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Juxta-Positioning the Effectiveness of the Common Law and Council Regulation (EC) No. 44/2001 (the Regulation) on the Recognition and Enforcement of Foreign Judgments in the United Kingdom (UK)

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Abstract

Under the principle of territorial sovereignty, a judgment delivered in one country cannot be enforced in another country, unless there is an international agreement to that effect. The common law, under some specified circumstances, permits the enforcement of foreign judgments within certain parameters. Under the doctrine of obligation, where a foreign court of competent jurisdiction has adjudicated that a sum of money is due from one person to another, the liability to pay that sum becomes a legal obligation that may be enforced in the UK by an action of debt, thus *Russell v Smith*. The doctrine of obligation came under intense criticism due to the fact that it failed to reveal the policy considerations underpinning the rules on recognition and enforcement of foreign judgments in the UK. The *Brussels I Regulation* on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters was introduced as a result of the shortfalls of the common law. In light of the above, this study was undertaken, in order to unearth the effectiveness or otherwise of the enforcement of foreign judgments under the common law, the *Administration of Justice Act 1920*, and the *Brussels I Regulation (the Regulation)* in the UK. The paper argues that enforcement under the *Regulation* is less complicated and accords the claimant much wider options of instituting enforcement proceedings in an enhanced forum (all Contracting State parties) than the common law and the *Administration of Justice Act 1920*.

Keywords: Common Law, Enforcement, Foreign Judgments, Jurisdiction, Fraud, Defences, Arbitration, European Convention on Human Rights, Administration of Justice Act 1920, Civil Jurisdiction and Judgments Act 1982, Brussels I Regulation.

1.0. Introduction

Complex questions in International Law do arise in instances of unsatisfied foreign judgments. In circumstances where a claimant is unsuccessful in obtaining satisfaction for a judgment in the country where the said judgment was secured, the logical question that follows is whether the said judgment can be enforced in another country where the defendant is found. On proof of the judgment, the burden shifts to the defendant to show why he should

not pay the debt. It was held in *Schibsby v Westenholz*,¹ that: "The judgment of a court of competent jurisdiction over the defendant imposes a duty or obligation on him to pay the sum for which judgment is given, which the courts in this country are bound to enforce." In *Grant v Easton*,² Lord Esher stated that: "The liability of the defendant arises upon an implied contract to pay the amount of the foreign judgment."

A judgment is worthless if it cannot be enforced. As a result of this long-established doctrine, this paper, in its attempt to undertake a comprehensive examination of the effectiveness of the common law and the *Regulation* on the recognition and enforcement of foreign judgments in civil and commercial matters in the UK, adopted the black-letter approach to doctrinal research in order to demystify the mystery surrounding the enforcement of foreign judgments in civil and commercial matters in the UK under the common law, the *Administration of Justice Act 1920* and the *Regulation*.

This study will contribute to the already existing body of knowledge in this subject area, and submit that enforcement proceedings under the *Regulation*, appears to be a much better option than enforcement under the common law and the *Administration of Justice Act 1920*.

Section 1 consists of the introduction and analysis of the enforcement of foreign judgments in the UK under the common law and proceeds to discuss what constitutes submission to the jurisdiction of a foreign court. The legal effect of an arbitration clause and the various defences open to the defendant are also taken care of in this section. Section 2 is devoted to an examination of the Enforcement of Foreign Judgments under the *Administration of Justice Act 1920 (AJA)*, and the various defences. Section 3 focuses on the enforcement of contracting state parties' judgments in the English courts under the *Regulation* and its accompanying defences, and this is followed by a conclusion.

1.1. Enforcement of Foreign Judgments in the UK under the Common Law

Judgments obtained in non-Contracting States (countries that are not parties to the *Regulation*), for example, the United States of America (USA) maybe enforced in the UK through the common law, provided that: It is for a debt or definite sum of money, not a judgment for taxes or penalties, and it is final and conclusive, in that, the foreign judgment does not create a valid cause of action in England unless it is *res judicata* by the law of the country where it was given and must have determined all the controversies between the parties (Fawcett, Carruthers & North 2008, p. 536).

At common law, a foreign judgment may be final and conclusive even though it is subject to an appeal and an appeal is actually pending in the foreign court where it was given (*Scott v Pilkington*).³

In addition, under the common law, a foreign judgment is not automatically enforceable, in that, fresh proceedings should be brought before the English courts. Buckley LJ in *Emanuel v Symon*,⁴ laid down the test for the enforcement of foreign judgments in the UK. The Judge stated that, in actions in *personam*, there are five cases in which the courts of the UK will enforce a foreign judgment: (a) where the defendant is a subject of the foreign country in which the judgment has been obtained; (b) where he was resident in the foreign country when the action began; (c) where the defendant in the character of plaintiff has selected the forum in which he is afterwards sued; (d) where he has voluntarily appeared and; (e) where he has contracted to submit himself to the forum in which the judgment is obtained.

