register and should have a licence (Article 12 of the Collection Agencies Law).[14] In addition, the Collection Agencies Law establishes certain restrictions on work with debtors aimed at prevention of harassment and unlawful practices.

Most collection agencies operate as agents of creditors and collect debts for a fee or percentage of the total amount owed. Generally, they charge the same fees as lawyers, but some of them also purchase claims and enforce them on their own behalf.

2.5 Insolvency proceedings

2.5.1 What costs are involved – including lawyer and court – for commencing and participating in insolvency proceedings against the debtor of a claim in the amount equivalent to EUR5,000, EUR50,000 and EUR500,000, if the debtor is not able to pay?

The costs for commencing and participating in insolvency proceedings do not depend on the amount of the claim against the debtor. Instead, the foreign IP must take into the account the following expenses.

First, since 1 January 2018, to apply for insolvency proceedings it is necessary to publish a preliminary notification of intention to file an insolvency petition. Such publication is registered in the Federal Corporate Register. The average cost for such publication is approximately RUB5,000 (approx. EUR60).

Second, to commence insolvency proceedings, the IP will have to prove that the debtor has enough assets to cover the expenses of the court-appointed receiver. If the bankruptcy estate is insufficient, the IP must be ready to finance the insolvency proceedings. Otherwise, the court will terminate the insolvency case. From a practical standpoint, the amount of initial financing is RUB200,000 (approx. EUR2,300). However, the exact amount depends on the complexity of the insolvency proceedings.

Third, the cost of lawyers' fees for commencing and participating in insolvency

[14] The official state register of collection agencies is available in Russian via the link: http://fssp.gov.ru/gosreestr_jurlic/.

proceedings varies according to the region, the complexity of the case and the status of the law firm. Based on court cases on claim costs reimbursements, the lawyers' costs range from RUB50,000 (approx. EUR542) to RUB4,600,000 (approx. EUR50,000) per insolvency petition / submission.

3. Economical conclusion

3.1 Taking into account the costs and expenses for a foreign IP, what is the minimum claim amount at which it makes sense to start litigation or enforcement?

Legal costs in Russia are very flexible. If the amount of a claim is below average, the claim is not disputed and the debtor has enough assets to actually recover the debt, a creditor may start litigation by itself, paying only the state fees, or involve a low-cost Russian law firm to save on lawyers' fees.

On the other hand, a complex legal dispute will require repayment of larger state fees and involvement of more reputable lawyers. In this case, a foreign IP should balance the lawyers' costs and fee estimates against the financial standing of the debtor or enforcement of the foreign court's act in Russia. Only after a preliminary risk assessment would it be possible to understand the feasibility of litigation in Russia.

SINGAPORE

This country report is written based on a situation where a foreign insolvency practitioner (IP) of an asset-poor insolvency estate is considering whether to pursue recovery against a (third party) debtor who is domiciled in Singapore. In deciding whether to attempt recovery in Singapore, the foreign IP has to assess the process and costs of doing so. Two scenarios are considered. In Scenario 1, the claim or potential claim has not been commenced and the foreign IP is contemplating commencing the claim or potential claim in Singapore. In scenario 2, a foreign judgment has been obtained in the jurisdiction where the foreign insolvency proceeding took place and this needs to be enforced in Singapore. `

SCENARIO 1: CLAIM OR POTENTIAL CLAIM HAS NOT BEEN COMMENCED IN SINGAPORE

It is important to distinguish between the following types of claims as this *may* have a bearing on the foreign IP's cost assessment. First, there are general claims arising outside of insolvency law, such as a claim to recover an unpaid debt. Second, there are claims which exist only under insolvency law. This would include claims such as antecedent actions.

1.1 Commencing proceedings

1.1.1 General claims arising outside of insolvency law

Generally, a foreign IP can bring a claim on behalf of the insolvency estate against a debtor present in Singapore as the Singapore court would have *in personam* jurisdiction over the debtor. The foreign IP would have to follow the same process as a local plaintiff – commencing an action by the relevant originating process and effecting proper service of the documents onto the potential defendant.

1.1.2 Claims arising under insolvency law

Singapore has adopted the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Cross-border Insolvency (Model Law) as the primary regime for the recognition of foreign insolvency proceedings.

In a situation where the foreign IP is intending to pursue an insolvency law claim in the foreign jurisdiction, recognition of the foreign proceedings under the Model Law in Singapore can be sought to assist in the foreign proceedings. In a situation where the foreign IP is contemplating a potential claim under Singapore insolvency law, the foreign IP may make an application under Article 23 of the Model Law after obtaining recognition of the foreign insolvency proceedings. This allows the foreign IP to pursue the claim and seek remedies available only under Singapore insolvency law.

Estimated costs of recognition proceedings can be between SGD10,000 to SGD50,000 depending on complexity and whether the recognition proceedings are contested.

1.2 Financing

1.2.1 Does your jurisdiction allow or provide for the following?

- ***Contingency fee agreements***

  Currently, contingency fee agreements are prohibited for contentious matters.

  There are proposals by the Ministry of Law to introduce a framework in which conditional fee agreements can be offered to clients. The difference between a conditional fee agreement and a contingency fee agreement is that the former will allow a lawyer to receive payment of his or her legal fees only if the claim is successful whereas the latter allows the lawyer to a share in an agreed percentage of the recovery with no direct correlation to the work done. The proposal is still under consideration as of 1 June 2021.

- ***Is legal aid for litigation available for a foreign IP?***

  There is no legal aid for litigation available to a foreign IP. Legal aid for civil matters is provided by the Legal Aid Bureau under the Ministry of Law and available to Singapore citizens and permanent residents who are residing in Singapore. The exception for foreign practitioners is only in relation to applications under the Hague Convention on the Civil Aspects of International Child Abduction.

- ***Are litigation financing and / or insurance for litigation costs provided and, if so, starting at which amount?***

  - *Litigation financing*

    Litigation financing is generally available for insolvency-related litigation.

    Case law has allowed litigation financing in connection with the sale and assignment of proceeds from causes of actions, and the underlying causes of actions themselves, which are the property of the company or the bankruptcy estate (*Re Vanguard;*[1] *Solvadis;*[2] *Re Fan Kow Hin;*[3] *Sumikin*[4]).

    It is typical for an IP to seek court approval of the funding agreement before proceeding with the litigation financing.

    In addition, the new Insolvency, Restructuring and Dissolution Act 2018 (IRDA) expressly permits judicial managers (section 99 read with the First Schedule) and liquidators (section 144) to sell and assign the proceeds of sale arising from the following actions:

    (1) transactions at an undervalue (section 224);

    (2) unfair preference transactions (section 225);

[1] *Re Vanguard Energy Pte Ltd [2015] 4 SLR 597.*
[2] *Solvadis Commodity Chemicals Gmbh v Affert Resources Pte Ltd* [2018] 5 SLR 1337.
[3] *Re Fan Kow Hin* [2019] 3 SRL 861.
[4] *Manharlal Trikamdas Mody and another v Sumikin Bussan International (HK) Ltd* [2014] 3 SLR 1161.

(3) extortionate credit transactions (section 228);

(4) fraudulent trading (section 238);

(5) wrongful trading (section 239); and

(6) recovery against delinquent officers (section 240).

However, in the exercise of this power, the IP has to comply with the relevant regulations. Accordingly, the IP has to, among others, obtain the necessary approvals from creditors or the Court.

- *Insurance for litigation costs*

Potential litigants can purchase 'after-the-event' (ATE) insurance to offset some of the legal costs arising from litigation. It is targeted at potential plaintiffs who are not poor enough to qualify for legal aid and not financially strong enough to absorb the potential costs of the litigation, including insolvency-related litigation (*e.g.*, by a judicial manager or liquidator).

The insurer will consider a spectrum of factors when pricing the insurance premium, including the merits of the case and the size of costs to be insured. Typically, the premium can range anywhere between 15% to 45% of the limit of indemnity. If the case is settled early, it is possible for insurers to offer sizeable discounts.

If the plaintiff wins the case and seeks to recover the ATE insurance premium as part of his or her costs, the plaintiff must show that such costs were reasonably incurred, except where costs are awarded on an indemnity basis (see section 1.6 below).

1.3 Out-of-court procedures

Before commencing proceedings in court, the foreign IP may consider mediation with the debtor. The Singapore Mediation Centre offers insolvency mediation under its Commercial Mediation Scheme for claims above SGD60,000. Under this scheme, the cost of mediation will be commensurate with the disputed sum and the process is guided by a panel of specialist mediators for insolvency disputes.

Singapore is also a party to the United Nations Convention on International Settlement Agreements Resulting from Mediation (Singapore Convention on Mediation). This will allow for the recognition of the mediated settlement among signatory states.

1.4 Lawyers' fees

There are no guidelines or recommended structure for lawyers' fees payable by their own client. The lawyers' fees are generally known as solicitor and client costs (S&C costs). The predominant method of charging by lawyers is time-based. However, it is also possible for fees to be fixed for certain services.

An estimated range of lawyers' fees are:

Senior counsel	SGD1,500–SGD2,000
Partner / director	SGD900–SGD1,200
Senior associate	SGD400–SGD700

1.5 Court fees

1.5.1 Costs in order to take legal action

A defendant may apply for the foreign IP to provide security for costs under Order 23 of the
Rules of Court or under section 388 of the Companies Act. The purpose of security for costs is to ensure that the defendant is able to recover the costs of the proceedings if they are awarded to him or her. Security for costs is commonly required where the plaintiff is located overseas, and there are reasons to believe that the plaintiff is unable to pay the costs of the defendant if ordered to do so. Therefore, a foreign IP has to consider whether the foreign insolvency estate has sufficient assets to offer as security for costs when commencing the action in Singapore.

The quantum of security for costs which has to be furnished by the plaintiff is only a reasonable estimate, determined at the time of the order, of expected costs.

1.5.2 Court fees in civil proceedings

The court fees for civil proceedings can be found in Appendix B to the Rules of Court.[5] Generally, the amount of court fees is proportional to the sum in dispute. Where the disputed sum is smaller, a potential plaintiff must commence the action in the small claim's tribunal or the magistrate's court where the court fees will be lower compared to, for example, if the action was commenced in the High Court for a larger disputed sum.

1.6 Refund of legal costs and expenses

The general rule of costs in Singapore is that "costs follow the event". This means that the losing party in the proceeding will have to pay the winning party. This is commonly known as party-and-party costs (P&P Costs). The P&P Costs may be fixed at the end of the proceedings or subject to taxation before a taxing Registrar.

Generally, P&P Costs are taxed on a standard basis. This means that any doubts as to the reasonableness of the costs incurred is resolved in favour of the losing party. However, there are situations in which P&P Costs may be taxed on an indemnity basis, such as where the losing party acted unreasonably during the course of the proceedings or by contract. This means that any doubts as to the reasonableness of the costs incurred is resolved in favour of the winning party.

For P&P Costs guidelines, refer to Appendix G of the Supreme Court Practice Directions.[6]

[5] Available at: https://sso.agc.gov.sg/SL/SCJA1969-R5?ProvIds=SaB-#SaB-.
[6] Available at: https://epd.supremecourt.gov.sg/downloads/Appendix_G/Appendix_G.pdf.

1.7 Examples of legal costs and expenses

Please refer to sections 1.4, 1.5 and 1.6 above.

Costs are not necessarily fixed to the quantum of the claim and can vary from case to case. Generally, the more complicated the matter, the greater the costs.

1.8 Average duration of litigation

The duration of litigation can differ depending on different factors such as, among others, complexity of subject-matter, quantity of evidence and the respective workload of the judge. In a relatively straightforward case where summary proceedings are possible, the matter can be concluded within three to six months. If the matter needs to proceed to trial, the approximate duration is between 18 months to two years for the proceeding to conclude. Thereafter, appeals to the Court of Appeal can be concluded within approximately six months from the time of filing.

SCENARIO 2: A FOREIGN JUDGMENT EXISTS AND NEEDS TO BE ENFORCED ABROAD IN SINGAPORE

It is important to distinguish between recognising and enforcing a foreign judgment for a sum of money, regardless of whether it is an insolvency-related judgment and recognising and enforcing a foreign declaratory order.

2.1 Recognition proceeding and costs

2.1.1 Foreign judgment for a sum of money

Singapore is a party to the Hague Choice of Court Convention (Hague Convention) which is enacted domestically in the Choice of Court Agreements Act 2016. The Hague Convention provides a framework for the automatic recognition and enforcement of judgments among contracting states. Therefore, if the requirements for recognition and enforcement are satisfied, the Singapore court has to recognise and enforce the foreign judgment. In Singapore, for a foreign judgment to be recognised and enforced under the Hague Convention, an applicant must apply to the High Court with the relevant supporting documents such as a complete and certified copy of the foreign judgment. The supporting documents must be translated into the English language if required, and this will incur additional costs for an applicant.

A foreign judgment can also be recognised and enforced in Singapore under various legislation, such as the Reciprocal Enforcement of Commonwealth Judgments Act (RECJA) and the Reciprocal Enforcement of Foreign Judgments Act (REFJA) which requires an applicant to register the foreign judgment with the High Court. Currently, RECJA and REFJA allow for the recognition and enforcement of foreign judgments arising from 11 jurisdictions. Upon registration, the applicant will provide notice to the judgment debtor. Currently, there are proposals for reform by repealing the RECJA and consolidating the statutory regime under the REFJA. This reform is still pending as of 1 June 2021.

It should be noted that the Singapore adoption of the Hague Convention excludes foreign judgments arising from bankruptcy, insolvency, composition or any analogous matter.

It should also be noted that, outside of these statutory procedures, a foreign judgment creditor may seek recognition and enforcement of a foreign judgment as a common law debt claim.

2.1.2 Foreign declaratory order

Singapore has not adopted the new UNCITRAL Model Law on Recognition and Enforcement of Insolvency-related Judgments. It is untested whether Singapore's adoption of the Model Law will allow for the recognition of an insolvency-related foreign declaratory order arising out of foreign insolvency proceedings.

The REFJA was amended in 2019 to allow for the registration of, among others, non-money judgments. Such non-money judgments may only be registered if the Singapore court is satisfied that enforcement of the judgment would be just and convenient. In the event that the Singapore court is of the opinion that such enforcement would not be just and convenient, the Singapore court may instead make an order for the registration of such amount as it considers to be the monetary equivalent of the relief.

2.2 Obtaining information about the debtor

The Insolvency Office of the Ministry of Law provides an online enquiry service which allows interested persons to ascertain the bankruptcy status of persons and the liquidation status of companies that have been compulsorily wound up by the court. The cost of such searches is SGD6 each. Alternatively, interested persons may check the national Gazette for information on companies which are under judicial management or liquidation.

Interested persons may also check the website of the debtor company to determine if it is under judicial management or liquidation.

A foreign IP can consider engaging a Singapore law firm to conduct searches that could provide information on all claims that a debtor may be subject to. The cost to do so would vary according to the law firm that is engaged and how comprehensive the requested search is.

2.3 Enforcement measures

A judgment for the payment of money can be enforced by one or more of the following means:

(1) writ of execution;

(2) garnishee proceedings;

(3) the appointment of a receiver; and

(4) an order of committal.

A writ of execution includes a writ of seizure and sale of movable and immovable property, a writ of delivery and a writ of possession. The type of writ of execution depends on the circumstances and will involve the sheriff / bailiff of the Supreme Court (sheriff). A writ of seizure and sale will authorise the sheriff to seize the judgment debtor's assets and sell them in order to satisfy the judgment debt. With respect to movable property, a writ of delivery directs the sheriff to seize the specific movable property and deliver it to the judgment debtor. For immovable property, a writ of possession allows the judgment creditor to obtain possession over the immovable property.

