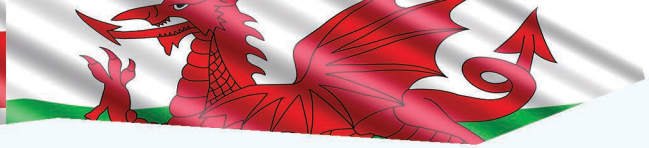

CROSS BORDER ENFORCEMENT OF MONETARY CLAIMS - INTERPLAY OF BRUSSELS I A REGULATION AND NATIONAL RULES

NATIONAL REPORT: ENGLAND AND WALES

Author
Wendy Kennett

University of Maribor Press

Faculty of Law

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Author sen. lect. Wendy Kennett, Ph.D.
(Cardiff University, School of Law and Politics)

Review full prof. Vesna Rijavec, Ph.D.
(University of Maribor, Faculty of Law)

Technical editor Jan Perša, M.D. (University of Maribor Press)

Cover designer Jan Perša, M.D. (University of Maribor Press)

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Cross border Enforcement of Monetary Claims - Interplay of Brussels I A Regulation and National Rules

National report: England and Wales

WENDY KENNETT

Abstract The "National Report: England and Wales" systematically and comprehensively addresses the main features of the enforcement of monetary claims in the German legal system, focusing in particular on the analysis of legal remedies in the enforcement procedure. Said issues are approached from both national and cross-border perspectives. The issues discussed are profoundlytopical in light of the recent coming into effect of the Brussels IA Regulation (Recast) and its more or less successful implementation in the national systems of the Member States, which has raised a number of issues. The report critically reflects some of the controversial solutions covered by the Recast Regulation regarding the effectiveness and appropriateness of the Regulation's application in the legal system in question and related problems. It also deals with national specificities in the enforcement procedure, which still constitute an obstacle to cross-border procedures. The report was created as part of a study conducted under the auspices of the EU project BIARE ("Remedies on the Enforcement of Foreign Judgments according to Brussels I Recast") under the coordination of the Faculty of Law University of Maribor.

Keywords: • Brussels IA Regulation • cross-border enforcement procedure • enforcement of monetary receivables • legal remedies • England • Wales•

CORRESPONDENCE ADDRESS: Wendy Kennett, Ph.D., Senior Lecturer in Law, Cardiff University, School of Law and Politics, Museum Ave, Cardiff, CF10 3AX, United Kingdom of Great Britain and Northern Ireland, e-mail: kennettw@cardiff.ac.uk.

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Table of Contents

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Part 1: Main features of the national enforcement procedures for recovery of monetary claims (general overview)

1.1 Domestic legal sources on enforcement

Following the most recent reforms of the law, the English law on enforcement is largely statute based. Nevertheless, the structure of the law, and the approach to interpretation of the statutes and the CPR, remains strongly influenced by its origins in the common law rules and principles of equity.

The key laws are the Civil Procedure Rules (CPR: delegated legislation made by the Civil Procedure Rules Committee under the 1997 Civil Procedure Act and regularly updated); the Tribunals, Courts and Enforcement Act 2007 (TCEA 2007); the Charging Orders Act 1979; the Attachment of Earnings Act 1971 and the County Courts Act 1984. For execution against goods, major changes authorised by the TCEA 2007 are to be found in the Taking Control of Goods Regulation 2013,[1] the

[1] SI 2013/1894.

Taking Control of Goods (Fees) Regulations 2014,[2] and the Certification of Enforcement Agents Regulations 2014,[3] which have significantly rationalised and modernised the law.

Where enforcement includes petitioning to have the debtor declared bankrupt, the relevant sources also include the Insolvency Act 1986 and the Insolvency Rules 2016 (delegated legislation made under the Act).

For cross-border litigation, an important source of law is the Civil Jurisdiction and Judgments Acts 1982 (as amended to take account of the relevant European Regulations, and Lugano and Hague Conventions).

[2] SI 2014/1.
[3] SI 2014/421.

1.2 Recent and ongoing reforms

Reform of the law has been slow in England and Wales, in spite of criticisms of the law of enforcement over several decades.[4] The most recent review of enforcement, conducted by the Lord Chancellor's Department (now Ministry of Justice), began in 1998. The review itself lasted for a couple of years, but reforms flowing from it have been introduced very gradually, with further consultations. Significant reforms were introduced by the TCEA 2007 and the delegated legislation made thereunder. The reforms that have been implemented relate principally to execution against goods and the recovery of commercial rent arrears, and include clarification and modernisation of the relevant rules.[5] The new rules are also applicable to most enforcement titles, public and private, and to enforcement by different types of enforcement agent. They rationalise the previous position whereunder different legal regimes were applicable depending on the instrument being enforced – which made it difficult to know whether the steps taken by an enforcement agent were lawful.

A reform of the law on execution against goods was perceived as particularly urgent since it is the most commonly used method of enforcement (see further below at 1.6 – 1.8), and there was a long history of complaints about abusive action by enforcement agents (bailiffs).

The TCEA 2007 also included reforms to other areas of enforcement law, of which the two most important ones addressed the difficulty of obtaining information about

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[4] A major review in the 1960s (Payne Committee Report 1969, Cmnd. 3909), led to some reforms, but the key recommendation of the creation of an Enforcement Office was never implemented. For other important reform recommendations see the Report of the Supreme Court Committee on Practice and Procedure 1953 (Evershed Committee) Cmd 8878.

[5] These reforms are described as the "rather sparse fruit of a nearly decade long enforcement review" by D Capper, H Conway and L Glennon, "From Obligations to Proprietary Interests: A Critique of the Charging Orders System in England and Wales" in S Bright (ed.) *Modern Studies in Property Law vol* 6 (Bloomsbury Publishing 2011) 81 at 97). The outputs of the Review include: Consultation Paper I, *How can the enforcement of civil court judgments be made more effective?* (Lord Chancellor's Department, 1998); Consultation Paper 2, *Key principles for a new system of enforcement in the civil courts* (Lord Chancellor's Department, 1999); Consultation Paper 3, *Attachment of earnings orders, charging orders and garnishee orders* (Lord Chancellor's Department, 1999); Consultation Paper 4, *Warrants and writs, oral examinations and judgment summons* (Lord Chancellor's Department, 2000); *Report of the First Phase of the Enforcement Review* (Lord Chancellor's Deparment 2000); *A single piece of bailiff law and a regulatory structure for enforcement* ('Green Paper') (Lord Chancellor's Department, 2001); Centre for Public Law, *Independent Review of Bailiff Law* (University of Cambridge, 2000); *Effective Enforcement – Improved methods of recovery for civil court debt and commercial rent and a single regulatory regime for warrant enforcement agents* (Cmd 5744) ('White Paper') (Lord Chancellor's Department, 2003).

the debtor (Part 4 of the Act), and debt management and relief (Part 5 of the Act). Improvements in the regulation of charging orders were also proposed in order to make this method of enforcement more flexible (see further below at 1.8).

Nearly ten years later, however, most provisions in Parts 4 and 5 of the Act have not yet entered into force. As a result, it is more difficult to obtain information about debtor's asset in England compared to most other countries in the EU.

1.3 Underlying philosophical or dogmatic framework for system of enforcement

English enforcement law has evolved over time driven by pragmatism and compromise. It is not easy to identify an underlying philosophical or dogmatic framework.

(i) **Sources of law.** Modern enforcement law bears distinct traces of its ancient origins. Although some medieval administrators clearly had a Roman law education, the distinctive features of English law in the period after the Norman conquest continued to derive from previous practices. Significant consequences of this included an emphasis on procedure, and a process that focused on ensuring the presence of the defendant in court, rather than on substantive law issues. The writ system – of which vestiges can still be found in the various writs of execution – originated with writs as executive orders issued by the King. In the context of the administration of justice, a writ was addressed to a sheriff ('shire reeve'), as the King's representative in the shires (counties).[6] It required the sheriff to command the defendant to render up the land, money or goods allegedly owned by or owed to the claimant, and if the defendant would not comply, then to summon him before the justices to provide an explanation. The possibility that the defendant might have good reasons for not meeting the claimant's demands was thus something of an afterthought, added onto the initial order. Although the modern writs of execution are issued post-

[6] Most of the original powers of sheriffs are now vested in the Lord-Lieutenant, High Court judges, magistrates, local authorities, the Police, coroners and HM Revenue and Customs.

judgment, rather than being a way of initiating proceedings, they were until recently still directed to the high sheriff of a county. In practice, a sheriff's officer and his bailiffs would be responsible for the actual enforcement of the writ. Since 2003 sheriff's officers have had their titled changed to High Court Enforcement Officers (HCEOs).[7] Nevertheless, part of the procedure for enforcement of judgments remains in the hands of the legal successors of the sheriff and his agents.[8]

Different approaches to enforcement were evolving in other fora, however. Equity developed as a system of justice operating on the defendant's conscience and was said to operate *in personam* – such that its principal initial enforcement mechanism was imprisonment of the uncooperative defendant. But the Chancery Court later developed new ways of securing compliance with its orders, unrestrained by the common law system of writs. These included the appointment of sequestrators to seize all the defendant's assets, or receivers to receive rents, profits or other income accruing to the defendant. This approach, involving a court order based on evidence as to the appropriateness of that order, has informed the current court-based enforcement mechanisms. A further source of inspiration was the process of 'foreign attachment' – permitting the garnishment of debts – long recognised in the Mayor's Court in the City of London. This pre-Norman custom was finally given a more general scope in civil matters by the 1854 Common Law Procedure Act, and again operated by way of a court hearing, rather than through a writ issued to the sheriff.[9]

Modern enforcement procedure is thus divided into two different modes: the use of writs of execution (mainly control, possession and

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[7] See further below at 1.5.

[8] For the role of the medieval bailiff, see TFT Plucknett, *Studies in English legal history*. Vol. 14. (A&C Black, 1983) 1-33. Since 'bailiff' was a general term applying to those who conducted management and administrative activities for a landowner, or for the sheriff, the logic of the feudal system meant that a bailiff might sometimes be a powerful representative of a major landholder, and might be part of the local justice machinery – but he could equally be a more humble estate manager. This 'unregulated' use of the term 'bailiff' means that it is still used in significantly varying ways under the modern law, for enforcement agents with different origins, powers and levels of training.

[9] N Levy Jr, "Attachment, Garnishment and Garnishment Execution: Some American Problems Considered in the Light of the English Experience" (1972-1973) 5 Conn. L. Rev. 399.

delivery) issued to HCEOs on application[10] (see further below at 1.6), and the use of other methods of enforcement which take the form of a court order.

(ii) In spite of the 'executive' origins of the writs of execution, enforcement is in principle under the supervision of a court. Civil enforcement agents are either certificated by a county court judge[11] (certificated enforcement agents, or CEAs) or are officers of the court (HCEOs) and their actions are subject to court scrutiny. Until recently the common law self-help remedy of distress for rent enabled a landlord to seize a tenant's goods to recover outstanding 'payments reserved as rent'. This was replaced on 6 April 2014 by a new statutory self-help remedy, Commercial Rent Arrears Recovery (CRAR),[12] which (in addition to limiting the remedy to purely commercial leases) gives greater protection for tenants, particularly in relation to the requirement of notice. Although the landlord can proceed to enforcement without a court order, seizure of assets must be done through the offices of a certificated enforcement agent.

(iii) Outside bankruptcy proceedings, the priority principle applies.

(iv) There are limited enforcement titles. Except in cases where CRAR is available, a judgment is the principal enforcement title recognised in civil and commercial cases. See further at 1.15.

(v) Different methods of execution typically address different assets of the debtor, rather than extending to all assets. A writ of control will allow an HCEO to seize any (unprotected) goods of the debtor up to the amount specified in the writ, but not extend to other assets. A charging order creates a charge over identified land or securities. Some enforcement measures nevertheless have a more general application. Equitable remedies operate *in personam* – so bind the debtor personally,

[10] Writs of execution are most likely to be relevant to cross-border cases. For judgment sums below £5,000 it is also possible to proceed by way of a warrant of execution in the County Court. A warrant of execution is the County Court exquivalent of a High Court writ of execution, and is enforced by a County Court bailiff. See further below at 1.6.

