

# ENFORCEMENT OF COURT JUDGMENTS IN THE UK, THE EU AND TURKEY AFTER BREXIT & ENFORCEMENT STRATEGY

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Legal Briefings

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For many years, commercial parties across the globe, and particularly in Europe, have preferred to enforce their English law-governed agreements, and resolve their disputes, in the courts of England. This combination has been selected for many good reasons, including: the independence and expertise of the English judiciary and the efficiency of the court process; and the existence of a solid body of law (including general contract law principles), applied by the courts with care and predictability.

Accordingly, parties can assess the legal effect of contractual terms in advance – a considerable contrast to a non-precedential system – and English law applied by the English courts generally gives effect to parties’ contractual bargain and admits limited scope for implied terms or influence by public policy changes. Indeed, as almost all the central principles of English contract law derive from English common law (rather than EU law), the advantages of English law remain after Brexit. Further, the validity and effectiveness of a contractual choice of English law, whether in England or in the EU member states is not affected by Brexit.

The reciprocal enforcement of judgments across the EU is addressed by a regime of treaties between, including the recast Brussels Regulation and the Lugano Convention (the **Brussels Regime**). The recast Brussels Regulation provides, among other things, a simple mechanism for the recognition and enforcement of EU Member State judgments in other EU Member States. The Lugano Convention provides for reciprocal enforcement of judgments on similar terms to the recast Brussels Regulation between the EU and Iceland, Norway and Switzerland (the **EFTA States**, with the exception of Liechtenstein which is not party to the Lugano Convention). When the UK was an EU Member State, English court judgments were therefore recognised and enforced across the EU and the EFTA States on a predictable basis.

After the UK left the EU on 31 January 2020, the UK and EU agreed that the Brussels Regime would continue during a transition period. However, as of 31 December 2020 (and save for a judgment arising from proceedings commenced before the end of the transition period), neither the recast Brussels Regulation nor the Lugano Convention apply to the UK. The EU-UK Trade and Cooperation Agreement concluded at the end of the transition period does not cover civil judicial co-operation between the UK and the EU member states.

## **CURRENT POSITION WITH REGARD TO ENFORCEMENT OF ENGLISH JUDGMENTS IN THE EU**

The 2005 Hague Convention on Choice of Court Agreements is an international treaty under which the States parties recognise and enforce judgments made in accordance with an exclusive jurisdiction clause. The States parties to the Hague Convention are currently the EU, Mexico, Montenegro, the UK and Singapore. The UK's accession as a party independent of the EU took effect on 1 January 2021. The Hague Convention is therefore in force between the UK and the EU member states. There is, however, some uncertainty as to whether the EU member states will treat the Convention as having been in force for the UK since 1 October 2015 (when it came into force for the EU member states, at that time including the UK) or from 1 January 2021 (when the UK re-acceded in its own right). The European Commission has so far indicated that it takes the latter view. This means that where an exclusive jurisdiction clause was agreed before 1 January 2021 (and on or after 1 October 2015), there is some uncertainty as to whether EU Member States will treat the clause as falling within the Hague Convention. This is often referred to as the “change of status” risk. It is also relevant that the Hague Convention does not apply to unilateral jurisdiction clauses. Such clauses, which compel one party to bring proceedings in a particular jurisdiction, but permit another party to bring proceedings in more than one jurisdiction (or in any court of competent jurisdiction), are regularly included finance transactions.

The UK has applied to re-accede to the Lugano Convention. The UK's accession requires the agreement of all signatories to the Lugano Convention. On 23 June 2021, the EU Commission sent a Note Verbale to the Swiss Federal Council as Depository of the Lugano Convention, that stated that “the European Union is not in a position to give its consent to invite the United Kingdom to accede to the Lugano Convention”. The UK continues to pursue accession[, and while the European Commission is against the UK's accession, it is a qualified majority vote in the European Council that is determinative of the matter].

So far as the enforcement of English judgments in the EU is concerned, most (but not necessarily all) EU Member States will enforce foreign judgments even without a specific reciprocal regime, although the type of judgment enforced may be more limited and the procedures involved more time consuming and costly.

An English judgment creditor may, in any case, wish to explore more options in terms of jurisdictions where they seek to enforce an English judgment.

Should the judgment creditor wish to enforce the judgment in Turkey, then the Turkish courts would have to establish that there is reciprocity between Turkey and the UK for the enforcement of *similar judgments*. Therefore, the enforceability of the English judgment in Turkey would necessarily entail the question of whether or not such judgment would have been enforced by the English courts had it been handed down by a Turkish court. Accordingly, in the below sections, we will briefly analyze the rules applicable to the enforcement of foreign court decisions in Turkey and the UK.

## **ENFORCEMENT OF FOREIGN JUDGMENTS IN TURKEY**

The rules related to the recognition and enforcement of foreign court judgments in Turkey are regulated by the Private International Law (*Law no. 5718*) ("**PIL**"). As per PIL, for a foreign court judgment to be enforced in Turkey, the judgment sought to be enforced must have been issued by a court of a foreign state; the dispute must relate to a civil matter and the decision must be final and binding according to the rules of that state whose court has rendered the decision. The enforcement of a foreign court judgment in Turkey will only be possible if the Turkish court decides to enforce such judgment as a result of an enforcement action.

Civil rights which have been decided by a criminal court as part of a judgment related to a criminal case can also be enforced in Turkey.

Interlocutory judgments, temporary injunctions, temporary restraining orders, cautionary attachments or other provisional orders from a foreign court are not enforceable in Turkey.