Garnishee proceedings allow the judgment creditor to garnish a debt from a third-party creditor (garnishee) of the judgment debtor. This will require the garnishee to pay the debt to the judgment creditor instead of the judgment debtor. A garnishee is often a bank.

The judgment creditor may apply to court to appoint a receiver by way of equitable execution. In determining whether to appoint a receiver, the court will consider whether it is just and convenient to make the appointment and shall have regard to the judgment debt, the recovery by the receiver and the probable cost of the appointment. The court-appointed receiver can take control over the judgment debtor's assets and realise it to satisfy the judgment debt.

The judgment creditor may apply to court to commence committal proceedings against the judgment debtor. The purpose of committal proceedings is to punish the judgment debtor for failing to comply with a court order. In making an order for committal, the court has the discretion to either order a custodial sentence or levy a fine.

2.4 Alternatives to lawyers

There are specialised debt collection agencies in Singapore which charge lower fees than lawyers. However, as there is no specific legislation which regulates debt collection, some of the methods used by the debt collectors may be considered oppressive or intrusive. The industry is regulated by the Credit Collection Association of Singapore (CCAS) which is an association of debt collection agencies. The CCAS has instituted a code of ethics for its members to improve industry standards.

Mediation is an up-and-coming alternative to resolve disputes and the foreign judgment creditor could refer the issue to mediation as an alternative mode of enforcing the foreign judgment. The Singapore Mediation Centre has a specialised scheme to resolve insolvency-related disputes by mediation. Further, Singapore is a signatory to the Singapore Convention on Mediation which provides a framework for the recognition of mediated settlements (please refer to section 1.3 above). Taken together, mediation may be a more cost-effective alternative mode of enforcement in certain situations.

2.5 Insolvency proceedings

There are three types of winding-up procedure:

(1) members' voluntary liquidation (MVL);

(2) creditors' voluntary liquidation (CVL); and

(3) compulsory liquidation (CL).

In an MVL and CVL, all proper costs, charges and expenses of and incidental to the winding-up are payable out of the assets of the company. Assuming that it is on an uncontested basis, expected costs can range between SGD7,000 to SGD10,000 with an additional estimated SGD6,000 to SGD8,000 for disbursements.

In a CL, the applicant must first bear the cost of commencing the winding-up. This sum will later be reimbursed by the liquidator out of the assets of the company. Assuming that the procedure is uncontested and straightforward, expected costs can range between SGD10,000 to SGD15,000 with an additional estimated SGD15,000 for disbursements.

Apart from a winding-up, another insolvency procedure is a judicial management, which is a creditor-led reorganisation procedure. This involves making an application to court, and, if successful, a judicial manager will be appointed to replace the management of the debtor. The purpose of judicial management is to achieve one or more of the following:

(1) the survival of the company, or the whole or part of its undertaking, as a going concern;

(2) the approval of a scheme of arrangement; or

(3) a more advantageous realisation of the company's assets than on a winding-up.

Where the judicial management order is uncontested, expenses for the procedure can be approximately SGD25,000 with an additional estimated SGD10,000 for disbursements. These costs are paid out of the assets of the company.

Another procedure is a scheme of arrangement, which is a debtor-led reorganisation procedure. However, as this is debtor-led procedure, a foreign IP will generally not be involved with commencement, and a cost assessment will not be provided.

It should be noted that a creditor bears the cost of proving its debt in the insolvency procedure. This can be done electronically and the filing for each proof of debt submitted is SGD5.

Generally, the cost of the insolvency proceeding will be greater if the debt is disputed by the debtor as this will involve additional costs such as P&P Costs (please refer to section 1.6 above).

3. Economical conclusion

Given the many factors which influence the costs of the procedure, it is difficult to provide an economic conclusion based on the quantum of claim. Generally, for relatively small claims, unless it is very straightforward, the costs and disbursements and all the above actions will not be cost-effective for a foreign IP to commence a claim or potential claim in Singapore. However, if it is with respect to a sizeable claim with a good prospect of recovery, commencing a claim or potential claim in Singapore, including the possibility of litigation financing, will seem viable.

Even if there is the possibility of a cost order which allows for recovery out of the assets of the debtor, a foreign IP has to consider whether there are sufficient assets to even meet the claim.

SOUTH AFRICA

This country report is written based on a situation where an insolvency estate includes a (potential) claim against a (third party) debtor who is domiciled abroad. The court-appointed insolvency practitioner (IP) has to assess the costs for pursuing the claim in order to decide whether it is affordable and economically reasonable to try recovery abroad. Two scenarios are considered. In scenario 1 the claim has not yet been subject to a court proceeding; in scenario 2 an executory title already exists and would have to be enforced abroad.

SCENARIO 1: CLAIM HAS NOT YET BEEN SUBJECT TO COURT PROCEEDINGS

1. Recognition proceeding and costs

1.1 What is the proceeding and what are the estimated costs for the recognition of the foreign insolvency proceeding and the IP's power to pursue a claim?

In 2003, the Cross-Border Insolvency Act 42 of 2000 (Cross-Border Insolvency Act) was promulgated in South Africa, which effectively adopts the principles set out in the Model Law on Cross-Border Insolvency accepted by the United Nations Commission on International Trade Law. However, the Cross-Border Insolvency Act is not operative, as it is dependent upon the designation of "States" to which the Cross-Border Insolvency Act will apply. The Minister of Justice responsible for such designation has not, since the promulgation of the Cross-Border Insolvency Act, designated any States to which the Act will apply.

Accordingly, the procedure that will apply in South Africa is based on common law principles of international private law and precedent with particular regard to the principles of comity, convenience and equity.

In terms of South African common law, the foreign IP will be required to make an application to a High Court in South Africa to be recognised as a foreign IP in order to pursue a claim against the debtor domiciled in South Africa. The foreign IP will not be allowed to act in South Africa in such a capacity before his or her appointment has been recognised by a South Africa court. The South Africa court will have a discretion whether to recognise the foreign IP, which discretion is an unfettered one, but recognition is usually granted where it is in the interests of comity and convenience to do so.

The recognition of the foreign IP will allow him or her to *inter alia* pursue claims owing by debtors and which are due and payable to the insolvent estate.

The costs of these recognition proceedings on a conservative basis could range from ZAR150,000 to ZAR300,000 depending on the complexity of the matter.

1.2 Financing

1.2.1 Does your jurisdiction allow or provide for the following?

- ***Contingency fee agreements***

  In South Africa, contingency fee agreements are permitted in terms of the Contingency Fees Act 66 of 1997. Section 2(1) of the Contingency Fees Act provides that a legal practitioner may, if he or she is of the opinion that there are reasonable prospects that his or her client will be successful in any

proceedings, enter into an agreement with such client in which it is agreed that he or she will not be entitled to any fees unless the client is successful to the extent set out in the agreement and that he or she will be entitled to fees equal to or higher than his or her normal fees if the client is successful in such proceedings.

A valid contingency fee agreement must comply with the requirements of the Contingency Fees Act 66 of 1997, which includes *inter alia* the following:

(1) the contingency fee agreement must be concluded at an early stage of the proceedings;

(2) the contingency fee agreement must be in writing and in the prescribed form; and

(3) the "success fee" contemplated in the agreement must not exceed normal fees by more than 100%. Secondly, in the case of claims sounding in money, the success fee must not exceed 25% of the total amount awarded.

Any contingency fee agreement that exists outside the parameters of the Contingency Fees Act is unlawful and invalid.

- ***Is legal aid for litigation available for a foreign IP?***

South African law provides for legal aid that assists indigent and vulnerable litigants that are unable to bear the costs of legal representation. Legal aid in South Africa is regulated by the Legal Aid South Africa Act 39 of 2014 and is administered by a national public entity known as Legal Aid South Africa. In terms of sections 3 and 4(1)(f) of the Legal Aid South Africa Act, the objects of Legal Aid South Africa are, *inter alia*, to provide legal representation to persons at the state's expense, as envisaged in the Constitution, where substantial injustice would otherwise result. This is usually limited to cases involving vulnerable groups such as women, children and individuals living in rural areas.

In order to determine whether an applicant qualifies for legal aid, a "means test" is applied by the Legal Aid Board. In terms of this means test, the Board has regard to the gross monthly income of a single applicant, the gross monthly income of the household of which the applicant is a member, and the net assets of the applicant or the applicant's household. Usually, an individual who earns less than ZAR5,500 per month will qualify for legal aid.

In the circumstances, it is unlikely that a foreign IP will qualify for legal aid for litigation in South Africa in terms of the aforementioned provisions.

- ***Is litigation financing and / or insurance for litigation costs provided and, if so, starting at which amount?***

Litigation funding is both lawful and encouraged in South Africa since the Supreme Court of Appeal judgment in *Price Waterhouse Coopers Inc and Others v National Potato Co-operative Ltd*.[1] The Supreme Court held that a

[1] (448/2003) [2004] ZA SCA 64; [2004] 3 All SA 20 (SCA).

litigation funding agreement is not contrary to public policy or void. The courts retain the power to prevent litigation funding if it amounts to an abuse of process.

Since this judgment, there has been an increase in litigation funding activity in South Africa for large commercial claims. Where proceedings are funded, the courts' approach has been to join funders to the litigation as co-plaintiffs, so that the defendant can seek a costs order directly against the funder.

The litigation funding is a different model to the purchasing of claims, as the award amount is not yet determined and is shared by the litigation funder.

Insurance against litigation costs is permitted in South Africa, and there is a range of insurance products available. These products fall under the broad category of miscellaneous short-term insurance contracts, as defined in section 1(1) of the Short-term Insurance Act 53 of 1998. In terms of these insurance contracts, the insured is covered against the risk of financial loss that may result from future legal proceedings that the insured may become involved in during the currency of the policy, either as plaintiff or defendant. The insurance contract may limit the sum or sums payable by the insurer. A related form of insurance is so-called "post-dispute litigation insurance", in terms of which an insurer covers against an adverse award of costs in litigation that has already commenced. In such circumstances, payment of a premium to the insurer is only made at the termination of the litigation, where no adverse award for costs is granted against the insured.

1.3 Obtaining an enforcement order

1.3.1 Besides commencing regular civil proceedings, are there easier and cheaper ways to obtain an enforcement order?

In South Africa, the only way to obtain an order which is enforceable against a debtor is to pursue civil proceedings.

Depending on the amount of the claim, the Small Claims Court (SCC) in South Africa assists claimants with claims not exceeding ZAR20,000. If the claim exceeds ZAR20,000 in value, part of the claim may be abandoned in order to pursue a claim in the SCC. This is a much cheaper process as legal representation is not required and the clerk of the SCC is required to assist claimants with the process and completing the summons. This process is, however, conducted as civil proceedings and will result in an order being obtained against a debtor which may be enforced.

South Africa also makes use of alternative dispute resolution (ADR) mechanisms such as mediation and arbitration. These ADR mechanisms can be used when the process has been contractually agreed to between the parties and consist of the following:

(1) mediation – this is a process used by the parties where a mediator assists the parties in reaching an agreement on the dispute. The mediator, however, has no decision-making powers and cannot impose a binding conclusion or settlement on the parties; and

(2) arbitration – this is an adjudication process where one party refers the dispute for final determination to an independent and impartial arbitrator appointed by or on behalf of the parties. The arbitrator will make an award, but in order to enforce the award an application will need to be made to a High Court for the award to be made an order of court which will be enforceable. The Arbitration Foundation of Southern Africa (AFSA) is a non-profit organisation established in South Africa as a private dispute resolution authority which manages and administers the confidential resolution of a wide range of local and international disputes by way of mediation, adjudication arbitration and related processes. The AFSA has been recognised as the preferred dispute resolution authority in South Africa.

1.4 Lawyers' fees

1.4.1 What are the legal provisions for lawyers' fees and are there compulsory statutory fees for some or all activities?

In terms of section 35 of the Legal Practice Act 28 of 2014, the fees of legal practitioners (attorneys) in South Africa are regulated by tariffs prescribed by the Rules Board for Courts of Law. These tariffs set out the fees that a legal practitioner may charge for every step of the process, such as taking instructions, perusal of documents, telephone calls made and received, emails and letters both sent and received, drafting of court documents, appearances at court etc.

Notwithstanding the above, the section does not preclude any user of litigious or non-litigious legal services, on his or her own initiative, from agreeing with a legal practitioner in writing, to pay fees for the services in question that are in excess of, or below, any statutory tariffs.

1.5 Court fees

1.5.1 In order to take legal action, does a foreign plaintiff have to provide security and / or make a prepayment for court costs, and, if so, how is the amount calculated?

There is no automatic obligation on a foreign plaintiff to provide security for costs. South African common law prescribes that a *peregrinus* (a foreign litigant that is not domiciled within the jurisdiction of the court) may be required to furnish security in order to protect an *incola* (a local litigant domiciled within the jurisdiction of the court) from not being able to recover costs especially where the *peregrinus* does not have any immovable property in South Africa. A court has a discretion to order security for costs and will consider the circumstances of each case, including principles of fairness and equity. Security for costs will usually be awarded by a court to protect an *incola* from the uncertainty and inconvenience of recovering costs in a foreign country.

Although section 13 of the Companies Act 61 of 1973 has been repealed and the Companies Act 71 of 2008 no longer contains the same provision, the South African Supreme Court of Appeal in the case of *Boost Sports Africa (Pty) Ltd v The South Africa Breweries (Pty) Ltd* held that the factors contained in section 13 of the Companies Act 61 of 1973 still have relevance.[2] Section 13 of the Companies Act

[2] (20156/2014) [2015] ZASCA.

61 of 1973 empowered a court to order a plaintiff company to lodge sufficient security for a defendant's costs when the court had reason to believe that a plaintiff company would be unable to meet an adverse costs order.

Accordingly, these proceedings are instituted by the defendant based on the factors enumerated in section 13 of the Companies Act 61 of 1973, as well as the procedural requirements of Uniform Rule 47 seeking an order that the foreign plaintiff is to provide security for costs.

The amount of such cost award will depend on the complexity of the case, the amount claimed, the anticipated length of the proceedings etc. and will be decided on a case-by-case basis.

1.5.2 What are the legal provisions for court fees in civil proceedings?

South African courts do not charge any fees for the services that they render. Litigants in South Africa are generally liable for the following costs:

(1) the costs of instructing an attorney to assist;

(2) the costs of the Sheriff of the High Court who attends to *inter alia* service of all court documents when first initiating legal proceedings and enforcing court orders; and

(3) the costs of an advocate (a specialised attorney who represents clients in court) depending on the complexity of the matter and which court has jurisdiction. Usually for small matters which are heard in the Magistrate Courts (lower courts in South Africa), an advocate will not be required.

1.6 Refund of legal costs and expenses

1.6.1 Is the winner of a court proceeding entitled to reimbursement of the legal costs and expenses?

It is generally accepted in South African law that a party that has been substantially successful in bringing or defending a claim is entitled to have a costs order made in its favour. Accordingly, an unsuccessful party will be required to pay the litigation costs incurred by the successful party, as well as its own costs. In this regard, it is important to note that a cost order must be pleaded and prayed for during court proceedings, and the court must award such costs.

In order for the successful party to recoup such costs from the unsuccessful party, a bill of costs must be drawn up. A bill of costs is an itemised account that reflects all the charges incurred during litigation, including fees and disbursements made by an attorney. The extent to which costs may be recovered is dependent on the scale of the costs order granted by the court. The court may order party-and-party costs, attorney-and-client costs, attorney-and-own-client costs, and costs *de bonis propriis*.

Party-and-party costs relate to the actual costs incurred in prosecuting or defending a claim and do not include legal costs incurred before legal proceedings are instituted or attendances between the client and the attorney. The party-and-party costs are based on the court tariffs described above.