[11] See further below at 1.6. Certification is currently regulated by s.64 of the TCEA 2007 and the Certification of Enforcement Agents Regulations 2014 (SI 2014/421) The judge has power to withdraw the certificate in appropriate cases.

[12] Tribunals, Courts and Enforcement Act 2007, ss.71-87 and Taking Control of Goods Regulations 2013

rather than the debtor's assets - but they may be ordered in relation to all the debtor's assets, real and personal. This is true of a writ of sequestration,[13] while in the context of interim measures a freezing injunction may specify that the debtor is prohibited from disposing of identified assets, but it may also cover all assets up to a certain value.[14]

1.4 Types of enforcement procedures

An important distinction to note in the context of enforcement is between enforcement out of the High Court and out of the County Court.[15] As explained above, however, another way of distinguishing between enforcement procedures is by reference to the relevant competent authority. Thus, some enforcement measures require a judicial decision, some may be processed by a court officer within the court, and others may be within the competence of an external enforcement agent (notably, an HCEO) on issue of the appropriate writ.

Alternative procedures exist in relation to debts owed to public authorities, and there is a complex network of legislation governing the enforcement of fines and public debts. Often public authorities have their own in-house enforcement agents but they may also use the services of certificated enforcement agents. For example, one of the large companies offering High Court enforcement services (Marston Group) has contracts with 265 local councils as well as HMRC, HMCTS, the Child Support Agency and the Legal Aid Agency. There is in this sense some cross-over between civil and public enforcement: certificated enforcement agents may work as part of a team under the supervision of an HCEO for civil enforcement or may work (usually on a self-employed basis) for a company engaged in collecting public debts.

Currently enforcement by way of execution against goods and repossessions (eviction) in the County Court is carried out by civil servants. The Ministry of Justice has on several occasions since 2011 considered privatising aspects of enforcement work, and has invited tenders, but recently abandoned its latest attempt.[16]

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[13] See further below at 1.8 (I)A VI.
[14] See further below at 1.18.
[15] See further below at 1.6-1.7
[16] The main focus of concern has been the privatisation of enforcement of criminal law fines, involving powers of arrest. See http://www.independent.co.uk/news/uk/politics/government-accused-of-wasting-9m-on-failed-court-fines-privatisation-bid-a6729011.html <accessed 26 February 2018>

The various methods of enforcement for money claims and non-money claims are discussed below at 1.8

1.5 A centralized or decentralized system?

The 'centralized/decentralized' dichotomy sometimes used in this context does not seem helpful for the purposes of understanding the situation in England. It suggests a distinction between a central court or agency and local enforcement bodies, rather than concentration in the hands of a single enforcement agent as distinct from the diffusion of enforcement functions among a variety of agents. Use of this terminology in other contexts suggests that what is meant is the concentrated/diffuse distinction.

The English system is certainly diffuse since – taken as a whole – it may involve action by solicitors, the County Court at local level and High Court in London, HCEOS – who operate independently of the courts – and/or County Court Bailiffs.

As to the level of territorial centralisation, there still a varied picture but the trend is towards centralisation. Thus, the administration of the County Court has been centralised and it is possible to bring online money claims through a central office (the County Court Business Centre (CCBC) in Northampton), provided that it is for a fixed amount of money less than £100,000, against no more than two defendants and served to a defendant with an address in England or Wales. Many paper-based claims can also be brought through a different central office (the County Court Money Claims Centre (CCMCC) in Manchester). These two centres also handle enforcement applications. Online applications for a County Court warrant of control can be made via the CCBC, while the form for an application for an attachment of earnings order can be downloaded from the internet and sent to the CCMCC. Payments made by employers under an attachment of earnings orders are also processed centrally via the Centralised Attachment of Earnings Payment System (CAPS).

As explained at 1.6 below, removal of territorial restrictions has also occurred in relation to the work of HCEOs.

1.6 Authorities/bodies and agents having competence with respect to enforcement

Enforcement of judgments is in principle undertaken under the supervision of a court, but many of the relevant officers of the court are independent professionals, including in particular HCEOs. Much of the practice of enforcement is undertaken by HCEOs who, in addition to their licensed activities as court officers, offer a range of services related to debt collection and so share some characteristics with liberal professional enforcement agents (*'huissiers de justice'*) found in several European jurisdictions. I would, however, argue that solicitors (in house or independent), who are also officers of the court, may be regarded as significant agents in the enforcement process since they are also likely to be giving advice as to appropriate methods of enforcement, making the relevant court applications, or taking other enforcement related steps.[17] Indeed, more realistically, enforcement related advice and action will be delegated to paralegals in a law firm or debt-collecting business. Thus, these personnel also undertake some of the activities of *huissiers de justice* and deserve to feature in a functional comparison.

The law on enforcement is complicated by the existence of the two court systems: the High Court and the County Court. The High Court is one of the Senior Courts of England and Wales.[18] It deals at first instance with all high value and high importance cases.[19] Although its central office is in London, almost any High Court case can be commenced in a District Registry – which is usually to be found in the same building as the local County Court centre. In enforcement matters, the High Court has sole responsibility for enforcing judgments for more than £5000 (including interest).

The County Court is the successor to county courts that were established by statute in 1846, replacing the earlier heterogeneous and ineffective local court structures. It is now a single, centrally organised and administered court system, sitting in County Court centres. The County Court deals with civil cases where the amount in dispute is relatively small, as well as having various special competencies. It has the exclusive

[17] See in particular below at 3.1.12.

[18] Together with the Court of Appeal and the Crown Court.

[19] It also has a supervisory jurisdiction over all subordinate courts and tribunals, with a few statutory exceptions.

responsibility for enforcement of claims arising under a regulated consumer credit agreement, and is also the only court in which an application for an attachment of earnings order (AEO) can be made.[20]

In minor civil and commercial disputes, the County Court is solely responsible for enforcing judgments for less than £600 (including interest). Judgments for amounts falling between £600 and £5000 may be enforced in the High Court or the County Court. These thresholds are currently subject to review. HCEOs are arguing for competence in relation to the enforcement of debts of any size.[21]

In principle, the Civil Procedure Rules apply in both the High Court and the County Court – but specific provisions may be limited to one court or the other, as in the case of AEOs. In cross-border cases, applications are most likely to be made to the High Court because the amounts involved are likely to be above the High Court threshold. Applications to the High Court are also the default position in relation to applications for a refusal of recognition or enforcement, or for applications for relief against enforcement. Thus, for example, CPR rule 74.7A(1)(b) states that an application under article 45 or 46 of Brussels I (recast) must be made "to the court in which the judgment is being enforced or, if the judgment debtor is not aware of any proceedings relating to enforcement, the High Court."

In addition to deciding which court to approach, the onus is on the creditor to decide which method of enforcement to pursue from those available, as is commonly the case in court-centred enforcement systems. However, unless creditors are aware of details about the debtor that make a specific method of enforcement attractive, their default position is to apply for execution against goods via a writ or warrant of control: a writ in the High Court, a warrant in the County Court. The advantage to the creditor of using an HCEO is that a 'writ of control', authorising the seizure of goods, can be issued by the Enforcement Office of the High Court without a court hearing. All that is required is a request for the issue of the sealed writ,[22] production

[20] There is a centralised procedure for attachment of earnings that operates from Northampton Business Centre (NBC). NBC has streamlined, secure computer systems used for various centralised procedures, and notably debt claims.

[21] See further the news item on High Court Enforcement Officers Association website: <https://www.hceoa.org.uk/news/19-judgment-enforcement-time-for-change> accessed 10 February 2017.

[22] The writ is pre-prepared by the HCEO on court Form No. 53.

of the judgment, and payment of the relevant fee. A similar situation prevails in relation to the parallel method of enforcement (via a 'warrant of control') in the County Court. Most other methods of enforcement require a court application.

The Tribunals, Courts and Enforcement Act 2007, has led to greater standardisation and integration within the industry.[23] In relation to the enforcement of civil judgments, three types of agents can be identified: High Court Enforcement Officers (HCEOs), County Court bailiffs,[24] and Certificated Enforcement Agents (CEAs) who are employed by HCEOs.

HCEOs. The predecessors of HCEOs were sheriff's officers. High Sheriff is now a largely titular and ceremonial role since the law and order functions of the sheriff have long been delegated to others. Until recently, civil enforcement functions in the form of the execution of High Court writs were delegated to an Under Sheriff, usually a solicitor, and performed in practice by sheriff's officers. Like the High Sheriff, their jurisdiction was limited to a single county. The Courts Act 2003 short-circuited this complex process of delegation by recreating sheriff's officers as HCEOs and giving them direct authority to enforce writs (in the context of seizure of goods).[25] It also allowed HCEOs to be appointed to more than one district,[26] so that many now in effect have nationwide jurisdiction. In practice, this has led to new businesses being established which group together several HCEOs who work together.[27] New qualifications and training have been brought in to improve training and professionalism.[28] An application to become a HCEO is made to the Lord Chancellor,[29] and is regulated by the High Court Enforcement Officers Regulations

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[23] Note that industry, rather than profession, is the term typically used.

[24] A further type of bailiff involved mainly in the collection of public debts has become regulated under the title of certificated enforcement agents: see the Tribunals, Courts and Enforcement Act 2007, ss.63 and 64.

[25] Courts Act 2003, s.99 and Sch.7(4).

[26] Schedule 7(2).

[27] The nationwide jurisdiction that HCEOs now enjoy has led to the merger or takeover of firms of HCEOs and other parties involved in the debt collection process, so that an integrated service can be offered.

[28] For further details see the website oef the High Court Enforcement Officers Association, the professional body: https://www.hceoa.org.uk/home. A diploma is offered by the Chartered Institute of Credit Management which leads to a Level 4 Diploma (approximately equivalent to the standard expected at the end of the first year of undergraduate university study).

[29] The Lord Chancellor used to combine judicial, legislative and executive functions – one of which was to function as the head of Ministry of Justice (then called the Lord Chancellor's Department). These were unravelled by the Constitutional Reform Act 2005. Currently the same person holds the

2004.[30] There are requirements as to good conduct and financial standing (reg.4). Beyond this, an application is required to include information about relevant business experience, professional memberships, legal training, and business plans, as well as details of relevant insurances, credit licences, and the audited accounts of previous businesses. In practice, a person seeking to become an HCEO following the restructuring of the industry will follow the route and training provided by the High Court Enforcement Officers Association.

HCEOs are in some ways comparable to the *huissiers de justice*/Judicial Officers familiar in other jurisdictions: their role largely is strategic and managerial, with employees/contractors to undertake administrative and debtor-facing duties.

County Court Bailiffs. County Court bailiffs are employees of the court service and trained within that service. As well as service of documents, seizure of goods and evictions, they deal with the committal to prison of those in contempt of court and transport from prison to court. Views differ as to whether they are effective. HCEOs have campaigned vigorously for the power to enforce all County Court judgments, and encourage judgment creditors to transfer judgment debts over £600, and repossession orders,[31] up to the High Court for enforcement.

post of Secretary of State for Justice and Lord Chancellor. Although the distinctive features of the Lord Chancellor's role have all but disappeared, the title 'Lord Chancellor' is retained in part because of the numerous references to that office in legislation.

[30] SI 2004/400.

[31] The majority of repossession claims have to be brought in the County Court under s.8 or s.21 of the Housing Act 1988 or the Rent Act 1977 (tenants), or CPR Part 55 (trespassers).

