

Business law untangled podcast

Enforcing foreign judgments in England and Wales: the practicalities

<p>Maria Koureas-Jones</p>	<p>Hello and welcome to another podcast from Francis Wilks & Jones.</p> <p>My name is Maria Koureas-Jones and I'm a partner at Francis Wilks & Jones, specialising in commercial litigation and contentious corporate and insolvency matters.</p> <p>I'm honoured to be here today with our special guest Maria Mulla who is an experienced barrister from No5 Barristers' Chambers with whom we work on a number of matters.</p> <p>Thanks for joining us today Maria.</p>
<p>Maria Mulla</p>	<p>Thanks for having me today Maria. So, I specialise in the same areas that Maria has said and also the same areas that Francis Wilks & Jones undertakes.</p> <p>It's wonderful to be here with Maria today. I love a good podcast and today is a topic that I particularly enjoy and that is the enforcement of foreign judgments.</p> <p>Now I have to say Maria and I will be going into a lot of detail, but we are not giving formal legal advice in this podcast.</p>
<p>Maria Koureas-Jones</p>	<p>We should point out that the enforcement of foreign judgments is a fairly large topic, so we don't propose to cover everything off today.</p> <p>What we will look at is key areas so the enforcement, for example, of European and worldwide judgments in England and Wales and the different processes available for enforcement of those judgments.</p> <p>We're not, for example, going to look at the enforcement of arbitration awards, which would need a whole separate podcast alone (and perhaps I will ask Maria at another stage to address those).</p> <p>But for now, as I say, we will focus on the enforcement of overseas judgments in England & Wales, and some of the practical aspects that our listeners should have regard to.</p>
<p>Maria Koureas-Jones</p>	<p>We mentioned that we won't be giving legal advice on this particular topic but if there are any queries that arise as a result of this podcast please do get in contact and speak to our experienced team who would be very happy to help.</p>
<p>Maria Koureas-Jones</p>	<p>In what type of scenario will an individual or company need to consider enforcing a judgment from an overseas regime here in England and Wales?</p>
<p>Maria Mulla</p>	<p>Well Maria, one of our listeners might be based abroad (or here) and may have a judgment that has been issued by a court in a jurisdiction overseas.</p> <p>They might realise that the person who owes them the money under the judgment</p>

	<p>overseas is based here or resident in this country. The debtor might be an individual or a company that owes the money.</p> <p>Or they may find out from investigations that the person who owes them the money has assets based here in England and Wales.</p> <p>The creditor (that is, the person who is owed the money under the judgment) may want to consider:</p> <p>1) Having the foreign judgment recognised here and;</p> <p>2) Then taking steps to enforce that judgment by, for example, seizing the debtor's goods or obtaining a charging order over the debtor's property. There are lots of options that can be investigated.</p> <p>So, by way of example, if you have a judgment from say, the USA or China, but you are aware that the debtor has assets in England and Wales which you would like to try and seize if possible to satisfy the debt then you would then take steps to get the judgment recognised here.</p> <p>One way for the creditor to find out about assets held by the debtor is to undertake what we call a detailed tracing report to see exactly what the debtor has which might be worth pursuing. I work with a number of good tracing experts who always produce good reports for me.</p> <p>Now it is important to note that no enforcement steps may be taken in relation to the judgment debt until the foreign judgment has been what we refer to as officially 'recognised' by the courts here.</p>
<p>Maria Koureas-Jones</p>	<p>So, shall we look at enforcing a European judgment first? So, that's a judgment that has been obtained in an EU or an EFTA member state.</p> <p>For those of you that don't know, EFTA stands for the European Free Trade Association and it consists of Iceland, Liechtenstein, Norway and Sweden.</p>
<p>Maria Mulla</p>	<p>Yes, well we know that post-Brexit (by that, I mean all judgments obtained in claims issued after the 31 January 2020), the Brussels Recast Regulation no longer applies.</p> <p>The UK did submit an application in April 2020 to join the Lugano Convention (which actually would have made enforcement matters relatively straightforward), but unfortunately this was rejected by the European Commission.</p>
<p>Maria Koureas-Jones</p>	<p>Yes absolutely. I understand that the decision now rests with European Council if the UK decides to pursue its application further, but we are going to have to watch this space in relation to that. In the meantime, without having the Lugano Convention to rely upon there are several other mechanisms available to creditors overseas one being the 2005 Hague Convention on the Choice of Court agreements.</p>
<p>Maria Mulla</p>	<p>Yes, the Hague Convention on the Choice of Court agreements.</p> <p>There are many contracting parties (that is, a number of different countries and states) who are a party to the Hague Convention. An example of some of those are the United Kingdom, various EU member states, Mexico, Singapore and Montenegro.</p>