Attorney and client costs include party-and-party costs, as well as other legal costs such as attendances between the client and the attorney. A court will usually award such costs if: (i) the matter is a contractual dispute, and it is a specific term of the contract that attorney and client costs would be payable in the event of a dispute; and (ii) the court believes that a litigant's conduct in the course of the litigation has been such that a punitive costs order is warranted. Where attorney and client costs are awarded, the costs are subject to the same court tariffs as party-and-party costs, and the client will be liable for all costs of the attorney that are not included in the party-and-party costs or awarded by the court.

Attorney and "own" client costs relate to fees payable to the attorney and will depend on the agreement between the client and the attorney.

Costs *de bonis propriis* is a penal costs order that is made against an attorney in instances where the court is satisfied that the attorney has been negligent.

1.7 Examples of legal costs and expenses

1.7.1 What would be the roughly estimated litigation costs and expenses – first instance including lawyer and court – for a (simple) claim in the amount equivalent to EUR5,000, EUR50,000 and EUR500,000?

(1) EUR5,000 (ZAR94,731.08) – the legal costs in South African, calculated on a conservative basis, could range between ZAR30,000 to ZAR70,000, which will include the costs of the attorney, an advocate, if required, the Sheriff of the High Court and the costs of execution.

(2) EUR50,000 (ZAR947,310.81) – the legal costs in South African, calculated on a conservative basis, could range between ZAR150,000 to ZAR350,000, which will include the costs of the attorney, an advocate, if required, the Sheriff of the High Court and the costs of execution.

(3) EUR500000 (ZAR9,473,108.11) – the legal costs in South African, calculated on a conservative basis, could range between ZAR500,000 to ZAR1.5 million, which include the costs of the attorney, an advocate, if required, the Sheriff of the High Court and the costs of execution.

1.8 Average duration of litigation

The average duration of legal proceedings in South Africa can range from six months to two years and longer, depending on the complexity of the case.

SCENARIO 2: ENFORCEMENT ORDER (JUDGMENT) EXISTS AND NEEDS TO BE ENFORCED ABROAD

2.1 Recognition proceeding and costs

2.1.1 What is the proceeding and what are the roughly estimated costs – including lawyer and court – for the recognition of the foreign enforcement order for a claim in the amount equivalent to EUR5,000, EUR50,000 and EUR500,000?

The recognition and enforcement of a foreign judgment is regulated by the South African common law, having regard to the principle of comity and the desire to do

justice. To have the foreign order recognised and enforced, an application must be made to the High Court wherein the foreign judgment is relied upon as a cause of action. A South African court then has a discretion whether or not to grant provisional sentence on the cause resulting in the recognition of the judgment. The provisional sentence judgment may then be enforced. The court will only grant such an order if it is satisfied that these requirements have been complied with.

One of the requirements includes that the foreign order must be final and conclusive. In the case of *Jones v Krok*, the court held that a foreign judgment will be regarded as final even though the judgment is subject to appeal, or even if an appeal is pending, provided it is final and conclusive.[3] The court also confirmed that a South African court has a discretion and can choose to stay the proceedings pending final determination of an appeal.

The court in the case of *Cooperative Muratori & Cementisti CMC Di Ravenna Societi Cooperative a Responsabilita Limitada (External Company Incorporated in Italy) and Others v Companies and Intellectual Properties Commission and Others*[4] held that the following requirements must be met for recognition:

(1) the court which pronounced the judgment must have had jurisdiction to entertain the case according to the principles recognised by South African law relating to international
jurisdiction or competence;

(2) the judgment must be final and conclusive in its effect and must not have become superannuated;

(3) the recognition and enforcement of the judgment by the South African courts must not be contrary to public policy;

(4) the judgment must not have been maintained by fraudulent means;

(5) the judgment must not involve the enforcement of a penal or revenue law of the foreign state; and

(6) the enforcement of the judgment must not be precluded by the provisions of the Protection of Business Act 99 of 1978, as amended.

The costs of these recognition proceedings on a conservative basis could range from ZAR150,000 to ZAR300,000 depending on the complexity of the matter.

2.2 Obtaining information about the debtor

2.2.1 Are there any sources of information about whether a debtor of a claim is without means or subject to an insolvency proceeding?

In South Africa, there are a few search engines which allow one to search through records of the South Africa Deeds Office and the Companies Intellectual Property Commission, which accurately records the essential information of all individuals

[3] 1995 (1) SA 677 (A).
[4] [2019] JOL 46324 (GP).

and companies including whether they own any immovable property which may be executed against and whether such company or individual is subject to any insolvency proceedings.

Further, section 31 of the Companies Act 71 of 2008 assists parties in obtaining information regarding the financial position of a debtor company. Section 31 provides that:

> *"(1) In addition to the rights set out in section 26, a person who holds or has a beneficial interest in any securities issued by a company, is entitled—*
>
> *(a) without demand to receive a notice of the publication of any annual financial*
> *statements of the company required by this Act, setting out the steps required to obtain a copy of those statements; and*
>
> *(b) on demand to receive without charge one copy of any annual financial statements of the company required by this Act.*
>
> *(2) If a judgment creditor of a company has been informed, by a person whose duty it is to execute the judgment, that there appears to be insufficient disposable property to satisfy that judgment, the judgement creditor is entitled within five business days after making a demand, to receive without charge, one copy of the most recent annual financial statements of the company."*

2.3 Enforcement measures

2.3.1 What main enforcement measures are available and what are the costs – including lawyer and enforcement authority – for enforcing a claim in the amount equivalent to EUR5,000, EUR50,000 and EUR500,000?

Assuming that the foreign judgment has been recognised and enforced by a South African court as stipulated in section 2.1 above, the primary enforcement measures available in South Africa are the following.

(a) The execution of the debtor's movable property

This is achieved by attaching the debtor's movable property by sheriff in terms of a valid and issued writ of execution, followed by the sale of such property by public auction. The proceeds of the sale in execution will be used to satisfy the money judgment.

(b) The execution of the debtor's immovable property

Where the debtor's movable property is insufficient to satisfy the claim, the debtor's immovable property may be sold in execution to satisfy the claim. It must be noted that certain safeguards have been put in place by the courts to ensure that the debtor's constitutional right to housing is not unduly infringed.

(c) Garnishee orders

A judgment creditor may attempt to enforce a judgment and recover a judgment debt by attaching a money debt owed to the judgment debtor by a

third party. The third party (garnishee) will be obliged, in terms of an issued writ of attachment, to pay over an amount of the money debt owed which will satisfy the judgment debt and costs.

(d) Emolument attachment orders

An application may be made, and a court may order the employer of a judgment debtor to pay a certain amount of the judgment debtor's salary on a regular basis to the judgment creditor.

The costs estimate stated in section 1.7 above includes any costs for enforcement measures. However, it is important to bear in mind that these cost estimates are calculated on a conservative basis and on the assumption that there are no complexities in the matter which require additional steps to be taken.

2.4 Alternatives to lawyer

2.4.1 Are there specialised debt collection agencies (or equivalent) which buy claims or work more cost-effectively than lawyers?

The National Debt Collectors Act 114 of 1998, as amended, regulates the process of collecting debts in South Africa. This Act allows an attorney, an agent of an attorney or a registered debt collector to recover funds due to a credit provider.

In terms of section 19 of the Debt Collectors Act, a debt collector may only recover the capital amount of a debt due and interest legally due and payable thereon for the period during which the capital amount of a debt remains unpaid, as well as the necessary expenses and fees.

There are a number of debt-collecting agencies in South Africa that assist in recovering funds from a debtor based on simple claims such as services rendered, overdue accounts etc. This alternative process is much more cost-effective than instructing attorneys. However, this process is generally not used for large and complex claims.

2.5 Insolvency proceeding

2.5.1 What costs are involved – including lawyer and court – for commencing and participating in insolvency proceedings against the debtor of a claim in the amount equivalent to EUR5,000, EUR50,000 and EUR500,000, if the debtor is not able to pay?

The costs estimate stated in section 1.7 above will apply. These costs, whether for enforcement of a claim or institution of insolvency proceedings may be negotiated with the attorney and managed to ensure that the legal costs are kept as low as possible for claims that are not disputed and are not complex.

Claims which are disputed and are far more complex will result in higher legal costs.

3. Economical conclusion

3.1 Taking into account the costs and expenses for a foreign IP, what is the minimum claim amount at which it makes sense to start litigation or enforcement?

As stated above, the costs of enforcement of a claim or institution of insolvency proceedings may be negotiated and agreed to with an attorney. There is no threshold of what the minimum claim amount would be as it will depend on the attorney who is instructed. It will not make any commercial sense to instruct an attorney from a large well-known law firm for a claim ranging between ZAR0 to ZAR100,000, as the legal fees of such law firms may be greater than the claim amount.

SPAIN

This country report is written based on a situation where an insolvency estate includes a (potential) claim against a (third party) debtor who is domiciled abroad. The court-appointed insolvency practitioner (IP) has to assess the costs for pursuing the claim in order to decide whether it is affordable and economically reasonable to try recovery abroad. Two scenarios are considered. In scenario 1 the claim has not yet been subject to a court proceeding; in scenario 2 an executory title already exists and would have to be enforced abroad.

SCENARIO 1: CLAIM HAS NOT YET BEEN SUBJECT TO COURT PROCEEDINGS

1.1 Recognition proceeding and costs

1.1.1 What is the proceeding and what are the estimated costs for the recognition of the foreign insolvency proceeding and the insolvency administrator's power to pursue a claim?

First of all, the insolvency administrator needs to notarise a power of attorney which contains a top copy of the court resolution of the appointment as administrator. The basic motive is that under Spanish law the power of attorney is a solemn form. Additionally, the power of attorney needs to be provided with the apostille and the power and the resolution have to be translated by a sworn translator into Spanish. Therefore, the costs of this first step will be the fees of the notary for the certification, the fees for the issue of the Apostille, and the sworn translations.

Secondly, the costs and the procedure vary depending on whether the recognition of the foreign insolvency is regulated under Regulation (EU) 2015/848 of the European Parliament and of the Council, 20 May 2015, on insolvency proceedings, and other EU norms and conventions which regulate this topic because it stems from a member state of the European Union (EU) (in the following, this is referred to as an EU insolvency), or whether it is regulated by the *exequatur* procedure because it is an insolvency which is being processed outside of the EU (in the following, this is referred to as a non-EU insolvency).

- EU insolvency

  In accordance with Article 19 of the Regulation (EU) 2015/848, a bankruptcy order issued in any member state will be recognised in the other member states from the moment it obtains effectiveness in the original member state.

  With this in mind, in order that the insolvency administrator can exercise his or her powers in Spain it is only necessary to present a certified copy of the appointment as such. This document needs to be translated. Although the translation does not necessarily have to be a sworn one, this is nevertheless advisable to avoid challenges of the translation by the other party.

  Given that the insolvency administrator will be represented by a local lawyer, the administrator should authorise the local lawyer by a notarised power of attorney which needs to be apostilled and translated into Spanish, as detailed above.

  If the insolvency administrator needs to exercise his or her powers before the tribunals and courts, apart from being represented by a lawyer, the

administrator also needs to be represented by a court agent (a *procurador*). Therefore, the costs of both these parties need to be considered, although the fees of the court agent are much lower.

- Non-EU insolvency

  Whenever the insolvency does not fall within the scope of application of Regulation (EU) 2015/848, the applicable norms are the Spanish insolvency order and the Civil Procedure Rules, since to date Spain has not signed any international conventions which specifically regulate this subject.

  The recognition has to follow the *exequatur* procedure and, to be recognised in Spain, the bankruptcy order needs to fulfil the prerequisites established in the insolvency order and the Civil Procedure Rules. Likewise, the said resolution will need to have enforceable character in accordance with the law of the state in which the bankruptcy order was issued.

  Consequently, the documents required for the *exequatur* procedure will be:

  - The original or a certified copy of the bankruptcy order with the apostille. If the order itself does not state its validity and enforceability, a certificate of the same judicial organ will need to be enclosed with the accreditation. This certificate needs to be apostilled as well.

  - A translation of the said document which need not necessarily be certified, although certification is advisable to avoid challenges against the translations of the other party.

  - Depending on the case and the type of order, even though it is not strictly necessary according to the law, we recommend a certificate on the legal situation in the state of origin. The costs to obtain and translate said certificate into Spanish need to be added.

  For the procedure, the intervention of a lawyer and a court agent (*procurador*) are necessary. The aforementioned costs of these need to be considered, along with the costs for the certification of the notarised power of attorney by the insolvency administrator and whoever empowers said professionals. Remember that these need to be accompanied by the apostille and translated with certification.

1.2 Financing

1.2.1 Does your jurisdiction allow or provide for the following?

- ***Contingency fee agreements***

  Contingency fee agreements are allowed. Bearing this in mind, in Spain, a free competence for the lawyers to agree on fees with the client exists. Nevertheless, in practice, it is common to agree that the client assumes all the rest of the costs (namely, translations, court agents and other costs related to the legal proceedings).

- ***Is legal aid for litigation available for a foreign insolvency administrator?***

  This is a question not expressly regulated in Spanish legislation and, following conservative criteria, it could be concluded that legal aid is not available, since according to Spanish legislation insolvency administrators obtain their compensation and the costs from the assets of the insolvency and by means of the amount of the assets and liabilities, in accordance with Royal Decree 1860/2004. Consequently, it could follow that the costs of litigations in Spain which are incurred by foreign insolvency administrators in Spain ought to be assumed by the assets of the insolvency of the country of origin because it would not be justified for the foreign insolvency to enjoy the benefits of free justice.

  Nevertheless, the Spanish law of free justice has established that nationals of the member states of the EU (with the exception of Denmark) can apply for the assistance of free justice if they accredit the insufficiency of means to litigate. Even though, with a very broad interpretation of the law, this norm could be applied to an insolvency administrator who lacks the necessary means to litigate in the country of origin based on legal criteria established in that country, we consider it would be extremely expensive and difficult to justify because there are assets of the insolvent party that could be liquidated or integrated into the assets of the insolvency proceedings.

  Consequently, for this typology of cases, for an insolvency administrator to apply for the assistance of free justice would be novel and unusual. This is a very special and rare casuistry which conflicts with the system of compensation for insolvency administrators anticipated by Spanish legislation, and this is why we respond negatively to this question.

- ***Are litigation financing and / or insurance for litigation costs provided and, if so, starting at which amount?***

  As opposed to what happens for example in Germany, the United Kingdom, or Switzerland, where a long tradition exists, in Spain the market has only recently opened up and some companies financing litigations, mainly English and Swiss, have now begun to explore this type of financial arrangement.

1.3 Obtaining an enforcement order

1.3.1 Besides commencing regular civil proceedings, are there easier and cheaper ways to obtain an enforcement order?

If the debt to be claimed is liquid, determined, due and payable, and can be proved with documents signed by the debtor or with the debtor's seal or any other physical or electronic signature or with documents that usually document credits or debts, such as invoices or delivery notes, the summary or collection proceedings (which is called *procedimiento monitorio* in Spain) can be used and consists of the following steps:

(1) Presentation of the form or the action of collection. This can be done without a lawyer or a court agent (*procurador*) following the steps and using the form published by the General Council of Judicial Power (*Consejo General del Poder Judicial*).

(2) The judge accepts it for revision and requires payment from the debtor.

(3) The debtor has 20 working days to:

(a) pay;

(b) object to the proceeding – in this case the plaintiff needs to file a lawsuit within a deadline of 30 days if the debt is higher than EUR2,000 or challenge the objection if the debt is lower than EUR2,000. In both cases the corresponding proceedings will be followed. If the debt is higher than EUR2,000 it is compulsory that a lawyer and a court agent (*procurador*) intervene, beginning in this phase;

(c) if the debtor does not pay and does not appear, the court issues a resolution which is enforceable. The plaintiff has to seek enforcement through a lawyer and court agent (*procurador*).