In an enforcement action, the applicant will have to present to the Turkish court the original of the judgment duly certified by the relevant authority of the foreign state or a copy of the decision duly certified by the judicial authority which rendered the decision, together with a certified translation. The applicant will also have to present a document evidencing that the decision is final. Such document must be duly certified by the relevant authority of the foreign state and its translation must also be presented to the Turkish court.

The Turkish court will only decide to enforce the foreign court judgment if:

- i. *There is reciprocity for the enforcement of judgments between the country of origin and Turkey.* Such reciprocity may be based on a treaty or a legal provision of the country of origin which allows the enforcement of Turkish judgments in that country. The reciprocity

may also be *de facto*, i.e. where, in practice, the courts of two states enforce the decisions of each other.

- ii. *The subject matter of the dispute does not fall within the exclusive jurisdiction of the Turkish courts.*
- iii. *The foreign court has not exercised exorbitant jurisdiction.* The court's assessment of this criterion is contingent upon the defendant's raising an objection to this effect.
- iv. *The foreign judgment is not in clear contraction with the Turkish public order.* Generally, moral values and traditions, fundamental rules of substantive Turkish law and the policy reasons upon which Turkish law is based, are taken into account when defining public order. The difference between the rules under which the foreign judgment was rendered and the rules that are applicable to the same subject matter under Turkish law does not constitute an infringement of public order. However, in the event that there is no direct cause or connection between the material facts determined by the foreign court and the judgment, the Turkish courts are likely to find the situation as an infringement of public order. On the other hand, a different interpretation of the applicable Turkish law by the foreign court or the differences regarding procedure or statute of limitations between the Turkish law and the national laws where the foreign court is located, does not constitute an infringement of public order.
- v. *The defendant does not raise an objection to the effect that in the foreign proceedings they have not been duly summoned to the court or heard according to the rules of the country of origin (i.e. given proper right of defense) or the decision has been rendered, in violation of the same laws, in their absence.*

In addition to the above-stated defenses available to the defendant in the Turkish enforcement action, i.e. the party against whom the decision of the foreign court is sought to be enforced, the defendant can also request from the court to deny enforcement of the foreign court decision by proving that the foreign court judgment has been either fully or partially performed or that an impediment has surfaced which prevents the performance of the judgment. These defenses which are available to the defendant, are exhaustive.

## **ENFORCEMENT OF FOREIGN JUDGMENTS IN THE UK UNDER COMMON LAW**

English law provides for enforcement of foreign judgments under common law and under five different enforcement regimes based upon international instruments. The choice of the appropriate mechanism will depend on the country of origin of the judgment (and, in relation to the Brussels Regime, the question of whether the proceedings were initiated before the end of the Brexit transition period). The common law applies to enforcement of Turkish judgments in the UK.

Under the common law, a foreign judgment creates an implied contract to pay, which can be enforced in England subject to certain defences. There are a number of key conditions that must be satisfied:

- i. *The foreign court must have had jurisdiction over the defendant according to English conflict of laws rules.* The circumstances in which a foreign court has jurisdiction to give a judgment in personam are where the defendant: at the date of the commencement of the proceedings, was present in the foreign country; submitted, or agreed to submit, to the jurisdiction of the foreign court; or was a claimant, or counterclaimant, in the proceedings in the foreign court.
- ii. *The judgment of the foreign court must be conclusive on its merits.* In particular, the foreign court must have ruled it had jurisdiction and accordingly decided on the cause of action to which the particular set of facts gave rise, without the possibility of its decision being varied, reopened or set aside by that court.
- iii. *The foreign judgment must be for a sum of money, but not for taxes, a fine or other penalty.* So, a foreign injunction or declaration cannot be enforced at common law.

The party seeking to enforce the foreign judgment must commence proceedings in the appropriate English court based on the implied contract to pay. This party will usually seek to obtain summary judgment on the basis that the defendant has no reasonable prospect of defending the claim.

There are a number of defences available, including that the foreign judgment: (i) was obtained by fraud, on the court or the successful party; (ii) is contrary to public policy or the European Convention on Human Rights; (iii) resulted from proceedings that were contrary to natural or substantive justice; (iv) is inconsistent with a prior judgment on the same subject matter and between the same parties; or (v) is for multiple damages and is therefore unenforceable under the Protection of Trading Interests Act 1980. The English court will not give effect to a foreign judgment which was obtained in breach of a jurisdiction or arbitration clause in favour of another forum. The court must analyse the claims as formulated by the claimant to assess whether they constitute a breach of the relevant agreement, rather than the terms of the judgment.

## **ENFORCEMENT STRATEGY**

The jurisdiction or dispute resolution clause is often buried at the back of a contract and neglected until the last minute as the parties seek to agree the key aspects of their legal bargain. However, contractual rights are of little value if they cannot be effectively enforced. Commercial parties should therefore consider enforcement issues before they enter into a transaction, to minimize the risk that a judgment cannot readily be enforced in the jurisdiction(s) in which the counter-party has assets.

Further, an effective enforcement strategy should be considered at the outset of any claim, to identify the jurisdiction(s) in which assets are held, and any legal hurdles in respect of enforcement of a judgment in that jurisdiction. Moreover, it is important to consider whether there is a risk of asset dissipation and, if so, to take steps to secure assets in a timely way (particularly so as many jurisdictions require an application for relief to demonstrate urgency). Enforcement risk, and the question of whether it may be mitigated, may be a key factor in determining whether to pursue a claim or, indeed, to accept an offer of a settlement.

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