Does a defendant's appearance in a foreign court to contest its jurisdiction amount to a submission to the jurisdiction of that court? The answer lies in s. 33 (1) of the *Civil Jurisdiction and Judgments Act 1982 (CJJA)*,

¹ [1870] LR 6 QB 155 at 159

² [1883] 13 QBD 302 at 303

³ [1862] 2 B. & S. 11

⁴ [1908] 1 KB 308

where it is provided that: "For the purposes of determining whether a judgment given by a court of an overseas country should be recognised or enforced in England and Wales or Northern Ireland, the person against whom the judgment was given shall not be regarded as having submitted to the jurisdiction of the court by reason only of the fact that he has appeared (conditionally or otherwise) in the proceedings for all or any one or more of the following purposes, namely – to contest the jurisdiction of the court..."

Therefore, a defendant's conditional appearance in a foreign court does not amount to submission to the jurisdiction of that court.

By virtue of *CJJA 1982* s. 32, if a claimant sues in a foreign country on a contract which contains a provision that the courts of some other country shall have exclusive jurisdiction, the ensuing judgment shall normally be refused recognition or enforcement in England.

In *Tracom SA v Sudan Oil Seeds*,⁵ the parties concluded a contract which contained a clause referring any dispute which might arise to arbitration in England. The claimant sued the defendant for breach of contract in Switzerland. The defendant appeared to contest the jurisdiction of the Swiss court but took no further part in the proceedings. The Swiss court went on to conclude that the arbitration clause was of no effect and handed down a judgment ordering the defendant to pay damages. When the claimant started enforcement proceedings in England, the defendant relied on *CJJA 1982* s. 32.

The Court of Appeal refused to enforce the judgment, notwithstanding the fact that the Swiss court had decided that the arbitration clause was of no effect. The defendant was, therefore, able to rely on the arbitration clause as a defence to the Swiss judgment (Clarkson & Hill 2006, pp. 154-155).

1.2. Defences under the Common Law against the Enforcement of Foreign Judgments in England and Wales

A number of defences are available at common law to defendants to resist the enforcement of foreign judgments in England and Wales. Before proceeding, it is important to state that as a general rule, it is not possible to raise at the recognition or enforcement stages, defences which were raised, or could have been raised in the foreign proceedings.

It is not a defence when it comes to the recognition and enforcement of foreign judgments in England that the judgment was wrong on the merits, thus whether on the facts or the law. It is even immaterial that the foreign court misapplied English law in reaching its decision (*Goddard v Gray*).⁶ The first defence to consider is a breach of a jurisdiction agreement.

Breach of Jurisdiction Agreement

The *Civil Jurisdictions and Judgment Act 1982 (CJJA)* s. 32 provides that:

(1) Subject to the following provisions of this section, a judgment given by a court of an overseas country in any proceedings shall not be recognised or enforced in the United Kingdom (UK) if:

(a) The bringing of those proceedings in that court was contrary to an agreement under which the dispute in question was to be settled otherwise than by proceedings in the courts of that country; and those proceedings were not brought in that court by, or with the agreement of the person against whom the judgment was given, and that person did not counterclaim in the proceedings or otherwise submit to the jurisdiction of the court..."

⁵ [1983] 1 WLR 662

⁶ [1870] LR 6 QB 139

(2) Subsection (1) does not apply where the agreement referred to in paragraph (a) of that subsection was illegal, void or unenforceable or was incapable of being performed for reasons not attributable to the fault of the party bringing the proceedings in which the judgment was given.

(3) ... a court in the UK shall not be bound by any decision of the overseas court relating to any of the matters mentioned in subsections (1) and (2).

If there is no evidence to suggest that the agreement between the parties was illegal, void or unenforceable or was incapable of being performed for reasons not attributable to the fault of the claimant in the foreign proceedings, the defendant at common law, can resist the enforcement of the foreign judgment successfully in the English courts.

Lack of Jurisdiction

A second defence under the common law is lack of jurisdiction on the part of the foreign court that gave the judgment. A foreign court may give a judgment which, according to the system of law under which it sits, is conclusively binding on the defendant, but unless the circumstances are such as in the eyes of English law to justify the court in having assumed jurisdiction, the judgment does not create a cause of action that is actionable in England (*Sirdar Gurdial Singh v Faridkote*).⁷

The Common Law Defence of Fraud

In addition, the common law defence of fraud is available to the defendant. Fraud is often divided broadly into 2 categories:

Fraud on the merits: That the judgment was obtained by the presentation of evidence which the other party knew to be false; or that the litigant was deprived of the opportunity to take part in the proceedings through tricks or threats; or

Fraud on the court: That the court accepted a bribe.