	<p>Now, the UK actually joined the Hague Convention in its own right from the 1 January 2021.</p> <p>However, the ambit of the Hague Convention is quite narrow, and it only applies to certain disputes and, specifically, where the parties have agreed in their contract a choice of court clause.</p> <p>I do recall at the time that Brexit was going on that many lawyers were inserting into their agreements the choice of court jurisdiction clauses to ensure that their contracts would then fall within the ambit of the Hague Convention.</p> <p>However, one of the downsides of the Hague Convention is that it will only apply if the clause had actually been entered into after the 1 January 2021!</p> <p>So, if you do have an agreement, you might wish to check there is a clause in there that enables the Convention to apply.</p> <p>If there is, this should enable the judgment to be easily recognised in this jurisdiction.</p> <p>Now, I know what we are all thinking, it is all very complex post-Brexit isn't it Maria?</p>
<p>Maria Koureas-Jones</p>	<p>It is indeed.</p> <p>So, it is perhaps a good time for a recap.</p> <p>Enforcing a European judgment. First, let's have a look to see whether the 2005 Hague Convention applies. If it doesn't, then the alternative considerations are whether the creditor has the option to enforce under a bilateral treaty between the UK and the member state that issued the judgment or, alternatively, whether the creditor can look to enforce through the statutory regime that allows enforcement of a judgment here in the courts of England and Wales.</p>
<p>Maria Mulla</p>	<p>Yes, so it's important to talk about what is referred to as the statutory regime. So many states have bilateral treaties in place between them which enables the judgments to be recognised very easily but where there are no bilateral treaties in place we will need to check if there is a particular statutory regime that can be relied on.</p> <p>Now when we refer to "the statutory regime", this is very specific and what is the statutory regime is either the <i>Administration of Justice Act 1920</i> or the <i>Foreign Judgments (Reciprocal) Enforcement Act 1933</i>.</p> <p>The creditor or most likely their legal advisor) will need to check the statute to see the up-to-date position on which countries are actually a party to that act but the Administration of Justice Act covers most commonwealth states and some small UK overseas territories.</p> <p>I know also that the Foreign Judgments (Reciprocal) Enforcement Act that I have referred to enables the reciprocal recognition of judgments between for instance the UK and Australia.</p>
<p>Maria Koureas-Jones</p>	<p>So, if the statutory regime is going to be relied upon by a creditor, that creditor will be subject to the Court rules that govern the English courts, and these are the Civil Procedure Rules.</p> <p>A formal application to the English court will need to be made for the judgment to be</p>