Certificated Enforcement Agents. CEAs may be employed by HCEOs and other debt recovery firms, but are typically self-employed. Certification is currently regulated by s.64 of the TCEA 2007 and the Certification of Enforcement Agents Regulations 2014 (SI 2014/421). The issue of a certificate requires a court application, and the court is required to maintain a list of CEAs. It also has the power to withdraw the certificate in appropriate cases. Under reg.3 of the 2014 Regulations, a certificate will be issued if the judge is satisfied that the applicant is a fit and proper person to hold a certificate, and (notably) that he or she

(i) possesses sufficient knowledge of the relevant law;
(ii) has lodged the required security (£10,000); and
(iii) does not carry on, and is not and will not be employed in, a business which includes buying debts

A certificate is normally valid for two years. There are commercially available courses for persons seeking to acquire "sufficient knowledge" of the law, usually advertised as two-day intensive courses.

1.7 A hybrid system: public and private elements

The English system is a hybrid one. It is has public and private elements. Enforcement proceedings in general are under the supervision of the courts and a court hearing is necessary to obtain an enforcement order. But it will be apparent from the previous section that the initiative lies with the creditor to get a judgment or other enforceable instrument enforced – using in-house legal expertise or approaching a solicitor or HCEO.

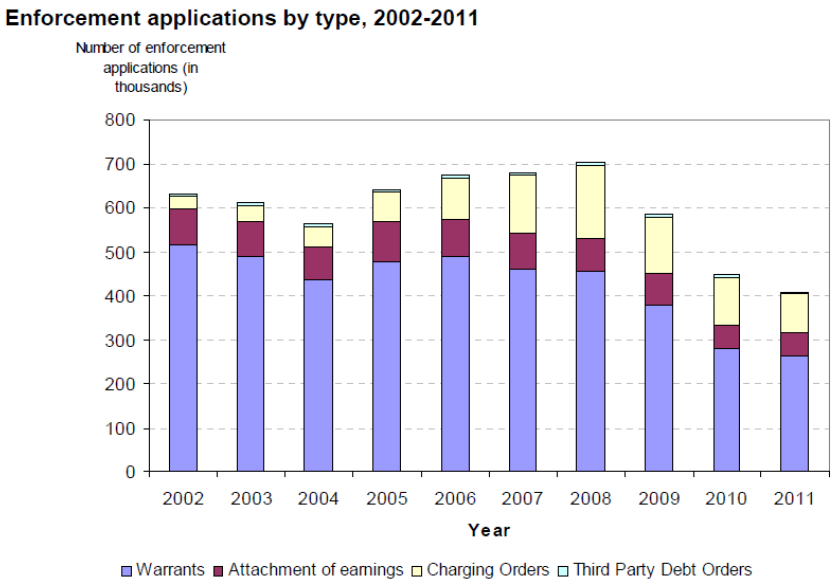
In fact, a very large proportion of enforcement proceedings involve writs and warrants of control (i.e. seizure of tangible movable property), rather than the wider range of enforcement measures which often prove most useful in other jurisdictions. The table below shows the comparative use of various methods of enforcement in the County Court in the period 2002-2011[32]. More recent statistics show that warrants of control continue to be issued by the County Court far more often than

[32] Taken from the Ministry of Justice, *Judicial and Court Statistics 2011 – full report* (June 2012), available at <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/217494/judicial-court-stats-2011.pdf> accessed 4 June 2016.

all other methods of enforcement put together. In fact the most recent statistics indicate that warrants of control are issued at about four times the rate of all other enforcement related orders.[33] In the High Court in 2016, the latest year for which data is available, 69,391 writs of *fieri facias* (now writs of control) were issued, only 193 charging orders were granted, and 52 third party debt orders issued.[34] There are several reasons why a judgment creditor may prefer to use a writ or warrant of control rather than another method of enforcement. First, the costs of initiating these proceedings directly with an HCEO (without any court hearing) or, in the County Court, online through the County Court Business Centre are lower than the costs of other enforcement procedures, and the procedures are relatively quick and easy to access. Secondly, there is a greater likelihood of direct contact with the judgment debtor and thus, information can be discovered about the debtor's circumstances and additional pressure can be exerted to obtain payment. The limited level of court involvement in enforcement by writ or warrant of control means that the practice of enforcement is to a large extent privatised.

[33] See Ministry of Justice, *Civil Justice Statistics Quarterly, July to September 2017 tables* (7 December 2017), available at <https://www.gov.uk/government/statistics/civil-justice-statistics-quarterly-july-to-september-2017> accessed 26 February 2018.

[34] See Ministry of Justice, *Civil Justice Statistics Quarterly January to March 2017, and The Royal Courts of Justice 2016* (1 June 2017) The Royal Courts of Justice Tables: 2016, available at <https://www.gov.uk/government/statistics/civil-justice-statistics-quarterly-january-to-march-2017> accessed 26 February 2018.



1.8 Methods of enforcement

Preliminary comment: It should be noted that in the case of married couples, English law operates a system of separation of property, and does not provide for enforcement out of a spouse's assets in the way that is permitted in some European legal systems. The interests of a spouse, who is not a joint debtor, in a bank account or in immovable property, will therefore be a factor that may limit or prevent enforcement out of that asset.

The following methods exist:

(I) *ENFORCEMENT PROCEDURES IN THE HIGH COURT:*

A. For payment of money

I. Issuing a writ of control for execution against goods, instructing an HCEO to seize (or now 'take control') of tangible movable assets. Most debt recovery actions take place in the County Court and the judgment is transferred up for enforcement.

II. Application for a third party debt order (e.g. where the judgment debtor has a bank account in credit)

III. Application for a charging order, stop order or stop notice

A "charging order" is a court order. Under s.3(4) of the Charging Orders Act 1979, it takes effect as an equitable charge on the legal estate of the debtor or on a beneficial interest under a trust of land. In the former case, a charge may be imposed on the following assets owned by a debtor:

(a) land,
(b) securities of any of the following kind:
    i. government stock,
    ii. stock of any body (other than a building society) incorporated within England and Wales,
    iii. stock of any body incorporated outside England and Wales or of any state or territory outside the United Kingdom, being stock registered in a register kept at any place within England and Wales,
    iv. units of any unit trust in respect of which a register of the unit holders is kept at any place within England and Wales, or
(c) funds in court.

A charge may also be imposed on assets held by a debtor under a trust, or in certain circumstances on a trustee.

A charging order that charges the legal estate may be protected by the entry of a notice (section 32 of the Land Registration Act 2002). A charging order that charges a beneficial interest under a trust of land cannot be protected by way of notice but can be protected by the entry of a restriction.[35]

Once a charging order has been obtained, it can act as security for the creditor in the case of any future sale of the asset, or it may be possible to obtain an order for sale. Section 93 of the TCEA 2007 allows a

[35] Land Registry Practice Guide 76. Land Registry Practice Guide 19 (7 October 2016): "A notice entered in the register in respect of a third party interest will protect its priority against that of a subsequent registrable disposition for value. A restriction, by preventing the registration of a subsequent registrable disposition for value, will prevent the priority of a third party interest from being postponed."

charging order to be granted even if the debtor is not in default of instalments, but the creditor cannot obtain an order for sale unless the debtor is in default of an instalment. The minimum financial threshold, below which the judgment creditor is not permitted to apply for an order for sale, has bee set at £1000 by the Charging Orders (Orders for Sale: Financial Thresholds) Regulations 2013, reg. 3. The court can assess the circumstances of the debtor to determine whether sale would be appropriate, particularly in the light of the needs of vulnerable adults and children, the level of equity in the property and the beneficial rights of third parties.

A "stop order" [36] means an order of the court prohibiting the taking, in respect of any of the securities specified in the order, of any of the following steps:

i. the registration of any transfer of the securities;
ii. in the case of funds in court, the transfer, sale, delivery out, payment or other dealing with the funds, or of the income thereon;
iii. the making of any payment by way of dividend, interest or otherwise in respect of the securities; and
iv. in the case of units of a unit trust, any acquisition of or other dealing with the units by any person or body exercising functions under the trust.

A "stop notice" is a notice requiring any person or body on whom it is duly served to refrain from taking any steps in respect of the securities specified in the notice without first notifying the person by whom, or on whose behalf, the notice was served.

IV. Appointing a 'receiver by way of equitable execution' is a rare form of enforcement that may be used only when other methods are unavailable.[37] A receiver may be appointed to receive future payments

[36] Charging Orders Act 1979, s.5(1) and (5)

[37] *Maclaine Watson and Co Ltd v International Tin Council* [1988] Ch.1. In fact the commonly used phrase 'equitable execution' is not technically correct. Cotton LJ noted in *In re Shephard* (1889) 43 Ch D 131 , 135 that what the judgment creditor 'gets by the appointment of a receiver is not execution, but equitable relief, which is granted on the ground that there is no remedy by execution at law; it is a taking

that are not covered by other forms of enforcement such as an attachment of earnings (e.g. rents accruing but not yet accrued). Since the appointment of a receiver is an equitable method of enforcement, the court has a discretion on whether to make the appointment or not and will do so only where it appears to be just and convenient, and where it will be effective.[38] The effect of such an appointment is not to create any charge or *in rem* right over the property. Instead it operates as an "injunction prohibiting the judgment debtor from receiving the income or dealing with the property to the prejudice of the judgment creditor".[39]

V. Issuing an application for committal (imprisonment) is available in very limited circumstances in case of a debt owed (maintenance; child support; certain taxes, premiums and benefits identified in Sch.4 of the Administration of Justice Act 1970).[40] However, it is also possible to seek the committal of a debtor for contempt of court, and this may apply where a debtor fails to co-operate with the court in the context of an Order to Obtain Information (CPR Part 71), or where the debtor fails to comply with a court order such as a freezing order or the appointment of a receiver.

VI. Issuing a writ of sequestration under CPR r.81.20. This is a drastic remedy for the enforcement of injunctions. Where a person is in contempt for disobeying a court order, and further refuses to comply, four sequestrators may be appointed to take control of the contemnor's property until the contempt is 'purged'. In practice, the use of this order is mainly confined to matrimonial cases.

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out of the way a hindrance which prevents execution at common law'. See also *Masri v Consolidated Contractors International UK Ltd and others (No 2)* [2008] EWCA Civ 303, per Lawrence Collins LJ at [53] ff.

[38] *Maclaine Watson and Co Ltd v International Tin Council* [1988] Ch.1. See further Allinson, *Enforcement of a Judgment* (12th ed Sweet & Maxwell 2016). There has been some recent growth in the use of receivers in international cases. See further below at 1.9.

[39] *Snell's Equity* (31st ed, Sweet & Maxwell 2005) paras 17-25, cited approvingly by Collins LJ in *Munib Masri v Consolidated Contractors International SAL, Consolidated Contractors (Oil & Gas) SAL* [2008] EWCA Civ 303 at para.52.

[40] For a discussion of the principles, see *Bhura v Bhura* [2012] EWHC 3633 (Fam)

B. In respect of land:

Issuing a writ of possession, which instructs a High Court Enforcement Officer (HCEO) to recover the property or land on behalf of the owner from tenants or trespassers. Most actions are started in the County Court and the judgment is transferred up for enforcement.

C. In respect of goods:

Issuing a writ of delivery of goods, which instructs and HCEO to recover specific goods, notably in cases of finance under a retention of title clause.

D. In respect of mandatory and prohibitory injunctions, or orders for specific performance:

CPR Part 70.2A(2) provides that "if a mandatory order, an injunction or a judgment or order for the specific performance of a contract is not complied with, the court may direct that the act required to be done may, so far as practicable, be done by another person",[41] which may include the person by whom the judgment was obtained, where appropriate. More generally, a failure to comply with a court order is a contempt of court, and attracts the sanction of committal proceedings or (in rare cases) a writ of sequestration.[42]

Insolvency. An application for insolvency, or the threat thereof, is also a common tool for dealing with commercial debtors and acquiring information regarding the debtors.