By way of exception to the general principle discussed earlier, the defendant is normally entitled to raise fraud even if the allegation of fraud was considered and rejected by the foreign court, or could have been raised before the foreign court but was not, thus *Abouloff v Oppenheimer*.⁸

In *Jet Holdings Inc. v Patel*,⁹ Staughton LJ stated that: "Where the objection is based on jurisdiction ... it is to my mind plain that the foreign court's decision on its own jurisdiction is neither conclusive nor relevant. If the foreign court has no jurisdiction in the eyes of English law, any conclusion it may have reached as to its own jurisdiction is of no value. To put it bluntly if not vulgarly, the foreign court cannot haul itself up by its own bootstraps. Logically the same reasoning must apply where enforcement is resisted on the ground of fraud ... If the rule is that a foreign judgment obtained by fraud is not enforceable, it cannot matter that in the view of the foreign court, there was no fraud".

Furthermore, in *Owens Bank Ltd v Bracco*,¹⁰ Lord Bridge made the statement that: "I recognise that as a matter of policy, there may be a very strong case to be made in the 1990s in favour of according overseas judgments, the same finality as the courts' accord to English judgments. But enforcement of overseas judgments is now primarily governed by the statutory codes of 1920 and 1933. Since these cannot be altered except by further legislation, it seems to me out of the question to alter the common law rule by overruling *Abouloff* ... To do so, would produce the absurd result that an overseas judgment creditor, denied statutory enforcement on the grounds that he had

⁷ [1894] AC 670

⁸ [1882] 10 QBD 295

⁹ [1990] 1 QB 335

¹⁰ [1994] 2 WLR 759

obtained the judgment by fraud, could succeed in a common law action to enforce his judgment because the evidence on which the judgement debtor relied on did not satisfy the English rule. Accordingly, the whole field is effectively now governed by statute and, if the law is now in need of reform, it is for the legislature, not the judiciary, to effect it” (<https://swarb.co.uk/owens-bank-ltd-v-bracco-and-another-no2-hl-17-jun-1992> 16/01/19)

Breach of Article 6 of the European Convention on Human Rights (ECHR)

A foreign judgment obtained in breach of Article 6 of the ECHR is a defence in the English courts when it comes to the enforcement of such judgments. In *Al-Bassam v Al-Bassam*,¹¹ the Court of Appeal held that a foreign judgment granted in circumstances where a fair trial had been denied abroad, would not be recognised.

Defence of Public Policy

A judgment will not be enforced if it is contrary to or inconsistent with English public policy. Therefore, “...an English court will refuse to apply a law which outrages its sense of justice or decency” (*In the Estate of Fuld (No 3)*).¹²

2.0. Enforcement of Foreign Judgments under the Administration of Justice Act 1920

2.1. Enforcement Mechanism under the *Administration of Justice Act 1920 (AJA)*

The *Administration of Justice Act 1920 (AJA)* may be relied upon by claimants to enforce foreign judgments in the English courts. This statute introduced the principle of registration of foreign judgments prior to its enforcement.

The *AJA 1920* applies to the enforcement of many judgments of superior courts of countries which are, or were part of the Commonwealth. Where a judgment creditor has obtained a judgment in a recognised ‘superior court’ under which a specific sum of money is payable, he may make an application to the UK High Court at any time within 12 months from the judgment, to register it.

Under *AJA 1920* s. 9 (2), the requirements for registration are that: the original court must have acted within its jurisdiction, and must have jurisdiction; and the judgment must not have been obtained by fraud or be inconsistent with, or contrary to English public policy.

If the court thinks it ‘just and convenient’ that the judgment should be enforced in England and Wales, it may order the judgment to be registered (*AJA 1920* s. 9 (1)). An order for registration is granted entirely at the court’s discretion.

2.2. Defences to Enforcement under the *Administration of Justice Act 1920 (AJA)*

Registration of a foreign judgment under *AJA 1920*, may be refused in instances where: the original court lacked jurisdiction. Registration could also be refused if the judgment was obtained by fraud (the test being the same as that at common law) or where enforcement of the judgment would be contrary to English public policy.

3.0. Enforcement of Contracting State Parties’ Judgments in the English Courts under the *Regulation*

A judgment given in a Member State (EU), falls under the *Regulation’s* regime for the enforcement of judgments, and all such judgments are recognised in England without any special procedure being required as per the provisions of *Article 33 (1)* of the *Regulation*. The rules on jurisdiction and recognition and enforcement, clearly

¹¹ [2004] EWCA Civ 857

¹² [1968] P 675

provide that they do not apply to proceedings, or issues arising in proceedings, in the Member States concerning the recognition and enforcement of judgments given in non-Member States, thus *Owens Bank Ltd v Bracco (No. 2)*.¹³

Furthermore, Article 38 of the *Regulation* provides that: "A judgment given in a Member State, and enforceable in that State shall be enforced in another Member State when, on the application of any interested party, it has been declared enforceable there."