	<p>registered and that application is made under Part 74 of the Civil Procedure Rules that I have just mentioned. The Practice Direction under 74 is also worth a review.</p> <p>The application to the court will need to be filed with written evidence which exhibits:</p> <ul style="list-style-type: none"> - A certified copy of the judgment plus any translation where that is needed; - The application will also need to be accompanied by a witness statement which sets out the grounds upon which the creditor is entitled to enforce their judgment here in England and Wales. So, for example, it will need to say whether the judgment being enforced is a money judgment, and whether interest applies to the judgment.
Maria Mulla	<p>It is also important to note Maria that the court will still retain a general discretion as to whether the court wishes to permit recognition.</p> <p>However, if all of the practical aspects that we have discussed are complied with, and the correct route has been chosen, recognition should be a relatively straightforward process.</p> <p>It is also worth mentioning that there are time limits that can impact the enforcement of judgments under the statutory regime and advice should be taken about what time limits apply to any judgment if it is to be successfully enforced here.</p>
Maria Koureas-Jones	<p>So, if the Hague Convention does not apply and the Statutory Regime does not allow for enforcement here, the other mechanism to be considered is “<i>the common law</i>” regime for enforcing judgments in England and Wales.</p>
Maria Mulla	<p>Yes, and this is the area that I mainly deal with in my advice.</p> <p>So, it is referred to as “<i>the common law regime</i>” because it is based entirely on case law and is not covered by any statute or codified process. So, for instance, if we wanted to enforce an English judgment say, in Germany, and none of the above mechanisms that Maria and I have referred to applied, then we would need to rely on local laws in Germany.</p> <p>Essentially, to enforce a judgment under the common law regime, a fresh debt claim will be issued in the high court based on the overseas judgment. However, I have to say Maria that the process under this regime is far more onerous for a creditor.</p>
Maria Koureas-Jones	<p>One of the reasons for that of course is that there are a few conditions that a creditor will need to satisfy before they can rely on the common law regime.</p> <p>So, for example, the sum claimed has to be for a definite sum, it must be final and conclusive and when we refer to ‘final’, it is important to point out that an appeal will not affect the finality of a judgment. So, for example, even a judgment obtained in default may actually be regarded as being final and therefore be enforceable.</p> <p>A creditor will also need to consider whether at the time the judgment was issued, the debtor was actually present in the country that issued the judgment.</p> <p>Now this seems like a strange thing to have to consider, but if the debtor was not in the country when the judgment was issued, a creditor may have difficulty seeking to enforce the judgment. So this is something that needs to be considered quite carefully. A creditor</p>

	<p>will need to consider, for example, whether in some way if the debtor agreed to the jurisdiction of the court that issued the judgment, for example, under a contract.</p>
Maria Mulla	<p>Yes, for instance, I had a case where this issue arose it was a massive debt that I was advising on where the judgment was obtained in the United States.</p> <p>However, it became clear that the debtor was not actually in the United States at the time of the judgment. He was based in the UK and there was no way of arguing that the debtor had voluntarily submitted to the US jurisdiction.</p> <p>There was no evidence at all that they were even aware of the US court process as it was going on.</p> <p>Sometimes there may be a clause in the contract, as Maria said, which the debtor has agreed to where you may try and argue <i>well clearly they intended to submit to that jurisdiction</i> but in this example that I am referring to there was nothing like that to rely upon at all. So, we did not proceed with relying on the common law regime to enforce the judgment in English and Wales.</p>
Maria Koureas-Jones	<p>We mentioned conditions earlier and one of the other key conditions to mention is that the judgment cannot be in respect of enforcement of tax, a penalty or a fine. So any judgment based on that is going to face difficulties in terms of enforcing under the common law regime.</p>
Maria Mulla	<p>So if you do have a judgment that satisfies many of the conditions that Maria and I have discussed, you really need to get the legal process going.</p> <p>At the first instance, obviously you need to obtain expert legal advice to ensure that you have a judgment that may be enforced under the common law regime.</p> <p>The second step is that a fresh claim will need to be commenced here in the commercial court, with a certified copy of the judgment relied upon.</p>
Maria Koureas-Jones	<p>We mentioned that sometimes the process can be more onerous for creditors but actually this in my mind verifies the importance of taking good legal advice because actually there are steps that can be taken to shorten the process.</p> <p>So, for example, where no defence is filed by a debtor to the claim to enforce a judgment in England and Wales under the common law regime, it is possible to apply for summary judgment which will allow the matter to be determined more quickly and enable a creditor to get on and enforce their judgment.</p>
Maria Mulla	<p>Yes indeed, but unfortunately sometimes cases are defended and there are a number of defences that a debtor may reasonably rely upon. For instance, they can try and say that the initial judgment was obtained by fraud, or that the foreign court breached the principles of natural justice.</p> <p>This might be where, for example, there may have been a procedural aspect which was not considered by the foreign court or, by way of example, a party may have been prevented from making submissions in the court proceedings themselves.</p>
Maria Koureas-Jones	<p>It is worth mentioning that the court can also refuse to recognise an overseas judgment if there are any concerns surrounding public policy.</p>

