



## ENFORCEMENT

**If you are going to spend time, money and resources pursuing or defending a court or arbitration claim, then you need to consider what you are going to get out of it in the long run. What can you do with an English court judgment or arbitration award at home or abroad? How can you trace and preserve assets to make sure you get paid?**

### What can I do with my English court judgment in England?

Usually, a judgment debtor will have 14 days from the date of the judgment to pay. So what can you do if they don't?

Some options to consider:

- Taking control of goods – taking control of goods can be quick, simple and straightforward. It does not require a judicial decision as a writ of control can be issued administratively by the Court Office.
- Apply for a third party debt order – this compels a third party (within the jurisdiction) to pay over to the judgment creditor the money he owes to the debtor. This can be useful where you can identify a bank account.
- Apply for a charging order, a stop order or a stop notice – this allows you to enforce over or against the debtor's interest in an asset. This can be used to prevent the debtor from selling property, for example land, without paying the judgment.

- Serve a statutory demand – this is required in advance of applying for a bankruptcy order, and is often used against companies to apply pressure as the threat of insolvency is often enough to prompt payment..

### What can I do with my arbitration award in England?

If a party refuses to comply with a final arbitration award, the judgment creditor can look to the English courts for assistance in this jurisdiction (and similarly elsewhere if the New York Convention 1958 applies).

A party can ask for the award to be recognised and then enforced.

**CAUTION:** Consider ramifications of enforcement efforts in other jurisdictions before applying for a judgment in the same terms.

Either application is a summary procedure and so does not require a full trial or a revisiting of the merits. The application will usually succeed unless the awarding tribunal did not have jurisdiction. On a successful application, the award (or judgment in the same terms) will be enforceable in the same way as an English court judgment, or if foreign award, in the same way as a domestic award.

### Identifying Assets

There is usually no point trying to enforce a judgment or award if the judgment debtor has no assets – no one wants to throw good money after bad. On that basis, it is always advisable to research the judgment debtor before embarking on enforcement proceedings, or initiating proceedings.

Some points to consider:

- Check the judgment debtor is not subject to an insolvency procedure - search the Insolvency Register, the Bankruptcy and Companies Court registries, Companies House and the London Gazette (you cannot, generally, enforce against a company in insolvency proceedings).
- Apply for an order to obtain information from a judgment debtor – this compels the debtor (if he is in the jurisdiction) to attend court to provide information, under oath, for the purpose of enabling a judgment creditor to enforce a judgment or order against him. If the debtor fails to comply, he faces a committal order.
- Apply for an order for disclosure of a non-party – this can compel third parties (for example banks of parent companies) to disclose documents which might reveal assets.
- Check the Register of Judgments, orders and fines (via [www.trustonline.org.uk](http://www.trustonline.org.uk)) – this lists all County Court and High Court judgments (for the payment of money) that are not satisfied within one calendar month of the date of the judgment.
- Instruct an Enquiry Agent – use the resources of professional enquiry agents to seek out assets in (and outside) the jurisdiction.

### **Preserving Assets**

Act quickly if you think the judgment debtor will try to dissipate their assets to frustrate a judgment or award.

Some points to consider:

- Apply for a Worldwide Freezing Order (WFO) – a WFO restrains a party from disposing of, or dealing with, its assets up to a certain value, preventing a defaulter concealing their assets to frustrate enforcement. They can also be used to force the judgment debtor to reveal the value and location of its assets. The requirement to provide details of assets worldwide can allow enforcement action, such as arrest or attachment proceedings, to be correctly targeted. An officer/director served with a WFO must comply as failure to do so could amount to contempt of court.
- Apply for an order for the detention, custody or preservation of property.

## **What can I do with my English court judgment or English arbitration award abroad?**

We highlight three jurisdictions below, chosen because of their very different approaches to enforcement of foreign judgments which we hope give an indication of how varied the approach can be.

### **Spotlight Switzerland**

#### **Judgment**

Most Commercial Court judgments will (with the exception of judgments relating to insolvency) be enforceable in Switzerland pursuant to the Lugano Convention.

#### **Some points to consider:**

Apply for a certificate in the form of Annex V to the Lugano Convention. This certificate, together with the original judgment (or a certified copy) must be produced together with the application for recognition of the judgment. No other formalities are generally necessary for recognition, and the substance of the judgment will not be reviewed.

It is unusual for a judgment not to be recognised - recognition can only be refused on very limited grounds (for example public policy).

The Lugano Convention can under some circumstances be used to obtain a WFO or other interim measures recognised and enforced in Switzerland.

#### **Award**

Arbitral awards are readily recognised in Switzerland pursuant to the New York Convention.

The party requesting the recognition of the award must produce the duly authenticated original award (or a certified copy). Some Swiss courts require a certified translation of the award into the relevant official language of the court, but this requirement is frequently waived for awards drafted in the English language.

The recognition proceedings are generally straightforward (but can be challenged under the New York Convention), and can be sought either separately from enforcement proceedings, or as a preliminary issue in enforcement proceedings.