An appeal against enforcement can be founded under *Article 43 (1)* of the *Regulation*. However, the scope to refuse enforcement under the *Regulation* is very narrow.

There is an implicit acknowledgement by the European Court of Justice (ECJ) in *De Wolf v Cox*¹⁴ that no other mode of enforcement such as an action on the judgment at common law is available to the claimant (McClean & Beevers 2009, p. 162).

3.1. Defences to Recognition and Enforcement under the Regulation

The *Regulation* states that a judgment *shall not* be recognised if it falls within Article 27. This is where recognition is contrary to public policy in the State in which recognition is sought (offending core principles of justice or morality in the national legal system).

Secondly, a judgment would not be recognised, if it was given in default of appearance, or the judgment conflicts with a judgment in a dispute between the same parties in the State in which recognition is sought, or is irreconcilable with an earlier judgment in a non-Contracting State between the same parties involving the same cause of action (judgment must be within the 'spirit' of the *Regulation*); or the court giving judgment lacked jurisdiction as the case fell within special or exclusive jurisdiction provisions (<http://www.legislation.gov.uk/ukpga/1982/27/schedule/3C/2009-04-06/data.xht?view=snippet&wrap=true> accessed 16/01/2019).

3.2. Discussion

In order to determine whether a Member State's court judgment is entitled for recognition under Chapter III per the provisions of Article 34 (4), the English court must first consider the effect of an earlier judgment of a non-Contracting State's court on the matter, if any, requiring enforcement in England under the common law. If both judgments satisfy the conditions for recognition and enforcement under the relevant regime, the English court must give priority to the earlier judgment delivered by the non-Contracting State. Suffice is to say that, if the non-Contracting State court's judgment fails to satisfy the conditions for recognition and enforcement under all three relevant regimes discussed above, the English courts will have no alternative other than to recognise and enforce a Contracting State's court judgment.

In addition, if the relevant court is entitled under the *Regulation* to assume jurisdiction, it must do so in the absence of proceedings taking place in another Contracting State in the same or related matter. A court becomes seised of an action when the case is 'definitively' pending before it. This is to be determined in accordance with the national law of the courts concerned so that procedural differences may be an important factor in winning a 'forum race.'

In three separate judgments in respect of the enforcement of Contracting States courts judgments in England, the Court of Appeal considered various orders which might be made after final judgments against a defendant to assist the judgment creditor in enforcing that judgment. It held that where the court had exercised jurisdiction on the merits of the claim over a defendant domiciled in another Member State, the jurisdictional rules of the *Regulation* were no obstacle to ordering the judgment-debtor to refrain from bringing proceedings in the courts of a non-

¹³ Case C-129/92

¹⁴ [1976] E.C.R. 1759

Member State designed to frustrate the enforcement of the judgment (Dicey, Morris & Collins 2008, p. 86), thus *Masri v Consolidated Contractors International Co SAL*.¹⁵

3.3. Conclusion

In conclusion, enforcing a foreign judgment in the English courts under the common law, appear not to be helpful. This is arrived at on the basis that a foreign judgment may be held by the English courts to be final and conclusive even though it is subject to an appeal and an appeal is actually pending in the foreign court where the judgment was given.

Secondly, the fact that the enforcement action must be in respect of a debt or definite sum of money, not a judgment for taxes or penalties, and it is final and conclusive, appear unhelpful. Per this common law provision, States cannot bring enforcement actions against their citizens who evade taxes and abscond to the UK. Furthermore, the common law provision that a foreign judgment is not automatically enforceable, unless fresh proceedings are brought before the English courts, appear to be burdensome.

The *Administration of Justice Act 1920*, is very restrictive, in that, it is only applicable to the enforcement of many judgments of superior courts of countries which are, or were part of the Commonwealth. The requirement that the action must be for a specific sum of money and an application made within 12 months to the UK High Court for registration after the delivery of the judgment in the foreign forum, and the fact that the Court has the discretion to deny registration if it deems it "just and convenient", together constitute a hindrance to the smooth and successful enforcement of foreign judgments in the UK under this statute.

In contrast to the above common law and *AJA 1920* difficulties in enforcing foreign judgments in the UK, enforcement under the *Regulation*, looks less complicated. Enforcement in the English courts comes without any special procedure being required. This is as a result of the provisions of *Article 33 (1)* of the *Regulation*.

Even though the *Regulation* is applicable only in Contracting State parties (limited area of applicability), this does not in any way make it ineffective.

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¹⁵ [2008] EWCA Civ 625