Even though for the initial petition it is not necessary for a lawyer or a court agent (*procurador*) to be involved, in the case of an insolvency administrator who is not familiar with the Spanish judicial system, deadlines and legal mechanisms – especially if the debtor is objecting or if the title is enforceable and the enforcement needs to be initiated – it is recommended that this proceeding be entrusted to a lawyer and a court agent (*procurador*), especially considering the very high probability that at some point of the process they will have to intervene on a compulsory basis.

1.4 Lawyers' fees

1.4.1 What are the legal provisions for lawyers' fees, and are there compulsory statutory fees for some or all activities?

There is no law that regulates the fees of the lawyers in Spain. Instead, there is free competence, and Spanish lawyers can freely agree their fees with their clients. Despite this, the Chambers of Lawyers have formulated a series of guiding criteria which are commonly applied to calculate the lawyers' fees in the determination of judicial costs. The majority of these guiding criteria are not public, and some Chambers of Lawyers only provide them on request of a lawyer who is not a member of their Chamber but who has a legitimate interest to obtain them (basically, when a party is represented in a proceeding for the determination of costs).

There are 83 Chambers of Lawyers in Spain. The National Commission of Markets and Competences (*Comisión Nacional de los Mercados y la Competencia*) has sanctioned some of them and has also declared some guiding criteria for the fees issued by aforementioned Chambers null because they were considered to be infringing free competence. As a result, it is extremely difficult to obtain this information for the entire territory of Spain, particularly as it sometimes does not even exist because it has been declared null by the National Commission of Markets and Competences, and new criteria in accordance with free competence need to be published.

On the other hand, the fees of court agents *(procuradores*) are regulated by law, specifically in Royal Decree 1373/2003, from 7 November, and they apply all over Spain. Usually, these fees are much lower than those of the lawyers largely

because court agents primarily act as messengers for documents between lawyer and court. But in all cases, this cost needs to be kept in mind because in the majority of judicial proceedings within civil jurisdiction the intervention of court agents is compulsory.

Both lawyers and court agents (*procuradores*) are taxed at 21% value-added tax (VAT), although, in general, according to current tax regulations, VAT is not applied to invoices issued to EU insolvency administrators.

1.5 Court fees

1.5.1 In order to take legal action, does a foreign plaintiff have to provide security and / or make a prepayment for court costs and, if so, how is the amount calculated?

In Spain, it is not necessary to pay any costs in advance nor to grant a guarantee or security. However, there are court costs, although they are exempt in respect of actions which in the interest of the bankruptcy estate and with the prior authorisation of the commercial judge are filed by bankruptcy administrators.

1.5.2 What are the legal provisions for court fees in civil proceedings?

Court fees are regulated at the state level in the following laws: Law 10/2012, of 20 November, which regulates certain fees in the area of the administration of justice and the National Institute of Toxicology and Forensic Sciences; and by Royal Decree 3/2013, of 22 February, which modifies the system of fees in the area of the administration of justice and the system of free legal aid. The table below lists the fees in the civil jurisdictional order.

Type of proceeding (civil judicial order)	Fixed fee
Oral / fast-tracking debt collection (*verbal / cambiario*)	EUR150
Ordinary (*ordinario*)	EUR300
Collection, European payment procedures and incidental action in insolvency proceedings (*monitorio, monitorio europeo y demanda incidental en proceso concursal*)	EUR100
Extrajudicial enforcement and opposition to the enforcement of judicial title (*ejecución extrajudicial y oposición a la ejecución de títulos judiciales*)	EUR200
Necessary insolvency (*concurso necesario*)	EUR200

1.6 Refund of legal costs and expenses

1.6.1 Is the winner of a court proceeding entitled to reimbursement for the legal costs and expenses?

Yes, unless the case presents serious doubts of fact or law. In that case, account would be taken of the case law in similar cases. Contrary to what happens in neighbouring countries, the imposition of costs is not clear-cut in Spain.

The losing litigant will only be obliged to pay for the part corresponding to the lawyers and other professionals who are not subject to fees or tariffs, a total

amount not exceeding one-third of the amount of the proceedings for each of the litigants who have obtained such a ruling.

Furthermore, in cases of partial success of the claim, the imposition of costs is likely on the party who has litigated recklessly. In this case the abovementioned limit does not apply.

1.7 Examples of legal costs and expenses

1.7.1 What would be the roughly estimated litigation costs and expenses – first instance including lawyer and court – for a (simple) claim in the amount equivalent to EUR5,000, EUR50,000 and EUR500,000?

In view of the complexity described above and the impossibility of calculating lawyers' fees throughout Spain in a uniform manner, solely as a theoretical example, the fees are calculated on the basis of the criteria of the Chamber of Lawyers of Barcelona published in March 2020 to assess costs, since they are in line with competition rules, as stated by the National Commission for Markets and Competition in its resolution of 27 February 2020. However, it is indicated that this calculation is not definitive and that the lawyers' fees may be higher or lower, since the fixing of the fees between lawyer and client is free in Spain and will depend on the agreements between them and also on the territory where the costs were to be assessed, if applicable.

The calculation of the fees is undertaken without application of VAT, which currently is at a rate of 21%. The costs of the notarised and apostilled power of attorney in the country of origin and the translation of the documents which need to be submitted to the proceedings also need to be added, as well as, if applicable, all the related expenses of the proceedings (expertise, interpreters, travel expenses etc.).

Civil procedure first instance without settlement	Claim amount (EUR)		
	5,000.00	50,000.00	500,000.00
Court fee	150.00	300.00	300.00
Lawyers' fees (claimant)	666.67	8,333.34	83,333.33
Court agents' fees (claimant)	144.37	687.50	1,409.36
Lawyers' fees (defendant)	666.67	8,333.34	83,333.33
Court agents' fees (defendant)	144.37	687.50	1,409.36
Total	1,772,08	18,341.68	169,785.38

Civil procedure first instance with settlement	Claim amount (EUR)		
	5,000.00	50,000.00	500,000.00
Court fee	60.00	120.00	120.00
Lawyer's fees (claimant)	666.67	8,333.34	83,333.33
Court agents' fees (claimant)	144.37	687.50	1,409.36
Lawyer's fees (defendant)	666.67	8,333.34	83,333.33

Court agents' fees (defendant)	144.37	687.50	1,409.36
Lawyer assisted settlement[1]*			
Total	1,682.08	18,161.68	169,605.38

1.8 Average duration of litigation

The average duration of ordinary proceedings in the first instance and in the civil jurisdiction during 2019 were around one year and three months in the entire territory of Spain.

In the following table, the average duration is split by autonomous region and according to the statistics of the General Council of Judicial Power (*Consejo General del Poder Judicial*) in 2019. It ought to be mentioned that these amounts are not absolute, since the capitals of the provinces usually complete the proceedings in shorter deadlines than the ones indicated below.

On the other hand, due to the Covid-19 pandemic, it is estimated that within the coming months the workload of the courts will significantly increase, even though measures have been taken to accelerate proceedings, such as telematic hearings or hearings in the afternoon.

Autonomous region	Months (year 2019)
Andalucía	17.4
Aragón	13.4
Asturias	6.3
Illes Balears	14.1
Canarias	14.2
Cantabria	12.2
Castilla y León	11.1
Castilla-La Mancha	14.5
Cataluña	18.0
Comunitat Valenciana	14.7
Extremadura	15.3
Galicia	15.6
Madrid	15.5
Murcia	17.0
Navarra	11.0
País Vasco	12.8
La Rioja	7.8
Average Spain	*15.1*

[1] This is not included in the criteria of the Chamber of Lawyers of Barcelona published in March 2020 to determine the costs.

SCENARIO 2: ENFORCEMENT ORDER (JUDGMENT) EXISTS AND NEEDS TO BE ENFORCED ABROAD

2.1 Recognition proceeding and costs

2.1.1 What is the proceeding and what are the roughly estimated costs – including lawyer and court – for the recognition of the foreign enforcement order for a claim in the amount equivalent to EUR5,000, EUR50,000 and EUR500,000?

This type of proceeding does not entail any court fees.

However, the procedure for recognition is usually combined with a procedure for enforcement. The following is a breakdown of the costs of applying for enforcement of a judgment, whether it is an EU or a non-EU title:

(a) EU title

- Costs of the certification of the notarised power of attorney by the insolvency administrator in the country of origin in favour of the lawyers and court agents (*procuradores*) with the apostille and the sworn translation.

- Translation of the title that is sought to be recognised and enforced.

- Example of the lawyers' and court agents' fees for the filing of an enforcement action according to the table (not including VAT, which currently amounts to 21%), based on the criteria of the Chamber of Lawyers of Barcelona of March 2020, approved to serve as a scale of fees for the proceedings of determination of costs:

Civil procedure enforcement claim	Claim amount (EUR)		
	5,000.00	50,000.00	500,000.00
Lawyers' fees (claimant)	227.19	2,271.91	22,719.14
Court agents' fees (claimant)	144.37	687.50	1,409.36
Total	371.53	2,959.41	24,128.50

(b) Non-EU title

- Costs of the certification of the notarised power of attorney by the insolvency administrator in the country of origin in favour of the lawyers and court agents (*procuradores*) with the apostille and the sworn translation.

- Translation of the title that is sought to be recognised and enforced.

- Depending on the case, it is advisable to submit a certificate of the law, issued by a lawyer, accrediting the legal force and validity of the title of the country of origin, which then ought to be translated and apostilled.

The lawyers' and court agents' fees for the filing of an enforcement action according to the table would amount to the same as for an EU tittle. Therefore, for illustrative purposes, we refer to the aforementioned example.

2.2 Obtaining information about the debtor

2.2.1 Are there any sources of information about whether a debtor of a claim is without means or subject to an insolvency proceeding?

The parties can obtain information about the solvency or the assets of the opposing party in the enforcement prior to the action by means of these different sources:

(a) Companies specialised in economic, financial, market and sometimes judicial information.

(b) The webpage of the *Registro Público Concursal* offers information about companies that have declared bankruptcy.[2] However, we have noted that on at least one occasion the information was not published. Therefore, if the company does not appear on this platform, we recommend making an inquiry to the commercial register or the Federal Law Gazette (*BOE*) for increased security.

(c) The commercial registers and annual accounts which are deposited by corporations are public.

(d) The Land Registry, where information about any right *in rem* in favour of a natural or legal entity over properties in the entire territory of Spain can be obtained.

(e) Register of Personal Property (*Registro de Bienes Muebles*) which contains up-to-date information on all the charges or restrictions which concern vehicles, whether economic or of another type.

The information on the commercial registers, the Land Registry and the Register of Personal Property is public information.[3]

Once the enforcement proceedings are opened, in Spain there is no official, particular professional body which oversees the collection of this information and its transmission to the parties or directly takes due measures. The executor / the lawyer who represents the insolvency administrator in the proceedings has to apply for the information about the assets directly to the court, whether in a general manner (from all the databases) or in a specific manner (one specific piece of information). If the request is general, the court can access the databases of the Land Register, tax revenue and the General Office of Traffic and Social Security. Likewise, an immediate distraint of the bank accounts of the opposing party in the enforcement of any bank in Spain is possible. On the other hand, an example of requests for information by the enforcing party or measure of specific character could result in the court asking third parties for information and / or seizing the assets of the opposing party.

[2] See: www.publicidadconcursal.es.
[3] See: www.registradores.org. This webpage also contains some information in English.

2.3 Enforcement measures

2.3.1 What main enforcement measures are available and what are the costs – including lawyer and enforcement authority – for enforcing a claim in the amount equivalent to EUR5,000, EUR50,000 and EUR500,000?

The most common compulsory measures are the distraint and the public auction of assets. In relation to the distraint of assets, the following costs needs to be accounted for:

- if the assets consist in movable property and need to be in the custody of a third party, the fees of the depositary; and

- if the assets consist in real estate and the distraint needs to be recorded in the land register, the registration costs and the taxes for documented judicial acts which can vary between 0.5% to 1.5% depending on the autonomous region need to be paid. In this case it is also necessary to add the costs of the application for a tax number for the insolvency administrator in Spain and his or her registration with the Treasury.

The public auction takes place electronically on a platform and prior to it the assets need to be estimated by an expert. The fees of the expert need to be added as additional costs.

As we have already stated, there is no specialised body in the field of enforcement, but it is rather the court itself which takes the measures on request of the enforcing party.

The costs of the lawyer and the court agents (*procuradores*) will be the same for the filing of the enforcement action as indicated above, plus the fees which arise for all the activities that they carry out during the enforcement (incidents, distraints, public auctions etc.). On the other hand, there will be no court fees, but there will be costs that might possibly arise through the enforcement itself.

All the costs of the enforcement need to be carried by the judgment debtor. In this sense, from the moment the enforcement action is filed, it is permissible to add reclamation and enforce an additional 30%, calculated by the main figure, as interest and costs of the enforcement.

2.4 Alternatives to lawyers

2.4.1 Are there specialised debt collection agencies (or equivalent) which buy claims or work more cost-effectively than lawyers?

Yes, in Spain there are specialised retrieval agencies, although their clients are usually financial entities or other larger companies. However, these agencies do not have a long tradition in Spain, nor do they assist insolvency administrators, as, for example, they do in Germany.

2.5 Insolvency proceedings

2.5.1 What costs are involved – including lawyer and court – for commencing and participating in insolvency proceedings against the debtor of a claim in the amount equivalent to EUR5,000, EUR50,000 and EUR500,000, if the debtor is not able to pay?

The criteria of the Barcelona Chamber of Lawyers published in March 2020 to assess costs do not provide for the calculation of fees in the case of a person and participation in an open bankruptcy against a debtor, so it is not possible to make the requested estimate. In any case, we reiterate that the principle of freedom to set fees between the parties applies and that the intervention of a lawyer and a solicitor would be obligatory, so clearly the granting of a power of attorney for lawsuits with an apostille and the translation of documents, if necessary, should be considered.

3. Economical conclusion

3.1 Taking into account the costs and expenses for a foreign insolvency administrator, what is the minimum claim amount at which it makes sense to start litigation or enforcement?

Considering the complexity of the cases, the number of professionals involved apart from the insolvency administrator (lawyer, solicitor, sworn translator / interpreter if necessary, lawyer who issues a certificate of law etc.) and the difficulty of a lawsuit with a foreign element, we consider that in order to have a proportion between the fixed costs to be assumed, whether the lawsuit is won or lost, and the amount to be claimed, this amount should be a minimum of EUR100,000. In this assessment we have considered that in Spain the criterion of success for the imposition of costs is not as clear as in other surrounding countries and that on many occasions a great deal of evidential and legal effort must be made to establish a claim with an international element.

However, in the area of executions of judicial or extrajudicial titles, this work is extremely straightforward, and, in addition, the uncertainty regarding the imposition of costs disappears, since if it is admitted and continues to be processed, the executed party will be obliged to assume all the costs of the execution, although the executor will have to advance them previously. For this reason, in enforcement cases, the minimum amount to be claimed would be reduced to EUR20,000.

THE NETHERLANDS

This country report is written based on a situation where an insolvency estate has a (potential) claim against a (third party) debtor that is domiciled abroad. The court-appointed insolvency practitioner (IP) must assess the costs for pursuing the claim to decide whether it is worthwhile to pursue recovery abroad. Two scenarios are considered. In scenario 1, the IP has no executory title and must litigate the claim abroad; in scenario 2 an executory title has been obtained but remains to be enforced. This technical paper will provide an outline of the debt collection process in The Netherlands and aims to provide an estimation of the costs that a foreign IP may incur.