(II) ENFORCEMENT PROCEDURES IN THE COUNTY COURT

Methods of enforcement in the County Court are substantially similar to those in the High Court although there are certain differences. Enforcement by way of seizure of tangible movable property is under a 'warrant' rather than a 'writ'. The County Court can also issue 'warrants of possession' and 'warrants of delivery'. All other methods of enforcement available in the High Court are available in the County Court. The difference between the courts lies in their jurisdiction. If the sum being recovered is £5,000 or more, the High Court has exclusive jurisdiction (subject to an exception for judgments obtained under an agreement regulated by the Consumer Credit Act 1974, which must be brought in the County Court).

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[41] See also the Senior Courts Act 1981, s.39.

[42] A judgment or order for payment, for possession or delivery may be in the nature of an injunction if it requires the action to be undertaken before a certain date.

If the sum being recovered is less than £600, the County Court has exclusive jurisdiction. For sums in between, the creditor has a choice. Judgments in this range may be transferred between the High Court and the County Court at the creditor's option.

It is a widely-held view that High Court enforcement agents are more effective than those in the County Court, but the County Court has additional orders available to it.

An attachment of earnings order (AEO).[43] Attachment of wages was introduced by the Maintenance Orders Act 1958, to deal specifically with men who defaulted on their maintenance payments, and as a measure to reduce the use of committal orders (imprisonment).[44] The measure was controversial because of long standing opposition from trades unions and employers – notably arising out of trade union opposition to the various deductions from wages operated in the past by employers, which had been outlawed under a series of Truck Acts and the Wages Attachment Abolition Act 1870,[45] and employer reluctance to become embroiled in the domestic affairs of their workforce. The "inviolability of the wage packet" was a fundamental principle for almost a century.[46]

Despite assurances at the time of the passage of the Maintenance Orders Act to the contrary, the attachment of earnings was extended to create a general method of enforcement of judgment debts by the Attachment of Earnings Act 1971. In relation to civil debts, as distinct from maintenance orders, the power to attach earnings is restricted to the County Court.[47]

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[43] The High Court can make an Attachment of Earnings Order to secure payments due under a High Court maintenance order: Attachment of Earnings Act 1971 s.1(1). These are then transferred to the County Court for administration.

[44] See Hansard, HC Deb 12 December 1957 vol 579 cc1540-610.

[45] Intended to control abuses of the garnishment procedure that had been introduced by the Common Law Procedure Act 1954 (see above at 1.3)

[46] For the problems involved in extending garnishee proceedings to wages, see also *Holmes v Millage* [1893] 1 Q.B. 551 per Lindley LJ. Attachment of debt applied only in the case of debts that had already accrued. Wages accrued on the date they were paid.

[47] See above at fn 41.

Administration Orders. Under the County Courts Act 1984 (CCA), s.112, the County Court has power, of its own initiative or on the application of either the debtor or the creditor, to make an administration order in respect of a debtor's estate where the "debtor is unable to pay forthwith the amount of any debt owed by him". An administration order will make provision for the way that the debts of the debtor should be paid, "either in full or to such extent as appears practicable to the court under the circumstances of the case". Instalment payments are the typical payment mechanism. Conditions can be established as to the position on future earnings or income. The debtor notifies the court of any creditors who have a claim against him or her, and these are included in the schedule of creditors to whom payments will be made. During the time that the administration order is in place, those creditors cannot commence individual proceedings, or bankruptcy proceedings,[48] against the debtor.

An administration order lasts for three years, or such shorter time as is ordered by the court (CCA s.112(9))

[48] Subject to exceptions.

1.9 The principles underlying the enforcement procedure

As noted above at 1.3, the approach of English law is one of slow, pragmatic evolution, rather than the elaboration of a principled system. Nevertheless, the CPR introduce an 'overriding objective' for the whole procedural code:

> **"CPR Part 1.1**—(1) These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly.
>
> (2) Dealing with a case justly includes, so far as is practicable—
> (a) ensuring that the parties are on an equal footing;
> (b) saving expense;
> (c) dealing with the case in ways which are proportionate—
> (i) to the amount of money involved;
> (ii) to the importance of the case;
> (iii) to the complexity of the issues; and
> (iv) to the financial position of each party;
> (d) ensuring that it is dealt with expeditiously and fairly; and
> (e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases."

Thus, the overriding principle emphasises efficiency, fairness and proportionality. The protection of the debtor as a potentially weaker party is in principle a consideration – as demonstrated by the requirements that the parties should be put on an equal footing and that the approach taken should be proportionate to the financial position of each party. Nevertheless, the system of litigation is rather creditor friendly in practice and access to justice is increasingly perceived as a problem.[49] But the importance of other institutions in contributing to the protection of weaker parties, including vulnerable debtors, should not be overlooked.

[49] The Lord Chief Justice, Lord Thomas of Cwmgiedd, stated in his 2015 Annual Report (p.5): "Our system of justice has become unaffordable to most. In consequence there has been a considerable increase of litigants in person for whom our current court system is not really designed" (see https://www.judiciary.gov.uk/wp-content/uploads/2016/01/lcj_report_2015-final.pdf). The need for changes in the funding and accessibility of civil justice was also emphasised in the 2016 Annual Report

Regulators (such as the Financial Conduct Authority) and civil society organisations (for example debt advice charities) play a very significant role in protection, advice and contributions to policy making.

Territorial or personal jurisdiction: the international context. There is limited case law on enforcement at both the national and international level (much of the national case law being concerned with bailiff law). Cases on 'enforcement' in the international context are primarily concerned with the freezing of assets prior to the commencement of an action, during proceedings, or post-judgment, to facilitate enforcement known 'Mareva injunction' or 'freezing order' (CPR Part 25, and PD 25A).

These orders fall within the equitable jurisdiction of the court, with the consequence that they operate *in personam* rather than *in rem*. They do not attach property, but issue a command to the defendant – which is also binding on third parties who are aware of it. The grant of such an injunction therefore depends on the defendant being within the jurisdiction of the court, rather than on the location of assets that may ultimately be affected by such an injunction. The court[50] may therefore, in a suitable case, issue an order preventing the defendant from disposing of assets anywhere in the world. Worldwide freezing orders are readily made against defendants within the jurisdiction where there is cogent evidence of international fraud (*Mediterranean Shipping Co v OMG International Ltd* [2008] EWHC 2150 (Comm)).

If a freezing order is sought in aid of foreign proceedings, however, and the assets are not located in England or Wales, the order will be granted only if the respondent or the dispute has a sufficiently strong link with the jurisdiction, or if there is some other factor justifying the court's intervention (*Mobil Cerro Negro Ltd v Petroleos de Venezuela SA* [2008] 1 Lloyd's Rep 684). Thus, in *Banco Nacional de Comercio Exterior SNC v Empresa de Telecomunicaciones de Cuba SA* [2007] 2 All ER 1093 the court concluded that it was inexpedient to grant a worldwide order because the judgment debtor was outside the jurisdiction, the original judgment was granted in Italy, and although assets within England and Wales were covered by a domestic freezing

[50] Initially a freezing order could only be issued in the High Court. The County Court Remedies Regulations 2014 (SI 2014/982) have removed this restriction. Large scale freezing orders in international commercial cases, including worldwide freezing orders, nevertheless remain solely within the jurisdiction of the High Court (Commercial Court).

order, granting a worldwide order would be likely to give rise to disharmony and confusion.

The standard terms for a freezing order can be found in the Annex to PD 25A. They include the so called '*Babanaft* proviso', according to which the order will not affect third parties outside the jurisdiction until, and to the extent that, it has been declared enforceable, or is enforced, by a foreign court.

Similar principles apply in relation to receivers, who are appointed to enforce a judgment by way of equitable execution. In cases where other methods of enforcement are proving ineffective against an evasive debtor, the High Court has now on several occasions appointed a receiver to get in assets that are located in another jurisdiction.[51] Indeed, in *Cruz City 1 Mauritius Holdings v Unitech Ltd* [2014] EWHC 3131 the fact that the debtor's assets were located in a jurisdiction that would not recognise an English court order was one of the considerations prompting the appointment of a receiver. Since the order appointing the receiver was addressed to the debtor, failure to comply with the order and allow the receiver to get in the assets would be a contempt of court, with the result that the sanctions for contempt (ultimately imprisonment) would be an incentive for the debtor – if they came within the jurisdiction – to comply with the order.

The scope of the principle of territoriality in domestic cases is considered below at 1.12

1.10 Stage of 'permitting the enforcement' of a judgment

A judgment is in principle enforceable without the need to seek permission.[52] There are exceptions to this however. For example, if the taking control of goods procedure is used, a writ cannot be issued without the leave of the court if six years

[51] *Masri v Consolidated Contractors (No 2)* [2008] EWCA Civ 303; *Cruz City 1 Mauritius Holdings v Unitech Ltd* [2014] EWHC 3131; *JSC VTB Bank v Pavel Skurikhin & Others* [2015] EWHC 2131 (Comm).

[52] Although in principle judgments are immediately enforceable, in the case of a judgment or order for the payment of money – which is of course in practice by far the most common situation – the default position is that money should be paid at the expiration of 14 days from the date of the judgment or order (CPR Part 40.11) unless there is a date for payment specified in the judgment or order, or payment by instalments is ordered.

have elapsed since the judgment was obtained.[53] In addition, if an attachment of earnings order has been made in the County Court, no competing method of enforcement may be used without the leave of the County Court.[54]

Nevertheless, a comparison with other European legal systems is instructive. The stage of 'permitting enforcement' is closely linked to the range of enforcement titles recognised by a legal system. It seems that systems which make use of an independent enforcement agent[55] are likely to have a narrow range of enforcement titles – so that the agent is not faced with disputes as to enforceability (the permissibility of enforcement), whereas those in which the court is the enforcement institution may allow a wider range of titles to be brought into the enforcement process, since the enforcement court is a proper forum to deal with any disputes about enforceability. An example of this can be found in the treatment of arbitral awards. A domestic arbitral award is directly enforceable in Austria as an enforcement title under Art.1(16) of the Enforcement Code, whereas in France it is necessary to obtain exequatur of the award before it can be passed to a *huissier de justice*. Other jurisdictions in which enforcement is court-based may have a similarly expansive view of enforcement titles.[56]

Against this background, given that enforcement is not an entirely court based process in England and Wales, and that important methods of enforcement can be undertaken by HCEOs with limited court scrutiny,[57] it is not surprising that English law requires any settlement between the parties or decision of a body other than a court to be recognised in a judgment or order, or at least to certified as filed with the court, as a precursor to enforcement.

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[53] CPR, Part 83.2. See further Allinson, *op.cit.*at 3-03.
[54] Attachment of Earnings Act 1971, s.8(2)(b). See further Allinson, *op.cit.* at 3-03.
[55] Whether a liberal professional like the French *huissier de justice* or a civil servant such as the German *Gerichtsvollzieher*.
[56] See for example art.517 of the Spanish *Ley de Enjuiciamiento Civil*
[57] See above at 1.3(i), 1.4 and 1.6.

For example, an employment tribunal award may be enforced without the permission of the court to proceed, but still needs to be 'clothed' with a court order.[58] Similarly, an arbitral award usually requires an order granting enforcement.[59] See further below at 1.15.

1.11 Subject-matter jurisdiction in enforcement proceedings

See above at 1.6 for the High Court and County Court, and below at 4.2.2 for the appeals system.

1.12 Territorial jurisdiction in enforcement proceedings

As noted above, the system of courts in England and Wales works in two tiers, but each covers the whole of the national territory. Cases are therefore brought either in the High Court or the County Court, and within each system there are local centres at which proceedings may take place (County Court hearing centres, and High Court district registries). The Court that handed down the judgment has jurisdiction to enforce it, but judgments may be transferred between tiers (e.g. a High Court judgment may be transferred down to the County Court since only the latter has jurisdiction to issue an Attachment of Earnings Order). Within the County Court, judgments may be transferred between hearing centres – thus a judgment handed down in one hearing centre may be enforced in another. For most enforcement actions in the County Court, the relevant procedures should take place in the hearing centre for the place where the debtor resides or carries on business, and so a judgment may need to be transferred to that centre.[60] Enforcement out of the High Court is primarily focused in London.

