

## A LITTLE PATIENCE – ENFORCEMENT OF FOREIGN JUDGMENTS IN ENGLAND AND WALES UNDER THE LUGANO CONVENTION

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In our interconnected world, businesses and individuals increasingly have assets in multiple jurisdictions. This means that, when it comes to enforcing a court judgment against a judgment debtor, there are often assets targeted outside the jurisdiction in which the judgment was obtained.

"The manner of enforcement of a judgment in a particular jurisdiction to which the Lugano Convention applies cannot derogate from the overarching provisions of the Convention itself."

Under the common law, a judgment obtained from a foreign court can be enforced as a debt in England and Wales, but this requires the commencement of fresh legal proceedings. The process is quicker and more straightforward where the UK has entered into arrangements with other jurisdictions which allow for the reciprocal treatment in the recognition and enforcement of judgments. In such cases the foreign judgment will not be reviewed as to its substance and enforcement action is much more straightforward and efficient.

In relation to judgments from EU Member States, the position in England and Wales is currently governed by the Recast Brussels Regulation<sup>1</sup>. This allows for judgments obtained in Member States (and, pursuant to the Brexit transition arrangements, England and Wales) to be enforced quickly and cost effectively. Provided the judgment creditor has served the judgment and a certificate certifying the judgment

is enforceable from the original court on the judgment debtor, the foreign judgment can be enforced as if it were an English judgment. It is then for the judgment debtor to seek refusal of enforcement, if it has grounds to do so.

The 2007 Lugano Convention sets out a similar reciprocal regime for the recognition and enforcement of judgments between EU Member States and Iceland, Norway and Switzerland. However, like the Brussels I Regulation (the predecessor to the Recast Brussels Regulation), the process involves an additional step, requiring the judgment creditor to apply for registration of the judgment. The judgment debtor then has a specified period to appeal against registration, during which time no enforcement measures can be taken. The Court of Appeal has recently emphasised the importance of judgment creditors waiting before taking steps to enforce.

## BACKGROUND

*Islandsbanki Hf & Ors v Stanford*<sup>2</sup> related to the purported enforcement of an Icelandic court judgment in England under the Lugano Convention. On 23 March 2016 the judgment creditor obtained an order registering the judgment in England and Wales. In accordance with Articles 43(5) and 47(3) of the Lugano Convention, the registration order provided that the judgment debtor had one month to appeal the registration and execution on the judgment could not occur until the expiration of that period, or until after any appeal had been determined.

Nevertheless, on 30 March 2016, a Writ of Control (a means of enforcement in England and Wales pursuant to which a High Court enforcement officer can take control of and sell a judgment debtor's goods) was issued by the High Court, purportedly to enforce the Icelandic judgment. Despite attending the judgment debtor's property, enforcement officers were unable to take control of property in compliance with the Writ and so they certified it to be "unsatisfied in whole". Consequently, the judgment creditor issued a bankruptcy petition against the judgment debtor contending, pursuant to section 268(1)(b) Insolvency Act 1986 that the debtor appeared unable to pay since "*execution ... has been returned unsatisfied in whole or in part*".

The judgment creditor accepted that the purported enforcement pursuant to the Writ of Control was premature as it took place before the period for appealing the registration order had expired. The question that arose was whether the bankruptcy petition could succeed in such circumstances.

## THE DECISION

Lady Justice Asplin highlighted that the manner of enforcement of a judgment in a particular jurisdiction to which the Lugano Convention applies cannot derogate from the overarching provisions of the Convention itself. In her view, the Convention was intended to promote the rapid enforcement of foreign judgments, enhance mutual trust between contracting states and maintain the fair and proportionate balance between the rights of the creditor and the debtor by preventing irreversible execution before the time to appeal the registration order has expired.

She observed that Article 47(3) of the Convention sets out a clear and unequivocal express prohibition against taking any measures of enforcement, other than protective measures, during the time specified for an appeal against the registration order and until any such appeal has been determined. No express provisions enabled that prohibition to be waived. Therefore, in her view any attempt by the English court to remedy the premature issue and execution under the Writ of Control, for example by exercise of the court's discretion to remedy errors of procedure under the Civil Procedure Rules or to hold that such enforcement could nevertheless amount to "execution" for the purposes of the Insolvency Act, would fundamentally and impermissibly undermine Article 47(3) and the Lugano Convention itself. In any event Lady Justice Asplin did not accept that the issue of the Writ of Control and the attempts to enforce it could be categorised as an "error of procedure" – it was not merely a "formal defect" or "irregularity". It was fundamental.

**"Even if a judgment debtor has no apparent grounds to appeal against registration of the foreign judgment, a little patience at this stage will save wasted time and costs later!"**

Accordingly, the lower courts had been right to hold that the bankruptcy petition could not succeed. The appeal was dismissed.

## CONCLUSION

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The current state of the Brexit negotiations suggest that if the UK is to enter into any form of reciprocal arrangement with the EU prior to the end of the withdrawal period, it will be on the terms of the Lugano Convention. Parties who have previously enforced EU judgments in England under the Recast Brussels Regulation, and have not needed to register their judgments, should therefore take careful note of the decision in *Islandbanki*, and in particular the clear message that it is necessary to wait for the specified period after a registration is obtained before enforcement measures can be taken. Even if a judgment debtor has no apparent grounds to appeal against registration of the foreign judgment, a little patience at this stage will save wasted time and costs later! If there are particular reasons for urgency and concern that the assets may no longer be available once the judgment is executed then, as noted by Lady Justice Asplin, interim protective measures are available and these do not offend the Article 47 (3) prohibition. As far as possible, the need for these measures should be considered in advance of the registration process commencing.

[1] Regulation 1215/2012, which applies to judgments in proceedings commenced after 10 January 2015.

[2] [2020] EWCA Civ 48

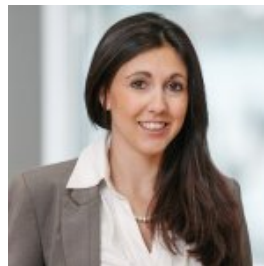
## KEY CONTACTS



**ANDREW HUTCHEON**  
PARTNER • LONDON

T: +44 20 7814 8049

[ahutcheon@wfw.com](mailto:ahutcheon@wfw.com)



**JEMMA DHILLON**  
SENIOR ASSOCIATE • LONDON

T: +44 20 7863 8943

[jdhillon@wfw.com](mailto:jdhillon@wfw.com)

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