SCENARIO 1: CLAIM HAS NOT YET BEEN SUBJECT TO COURT PROCEEDINGS

1.1 Recognition proceeding and costs

1.1.1 What is the designated procedure and what are the estimated costs for the recognition of the foreign insolvency proceeding and the IP's power to pursue a claim?

If the insolvency proceedings have been opened outside of the scope of the European Insolvency Regulation[1] – that is to say, in a country that is not a member of the European Union (EU) (including Denmark which has opted out, and the UK after completion of BREXIT) – the recognition of insolvency proceedings is governed by the rules of Dutch international civil law. According to the *Hoge Raad* (the Dutch Supreme Court), the foreign ruling on the opening of insolvency proceedings can be recognised in principle if the following conditions have been met:

(i) the authority of the ruling judge is based on rules of jurisdiction that are acceptable by international standards;

(ii) the decision of the foreign court is the result of legal proceedings that fulfil the requirements of a fair judicial process;

(iii) the recognition of the foreign decision is not irreconcilable with the Dutch public order; and

(iv) the foreign decision is not incompatible with prior decisions by Dutch courts arising from legal proceedings between the same parties, or a prior decision of a foreign court in legal proceedings between the same parties on the same issue(s) with the same direct cause except when this prior decision is fit for recognition in the Netherlands.

If the aforementioned conditions have been met, foreign insolvency proceedings opened outside of the EU can be recognised in the Netherlands. The IP thus does not incur extra costs to exercise his or her authority in the Netherlands. However, if the authority of the IP is disputed in court by one or more of the Dutch creditors, the situation can change. In that case the IP will have to be represented by a Dutch attorney during court proceedings in the Netherlands which will oblige the IP to pay legal fees.

[1] Regulation (EU) No 2015/848 on Insolvency proceedings (recast).

1.2 Financing

1.2.1 Does your jurisdiction allow or provide for the following?

- ***Contingency fee agreements***

  The rules set out by the Dutch Bar Association (the Netherlands Bar, *Orde van Advocaten*) in the *Verordening op de advocatuur (*Regulation on the Legal Profession) and the *Gedragsregels voor de advocatuur* (Dutch Code of Conduct for Attorneys) in principle do not allow for contingency fee arrangements. This specific rule is set out in Article 7.7 of the Regulation on the Legal Profession.

  There is one exception to this general rule. In January 2014, an experiment was started where Dutch personal injury attorneys were permitted to implement "no-cure-no pay" fee structures. This experiment will continue until January 2024 but is not relevant in the field of insolvency.

- ***Is legal aid for litigation available for a foreign IP?***

  In the Netherlands individuals qualify for legal aid if their finances hamper their ability to solicit the services of an attorney or mediator. The size of the contribution will depend on the individual's level of income, the value of his or her assets and the scope of the legal issue at hand. Legal entities do not qualify for this legal aid, nor do foreign IPs.

- ***Are litigation financing and / or insurance for litigation costs provided and, if so, starting at which amount?***

  Corporate insurance for legal expenses is not uncommon in the Netherlands. Such insurance policies are often construed to cover legal expenses borne by exposure to specific legal risks, like intellectual property law infringements and labour law disputes. These policies frequently carve out coverage for criminal or insolvency-related issues.

  IPs can be held personally liable if their actions on behalf of the estate have caused damage to other parties. This liability will normally be covered by the malpractice insurance that each attorney (and hence IP) is required to have by law.

  As far as we know there is no separate insurance policy available for IPs that covers the costs of legal proceedings initiated by the IP on behalf of the estate. However, litigation financing is – finally – finding its way into the insolvency sphere. Dutch IPs can apply for litigation financing, after receiving permission from the insolvency judge. The practice is not (yet) widespread due to its novelty. Dutch IPs can apply for a grant from *Dienst Justis* (part of the Ministry of Justice and Security) if the estate lacks sufficient means for the IP to conduct an adequate investigation into the cause of the insolvency and the role of the directors therein. Dutch IPs are required by law to conduct such investigations, yet insolvency estates often lack sufficient resources to do so. A grant is also available to investigate questionable related-party transactions or transactions at an undervalue (transaction avoidance / fraudulent conveyances). If the subsidy is granted, the IP will be able to start the investigation and has the

option of applying for additional financing if he or she has reasons to believe that suing directors or voiding certain transactions will restore value to the estate.

1.3 Obtaining an enforcement order

1.3.1 Besides commencing regular civil proceedings, are there easier and cheaper ways to obtain an enforcement order?

The Netherlands does not have a judicial dunning procedure similar to the likes of Germany (*Mahnverfahren*), France (*injonction de payer*) and Austria (*Mahnverfahren*). Creditors in the Netherlands must rely on the "regular" civil procedures if they wish to obtain an enforceable title. This often leads to a default judgment as it is not uncommon for the debtor to be absent from court. If it is a cross-border claim – that is if one of the parties is domiciled in another country that is party to the European Regulation on payment order[2] – then European Payment Order proceedings can be initiated in the Netherlands. Parties can apply for this procedure at the competent court in The Hague, thereby making it possible to receive an enforceable title through uniform proceedings in the Dutch language. Information on these proceedings can be accessed online via the judiciary's website.[3]

For claims with a maximum of EUR25,000, it is also possible to retain a bailiff. The bailiff can serve all summons but can also collect claims by starting civil proceedings at the Sub-district Court (*Kantongerecht*). The parties disputing a claim with a maximum of EUR25,000 do not need to be represented by attorneys as the obligation to be represented by an attorney does not apply before the lowest court. The bailiff is not bound by the Attorneys' Code of Conduct (see section *1.4.1* below) and will generally make fee agreements. The costs of soliciting the services of a bailiff are normally significantly lower than those associated with hiring an attorney.

1.4 Lawyers' fees

1.4.1 What are the legal provisions for lawyers' fees and are there compulsory statutory fees for some or all activities?

In principle, attorneys in the Netherlands have the discretion to determine the fees for their services themselves. The hourly rate is most used. This hourly rate normally depends on the experience and the nature of the specialisation of the attorney. It is also possible to agree a fixed fee for the services of the attorney.

By determining the hourly rate attorneys must comply with the Regulation on the Legal Profession and the Dutch Attorneys' Code of Conduct. One of the rules in the Regulation requires attorney fees – except for exceptional cases – to be cost-effective, and (as mentioned in section *1.2.1*) the attorney may not agree to a no-cure-no-pay fee structure.[4] The latter means that fees cannot be dependent on the outcome of proceedings (which could result in the attorney receiving no fee at all), nor can parties agree to pay the attorney a percentage of the successfully claimed

[2] Regulation (EC) No 1896/2006 on a European order for payment procedure.
[3] Available at (Dutch): https://www.rechtspraak.nl/Voor-advocaten-en-juristen/Reglementen-procedures-en-formulieren/Civiel/Handelsrecht/paginas/europese-betalingsbevelprocedure.aspx.
[4] Article 7.7 of the Regulation on the Legal Profession (*Verordening op de advocatuur*).

amount. The Dutch Bar Association has set these rules to safeguard the quality of the services provided.

One exception to the prohibition of no-cure-no-pay fee arrangements applies to "plain vanilla" debt collection cases. If an attorney is retained to collect a series of ordinary – monetary – debts and does not have any reason to expect a legal dispute with the debtor, then the attorney is permitted to quote a percentage of the collected amount.

There are also other avenues that can be explored when it comes to outcome-related fees. However, it is to be expected that the debt collection efforts of foreign IPs do not usually qualify for these exceptions. By and large, foreign IPs will have to pay the hourly fee as determined by the Dutch legal professional that they have retained.

1.5 Court fees

1.5.1 In order to take legal action, does a foreign plaintiff have to provide security and / or make a prepayment for court costs and, if so, how is the amount calculated?

To initiate proceedings before the civil courts in the Netherlands, the plaintiff must always pay court fees. If the case is brought before the Sub-district Court (*Kantongerecht*), only the plaintiff is required to pay these fees. At all other courts, the defendant is also required to pay court fees. The court fees need to be paid at the start of the proceedings. If the court fees have not been paid in time, this could lead to the claim not being received.

The amount to be paid is determined by the nature of the case and the plaintiff's income or legal personality (i.e. the law sets higher fees for legal entities than for natural persons). Higher fees will be levied if parties wish to contest the ruling through appeal or appeal in cassation. The court fees at the appellate level (Court of Appeal) or at the Supreme Court are thus higher compared to the fees at the District Court level.

At the request of the defendant, a foreign – non-European Economic Area – plaintiff can be required to provide security for the legal fees and court costs and for a predetermined amount in damages that he or she might be ordered to pay if the defendant countersues on a tortious claim brought before the court by the plaintiff. Security shall be provided by means of a written, irrevocable, unconditional and (un)limited guarantee of a bank authorised to conduct business in the Netherlands, or by depositing funds in an escrow account. This rule can be set aside if its application is incompatible with an international treaty or EU regulation, or if the plaintiff has sufficient secure (unencumbered) assets in the Netherlands to provide for payment of the costs of the proceedings and damages. A foreign plaintiff domiciled in the EU or in a state party to the Agreement on the European Economic Area does not have to provide security.

1.5.2 What are the legal provisions for court fees in civil proceedings?

In civil proceedings before the Sub-district Court (*Kantongerecht*), the defendant does not have to pay any court fees. At the District Court and all appellate courts, the defendant is required to pay court fees. The court fees are specified in the Act

on Court Fees in Civil Proceedings (*Wet griffierechten burgerlijke zaken*). The amount is determined by the importance of the case (the value claimed or the amount in dispute), the income of the party and whether the party is a natural person or a legal entity. The amounts increase if an appeal is lodged at, respectively, the Court of Appeal or the Supreme Court. In the appendix of the Act, the fee amounts are categorised. As can be seen in the tables below, the Sub-district Courts are not authorised to adjudicate on claims that exceed EUR25,000. If the claim exceeds this amount, applicants must lodge their claim before the District Court.

The table below shows the estimated court fees for natural persons for claims of EUR5,000, EUR50,000 and EUR500,000.

Court fees (natural persons)	Claim amount (EUR)		
	5,000.00	50,000.00	500,000.00
Subdistrict Court	240.00	-	-
District Court	952.00	952.00	1,666.00
Court of Appeals	338.00	772.00	1,756.00
Supreme Court	350.00	845.00	2,106.00

The table below shows the estimated court fees for non-natural persons (legal entities such as businesses, organisations, public bodies etc.) for claims of EUR5,000, EUR50,000 and EUR500,000.

Court fees (non-natural persons)	Claim amount (EUR)		
	5,000.00	50,000.00	500,000.00
Subdistrict Court	507.00	-	-
District Court	2,076.00	2,076.00	4,200.00
Court of Appeals	772.00	2,106.00	5,610.00
Supreme Court	850.00	2,805.00	7,015.00

1.6 Refund of legal costs and expenses

1.6.1 Is the winner of a court proceeding entitled to reimbursement for the legal costs and expenses?

In civil proceedings the unsuccessful party is normally burdened with the costs of the proceedings, or at least a proportion of the costs. The ruling court will determine the amount that the unsuccessful party will have to pay without providing justification as to the rationale of the decision. Contrary to the rules that apply in other jurisdictions, this does not mean that the unsuccessful party will have to cover the full amount of the successful party's legal expenses.

Under Dutch law, the attorney fees that are compensable by the unsuccessful party are capped by so-called "liquidation amounts" (*Liquidatietarief*). The total amount that the unsuccessful party can be ordered to pay his or her counterparty is based on the variety of legal acts carried out in the proceedings and the importance of the case (which is usually measured by the monetary value of interests at stake). This normally means that only a small part of the legal expenses will be borne by the unsuccessful party.

1.7 Examples of legal costs and expenses

1.7.1 What would be the roughly estimated litigation costs and expenses – first instance including lawyer and court – for a (simple) claim in the amount equivalent to EUR5,000, EUR50,000 and EUR500,000?

As mentioned before, attorneys in the Netherlands have the discretion to set their hourly rates or determine their legal fees themselves. Hourly rates range from approximately EUR150–200 an hour for junior attorneys to EUR300 and upwards for more senior attorneys. The hourly rate is thus usually a factor of seniority and expertise. Larger firms often have a variety of rates depending on the level of seniority required on a particular case. Straightforward cases are carried out by junior attorneys (under supervision of more senior attorneys) at a lower hourly rate, and more complex cases are handled by more senior attorneys at a higher hourly rate. It is difficult to provide an estimate of costs of litigating claims as there are a lot of variables that can influence the workload in a particular case. For instance, the strategy employed by the defendant can heavily determine the number of billable hours required to successfully litigate a claim. Only the court fees are fixed (as listed in Section 1.5.2 above), but the largest determinant of the total litigation costs, attorney fees, is nearly impossible to estimate.

This means that, in The Netherlands, litigating a claim valued at EUR5,000 will hardly ever prove worthwhile. Even for a claim of EUR50,000 litigation costs can dissuade plaintiffs from pursuing legal action, even more so if the claim is disputed and if documents, including attachments in the proceedings and all procedural documents, need to be translated. As the amount of legal work involved does not usually correlate with the amount claimed (i.e. the same amount of work can be needed for a claim of EUR5,000 as for a claim of EUR5,000,000), the following hypothesis will often hold: the higher the amount claimed, the more attractive pursuing legal action can become.

1.8 Average duration of litigation

The duration of civil proceedings depends on several variables. Of significant importance is how parties choose to navigate through civil procedural law as this will determine the scope of the legal acts involved and thus the work that needs to be completed at every stage. For instance, if parties choose to introduce cross-claims and request witness examinations and cross-examinations, proceedings will be protracted. Another factor that must be considered is the potential backlog at the court where proceedings are initiated.

Generally, a relatively straightforward interim injunction order may be obtained within a few weeks. More complex matters can take up to two years to be resolved. To summarise, the duration of proceedings is heavily dependent on a variety of factors and therefore difficult to estimate. In a relatively straightforward case before the District Court, deliberations between parties may take five months to complete and, depending on the timing of the court, it could take between six weeks and a year or more to receive a verdict.

SCENARIO 2: ENFORCEMENT ORDER (JUDGMENT) EXISTS AND NEEDS TO BE ENFORCED ABROAD

2.1 Recognition proceeding and costs

2.1.1 What is the designated procedure and what are the roughly estimated costs – including lawyer and court – for the recognition of the foreign enforcement order for a claim in the amount equivalent to EUR5,000, EUR50,000 and EUR500,000?

The designated procedure and the associated costs for the recognition of a foreign judgment depend on whether the judgment was issued by a court in an EU member state or outside of the EU.

- Within the EU

  Under Article 39 of Regulation (EU) No 1215/2020 (Brussel I-bis) a court decision issued in an EU member state and enforceable in that member state is automatically enforceable in other member states without needing to obtain a declaration of enforceability. According to Article 42 of Brussel I-bis, all that is required is a copy of the judgment that satisfies the conditions necessary to establish its authenticity and a certificate of enforceability issued by the court of origin.[5] Accordingly, no additional costs for recognition are incurred in the target state.

- Outside of the EU

  A judgment issued by a court outside of the EU can only be recognised in the Netherlands if recognition is facilitated by an international treaty or domestic law (Article 985 of the Code of Civil Procedure, *Wetboek van Burgerlijke Rechtsvordering*). If enforceability is not predetermined by a treaty or provisions of national law, then the enforceability is determined by the domestic enforcement procedure (*exequatur* procedure).

  If recognition is warranted based on a treaty or provisions of domestic law, no separate costs for recognition will be incurred in the Netherlands.