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[58] Via Court Form 322B.

[59] Ss.66, 99 and 101 of the Arbitration Act 1996; CPR Part 62. Note that for the purposes of enforcement of foreign judgments, the Administration of Justice Act 1920, s.12(1), states that "[t]he expression "judgment" means any judgment or order given or made by a court in any civil proceedings, whether before or after the passing of this Act, whereby any sum of money is made payable, and includes an award in proceedings on an arbitration if the award has, in pursuance of the law in force in the place where it was made, become enforceable in the same manner as a judgment given by a court in that place."

[60] Allinson, *Enforcement of a Judgment* (12th ed, Sweet & Maxwell 2016) 5-03.

Theoretically the court remains at the centre of enforcement, but, as noted above at 1.6, in practice the system is largely privatised because of the importance of seizure of goods as a method of enforcement, and the major role played by private enforcement agents in the seizure of goods. In that context, recent developments in English law have both encouraged and regulated competition between enforcement agents.

As also noted above at 1.6, there has been a significant restructuring of the territorial competence of civil enforcement agents under the Courts Act 2003. HCEOs can be appointed to multiple districts, and there are now a small number of HCEO-led enforcement businesses, which can compete nationally.

There was already competition among 'private bailiffs' (CEAs) who enforced public debts (council tax, parking penalties, magistrates' courts fines etc) – but this competition was cut-throat and led to unethical behaviour for various reasons including notably the lack of clear legal regulation, and adverse financial incentives. Legal reforms described in Section 1.2 have sought to unify the law on seizure of goods for HCEOs, County Court bailiffs and certified enforcement agents; establish a code of practice; and introduce a fee structure which provides appropriate incentives for fair competition. The reforms are currently under review by the Ministry of Justice to determine how effective they have been.

1.13 Conditional claims

It is possible for an order to be made recognising the mutuality of obligations between the parties. A court may issue an injunction recognising that mutuality,[61] but in practice where both parties need to assume responsibilities in order for the dispute to be resolved, this will be achieved via a compromise agreement, a consent order embodying the undertakings entered into by the parties, or a Tomlin Order. These are explained further below at 1.15.

Conditional compromises are common in employment cases, particularly given that an initial conciliation attempt is compulsory prior to employment tribunal proceedings.[62] Provision is made for a conditional compromise to be enforced in

[61] See e.g. *Sunrise Brokers LLP v Rodgers* [2014] EWHC 2633 (QB)
[62] Employment Tribunal Act 1996, s.18A

the same way as a court order under CPR rule 70.5(1), if it includes a payment of a sum of money and it requires no action by the creditor other than to discontinue or not start proceedings. If, however, any other action is required from the creditor, the permission of the court is necessary before enforcement of the money claim by the creditor can proceed.[63]

1.14 Legal succession after the enforcement title has been obtained

The personal representatives of a **deceased** with a solvent estate are under an obligation to pay any debts owed by the estate with due diligence having regard to the assets in their hands that are properly applicable for that purpose and all the circumstances of the case.[64]

As to the position of personal representatives where enforcement measures are required, the Civil Procedure Rules contain specific rules for writs and warrants of execution. Thus, as far as writs and warrants of control, or warrants of delivery or possession are concerned, under CPR r.83.2(3)(b) a writ or warrant must not be issued without the permission of the court "where any change has taken place, whether by death or otherwise, in the parties (i) entitled to enforce the judgment or order; or (ii) liable to have it enforced against them". Similarly, under r.83(2)(3)(c) permission is required if the judgment or order is against the assets of a deceased person coming into the hands of that person's executors or administrators after the date of the judgment or order, and it is sought to issue execution against such assets. The application is made without notice to the other party.

No similar rule exists for other methods of enforcement, but the distinction between writs and warrants of execution, and methods of court that necessarily require a court hearing (third party debt order, attachment of earnings, charging order etc) should be borne in mind.[65] Since no court hearing is required for the issue of a writ or warrant, a specific application for permission to issue a writ or warrant is needed to bring the matter of the legal succession before the court. In the case of other

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[63] Employment Tribunal Act 1996, s.19A(3)-(6). See further below at 1.15.
[64] Administration of Estates Act 1925, ss.32-24 and Part II of Sch.1; *Re Tankard* [1941] 3 All ER 458. See further *Snell's Equity* (33rd ed, Sweet & Maxell 2015), Ch 32.
[65] See above at 1.3(i), 1.4 and 1.6.

methods of enforcement, the status of the personal representatives will be drawn to the attention of the court as part of any application for enforcement.

The **assignment** of part of a judgment does not amount to a change in the parties, to enable the assignee to issue execution. The assignee of a judgment debt must apply for leave to issue execution by writ or warrant under CPR Part 83.2(3)(b), but does not need to obtain an order adding him as a party under CPR Part 19.2.

Where a claim or cause of action has been assigned, the question of the status of the assignee in enforcement proceedings will be dependent on the construction of the assignment documentation. In *Adedeji and another v Patahania* [2015] EWHC 1434 (Ch), an assignment of the cause of action against the defendant took place after judgment and charging orders had been obtained. The assignee applied for orders for sale to enforce the charging orders and the High Court held that this enforcement action was covered by the assignment, even though the wording was somewhat restrictive. Nugee J noted that the modern approach to construction of documents was to try to give practical effect to them so far as possible. The benefit of the judgment was the content of the assigned cause of action. Further, "the effect of assigning … the benefit of the judgment and such right, title or interest as the assignor might have in or to the judgment … included the steps which had already been taken to seek to turn the judgment into money by way of enforcement, and so by way of the charging order."[66]

1.15 Enforcement titles

As is typical of the approach English law, there is no clear enumeration of enforcement titles. Indeed, there is no formal recognition of a category of enforcement title, or clear distinction between an enforcement title and an order permitting enforcement. These analytical categories do not feature in (mainly practitioner) texts on enforcement. Nevertheless, whether characterised as an enforcement title or an order permitting enforcement, a judgment or order is necessary in order to proceed to enforcement.

A judgment or order may be drawn up by the court, but alternatives are common. In fact, in the High Court Queen's Bench Division, the Technology and

[66] At para.14.

Construction Court and the Commercial Court, orders are always drawn up by the parties, and the court may ask the parties to draw up an order in other cases (or they may request permission to do so).[67] There are a variety of prescribed forms for judgments and orders to assist in this process.[68] Judgment is entered when the order giving effect to the judgment is drawn up and sealed. It is the inclusion of the seal in the printed judgment or order that indicates that it is final and enforceable.

In addition, it is rare for a claim to go all the way to trial, and very common for the parties to agree terms of settlement, which can then be recorded.[69] The parties may simply agree on immediate payment of the agreed sum with costs, but it is likely that their agreement will be more complex. In *Green* v *Rozen* ([1955] 2 All ER 796), Slade J lists a number of possibilities that are encountered (the following list is taken from Sime, who adds points of clarification):

> "(a) Where a claim is settled on terms as to the payment of money, judgment may be entered for the agreed sum, subject to a stay of execution pending payment of stated instalments. If the instalments fall into arrears, the stay will be lifted, and the judgment creditor can immediately take enforcement proceedings.
> (b) A consent order may be drawn up embodying the undertakings of both parties in a series of numbered paragraphs. If any of the terms are not complied with, enforcement may be possible immediately or on application to the court depending on the nature of the term in question.

[67] See Stuart Sime, *A Practical Approach to Civil Procedure* (19th ed. OUP 2016) 460 for further variations.
[68] See CPR Part 4.
[69] Judicial approval may be required before the consent order is entered, but CPR 40.6 allows certain types of consent orders to be entered by a purely administrative process.

(c) The agreement may be recorded in a Tomlin order. A Tomlin order has the effect of staying the claim save for the purpose of carrying the term set out in a schedule to the order into effect.[70]

(d) A consent order may be drawn up staying all further proceedings upon the agreed terms. If the agreement is reached immediately before the hearing its terms will usually be endorsed on counsel's briefs and the court will be asked to make a consent order in those terms. Unlike with Tomlin orders, the courts are very unwilling to remove the stay imposed by such orders, so enforcement can usually be effected only by bringing fresh proceedings for breach of the contract embodied in the compromise.

(e) The court may merely be informed merely that the case has been settled upon terms endorsed on counsel's briefs. This is the most informal way of compromising a claim. Its effect is to supersede the existing claim with the compromise. Any breach can only be enforced by issuing fresh proceedings."[71]

[70] Tomlin Orders are sought where the nature of the responsibilities undertaken by the parties is such that it could not be formulated as a court order, and/or where the parties want to ensure the confidentiality of the terms of their settlement. In such a case, the court orders the stay of the proceedings "except for the purpose of carrying the terms of the agreement into effect and for that purpose the parties have permission to apply [without the need to issue fresh proceedings]" (this form of order is taken from the Chancery Guide). The agreement is contained in a schedule. This may be attached to the order, but it may be confidential and can be retained by the parties' solicitors without any inspection by the court (provided that it is adequately identified in case of further dispute). The advantage of such an order is thus that the original proceedings may be resumed in the case of breach of the order, rather than it being necessary to start new proceedings.

[71] Stuart Sime, *A Practical Approach to Civil Procedure* (19th ed OUP 2016) 453-4.

CPR Part 70.5 provides for the enforcement of decisions of bodies other than the High Court and the County Court and compromises enforceable by enactment. The rule applies

> "where an enactment provides that
> (a) a decision of a court, tribunal, body or person other than the High Court or the County Court; or
> (b) a compromise,
>
> may be enforced as if it were a court order or that any sum of money payable under that decision or compromise may be recoverable as if payable under a court order".[72]

The rules go on to deal with enactments that require registration of a decision before enforcement is available, or that require an order permitting the creditor to proceed to enforcement. These rules are intended to deal, in particular, with decisions of tribunals established by statute (notably, in the civil law context, decisions of employment tribunals).[73] [74] An application for a court order is made under the procedure in CPR Part 70.5 and PD 70. Depending on the relevant enactment, the order may be issued by a court officer or may need judicial scrutiny. Even where no permission as such is required, an application for an order to allow enforcement is a necessary precursor to enforcement (Form N322B).

A court order of some form is therefore almost invariably necessary before enforcement commences, but the level of scrutiny, and of judicial involvement, will vary with the nature of the decision.

Arbitral awards require leave from a court before they can be enforced – and this results in a judgment being entered in terms of the award.[75]

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[72] CPR Part 70.5(1)
[73] For a description of the tribunal system under English law, see e.g. E Jacobs, *Tribunal Practice and Procedure* (4th ed Legal Action Group 2016).
[74] See, for example, CPR 70.5(4A), which deals specifically with the enforcement of a conditional compromise (see above at 1.13)
[75] Arbitration Act 1996, s.66(1)-(2).

Substitutes for a wider range of enforcement titles. Although English civil law does not recognise the range of enforceable instruments recognised in many civil law jurisdictions, and, in particular, the authentic instrument witnessed by a notary, it does provide a streamlined system for obtaining an enforceable judgment. The merits of a case are not examined unless it proceeds to trial: there is no mandatory requirement for a hearing, or for a judge to give reasons for the decision. Default judgments are thus issued under a purely administrative procedure. In 2016 1,802,286 claims were commenced, but only 284,315 were defended and only 52,926 actually went to trial.[76] The vast majority of claims thus ended in a default judgment, and many of the remainder settled before trial.

Ease of obtaining a default judgment is balanced by the fact that it is relatively easy to have a judgment set aside if the criteria for entering judgments are not satisfied, and notably if a defendant has not received notice of the proceedings.[77] The court also has discretion to set aside a judgment if the defendant has a real prospect of successfully defending the claim, or if it appears to the court that there is some other good reason why the judgment should be set aside or varied or the defendant should be allowed to defend the claim.[78] For further details on setting aside see below at 4.2.