Once the award is recognised, it is enforceable as if it were a final and binding Swiss judgment.

## Spotlight United States

### Judgment

The enforcement of foreign judgments in the US is usually governed by the laws of the individual states. A party seeking to enforce a non-US judgment in the US may file suit in a state or federal court (depending on “subject matter jurisdiction”).

If all the prerequisites for enforcement are met, a US court will make it a US judgment of that court – it will then become enforceable.

Enforcing the judgment is generally done by commencing a new action in the US court or by a form of summary proceeding.

### Award

Arbitral awards are readily recognised in the US pursuant to the New York Convention.

The enforcing party will need to file a petition or motion (depending on the jurisdiction) in a US federal district or state court – this will need to be accompanied by certified copies of both the arbitration award and the arbitration agreement.

## Spotlight Hong Kong

### Judgment

English court judgments for monetary sums are generally enforceable in Hong Kong – they create a cause of action – but other types of judgments, e.g. those ordering or prohibiting the doing of certain acts, will be unenforceable. If one succeeds in the enforcement proceedings, the English court judgment will be enforceable as if it were a judgment given by the Hong Kong court.

Points to note:

- The court will not re-examine the merits of the underlying claim/dispute.
- The judgment must be final.
- An injunction or order compelling a party to do certain acts is unenforceable.
- If the proceedings were contrary to a valid dispute resolution agreement and the judgment debtor did not submit to such jurisdiction, the judgment will be unenforceable.
- Procedural defects in the English proceedings will not automatically preclude enforcement.
- Enforcement proceedings must be brought within 12 years of the date of judgment.

- The courts will not enforce a judgment obtained by fraud.

Enforcement options to consider:

- Issue a writ of execution to seize and sell the judgment debtor's goods.
- Apply for a winding-up order.
- Ask the court to examine the judgment debtor by oral cross-examination for information about debts owing to him and what other property or means he has to satisfy the judgment.
- Commence garnishee proceedings, to require debts due from third parties to be paid directly to the judgment creditor.
- Apply for a charging order for a charge on an interest in land or securities owned by the judgment debtor.

### Arbitration award

Hong Kong (or more accurately China) is a contracting state to the New York Convention. An English arbitration award is, with the leave of the court, enforceable in the same manner as a judgment of the court and has the same effect. Leave will only be refused in limited circumstances, for example where the arbitration award deals with a dispute not contemplated by the relevant arbitration agreement.

## Spotlight China

### Judgment

As China has not entered into an agreement regarding the recognition and enforcement of foreign judgments with the UK, an English court judgment is not enforceable in China, unless the applicant can prove that it should be recognised by ‘principle of reciprocity’ which is very difficult.

### Arbitration award

China is a contracting state to the New York Convention. An English arbitration award is, in theory, enforceable in the judgment debtor's local court to target property. Local procedures can vary but the party requesting enforcement will sometimes first need to apply to the court for recognition before enforcement. Other courts will deal with recognition and enforcement at the same time. A recognition application will usually need to be accompanied by the original (or certified copy of) the award, the arbitration agreement and a Power of Attorney. In courts where an additional enforcement hearing is necessary, the proceedings will progress to a hearing where the enforcing party can ask the court to make a written order permitting enforcement, which will require assets to be identified.

## Enforcement abroad – a snapshot

Country	English court judgment – enforceable?	London arbitration award – enforceable?
Switzerland	✓	✓
USA	✓	✓
China	✗	✓
Hong Kong	✓	✓

### Enforcement – points to consider:

- In a global sense, arbitration awards generally have better prospects of success in terms of enforcement.
- Always consider how enforcement actions in one jurisdiction might impact your options in another jurisdiction.
- Some jurisdictions will re-examine the merits of a judgment or award before enforcing it.
- Some jurisdictions will not enforce summary judgments (or equivalent) – for example India – and so explore possible enforcement jurisdictions before making a summary judgment application.

- Not all jurisdictions will enforce declaratory judgments or awards (as opposed to money claims).
- Use trade association default lists (for example the Baltic, GAFTA and FOSFA) to publicise unpaid awards to increase commercial pressure on a defaulter. Some associations will go so far as to ban the defaulter trading on their terms.

### Prevention is better than cure:

- Give special attention to your law and jurisdiction clauses – be sure that your judgment or award will be enforceable.
- Consider taking security – whether for payment or for your claim.
- Identify assets – or the potential dissipation of those assets – early.
- Look after your original award – you might need to provide it (or a certified copy) for enforcement proceedings.
- Check your contract does not prohibit interim court relief (for example anti-suit injunctions) which might prevent you effectively enforcing an arbitration agreement (e.g. FOSFA).
- Make sure you comply with any local requirements to register a guarantee or claim.

**This client guide was produced by Brian Perrott and Prashant Kukadia. Should you require any further information or assistance with any of the issues dealt with here, please do not hesitate to contact them or your usual HFW contact to discuss.**



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