  The court fees incurred when initiating domestic enforcement proceedings were limited to EUR656 in 2020. The additional costs involved will pertain to, but shall not be limited to, the costs borne by having to translate relevant authentic documents into the Dutch language and pay the fees of the obligatory Dutch attorney. Since the request directed at the court is in itself not very technical in nature – and the fact that the case study at hand is constrained to the dilemma of a foreign IP wishing to enforce a relatively simple judgment in the Netherlands – excessive legal fees should not be expected, anything in the range of EUR1,500 to EUR3,000 would offer a fair estimate.

[5] Article 53 in conjunction with Annex 1 of Regulation (EU) No 1215/2020 (Brussel I-bis).

2.2 Obtaining information about the debtor

2.2.1 Are there any sources of information to ascertain whether a debtor of a claim has assets for recourse or is subject to an insolvency proceeding?

There are various private credit agencies that collect information on the creditworthiness of corporations and / or individuals. They offer an insight into the credit history of legal persons and suggest possible measures for recourse. The information they provide is based *inter alia* on the annual accounts and all other publicly accessible data from registers and elsewhere.

For individuals in the Netherlands an important registry is the registry of *Stichting Bureau Krediet Registratie*. In this registry all credit facilities (including hire purchases and financial leases) and all current and past late payments of an individual are listed. This information is only accessible for specific credit institutions, car-leasing companies and agencies that provide debt relief assistance and that are members of the "*NVVK*", *Vereniging voor schuldhulpverlening en social bankieren*. The registry is not publicly accessible to other creditors. Furthermore, the registry exclusively lists information pertaining to natural persons and does not cover legal entities.

Other information can be derived from public registries. All information from the company registry is available after payment of a small fee to the Dutch Chamber of Commerce (*Kamer van Koophandel*).[6] Published annual accounts of companies can also be obtained from the Dutch Chamber of Commerce. This registry also keeps track of the legal status of companies (i.e. whether a company is actively trading, has been liquidated, declared bankrupt or has merged etc.).

All insolvency proceedings, including suspension of payments, bankruptcies and debt restructurings for natural persons, are published in the Central Insolvency Register (CIR, *Centraal insolventieregister*).[7] Legal entities are found by name, registration number or address. Natural persons can be found by filling a combination of several data entries such as, for instance, their name and date of birth or their name and postcode. Information on all of registered insolvency proceedings will remain on the CIR for a maximum of six months after the proceedings have been terminated.

For information on real estate ownership, the Real Estate Registry (*Kadaster*) offers an invaluable resource.[8] All Dutch properties are listed, and all parties that have signed up for an account with the real estate registry – like notaries and attorneys – can access these registrations. Users can search by entering an individual's (or company's) name or by entering the address of the property. If the search is conducted on the address, the registration of relevant mortgages can also be found. The balance due on a mortgage is not updated and will therefore only be listed at the amount that was outstanding when the mortgage was first registered. It is also possible to ascertain from the registry whether an attachment has been placed on a particular property.

[6] See: www.kvk.nl.
[7] Access to the CIR is possible via the website of the judiciary: www.rechtspraak.nl.
[8] See: www.kadaster.nl.

An attorney or IP can enter a request for information on vehicle ownership at the RDW, the government registry for all motor vehicles.[9]

As stated before, all creditors can solicit a bailiff to collect claims if the amount has a value of less than EUR25,000. Bailiffs are public officials and can – before serving a summons – check the digital Attachment Registry. In this registry any prior attachment on assets of the debtor is listed. Bailiffs are permitted to collect claims by starting civil proceedings at the Sub-district Courts (*Kantongerecht*) if the claim does not exceed EUR25,000. As bailiffs are not bound by the attorneys' Code of Conduct, they can provide an attractive alternative when the IP has smaller claim(s) to collect. They normally charge (significantly) lower fees and often request a percentage of the amount collected which can be favourable if the assets of the estate are not liquid enough to upfront the costs. Additionally, bailiffs have the authority to request information on the income of the debtor from the UWV (*Uitvoeringsinstituut Werknemersverzekeringen*), the Dutch employment agency as soon as a positive ruling has been received. Bailiffs will need this information when executing a writ of attachment on debtors' income.

A Dutch IP has the authority to request information from the Dutch tax office pertaining to any known assets of the debtor (and the directors of the debtor). The tax office bases this information on prior tax returns.

2.3 Enforcement measures

2.3.1 What main enforcement measures are available and what are the costs – including lawyer and enforcement authority – for enforcing a claim in the amount equivalent to EUR5,000, EUR50,000 and EUR500,000?

- Extrajudicial debt collection[10]

  A debt collection agency is authorised to perform the same legal acts as the creditor when collecting claims on his or her behalf during the extrajudicial debt collection phase. This is the phase that precedes bringing the claim before the court. Following the launch of recovery proceedings, the debt collection agency can issue written summons to pay and contact the debtor by telephone.

  The bailiff, on the other hand, is a public official and authorised to execute all judgments and to serve writs of attachment. As soon as the debtor is in arrears, collection agencies and bailiffs solicited by the creditor may issue collection fees that the debtor will have to pay on top of the claim. The maximum collection fees for claims of EUR5,000, EUR50,000 and EUR500,000 are listed in the table at the end of this section.

- Attachment and execution

  In the Netherlands it is possible to request for an attachment on the assets of the debtor by initiating preliminary relief proceedings (a prejudgment attachment). This is to ensure that the debtor will provide recourse for the claim if the debtor is ordered to pay by the court ruling over the claim.

[9] See www.rdw.nl.
[10] Cf. Sections 1.3 and 1.4 above for the costs attributed to commencing court proceedings.

Examples of property on which an attachment can be imposed include, but are not limited to, real estate, movable property, claims and scriptural accounts. Other assets are categorically exempted from attachment. For instance, a proportion of income and certain specific goods necessary for living are protected from attachment by law.

Normally, preliminary relief proceedings will be initiated by filing a request for attachment with the president of the competent District Court. As soon as this request is granted, the bailiff can serve the writ of attachment. If the creditor's claim is subsequently granted by the court, the preliminary attachment is automatically converted into an executory attachment, meaning that the property can be sold on behalf of the creditor.

The costs incurred by the creditor in the process are to be reimbursed by the debtor up to the maximum amount as determined in the *Liquidatietarieven kanton / Liquidatietarieven voor rechtbanken en gerechtshoven* – with regards to attorney's fees – and the *Besluit tarieven ambtshandelingen gerechtsdeurwaarders* (*Btag*) – with regards to the bailiff's fees. This means that, if the legal fees exceed the predetermined maximum, the creditor cannot claim the full amount from the debtor (or from the sale of the seized property). *Btag* determines the costs of the bailiff per official act. This means that the bailiff's fees depend heavily on the number of official acts needed in the process and the nature of these acts. The table below provides an indication of the costs.

Execution measures	Claim amount (EUR)		
	5,000.00	50,000.00	500,000.00
Extrajudicial phase	625.00	1,275.00	4,275.00
Attachment and seizure of debtor's assets	> 136.56	> 136.56	> 136.56
Bailiff (per asset)[11]	2,076.00	2,076.00	4,200.00
Court fees[12]	> 321.00	> 321.00	> 321.00
Lawyers' fees[13]	490.00	1,074.00	3,099.00

2.4 Alternatives to lawyers

2.4.1 Are there specialised debt collection agencies (or equivalent) which buy claims or work more cost-effectively than lawyers?

The Netherlands houses many debt collection agencies. These agencies vary in size and some are specialised in certain industries (e.g. utility, healthcare). A few law firms also specialise in debt collection. Many debt collection agencies work

[11] Note: these costs are indicative. Costs vary according to: 1) the number of official acts required to enforce the debt and; 2) the asset type. Costs for precautionary attachment of an asset generally start around EUR165.

[12] Considers court fees for businesses that are not sole proprietors.

[13] Lawyers are permitted to deviate from the fees listed in the table. However, the fees listed in this table will govern the relationship between the creditor and the debtor. Cf. *Liquidatietarieven Kanton 2021, available at: https://www.rechtspraak.nl/Voor-advocaten-en-juristen/Reglementen-procedures-en-formulieren/Civiel/Paginas/aanbeveling-tarieven-kort-gedingen-kantonzaken-en-handelszaken.aspx;* and *Liquidatietarieven voor rechtbanken en Gerechtshoven, available at: https://www.rechtspraak.nl/Voor-advocaten-en-juristen/Reglementen-procedures-en-formulieren/Civiel/Paginas/Liquidatietarief.aspx*.

based on no-cure-no-pay (which attorneys are not permitted to do). Additionally, debt collection agencies charge collection fees which are borne by the debtor. Therefore, it can be efficient and cost-effective to solicit a debt collection agency for several smaller claims and an attorney for larger claims. Several debt collection agencies have a business in buying claims; this is not uncontroversial as it can make the process more hostile and has the potential to inflate collection fees.

2.5 Insolvency proceeding

2.5.1 What costs are involved – including legal and court fees– for opening and participating in insolvency proceedings against the debtor of a claim in the amount equivalent to EUR5,000, EUR50,000 and EUR500,000, if the debtor is not able to pay?

If the debtor requests the court to open insolvency proceedings, he or she is not burdened by significant costs. No court fees apply, and there is no requirement for legal representation by an attorney. A current extract from the company's registry at the Chamber of Commerce will have to be provided. The costs associated with obtaining this document range from EUR7.50 to EUR15.

If a creditor wishes to petition for the opening of insolvency proceedings against one of his or her debtors, the creditor must submit two claims: the creditor's own claim and another creditor's claim (plurality of creditors). In this case, court fees do apply. For natural persons an amount of EUR304 will be levied, and for legal entities EUR656. Furthermore, the creditor will need to be represented in court by an attorney. The legal fees for a relatively simple non-disputed opening of proceedings before the District Court often range from approximately EUR1,500 to EUR2,000. If the claim is disputed and certain legal issues arise, these costs will increase as the hours needed to complete proceedings are an important factor. These costs are not in any way connected to the size of the initial claim on the debtor.

The costs associated with petitioning for insolvency proceedings to be opened have preferential status in the subsequent bankruptcy of the debtor (Article 3:288, section a BW, *Burgerlijk Wetboek i.e* Dutch civil code). Unfortunately, the IP will often not be able to reimburse these costs as the majority of bankruptcy estates in the Netherlands lack sufficient assets to cover the claims of all the preferential creditors.

When it comes to participating in insolvency proceedings, for instance by submitting a claim with the IP and simply waiting for payment, costs will be limited and may not even be incurred at all. Many IPs provide English instructions and documentation on how to submit claims. Creditors are often able to submit their claims and related documents through an online portal.

3. Economical conclusion

3.1 Considering the costs that a foreign IP may face, what is the minimum claim amount at which it becomes economical to start litigation or enforcement?

If the amount is low enough to be enforced by a bailiff, that is, if the claim falls below the EUR25,000 threshold, it is possible to make a cost-effective fee arrangement. These claims can subsequently be litigated and enforced by the

bailiff meaning that all the necessary work is outsourced. The tipping point is likely to be reached when claims have a value between EUR25,000 and EUR50,000. For these claims the litigation costs can be quite substantial, especially in comparison to the amount at stake. For claims above EUR50,000, the chances are that the potential upside outweighs the costs of taking legal action. Foreign IPs should note that prejudgment attachment can be obtained to preserve the debtor's assets while proceedings are ongoing.

UNITED KINGDOM

This country report is written based on a situation where an insolvency estate includes a (potential) claim against a (third party) debtor who is domiciled abroad. The court-appointed insolvency practitioner (IP) has to assess the costs for pursuing the claim in order to decide whether it is affordable and economically reasonable to try recovery abroad. Two scenarios are considered. In scenario 1 the claim has not yet been subject to a court proceeding; in scenario 2 an executory title already exists and would have to be enforced abroad.

SCENARIO 1: CLAIM HAS NOT YET BEEN SUBJECT TO COURT PROCEEDINGS

The law as stated in this response is that in force as of 28 January 2021. The position regarding reciprocation and enforcement as between the United Kingdom (UK) and the European Union (EU), however, is currently in a state of flux. This response is intended to be a general guide only and does not constitute legal advice. Insolvency practitioners (IPs) seeking recognition of foreign insolvency proceedings or judgments in the UK will need to obtain specific, up-to-date legal advice at the relevant time, as the position may have changed.

1.1 Recognition proceeding and costs

1.1.1 What is the proceeding and what are the estimated costs for the recognition of the foreign insolvency proceeding and the IP's power to pursue a claim?

For foreign insolvencies where the main proceedings were opened on or after 1 January 2021, the procedure for recognition in the UK is the same regardless of whether the proceedings were opened in an EU member state or not. This is because on 1 January 2021 the EU regime relating to private international law, including the Insolvency Regulation (EC 1346/2000), the Recast Brussels Regulation (EU) 1215/2012 and the Recast Insolvency Regulation (EU) 2015/848 ceased to apply in the UK.

The current position is therefore that recognition of *all* foreign insolvencies opened on or after 1 January 2021 will be dealt with under the Cross-Border Insolvency Regulation UKSI 2006/1030 (CBIR).

The CBIR implements the United Nations Commission on International Trade Law (UNCITRAL) Model Law and enables the English courts, on application, to grant relief in support of foreign insolvency proceedings. Where those proceedings are recognised as "main" proceedings (i.e., where the foreign proceedings have been commenced in the country where the debtor has its centre of main interests), this will result in an automatic stay on the commencement or continuation of any action or proceeding concerning the debtor's assets, rights, obligations or liabilities. The court also has a discretion to grant further forms of relief in support of the foreign insolvency.

The costs of an application to court to recognise foreign insolvency proceedings under the CBIR is likely to start at around GBP5,000. The costs and procedure may change in respect of EU insolvencies, however, if the UK's application to join the Lugano Convention is approved by the EU and / or the EU implements the UNCITRAL Model Law.

For insolvencies where the main proceedings commenced in an EU member state on or before 31 December 2020, the Recast Insolvency Regulation will continue to

apply, providing for automatic recognition of the proceedings in all of the other member states, including the UK. The costs of obtaining this recognition are likely to start at around GBP1,500.

1.2 Financing

1.2.1 Does your jurisdiction allow or provide for the following?

- ***Contingency fee agreements***

  Conditional fee agreements (CFAs) and damages-based agreements (DBAs) are permitted for most litigation matters except for criminal and family cases. Both are kinds of "no-win-no-fee" agreements:

  - in a CFA, if the client wins, it is liable to pay all legal fees and expenses, often including an additional "success fee";
  - in a DBA, if the client wins, it is liable to pay an agreed percentage of any damages received to its legal representatives.

  In either case, if the client loses, it pays nothing to its own representatives (although it may still be liable for the costs of the other side). The client will have to fund its own disbursements, such as court fees and barrister's fees.

- ***Is legal aid for litigation available for a foreign IP?***

  No legal aid is available.

- ***Is litigation financing and / or insurance for litigation costs provided and, if so, starting at which amount?***

  Yes. Both third-party litigation financing and "after the event" legal expenses insurance are available. The cost and the terms offered are individually negotiated based upon the amount of the claim, the merits and the prospects of recovery against the debtor of any judgment. Generally, in order to consider an application, an insurer or funder will require full details of the proposed claim including draft particulars, together with counsel's advice on the merits.

  It is usually only cost-effective to obtain legal expenses insurance where the expected recovery is more than GBP50,000. It is no longer possible for legal expenses insurance premiums to be recovered from the losing side, so the premium would need to be paid from the damages received by the claimant.

  Third-party litigation finance is a bespoke arrangement and is generally the most expensive form of litigation funding. If the claim is successful, then the funder will take a share of the damages, usually 30%–50% of the amount awarded. For this reason, litigation financing is only likely to be an option for higher value claims starting at GBP400,000.