Furthermore, if a defendant does put in a weak defence to an action as a delaying tactic, the CPR provide ways of tackling this. Under CPR Part 3.4, the court can strike out a hopeless defence, or one which is seen as an abuse of process. In addition, if a defence – even if not meeting the criteria for striking out - can be shown to have no reasonable prospect of success, the claimant can apply for summary judgment under CPR Part 24.[79]

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[76] See Ministry of Justice, *Civil Justice Statistics Quarterly January to March 2017, and The Royal Courts of Justice 2016* (1 June 2017) The Royal Courts of Justice Tables: 2016, available at <https://www.gov.uk/government/statistics/civil-justice-statistics-quarterly-january-to-march-2017> accessed 26 February 2018

[77] CPR Part 13.2. This is subject to the question whether the defendant should have notified the claimant of a change of address and has failed to do so.

[78] CPR Part 13.3. In such circumstances, a defendant must act promptly once the grounds for setting aside have become known: CPR Part 13.3(2)

[79] Summary judgment is not limited to cases in which a defence has no reasonable prospect of success. An application may also be made by a defendant who is faced with a weak claim.

Specifically in the context of landlord and tenant agreements, where authentic instruments typically play an important role in civil law jurisdictions, a statutory enforcement regime exists: Commercial Rent Arrears Recovery (CRAR).[80] This was brought into force in 2014, replacing a common law procedure known as distress for rent. CRAR allows the landlord to employ a certificated enforcement agent (see above at 1.6) to seize assets at the rented property in the case of non-payment of rent. The remedy is now limited to purely commercial leases. It gives greater protection to tenants than was the case with distress for rent, particularly in relation to the requirement of notice. The landlord can proceed to enforcement without a court order where there is net unpaid rent equal to seven days rent, but seven clear days' notice must be given before enforcement.

1.16 Requirements for issuing the certificate confirming enforceability of a judgment

The foregoing section has considered the extent to which an enforcement title must be a court order. When a judgment or order is issued, confirmation that it is a final enforcement title is provided by a court seal.

1.17 Service/notifications of documents and decisions

Service in England and Wales is regulated by the Civil Procedure Rules (CPR), which provide a single point of reference for High Court and County Court procedures. The procedures are nevertheless not entirely harmonised. In the past, almost all cases with an international element would have been heard in the High Court. Extension of the jurisdiction of the County Courts means that there is a greater likelihood that international cases may now also be heard in the County Courts.

The CPR are supplemented by Practice Directions (PD). Service of documents other than the claim form is regulated by CPR Part 6.20 ff.

Responsibility for service of court documents. Under CPR Part 6.21, the usual position is that a party to proceedings will serve the document which that party has

[80] Tribunals, Courts and Enforcement Act 2007, ss.71-87 and Taking Control of Goods Regulations 2013.

prepared, and the court will serve a document which it has prepared. There are exceptions to this – such as where a rule or practice direction provides otherwise in a particular context, or where the court orders otherwise.

Methods of service. No hierarchy of methods of service exists as such. The rules distinguish between situations when service must be effected in a particular way, or at a particular place, and those in which there is a choice of method and place.

The emphasis of the CPR is on the steps to be taken by the claimant, and not actual receipt by the defendant.

1. Personal service

Personal service on an individual means leaving the claim form with that individual – it involves physical delivery. For a corporation, personal service is effected on a person holding a senior position in that corporation (see PD 6A for details). For a partnership, personal service can be on a partner or a person who at the time of service has the control or management of the partnership business at its principal place of business. There are no particular qualifications required to be a process server. Enforcement businesses often offer process serving services.

CPR Part 6.22 provides that a document must be served personally where 'required by another Part, any other enactment, a practice direction or a court order'. Personal service is required in relation to procedures immediately affecting the addressee's person or property:

Eg.

A. the service of a statutory demand for payment prior to the commencement of personal insolvency proceedings (PD – Insolvency Proceedings 13.2)
B. service on a judgment debtor of an order to attend court to provide information (CPR 71.3)
C. service of a judgment summons in proceedings for committal in order to enforce a judgment (FPR 33.13).

In other situations, a document may be served personally, but with some important exceptions and notably where the person to be served has given an address for service as required by CPR Part 6.23.

2. Requirement of an address for service

CPR Part 6.23 requires a party to proceedings to give an address at which that party may be served with documents relating to those proceedings. If a lawyer is acting for the party, the address should be the lawyer's place of business within the UK or another EEA state. In other cases, it should be an address within the EEA at which the party resides or carries on business.[81]

3. Methods of service other than personal service

Under CPR Part 20.1(b)-(e), a document may be served by first class post, document exchange or other method which provides for delivery on the next business day; it may be left by a process server at the address given for service; or it may be served by fax or other means of electronic communication.[82] These methods of service are further elaborated in PD 6A.

According to PD 6A.4(1), where a document is to be served by fax or other electronic this means –

> "(1) the party who is to be served or the solicitor acting for that party must previously have indicated in writing to the party serving –
>
> (a) that the party to be served or the solicitor is willing to accept service by fax or other electronic means; and
>
> (b) the fax number, e-mail address or other electronic identification to which it must be sent; and
>
> (2) the following are to be taken as sufficient written indications for the purposes of paragraph 4.1(1) –

[81] If a party does not reside or carry on business in the EEA, and has no lawyer there, the party must provide an address for service in the UK (CPR Part 6.23(3))

[82] In this situation the fax number must be at the address for service, and an email address or other electronic identification given by a party will be deemed to be at the address for service (CPR Part 6.23(5) and (6)).

> (a) a fax number set out on the writing paper of the solicitor acting for the party to be served;
> (b) an e-mail address set out on the writing paper of the solicitor acting for the party to be served but only where it is stated that the e-mail address may be used for service; or
> (c) a fax number, e-mail address or electronic identification set out on a statement of case or a response to a claim filed with the court."

Additional methods of service are available in relation to a company or a limited liability partnership, i.e. any method of service permitted under the Companies Act 2006 (in the case of LLPs modified rules apply)

Two final possibilities exist. When there is 'good reason' to do so, the court may authorise a method of service under CPR Part 6.27 (see further below), or under CPR Part 6.28 it may dispense with service.

Alternative service (CPR Part 6.27). The same rules apply both for service of a claim form and other documents, and so CPR Part 6.27 refers back to Part 6.15 – the equivalent provision in relation to a claim form.

The court has a considerable discretion. Where it appears to the court that there is a good reason to authorise alternative service, it may "make an order permitting service by an alternative method or at an alternative place". Furthermore, it can validate retrospectively the actions of the claimant. Under CPR 6.15(2) it "may order that steps already taken to bring the claim form to the attention of the defendant by an alternative method or at an alternative place is good service".

Time/Place of service.

1. ***Time:*** There is no regulation of the hours at which service may be effected, but the relative unimportance of personal service, and the deeming provisions identified below mean that service can be effected at any time.
2. ***Deeming provisions:*** CPR Part 6.26 provides that a document, other than a claim form, served within the UK in accordance with the CPR or any relevant practice direction is deemed to be served on the day shown in an attached table. The basic principles in the table are:

- for immediate methods of service, service of deemed to have taken place on the day that the last step in effecting service was undertaken (delivery, fax transmission, email sent), provided that it occurred before 4.30pm. Otherwise, service is deemed to have taken place on the next business day.
- for slower methods of service (post, document exchange), service is deemed to have taken place on the second day after the last such step was taken (posting, delivery to document exchange etc), provided that day is a business day. Otherwise, it is the next business day after that day.

Consequences of defective service and cure. Defects in procedure are governed by CPR 3.10 which provides:

> **"**Where there has been an error of procedure such as a failure to comply with a rule or practice direction –
> (a) the error does not invalidate any step taken in the proceedings unless the court so orders; and
> (b) the court may make an order to remedy the error."

English courts have traditionally taken a liberal approach to the cure of defective service where there is evidence that the defendant had actual notice of the document served (in practice typically a claim form) – and this is true both in domestic cases and in the case of service abroad. For the use of CPR Part 3.10 in cross-border cases see e.g. *Philips v Nussberger* [2008] 1 WLR 180 (HL) and *Integral Petroleum SA v SCU-Finanz AG* [2014] EWHC 702 (Comm). In the latter case Popplewell J stated: "CPR 3.10 is to be construed as of wide effect so as to be available to be used beneficially wherever the defect has had no prejudicial effect on the other party".

1.18 Division between enforcement and protective measures

There is a clear distinction in English law between measures that are adopted to freeze assets as a stage in the enforcement procedure and provisional measures granted to secure future enforcement.

1.18.1 Available provisional measures

The CPR include Part 25 on Interim Remedies and Security for Costs. The remedies there enumerated may be sought at any time, including before the start of proceedings and after judgment has been given (CPR Part 25.2(1)). Those relevant to enforcement include:

> "(a) an interim injunction;
> (b) an interim declaration;
> (c) an order –
>
> (i) for the detention, custody or preservation of relevant property;
>
> …
>
> (v) for the sale of relevant property which is of a perishable nature or which for any other good reason it is desirable to sell quickly; and
>
> (vi) for the payment of income from relevant property until a claim is decided;
>
> (d) an order authorising a person to enter any land or building in the possession of a party to the proceedings for the purposes of carrying out an order under sub-paragraph (c);
> (e) an order under section 4 of the Torts (Interference with Goods) Act 19771 to deliver up goods;
> (f) an order (referred to as a 'freezing injunction') –
>
> (i) restraining a party from removing from the jurisdiction assets located there; or
>
> (ii) restraining a party from dealing with any assets whether located within the jurisdiction or not;
>
> (g) an order directing a party to provide information about the location of relevant property or assets or to provide information about relevant

> property or assets which are or may be the subject of an application for a freezing injunction;
> …
> (k) an order for interim payment by a defendant of any damages, debt or other sum (except costs) which the court may hold the defendant liable to pay;
> (l) an order for a specified fund to be paid into court or otherwise secured, where there is a dispute over a party's right to the fund;
> (m) an order permitting a party seeking to recover personal property to pay money into court pending the outcome of the proceedings and directing that, if he does so, the property shall be given up to him;
> (n) an order directing a party to prepare and file accounts relating to the dispute;
> (o) an order directing any account to be taken or inquiry to be made by the court; and
> (p) an order under Article 9 of Council Directive (EC) 2004/48 on the enforcement of intellectual property rights (order in intellectual property proceedings making the continuation of an alleged infringement subject to the lodging of guarantees)."

Although lengthy, this list of remedies is not exclusive. CPR Part 25.1(3) makes clear that the fact that a particular kind of interim remedy is not listed in paragraph (1) does not affect limit the power of the court to grant that remedy in common law as part of its 'inherent jurisdiction' to hear any matter that comes before it unless Parliament has specifically limited its authority by statute.[83] The "general power of the Court to control its own procedure so as to prevent its being used to achieve injustice"[84] has been used by the Court to fashion a variety of orders.

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[83] N Andrews states that "[i]n modern times, the inherent jurisdiction is best regarded as a residual source of autonomous control which the courts exercise over their own process, and they can use to supplement the statutory procedural framework" ("The New English Civil Procedure Rules (1998)" in CH van Rhee (ed) *European Traditions in Civil Procedure*. 161-181 at 165). See further JHH Jacob, "The Inherent Jurisdiction of the Court" (1970) 23 Current Legal Problems 23 and M Dockray, "The Inherent Jurisdiction to Regulate Civil Proceedings," (1997) 113 Law Quarterly Review 120.

[84] *Bremer Vulkan Schiffbau und Maschinenfabrik v South India Shipping Company Ltd* [1981] AC 909 per Lord Diplock

The Senior Courts Act 1981 s.37 states that the High Court may by order, whether interlocutory or final, grant an injunction in all cases in which it appears to the court to be just and convenient to do so. Any such order may be made either unconditionally or on such terms and conditions as the court thinks just.