	<p>For instance, if any human rights issues apply. This may be in respect of some jurisdictions that perhaps have a questionable human rights record and where there are doubts regarding the integrity of the foreign judgment obtained.</p>
Maria Mulla	<p>Yes, indeed but, ultimately, where a spurious defence has been raised by a debtor, a creditor may still be able to apply for summary judgment so that the enforcement is dealt with much more quickly.</p>
Maria Koureas-Jones	<p>It seems like a good time to recap there.</p> <p>So, we are looking at the Hague Convention, we are looking at bilateral treaties, we are looking at whether enforcement under a statutory regime is possible and if not under the common law regime.</p> <p>Now we have covered off the legal processes Maria shall we have a look at some of the practical aspects that need to be considered?</p>
Maria Mulla	<p>Absolutely, the practical aspects are always very important!</p> <p>So as I mentioned earlier time limits are key. Generally you have six years in which to enforce a foreign judgment. But as there are a lot of practical considerations to think about - particularly ensuring that you obtain the correct legal advice because we have heard that things are quite complex - I wouldn't mess around in taking action.</p> <p>If you have a judgment, act quickly to take steps to get the judgment first recognised, and then enforced here.</p> <p>It is also worth discussing assets being dissipated Maria because we may have a case where you need to act very quickly indeed.</p>
Maria Koureas-Jones	<p>Absolutely. As with all enforcement, it is only worth enforcing a judgment if there is an asset at the end against which a recovery can be made. So one of the key issues is assessing whether assets are being moved around or risk being dissipated by a debtor in order to frustrate the enforcement process.</p> <p>If a creditor has a genuine concern that there is a risk of assets being moved, hidden, dissipated then it may also be necessary for a creditor to apply for a freezing order so that the debtor's assets are frozen so not to frustrate the enforcement process.</p>
Maria Mulla	<p>Yes and to do that that will be a formal application seeking a court order preventing those assets from actually being moved about.</p> <p>Now if the assets are based here, the freezing order can apply here.</p> <p>But if you have assets that are based in multiple jurisdictions or overseas you can also consider obtaining a worldwide freezing injunction.</p>
Maria Koureas-Jones	<p>It is perhaps well timed because we are certainly seeing more and more circumstances that are giving rise to our clients needing to apply for freezing orders and particularly worldwide freezing orders are being used frequently where assets are held in multiple locations and those draconian steps are required to stop the frustration of the enforcement process.</p>
Maria Mulla	<p>Yes, so, if we get the judgment recognised here and we know the assets have not been</p>

	<p>moved or dissipated – or if for instance we have been successful in obtaining a freezing injunction to prevent those assets from being moved - then the creditor will have a lot of options available to them to then go on to enforce that judgment to actually realise the assets so they can make a financial return.</p>
Maria Koureas-Jones	<p>Absolutely and that's the key isn't it? The key to any of these enforcement processes is to get some cash at the end of the process.</p> <p>It is worth summarising some of the enforcement options available in England and Wales:</p> <p>So, the first being a third party debt order which allows any credit held in the debtor's bank account to be frozen and released to the creditor;</p> <p>A second option being a charging order which allows registration of a debt against property owned by the debtor and this allows the creditor, in some instances, to actually apply for that property to be sold again so that the net proceeds of sale can be paid to the creditor in part-payment or full payment even of the judgment;</p> <p>Another option is to seek an order for possession and sale of any land owned by the debtor;</p> <p>And one of the common enforcement options utilised is an order seeking the appointment of an enforcement agent to seize assets held by the debtor. Now this can be vehicles, it can be artwork, it can be aircraft and again this is with a view to those assets being sold and money making its way back into the creditor's pocket.</p>
Maria Mulla	<p>Now I appreciate that all of the above has sounded pretty complicated but the important aspect to bear in mind in these cases is the need to obtain specialist legal advice at the outset from experts who actually deal with these cases. This can then massively reduce the cost and time associated with the process of enforcing a foreign judgment in England and Wales.</p>
Maria Koureas-Jones	<p>And of course, act quickly and protect the assets where you think that the debtor is likely to dissipate them so that you don't end up spending money on the enforcement process only to find that there are no assets left against which enforcement can be successfully pursued.</p>
Maria Koureas-Jones	<p>Well thank you Maria for helping me dissect this very full and extensive topic. I'm sure our listeners will have found this helpful today.</p> <p>Just to reiterate that if you do require expert legal advice on enforcing a foreign judgment in England and Wales, our team at Francis Wilks & Jones is here to assist, as is Maria at No 5 Chambers.</p>
Maria Mulla	<p>Thank you so much for having me Maria and I look forward to our future podcasts.</p>