1.3 Obtaining an enforcement order

1.3.1 Besides commencing regular civil proceedings, are there easier and cheaper ways to obtain an enforcement order?

If the debt is undisputed, then it may be more appropriate to seek to commence insolvency proceedings against the debtor by serving a statutory demand or winding-up / bankruptcy petition. Under the Corporate Insolvency and Governance Act 2020, however, statutory demands against limited companies are currently void and winding-up petitions are only allowed to proceed if the court is satisfied that the debtor company's difficulties are not caused by the Covid-19 pandemic. These provisions are in force until the end of March 2021 and may yet be extended further.

1.4 Lawyers' fees

1.4.1 What are the legal provisions for lawyers' fees and are there compulsory statutory fees for some or all activities?

Lawyers' fees are a matter of contract. Most fees are charged on the basis of an hourly rate, although fixed or capped fees may be available for more routine work. There are no compulsory statutory fees.

1.5 Court fees

1.5.1 In order to take legal action, does a foreign plaintiff have to provide security and / or make a prepayment for court costs and, if so, how is the amount calculated?

A court fee is payable by the claimant in order to issue proceedings. Court fees in civil proceedings are calculated by reference to the amount of the claim. For claims in excess of GBP10,000 the court fee is 5% of the amount claimed up to a maximum fee of GBP10,000. There is also a hearing fee payable if the matter proceeds to trial, which ranges from GBP25 to GBP1,090 depending on the amount of the claim.

In limited circumstances, a claimant can be ordered by the court, on application by the defendant, to provide security for the defendant's costs of the proceedings. This includes where the claimant is resident outside of the jurisdiction and not within a state bound by the 2005 Hague Convention on Choice of Court Agreements, and where the claimant is a company and there is reason to believe that it will be unable to pay the defendant's costs if ordered to do so. Where the application for security for costs is made out, the claimant can be ordered to provide security in an amount that the court thinks fit in all the circumstances and should be proportionate to the amount involved in the case.

1.5.2 What are the legal provisions for court fees in civil proceedings?

Court fees in civil proceedings are set out in the Civil Proceedings Fees Order UKSI 1053/2008 as amended.

1.6 Refund of legal costs and expenses

1.6.1 Is the winner of a court proceeding entitled to reimbursement for the legal costs and expenses?

Costs recovery is very limited in money claims where the amount outstanding is less than GBP10,000. These matters fall into the "small claims track", where the successful party can usually only recover a nominal sum.

Higher-value cases are allocated to either the "fast track" (where the value of the claim is between GBP10,000 and GBP25,000) or the "multi track" (for claims over GBP50,000). The usual position in the fast and multi tracks is that the unsuccessful party is ordered to pay the successful party's legal costs and expenses, to be assessed by the court if not agreed.

1.7 Examples of legal costs and expenses

1.7.1 What would be the roughly estimated litigation costs and expenses – first instance including lawyer and court – for a (simple) claim in the amount equivalent to EUR5,000, EUR50,000 and EUR500,000?

Costs and expenses	Claim amount (EUR)		
	5,000	50,000	500,000
Court fee for issue (GBP)	455	2,500	10,000
Hearing fee (GBP)	335	1,090	1,090
Lawyer's fees[1] (GBP)	3,000	15,000	50,000

1.8 Average duration of litigation

The standard court timetable results in the following approximate durations:[2]

- small claims – 10 months;
- fast track – 15 months; and
- multi track – 15 months.

SCENARIO 2: ENFORCEMENT ORDER (JUDGMENT) EXISTS AND NEEDS TO BE ENFORCED ABROAD

2.1 Recognition proceeding and costs

2.1.1 What is the proceeding and what are the roughly estimated costs – including lawyer and court – for the recognition of the foreign enforcement order for a claim in the amount equivalent to EUR5,000, EUR50,000 and EUR500,000?

The Recast Brussels Regulation and the European regime of reciprocal enforcement apply to the judgments of EU / European Free Trade Association

[1] The figures for lawyer's fees are a very rough guide only as they will be determined more by the complexity of the matter than the amount of the claim.
[2] Source: *Civil Justice Statistics Quarterly* (July–September 2020).

(EFTA) member state courts where the proceedings were commenced on or before 31 December 2020.

EU / EFTA judgments in relation to proceedings commenced from 1 January 2021, and the judgments of other jurisdictions, may be subject to procedures provided by treaty, statute or rule which will be used where available. Otherwise, the common law rules will apply. A foreign judgment is not directly enforceable in the English courts but can be cited as proof of the debt in a fresh action in the High Court pursuant to Part 74 of the Civil Procedure Rules. Once issued, the claimant can seek summary judgment which will usually be dealt with without a hearing.

The legal fees for an application where the European regime applies would likely start at GBP1,500. Where that regime does not apply, the costs will likely start at around GBP2,500. A certified translation of the judgment must be submitted to the court along with the application.

2.2 Obtaining information about the debtor

2.2.1 Are there any sources of information about whether a debtor of a claim is without means or subject to an insolvency proceeding?

Where the debtor is an individual, a bankruptcy search can be undertaken, as well as a search of the Registry of Judgments, Orders and Fines.[3] These would reveal whether the debtor is currently bankrupt or subject to an individual voluntary arrangement, and whether they have any unpaid court judgments registered against them.

Where the debtor is a limited company, searches can be undertaken via the courts to ascertain whether the company is subject to any current or pending insolvency procedures, and accounting information is publicly available from Companies House.[4]

If a judgment is obtained, then a creditor can apply to court for an order requiring the debtor to attend court for questioning as to their means.

2.3 Enforcement measures

2.3.1 What main enforcement measures are available and what are the costs – including lawyer and enforcement authority – for enforcing a claim in the amount equivalent to EUR5,000, EUR50,000 and EUR500,000?

The main enforcement measures are as follows:

- taking control of goods using writs and warrants of control;
- third-party debt orders;

[3] See: https://registry-trust.org.uk.
[4] See: https://find-and-update.company-information.service.gov.uk.

- attachment of earnings orders; and
- charging orders over property.

Costs (GBP)	Court fee	Fixed recoverable costs	Non recoverable costs	Disbursements
Writ / warrant of control	110	51.75	125	90
Third-party debt order	110	98.50	125	
Attachment of earnings	110	8.50	125	
Charging order	110	110	225	83

These costs are not dependent upon the amount of the debt.

2.4 Alternatives to lawyers

2.4.1 Are there specialised debt collection agencies (or equivalent) which buy claims or work more cost-effectively than lawyers?

There are debt collection agencies which buy claims. Whether they work more cost-effectively than lawyers will depend on the circumstances.

2.5 Insolvency proceedings

2.5.1 What costs are involved – including lawyer and court – for commencing and participating in insolvency proceedings against the debtor of a claim in the amount equivalent to EUR5,000, EUR50,000 and EUR500,000, if the debtor is not able to pay?

The estimated costs for commencing insolvency proceedings against a debtor are as follows (based upon the petition not being disputed and the order being made at the first hearing).

Costs (GBP)	Court fee	Legal fees	Other disbursements
Bankruptcy petition (individuals)	280	1,500	1,500
Winding-up petition (companies)	280	2,500	2,000

These costs are not dependent upon the amount of the debt.

3. Economical conclusion

3.1 Taking into account the costs and expenses for a foreign IP, what is the minimum claim amount at which it makes sense to start litigation or enforcement in your jurisdiction?

We would suggest that the minimum claim amount which it makes sense to litigate / enforce is GBP10,000, particularly in view of the fact that the European reciprocal enforcement regime will no longer be available in the UK in the majority of cases. This position may improve in the near future if, for example, the UK's application to join the Lugano Convention is accepted.

UNITED STATES OF AMERICA

This country report is written based on a situation where insolvency estate includes a (potential) claim against a (third party) debtor who is domiciled abroad. The court appointed insolvency practitioner (IP) has to assess the costs for pursuing the claim in order to decide whether it is affordable and economically reasonable to try recovery abroad. Two scenarios are considered. In scenario 1 the claim has not yet been subject to a court proceeding; in scenario 2 an executory title already exists and would have to be enforced abroad.

SCENARIO 1: CLAIM HAS NOT YET BEEN SUBJECT TO COURT PROCEEDINGS

1.1 Recognition proceeding and costs

1.1.1 What is the proceeding and what are the estimated costs for the recognition of the foreign insolvency proceeding and the IP's power to pursue a claim?

A foreign insolvency administrator may pursue an out-of-court agreement to settle a claim without initiating a separate legal process in the United States (US). Such actions could take the form of a demand letter or referral of the claim to a local insolvency practitioner or collections agency. Costs in this regard would be minimal for simple correspondence and most likely be recovery-based if using a local practitioner or collections agency. There are law firms in the US that limit their practice to debt collection and would usually work on a contingent basis that may be more cost-effective than a general practitioner but may be unable to handle more complex negotiations if they are required.

Also, a foreign insolvency administrator can seek to have his or her client's claims against a US entity settled without initiating separate *insolvency* proceedings in the US on behalf of the foreign debtor, especially where the foreign debtor has no assets in the US, but the success of such an action would be highly dependent on the factual bases of the claim. Although the foreign insolvency administrator would not have to initiate insolvency proceedings in the US, he or she would have to file a complaint against the target they seek to recover from in either state or federal court. In this regard, the foreign insolvency administrator should consider in advance factors such as jurisdictional requirements, the ability to collect from the target of recovery, and potential challenges under the doctrine of *forum non conveniens*. *Forum non conveniens* defences arise where a court might decline to adjudicate a case when the defendant or the judicial system would be inconvenienced, even though jurisdiction and venue are proper. If the court determined that another jurisdiction, such as the foreign administrator's own, were better suited to handle the litigation (the injury occurred there, the contract was signed there, the depositions would need to be taken there etc.), the court might decline to hear the case. As mentioned above, the foreign insolvency administrator would have to file the claim in either state or federal court. Claims of USD75,000 and under would have to be brought in state court, while claims over USD75,000 could be brought in federal court. The filing fee for a complaint in state court in New Jersey is USD250; in New York it is USD305. The filing fee for a complaint in federal court is USD400.

1.2 Financing

1.2.1 Does your jurisdiction allow or provide for the following?

- ***Contingency fee agreements***

  Yes, contingency fee arrangements are allowed, and a typical arrangement is 33⅓% of recovery to the attorney, plus costs. However, arrangements could be more or less. In commercial matters, the maximum contingency fee under New York or New Jersey law is 33.3%. Specifically, in New Jersey, contingency fee arrangements are governed by rule 1:21-7 of the Rules of Court. An attorney shall not contract for, charge, or collect a contingent fee in excess of the following limits:

  (i) 33⅓% on the first USD750,000 recovered;

  (ii) 30% on the next USD750,000 recovered;

  (iii) 25% on the next USD750,000 recovered;

  (iv) 20% on the next USD750,000 recovered; and

  (v) on all amounts recovered in excess of the above, by application to the court for reasonable fees if the attorney considers the fee collected already to be inadequate.

  In New York, the standard contingent fee arrangement is 33⅓% of the recovery.

- ***Is legal aid for litigation available for a foreign IP?***

  Legal aid for litigation is not practised in the US and is normally accomplished through contingent fees as discussed above. However, if many actions are being pursued, there may be an avenue for the foreign insolvency administrator to seek accommodations from the Clerk's Office for filing fees and have such fees paid out of recoveries.

- ***Are litigation financing and / or insurance for litigation costs provided and, if so, starting at which amount?***

  Yes, litigation financing is allowed. There is no government-subsidised litigation financing, however. All litigation funding is provided by private parties. There is no floor below which litigation funding cannot start, but the decision to approve funding is done on a case-by-case basis and takes a variety of factors into consideration including likelihood of recovery, amount of required funding, length of time to recovery, and the nature of the case. It is unlikely litigation funding would be available for claims under several hundred thousand dollars. Funding in this regard is usually provided in an amount of 10%–20% of the anticipated settlement. However, a recipient of litigation funding need not accept a lump sum at one time. Rather, the recipient can incrementally request litigation funding.

1.3 Obtaining an enforcement order

1.3.1 Besides commencing regular civil proceedings, are there easier and cheaper ways to obtain an enforcement order?

There are no "dunning procedures" in the US. Only a court can issue a judgment against a defendant in the US. However, there are ways to streamline issuances of a judgment in cases where a plaintiff seeks to recover a debt from a defendant that is uncontested, which would be the most akin to a judicial dunning procedure. The plaintiff can file a complaint with supporting documentary evidence of the debt owed. If the debt is uncontested, after the period to reply to the complaint has lapsed, the plaintiff can request that the clerk of court enter default against the defendant. After default is entered against the defendant, a plaintiff would normally need to request a judge to enter a final judgment of default against the defendant. However, in a situation where the debt is for a "sum certain", the plaintiff can have the clerk of court enter the final judgment and avoid the costs associated with appearances in court before a judge. The plaintiff is required to file an affidavit setting forth the amount owed and the dates the debt was incurred, as well as any payments against the debt and a calculation of interest. At that point, the clerk of court can enter final judgment which can be used in collection actions against the defendant. The costs associated with such a process would include the statutory filing fee for a complaint (USD250 in New Jersey and USD210 in New York), but additional fees would be greatly reduced because the practitioner would not have to rebut any denials from the defendant regarding the validity of the debt, nor would the practitioner incur additional costs related to appearing in court.

1.4 Lawyers' fees

1.4.1 What are the legal provisions for lawyers' fees and are there compulsory statutory fees for some or all activities?

There are no compulsory statutory lawyers' fees in the US. Fees incurred by lawyers on an hourly basis are pursuant to a contract between lawyer and client, and non-payment can be pursued through contract law. Contingency fee arrangements normally require a recovery on the claim in order for the lawyers' fees to be paid, and these are paid out of said recovery pursuant to the terms of the agreement between the parties, subject to the limitations discussed in section *1.2.1* above.

1.5 Court fees

1.5.1 In order to take legal action does a foreign plaintiff have to provide security and / or make a prepayment for court costs and, if so, how is the amount calculated?

No security is required, but court costs will be required at the time of filing.

1.5.2 What are the legal provisions for court fees in civil proceedings?

The filing fee for a complaint in state court in New Jersey is USD250; in New York it is USD305. The filing fee for a complaint in federal court is USD400.

1.6 Refund of legal costs and expenses

1.6.1 Is the winner of a court proceeding entitled to reimbursement for the legal costs and expenses?

No. Courts in the US follow the "American Rule", meaning each side bears its own fees. Recovery of legal fees from the losing side is only available if:

(i) the litigants have an existing contract that is the subject of the dispute which provides that the losing side is responsible for the winning side's legal fees if there is a dispute under the contract; and

(ii) in rare circumstances where costs are awarded as a punitive measure where the litigation, usually brought by the losing side, is determined to be frivolous.

1.7 Examples of legal costs and expenses

1.7.1 What would be the roughly estimated litigation costs and expenses – first instance including lawyer and court – for a (simple) claim in the amount equivalent to USD5,000, USD50,000 and USD500,000?

Filing fees in New Jersey are: (a) USD5000 demand – USD75 plus USD5 for each additional defendant after the first (Special Civil); (b) USD50,000 demand – USD250 (Law Division); and (c) USD500,000 demand – USD250 (Law Division).

Filing fees in New York are: (a) USD5000 demand – USD140 (Supreme Court, NYC Civil Branch); (b) USD50,000 demand – USD210 to file, USD95 for request for judicial intervention (Supreme Court); and (c) USD500,000 – USD210 to file, USD95 for request for judicial intervention (Supreme Court). The fee for a federal court action is USD400.

Beyond filing fees, it is very difficult to estimate lawyer costs without knowing the applicable facts and law. With that said, a "simple claim" would likely be pursued on a contingent fee basis, so as a general matter it is probably fair to view the typical lawyer costs for a "simple claim" to be 33⅓% of the recovery.