Where the court has *in personam* jurisdiction over the person against whom an injunction, whether interlocutory or final, is sought, the court has jurisdiction to grant it (*Fourie v Le Roux* [2007] UKHL 1).

1.18.2 Stringency of requirements for obtaining a protective measure

CPR Part 25.2 (b) specifies that the court may grant an interim remedy before a claim has been made only if –

(i) the matter is urgent; or
(ii) it is otherwise desirable to do so in the interests of justice.

The application should be made in the court in which the substantive claim is likely to be brought 'unless there is good reason to make the application to a different court' (CPR 23.2(4)). A particularly urgent application for an injunction may involve an interruption of the other business of the court, and a duty judge may hear out-of-hours applications by telephone if the applicant is acting through a legal representative (PD 25A paras.4.2 and 4.5(5)). A draft of the order sought will usually be attached the application.

Since urgent applications will generally be made without notice to the other party, and with some relaxation of the normal requirements as to evidence, various undertakings are built into the order to protect the position of that party, and the applicant is expected to commence a claim as soon as possible – ideally serving the claim form at the same time as the interim injunction (PD 25A, para.4.4(2)).

The **basic requirements for grant of an injunction** include the need for a 'serious question to be tried' on the merits, the fact that damages will not provide an adequate remedy for the applicant, and a finding that the balance of convenience is in favour of granting the injunction: *American Cyanamid Co v Ethicon Ltd* [1975] AC 396. In general, there is a preference for maintaining the status quo if the factors seem to be

evenly balanced. The applicant for an interim injunction is almost always required to give an undertaking to compensate the respondent for any loss caused by the injunction if it later appears that it was wrongly granted (PD 25A, para.5.1 and 2). The importance of this undertaking is emphasised by a recent case in which the undertaking was enforced in the context of a freezing injunction (see immediately below) for an amount exceeding $70 million (*SCF Tankers Ltd (Formerly Fiona Trust and Holding Corp) v Privalov* [2017] EWCA Civ 1877).

Freezing injunctions (formerly known as *Mareva* injunctions) may be of particular interest in this context (CPR r. 25.1(1)(f)).[85] The order restrains a party from removing assets located within the jurisdiction out of the country, or from dealing with assets whether they are located within the jurisdiction or not. It does not, however, give the claimant any security[86] or any priority in relation to other creditors. Given the risk against which protection is sought, an application for a freezing injunction will be made without notice to the defendant, and before service of the claim form. A draft claim form (or the equivalent document in relating to overseas proceedings) must nevertheless be produced so that the court can identify the substantive claim. The application must be supported by evidence in the form of a sworn statement, with supporting documentation, and must give "full and frank disclosure" of all material facts – including those that are not in the applicant's favour.

The jurisdiction of the High Court to grant a freezing injunction is part of its inherent jurisdiction,[87] clarified in the Senior Courts Act 1981, s.37 which states that:

> (1) The High Court may by order (whether interlocutory or final) grant an injunction or appoint a receiver in all cases in which it appears to the court to be just and convenient to do so.
> (2) Any such order may be made either unconditionally or on such terms and conditions as the court thinks just.

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[85] For a comparison of freezing injunctions with French *mesures conservatoires*, see A-M Brunet, "Mesures conservatoires et freezing injunctions : deux institutions similaires?" Les blogs pédagogiques de l'Université Paris Nanterre, 6 July 2015: available at <http://blogs.u-paris10.fr/content/mesures-conservatoires-et-freezing-injunctions-deux-institutions-similaires-par-anne-marguer> accessed 28 February 2018.
[86] *UCB Home Loans Corporation Ltd v Grace* [2011] EWHC 851 (Ch), March 22, 2011, unrep.
[87] See *Fourie v Le Roux* [2007] 1 WLR 320 per Lord Scott of Foscote at [25].

> (3) The power of the High Court under subsection (1) to grant an interlocutory injunction restraining a party to any proceedings from removing from the jurisdiction of the High Court, or otherwise dealing with, assets located within that jurisdiction shall be exercisable in cases where that party is, as well as in cases where he is not, domiciled, resident or present within that jurisdiction.

Jurisdiction has recently also been conferred on County Court judges to issue freezing injunctions.[88]

For a freezing injunction to be granted there must normally be:

1. **A cause of action justiciable in England and Wales**.
   It is not necessary for the substantive claim to be brought in England and Wales, provided that a case for substantive relief has been formulated (Civil Jurisdiction and Judgments Act 1982, s.25, as extended by the Civil Jurisdiction and Judgments Act 1982 (Interim Relief) Order 1997.[89,90]
2. **A good arguable case:** *Ninemia Maritime Corporation v Trave Schiffahrtsgesellschaft mbH & Co KG* [1983] 1 WLR 1412 per Mustill J.
   The merits of the claim must be arguable to a standard higher than the 'serious question to be tried' standard applicable to interim injunctions in general, discussed above in this section.[91]

3. **Assets of the defendant within the jurisdiction**
   The term "assets" has no restrictions placed on its meaning, and it includes ships and aircraft, chattels such as motor vehicles, jewellery, objets d'art, and other valuables as well as choses in action: *C.B.S. (UK) Ltd v Lambert* [1983] Ch. 37 (but cf below the possibility of granting an order that includes assets located abroad).

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[88] Jurisdiction to grant such injunctions was restricted to the High Court by the County Court Remedies Regulations 1991 (SI 1991/1222), but this restriction was removed by the County Court Remedies Regulations 2014 (SI 2014/982).
[89] SI 1997/302.
[90] For clarification see *Fourie v Le Roux* [2007] 1 WLR 320
[91] In *Metropolitan Housing Trust Ltd v Taylor* [2015] EWHC 2897 (Ch), October 19, 2015, unrep., Warren J stated that the test of good arguable case in relation to a freezing order was not the same as for summary judgment/strike out, and that "a stronger case must be shown than would justify relief of a less stringent kind".

4. **A real risk of dissipation of those assets before judgment can be enforced.**

   A claimant will demonstrate a sufficient "risk of dissipation" if it can show that "(i) there is a real risk that a judgment or award will go unsatisfied, in the sense of a real risk that, unless restrained by injunction, the defendant will dissipate or dispose of his assets other than in the ordinary course of business, … or (ii) that unless the defendant is restrained, assets are likely to be dealt with in such a way as to make enforcement of any award or judgment more difficult, unless those dealings can be justified for normal and proper business purposes": *Congentra AG v Sixteen Thirteen Marine SA* [2008] EWHC 1615 (Comm) per Flaux J at [49].

   Exceptions can be included within the freezing injunction – whether in the initial order or on the defendant's application – to enable him to continue to run a business, to paying living and other routine expenses, meet unexpected bills (e.g. medical costs), and pay legal expenses incurred by the action.

The position of third parties is particularly important in the context of a freezing order, since the assets of the defendant will often be held by an innocent third party (e.g. a bank). In such a case, the effectiveness of the order will depend on being able to restrain the actions of the third party. The applicant is required to give third parties notice of the injunction and to notify them of their right to seek to vary it: *Guinness Peat Aviation (Belgium) N.V. v Hispania Lineas Aereas SA* [1992] 1 Lloyd's Rep. 190. The rights of such third parties will be taken into account in deciding whether or not to grant a freezing order, and the order will specify as precisely as possible the obligations placed on that party.

A third party is bound by the terms of the injunction as soon as he has notice of it, even though the defendant himself has not yet been served and does not know that the order has been made. The third party must do what he reasonably can to preserve the assets otherwise he will be guilty of contempt of court as an act of interference with the course of justice: *Z Ltd v A-Z and AA-LL* [1982]1 Q.B. 558; sub nom.*Z. Ltd v A.* [1982] 1 All E.R. 556, CA, which also provides guidance on the way in which a freezing order may apply to banking operations. The third party does not, however, assume any responsibility towards the applicant.

As a term of a freezing injunction, the applicant may be obliged to undertake to indemnify any third party affected by the order against all expenses reasonably incurred in complying with the order.

In some situations, a third party may be added as a defendant in the proceedings. In *TSB Private Bank International SA v Chabra* [1992] 1 W.L.R. 231 Mummery J held that, where the defendant is restrained from disposing of the assets of a company, the court has jurisdiction of its own motion to join the company (in effect, a third party) as a second defendant and to grant a freezing injunction against it, even though there is no cause of action against the company. This jurisdiction was further refined by Flaux J in *Linsen International Ltd v Humpuss Sea Transport Pte Ltd* [2011] EWHC 2339 (Comm). It arises when: (1) a third party against whom there is no cause of action is in possession of assets beneficially owned by the defendant; (2) the latter can be shown to have substantial control over the former's assets; and (3) there is good reason to suppose either (i) that the defendant can be compelled (through some process of enforcement) to cause the assets held by the third party to be used to satisfy the judgment; or (ii) that there is some other process of enforcement by which the claimant can obtain recourse to the assets held by the third party. [150] and [152]

Extraterritorial effect of freezing orders. The court also has jurisdiction to grant a freezing injunction restraining a party from dealing with his assets located abroad (*Babanaft International Co SA v Bassatne* [1990] 1 Ch. 13; *Republic of Haiti v Duvalier* [1990] 1 Q.B. 202). Such an order is described as a "worldwide" freezing injunction. From the perspective of English law, this does not interfere with the jurisdiction of a foreign court, since the injunction operates *in personam*. See further above at 1.9.

If a worldwide freezing order is granted it may not be enforced without the permission of the court. In *Dadourian Group International Inc v Simms (Practice Note)* [2006] EWCA Civ 399, the Court of Appeal provided guidelines to be applied where a party applies to the court for such permission:

1. The principle applying to the grant of permission to enforce a worldwide freezing order abroad is that the grant of that permission should be just and convenient for the purpose of ensuring the effectiveness of the worldwide freezing order, and in addition that it is not oppressive to the parties to the English proceedings or to third parties who may be joined to the foreign proceedings.
2. All the relevant circumstances and options need to be considered. In particular, consideration should be given to granting relief on terms, for example terms as to the extension to third parties of the undertaking to compensate for costs incurred as a result of the worldwide freezing order and as to the type of proceedings that may be commenced abroad. Consideration should also be given to the proportionality of the steps proposed to be taken abroad, and in addition to the form of any order.
3. The interests of the applicant should be balanced against the interests of the other parties to the proceedings and any new party likely to be joined to the foreign proceedings.
4. Permission should not normally be given in terms that would enable the applicant to obtain relief in the foreign proceedings which is superior to the relief given by the worldwide freezing order.
5. The evidence in support of the application for permission should contain all the information (so far as it can reasonably be obtained in the time available) necessary to make the judge to reach an informed decision, including evidence as to the applicable law and practice in the foreign court, evidence as to the nature of the proposed proceedings to be commenced and evidence as to the assets believed to be located in the jurisdiction of the foreign court and the names of the parties by whom such assets are held.
6. The standard of proof as to the existence of assets that are both within the worldwide freezing order and within the jurisdiction of the foreign court are a real prospect; that is the applicant must show that there is a real prospect that such assets are located within the jurisdiction of the foreign court in question.

7. There must be evidence of a risk of dissipation of the assets in question.
8. Normally the application should be made on notice to the respondent, but in cases of urgency, where it is just to do so, the permission may be given without notice to the party against whom relief will be sought in the foreign proceedings, but that party should have the earliest practicable opportunity of having the matter reconsidered by the court at a hearing of which he is given notice.

An example freezing order, taken from the CPR (PD 25A) is provided as an Annex to this text, illustrating the obligations usually imposed on third parties, the extent to which assets may be excepted from the operation of the order, and the undertakings required from an applicant before an order will be granted.