1.8 Average duration of litigation

It is difficult to determine the average duration of litigation because there are many variables such as amount of discovery, if any, anticipated motion practice, and appetite of the adversary to bog down the litigation. Any case that is completed in under six months would be considered fast and would likely experience few, if any, roadblocks. However, a litigation in the US can last multiple years depending on the complexity of the subject-matter as well as the obstinacy of one's adversary and opposing counsel.

SCENARIO 2: ENFORCEMENT ORDER (JUDGMENT) EXISTS AND NEEDS TO BE ENFORCED ABROAD

2.1 Recognition proceeding and costs

2.1.1 What is the proceeding and what are the roughly estimated costs – including lawyer and court – for the recognition of the foreign enforcement order for a claim in the amount equivalent to USD5,000, USD50,000 and USD500,000?

Short answer: the procedure is the Uniform Foreign Country Money Judgments Recognition Act (*NJSA* 2A:49A-16 – 24) (UFMJRA) in New York and New Jersey. The cost to initiate a proceeding in New Jersey is USD250, and in New York it is USD305. The cost for the foreign insolvency administrator to pursue claims of varying amounts is not much different because the work involved will almost always be a contingency fee arrangement.

Long answer: under the US constitution, judgments obtained in one state are entitled to full faith and credit in any other state if the judgment meets certain standards of due process. Similarly, in New Jersey, a foreign country money judgment is enforceable in the same manner and entitled to full faith and credit, provided that the provisions of the UFMJRA are met. The procedure will vary depending on which state recognition is sought; New Jersey and New York will be discussed as examples.

Recognition of the foreign judgment traditionally was accomplished through a uniform submission by an attorney licensed to practise law in New Jersey. First, the practitioner would need to obtain an authenticated copy of the foreign judgment with the seal of the issuing court affixed thereto. Second, the judgment creditor or the judgment creditor's lawyer must include an affidavit setting forth:

(1) the name and last known address of the creditor;

(2) the name and last known address of the debtor;

(3) the date and amount of the judgment;

(4) whether the time to appeal the foreign judgment has expired in the court of origin;

(5) whether the court of origin has granted a stay; and

(6) whether or not the foreign judgment was entered by default.

If the foreign judgment was entered by default, the affidavit must indicate the date under the rules of the court of origin for vacating the default with a copy of the cited court rule. Finally, the application to have the foreign judgment docketed in New Jersey (original and two copies) must be mailed to the Superior Court Clerk's Office with a filing fee payment in the amount of USD35. The filing fee did not change based upon the amount of the judgment. Many states continue to adhere to this process.

However, in January 2018, the outgoing governor of New Jersey enacted a revised version of the UFMJRA on his last day in office. Whereas previously the

judgment creditor just had to mail the application to the clerk, the creditor is now required to file a complaint seeking recognition of the judgment. The filing of a complaint incurs an additional USD250 fee. Additionally, the creditor carries the burden of establishing that the judgment is final, conclusive and enforceable under the foreign country's laws and that it is not a judgment for taxes, fines, or rendered in connection with a domestic relations action. Unfortunately, the need to now file a complaint in New Jersey, whereas in the past an affidavit was sufficient, may provide the debtor with an opportunity to relitigate issues that were already decided in the foreign jurisdiction. Moreover, the revised UFMJRA introduced a nebulous legal standard that permits refusal of recognition of a foreign judgment in situations where "the judgment was rendered in circumstances that raise substantial doubt about the integrity of the rendering court with respect to the judgment". Because this revision to the UFMJRA was just recently introduced, there exists no jurisprudence in our jurisdiction at the moment, but surely that will change in the future with such uncertain language inserted into the UFMJRA.

In New York, the UFMJRA is codified under Article 53 of the Civil Practice Laws and Rules.

The standards for enforcing a foreign money judgment in New York are the same, in that the judgment must be final, conclusive and enforceable in the country it was rendered in. The procedure by which a foreign money judgment is enforced in New York is usually by a motion for summary judgment in lieu of a complaint, although any properly initiated proceeding will suffice. If an action is already pending, enforcing a judgment through the UFMJRA can be accomplished by cross-claim, counterclaim, or affirmative defence. However, service on the defendant must be properly made pursuant to New York law and the Hague Convention; New York need not have personal jurisdiction over the defendant though, nor does the defendant need to have assets in New York.

There are also a standard set of defences associated with the UFMJRA. These defences are almost always based on the argument that a court should not recognise a foreign country judgment if:

(i) the judgment is "rendered under a judicial system that does not provide impartial tribunals or procedures compatible with the requirements of due process of law, as determined by the court using standards developed by the American Law Institute and the International Institute for the Unification of Private Law to govern resolution of transnational disputes";

(ii) the foreign court lacked personal jurisdiction over the defendant; or

(iii) the foreign court lacked jurisdiction over the subject-matter.

Furthermore, a court may refuse to recognise a foreign judgment in certain situations, including if the foreign court failed to give adequate notice to the debtor, the judgment was obtained by fraud that deprived the losing party of an adequate opportunity to present its case, or if the judgment or cause of action on which the judgment is based is repugnant to the public policy of the particular state or the US.

Finally, if the foreign award is pursuant to an arbitration award, there is a federal court rule that provides for having the award recognised: 9 United States Code (USC) §201 *et seq*. codifies the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958. Cases involving this code section are heard in federal district court, with all the venue and removal rights of a standard case in the US. Within three years after an arbitral award falling under the Convention is made, any party to the arbitration may apply to any court having jurisdiction under this chapter for an order confirming the award as against any other party to the arbitration. The court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention: 9 USC §207.

2.2 Obtaining information about the debtor

2.2.1 Are there any sources of information about whether a debtor of a claim is without means or subject to an insolvency proceeding?

Yes. A search for insolvency proceedings, or any judicial proceedings as well as any docketed judgments or liens, pertaining to a debtor can be done through various databases. For the most part, all of the databases are available online, but in some instances, it may be necessary to appear in person or inquire telephonically. Such instances are rare and might happen at a town or county level. Acquiring copies of papers filed with the courts in judicial proceedings, or copies of liens filed against a debtor will usually incur nominal costs, somewhere in the range of USD0.01 to USD0.15 per page, and many times they are capped at USD5–10 (i.e., PACER is USD0.10 per page and capped at USD3 per search / document). Determining the amount and location of available assets of a debtor is more onerous. There is no central database that tracks assets. Searches can be done to see what kinds of real or personal property are registered to the debtor, but those assets would then have to be run through various other databases to determine if they are encumbered and, even then, one could not be 100% certain to have located an unencumbered asset. Uniform Commercial Code filings are public information and detail collateral that was pledged as security. Corporate and Securities Exchange Commission filings can be searched to see corporate ownership or certain disclosures such as sock options to executives that may provide a source of funds. Additionally, intellectual property can be searched to see if the debtor has any potentially valuable patents or trademarks. Bank and financial records are usually off limits unless the searcher has proper authorisation from the debtor or a court order. Moreover, there are services that gather public information (and possibly some non-public information) about corporate entities and individuals which can be obtained for a fee (either an annual fee or for a one-off report). Private investigators can also be hired to search for assets.

2.3 Enforcement measures

2.3.1 What main enforcement measures are available and what are the costs – including lawyer and enforcement authority – for enforcing a claim in the amount equivalent to USD5,000, USD50,000 and USD500,000?

Once a judgment has been recognised and docketed, it must next be enforced. A creditor that obtains a judgment against a debtor in New Jersey has the right to take discovery of people with knowledge of the debtor's assets, as well as serve the debtor with an information subpoena under New Jersey Court rule 6.7. An

information subpoena is a useful tool because it does not require leave of court and presents written questions that the debtor must answer under oath with regard to location of the debtor's assets. In such a subpoena, the judgment creditor could inquire about bank accounts and other financial abilities of the debtor. Once the judgment creditor has a good handle on the location of the debtor's assets, multiple avenues of recovery are available to it. A request can be made to execute on a debtor's goods and chattels whereby a civil officer will seize the debtor's goods or chattels so that they can be used to satisfy the judgment. With a state court judgment, this is accomplished through sending a writ of attachment for the sheriff to levy on the debtor's assets located within the sheriff's jurisdiction (blind levy). With a federal court judgment, a writ of attachment is sent to a US marshal to levy on the debtor's assets located within the marshal's jurisdiction. The marshal or another person, presumably a law enforcement officer, will serve the writ, seize the assets and maintain custody of the attached property under court supervision. Writs that seek to enforce judgments may be served by the US marshal but are governed by the law of the state in which they are being served. In New York, the cost is USD40 for each piece of real or personal property upon which the writ is to be levied. Bank accounts can be levied on if the judgment creditor knows where the debtor has a savings or checking account in the state. Once levied upon, any funds in the bank account are considered "frozen", and the judgment creditor would have to file a motion to turn over the funds. It should be noted that this remedy is not a continuing remedy, and a levy only serves to seize the funds that were in the account at the time of the levy. However, additional levies can continue to be made, but each time funds were frozen, a turnover motion would need to be filed. Also, a judgment creditor can garnish a debtor's wages if the target of the levy earns more than USD217.50 per week. The amount of the judgment does not influence the cost to collect on the judgment, but, as noted above, if multiple levies are required, the process may take a long time and incur additional costs from the attorneys making the requests and interacting with the court and officers of the court.

Similar remedies are also available in New York. Information subpoenas can be served on debtors to determine where the debtor's assets are once a judgment has been obtained. The court clerk must sign the information subpoena, and, once it is served, the recipient must respond within seven days. Article 52 of the Civil Practice Law and Rules (CPLR) governs the enforcement of money judgments in New York and includes such remedies as garnishment of wages, liens on real property, restraints on transfer of property and forced sales of personal property.[1]

The initial costs for enforcement (drafting the writ, sending writ to sheriff / marshal, drafting and sending out information subpoena) will be the same for a USD5,000 or a USD500,000 judgment. Court actions to pursue additional remedies will be more likely when pursuing a larger judgment. Depending on how the contingency fee arrangement is drafted, those additional court costs could come off the top if there is a recovery.

[1] See NY CPLR §§5021 *et seq*.

2.4 Alternatives to lawyers

2.4.1 Are there specialised debt collection agencies (or equivalent) which buy claims or work more cost-effectively than lawyers?

Generally speaking, no. As noted above, there are law firms that specialise in collecting claims / judgments. Collection agencies can send out demand letters like a law firm. However, a collection agency would need to retain a lawyer to pursue a court action if the demand letter was unsuccessful. The costs of a collection agency versus lawyers that do collection work are not significantly different and going with attorneys that do collection work can be more efficient if court proceedings are necessary. Lastly, there are collection lawyers that have related collection agencies that "buy" claims and then handle the legal work if necessary.

2.5 Insolvency proceeding

2.5.1 What costs are involved – including lawyer and court – for commencing and participating in insolvency proceedings against the debtor of a claim in the amount equivalent to USD5,000, USD50,000 and USD500,000, if he is not able to pay?

If the debtor individual or debtor company is already in an insolvency proceeding under the US Bankruptcy Code, it is relatively easy and inexpensive for a foreign creditor to assert a claim in those proceedings. A proof of claim would need to be filed in the US Bankruptcy Court, which claim form is simple and needs to be signed under penalty of perjury. Once filed, the claim is *prima facie* evidence of the amount of the claim asserted. The cost of filing a proof of claim for USD5,000, USD50,000 and USD500,000 is the same – there is no filing fee to file a claim.

In the event the debtor objects to the foreign creditor's claim, then the foreign creditor would need to respond to the claim objection to avoid having the claim expunged by the US Bankruptcy Court. The cost of responding to the claim objection is fact-specific, but it would be up to the foreign creditor to weigh the cost / benefit analysis of litigating its claim.

If the debtor is not already in an insolvency proceeding under the US Bankruptcy Code, there are provisions to "force" the debtor into such a proceeding through an involuntary proceeding. If the foreign creditor holds a claim, it may seek to utilise sections 303(b)(2) or (b)(3) of the US Bankruptcy Code, which provide for a procedure to initiate such an involuntary bankruptcy. These involuntary bankruptcy provisions are a bit complex and would normally not be worthwhile to pursue unless the foreign creditor holds a large claim that the foreign creditor has been unable to collect through other litigation in the US.

Another potential alternative under the US Bankruptcy Code which may be relevant for a foreign representative of a foreign estate that is seeking to collect a larger claim (USD500,000) from an entity in the US is chapter 15 of the Bankruptcy Code (11 USC §1501 *et seq*.). Chapter 15 provides the legal basis by which foreign insolvency proceedings are recognised in the US. The purpose of Chapter 15 is to "incorporate the Model Law on Cross-Border Insolvency so as to provide effective mechanisms for dealing with cases of cross-border insolvency".

To initiate a chapter 15 proceeding, the foreign representative files a petition in the US Bankruptcy Court. The US Bankruptcy Court will consider entry of an order recognising the foreign insolvency proceeding. Assuming recognition is granted, the foreign representative may then seek to pursue collection of its claim through the US bankruptcy court, which may be viewed as a friendly forum for the foreign representative. The fee to file a chapter 15 proceeding is approximately USD1,700.

There is another, potentially less costly, option available to a foreign insolvency administrator. Section 1509(f) does provide that: "the failure of a foreign representative to commence a case or to obtain recognition under this chapter does not affect any right the foreign representative may have to sue in a court in the United States to collect or recover a claim which is the property of the debtor": 11 USC §1509(f). This is a limited exception to the "prior recognition" rule, discussed above, and allows for collection of a claim which is the property of the debtor, for example an account receivable, by a foreign representative without commencing a chapter 15 proceeding. The jurisprudence surrounding section 1509(f) and when and how it may be used is still developing in this country. However, at least one court has suggested 1509(f) can be "interpreted broadly, thereby permitting U.S. non-bankruptcy courts to grant many kinds of relief to a foreign representative in a non-qualifying proceeding as long as that relief is related in some way to 'collect[ing] or recover[ing] a claim which is property of the debtor'."[2] A potential defence to a direct action in a non-bankruptcy court is that the foreign representative lacks standing to bring a claim on behalf of the debtor in the USA. That argument was defeated in federal court in New York under the reasoning that, there, the plaintiffs were not requesting comity or cooperation from the court with respect to foreign insolvency proceedings but were seeking to recover an independent claim that was the property of their receivership, rendering the prior recognition proceeding unnecessary to confer standing on the foreign representative.[3]

3. Economical conclusion

3.1 Taking into account the costs and expenses for a foreign IP, what is the minimum claim amount at which it makes sense to start litigation or enforcement?

There are many factors that impact this decision, such as the strength of the particular claim and the ability of the target to pay any award. However, assuming the claim is near indisputable, and the target can easily pay the award, USD30,000 seems appropriate as the minimum claim amount to start litigation or enforcement in New Jersey or New York, which assumes one-third (USD10,000) will be utilised to cover the fees of the local practitioner so the net to the IP would be USD20,000.

The minimum claim amount could be less if simple demand letters (without litigation or enforcement) were pursued. Also, the minimum claim amount provided above does not take into account that there could be other reasons for initiating proceedings in the US; for example, there could be multiple reasons to pursue a chapter 15 proceeding separate and apart from collecting claims for the

[2] "Do Foreign representatives need to satisfy the recognition requirement? (2017) 9 St John's Bankruptcy Research Library 24. (Citing *In re Loy*, 380 BR 154, 166-67 (Bankruptcy ED Va 2007).

[3] Ibid (citing *Peterson Energia Inversora, SAU v Argentine Republic*, 2016 WL 4735367 (SDNY Sept 9, 2016).

debtor company, such reasons include binding US-based creditors to a foreign proceeding, obtaining the benefit of the automatic stay to avoid adverse judgments against the debtor company, and / or protecting assets of the debtor company located in the US.

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