1.19 Critique of the approach of English law to enforcement

Enforcement has long been a very neglected area of law. In 1987, Sir Jack Jacob wrote in *The Fabric of English Civil Justice*:

> "The distinguishing feature of the English system of enforcement of judgment and orders of the court is that it is an unplanned, unsystematic, haphazard, complex system. It operates, especially in relation to money judgments, largely on a hit-or-miss basis. In relation to both money and non-money judgments, it is in part effective, but in part it is ineffective, inefficient, somewhat random and sometimes oppressive. It functions in the absence of a general body of principles, but rather on an ad hoc basis applicable to particular modes of enforcement. From the point of view of legal and social theory, the enforcement process is in a kind of backwater, seldom examined or studied."[92]

A major review of enforcement took place between 1965 and 1969, resulting in a report (the Payne Committee Report[93]) whose principal recommendation was the establishment of an Enforcement Office to centralise and streamline enforcement. Although some recommendations of the Committee were taken up (such as the

[92] Part of the series of Hamlyn Lectures (Stevens and Sons 1987) at 188.
[93] The Payne Committee, Report of the Committee on the Enforcement of Judgment Debts 1969 (Cmnd.3909).

extension of AEOs from maintenance cases), this principal recommendation was not pursued, in view of the costs involved. Since that time, aspects of enforcement have been the subject of other reviews, and a further major government review began in 1998 (the 1998 Enforcement Review[94]) which has led to significant changes in the law relating to the seizure of tangible movable property, but has had little impact on the overall structure of enforcement proceedings (or lack thereof). Last year the final report of a review of civil court structure was published (the Briggs Report[95]), and it contains a chapter on enforcement which makes some recommendations for reform – although leaving many areas unaddressed.

A frequent complaint about the English system of civil justice is that it provides a 'Rolls Royce' service in high value commercial cases, but is less satisfactory in low value cases. In the context of protective measures, freezing orders are perceived as an effective weapon against evasive defendants but are expensive and will not be granted in low value cases. In general enforcement proceedings, there is a heavy reliance on seizure of goods – which may be efficient in certain types of case but will be disproportionate and ineffective in others.

The Briggs Report notes in connection with the different enforcement agents employed for execution against goods:

> "The main arguments of the judgment creditors (put forward uniformly by the largest and the smallest within that class) including both the Civil Court Users Association and individual small business consultees, are that although the privatised services of HCEOs and EA[96]s are more expensive, and perhaps excessively so for very small debts, they are both much speedier and more effective modes of enforcement, compared with the under-funded, under-staffed and under-motivated County Court bailiffs.

[94] The Review of the Enforcement of Civil Court Judgments was conducted by the Lord Chancellor's Department (now Ministry of Justice) over several years, eventually resulting in the post 2000 legislation referred to at 1.1 and 1.2.

[95] The Civil Courts Structure Review: Final Report 2016

[96] EAs are Enforcement Agents, who are largely used in public debt collection, but also employed by HCEOs to undertake High Court work. They are 'certificated' – that is, they have to hold a certificate issued by a County Court – but have quite limited training.

> The main arguments on behalf of the judgment debtors are that the privatised services are so expensive that a modest debt can be more than doubled, in its burden upon the judgment debtor, by the accrual of enforcement fees, and that despite a recent regulatory regime imposed by means of the Tribunals Courts and Enforcement Act 2007 and the Taking Control of Goods Regulations 2013, some privatised enforcement officers and agents still commonly enforce in ways involving unfairness and oppression for vulnerable judgment debtors, and a high continuing level of complaints."

A welcome feature of the Briggs Report is its assumption that enforcement is a matter in which courts have an intimate interest and that "[m]any methods of enforcement, particularly against individuals, have consequences for them, depending upon how they are implemented, which means that the public rely upon the courts to ensure that enforcement is fair, just and socially acceptable." He continues by saying that "[i]t is therefore of prime importance that enforcement applications, and communications about enforcement, are made to a court and dealt with under judicial supervision, and by judges in the event of disputes, rather than merely to a government service or even (as some have suggested) a privatised service." Since it is clear that both a government service and a privatised service (where the professional enforcement agent is nevertheless an officer of the court) can work well in other jurisdictions I am agnostic about that conclusion. There is, however, a reason for considering that court-based enforcement might arguably be the best solution – or an important part of the solution – in the English context: the problem of access to information.

There have been rapid developments in making information about debtors' employment, banking and other financial arrangements available to enforcement agents in many European states, but progress is slow in this respect in England and Wales. There is significant political resistance to such a development. The Briggs Report states that "concern was expressed about data protection issues, and about any automated link between enforcement processes and information about judgment debtors held by other government agencies."

It might be possible to combat that concern where the information obtained is retained with the court.[97] The release of information to private entities would meet strong objections. In particular, a long history of lack of public trust in private enforcement agents and the difficulty of ensuring robust ethical regulation are factors that impede more effective enforcement.

The Report concludes that there should be a unitary authority for enforcement and suggests centralising enforcement in the County Court, but notes that the current County Court bailiff service is uniformly considered to be "gravely afflicted in its quality by delays and under-performance", because of its bailiffs are "under-paid, under-staffed and under-motivated". A further review to look at this issue in a more comprehensive fashion is therefore recommended.

[97] Sections 95-105 in Part 4 of the TCEA 2007, which have not been brought into force, provide for the courts to seek information from government departments and other specified information providers as to, *inter alia*, a debtor's address, and his or her employer's address, date of birth and national insurance number. Although these provisions remain unimplemented, legislation has recently been adopted (Digital Economy Act 2017) which permits and will facilitate data sharing between public bodies for the purpose of collecting public debts. The protocols, codes of practice and other implementing measures introduced in this context may in future be used to assist the courts in civil matters.

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Part 2: National procedure for recognition and enforcement of foreign judgments

2.1 Traditional English law approach to recognition and enforcement of foreign judgments

Under its traditional common law rules, English law recognises and enforces foreign judgments without a review of the merits of the judgment. A distinction must be drawn between actions *in personam* and actions *in rem*. An *in personam* judgment determines rights and liabilities only between the parties to the action, whereas a judgment *in rem* determines the title to property or the status of a person, property or thing and is binding against 'the whole world'.

(i) *ACTIONS* IN PERSONAM

Common law action on the judgment. As a matter of the common law, it will only enforce **final judgments** and only judgments for a **sum of money**. In this context, the English common law does not apply a 'comity' theory of recognition. Reciprocity is not required. Rather, in so far as a theory is espoused at all, the courts have suggested that the basis for recognition is the fact that the judgment debtor is under an obligation. This was reaffirmed in 1989 by the Court of Appeal in *Adams v Cape Industries plc* [1990] Ch. 433:

> "[A]t common law in this country foreign judgments are enforced, if at all, not through considerations of comity but upon the basis of a principle explained thus by Parke B. in *Williams v. Jones* (1845) 13 M. & W. 628 , 633: 'where a court of competent jurisdiction has adjudicated a certain sum to be due from one person to another, a legal obligation arises to pay that sum, on which an action of debt to enforce the judgment may be maintained. It is in this way that the judgments of foreign and colonial courts are supported and enforced . . . '"

A **domestic debt action is needed in order to 'enforce' the foreign judgment**. The claimant has to prove the existence of the judgment in his favour, and show that the foreign court had jurisdiction. If the jurisdiction of the foreign court can be proved, there are limited defences to recognition and enforcement of its judgment. In cases in which there is no genuine dispute about the jurisdiction of the foreign court, the judgment creditor may apply for summary judgment under CPR Part 24 (see above at 1.15).

Jurisdiction. The test for jurisdiction in this context is 'indirect'. The issue is not the basis on which the foreign court took jurisdiction, or whether the foreign court had jurisdiction on a basis utilised in English proceedings. Rather, an English court will investigate whether the foreign court had jurisdiction on the basis of either submission to the courts of that forum or a sufficient territorial connection to that forum. In the case of individuals, a territorial connection can be established by physical presence in the forum at the time the foreign proceedings were commenced, and arguably by residence there when the proceedings were commenced even if temporarily absent (*Adams v Cape Industries plc* [1990] Ch 433). In the case of companies, the question is whether the corporation had a place of business in the forum – which may be established either through direct presence or indirectly through the presence of an agent. A company has direct presence the foreign forum if "it has established and maintained at its own expense (whether as owner or lessee) a fixed place of business of its own in [that] country and for more than a minimal period of time has carried on its own business at or from such premises by its servants or agents".[98] Indirect presence is established if a representative of the company has for more than a minimal period of time been carrying on the

[98] *Adams v Cape Industries plc* [1990] Ch 433.

company's business in the other country at or from some fixed place of business. A range of factors are considered in order to determine whether a representative is carrying on the *company's* business – including, for example, the extent to which the company contributes to the financing of the business carried out by the representative; the degree of control the company exercises over the running of the business conducted by the representative; and whether the representative displays the company's name at his premises or on his stationery.[99] The authority of the representative to contract on behalf of the company is a particularly significant factor.[100]

Finality. The 'final judgments' rule means that an English court will not enforce provisional awards. However, a judgment that has become final in the court that delivered it may be enforced even if it is subject to appeal. If the appeal is successful, the enforcement will be set aside.

Defences. The following defences may be pleaded in an action on a foreign judgment:

(i) The exercise of jurisdiction by the foreign court was contrary to a jurisdiction or arbitration agreement between the parties. This defence is established by s.32 of the Civil Jurisdiction and Judgments Act 1982, which states:
"a judgment given by a court of an overseas country in any proceedings shall not be recognised or enforced in the United Kingdom 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
(b) those proceedings were not brought in that court by, or with the agreement of, the person against whom the judgment was given; and
(c) that person did not counterclaim in the proceedings or otherwise submit to the jurisdiction of that court."

(ii) Recognition or enforcement of the judgment would be contrary to public policy.

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[99] See for details *Adams v Cape Industries* at 530-31.
[100] *Vogel v R & A Kohnstamm Ltd* [1973] QB 133.

(iii) The proceedings in the State of origin were vitiated by lack of natural justice. The contours of this defence are unclear. It goes beyond cases in which the defendant receives no notice of proceedings, or is not given an adequate opportunity to present a defence, and extends to any circumstances which would constitute a breach of the English court's understanding of 'substantial justice': *Adams v Cape Industries plc* [1990] Ch 433. It covers situations in which the proceedings in the State of origin did not meet the 'fair trial' standard of Art.6 ECHR: *Merchant International Co Ltd v Natsionalna Aktsionerna Kompaniya Naftogaz Ukrayiny* [2012] EWCA Civ 196.

(iv) The judgment was fraudulently obtained – whether the fraud was on the part of the court or the successful party. Issues decided in the case on the merits may be reopened, even in the absence of fresh evidence, in order to decide the question of fraud: *Owens Bank Ltd v Bracco* [1992] 2 AC 443.

(v) The judgment is for multiple damages. Section 5 of the Protection of Trading Interests Act 1980 prevents registration of such a judgment under Part II of the Administration of Justice Act 1920 or Part I of the Foreign Judgments (Reciprocal Enforcement) Act 1933 and does not permit any court in the United Kingdom to entertain proceedings at common law for the recovery of any sum payable under such a judgment. A judgment for multiple damages means "a judgment for an amount arrived at by doubling, trebling or otherwise multiplying a sum assessed as compensation for the loss or damage sustained by the person in whose favour the judgment is given." Section 5 of the Act gives the Secretary of State further powers to restrict the recognition and enforcement of judgments concerned with the prohibition of restrictive trade practices, while s.6 allows an action to be brought in the United Kingdom for recovery of the non-compensatory portion of a judgment for multiple damages. These provisions are intended to protect against expansive assertions of jurisdiction in anti-trust matters by the US courts.

(vi) The foreign judgment is for taxes (*Government of India v Taylor* [1955] AC 491) or penalties (*Huntington v Attrill* [1893] AC 150). But if a foreign judgment imposes a fine on the defendant and also orders the defendant to pay compensation to the injured party, the compensatory part can be enforced in England (*Raulin v Fischer* [1911] 2 KB 93).

(vii) There is a previous final and conclusive judgment of a competent foreign or English court with sufficient jurisdiction that conflicts with the judgment that is being sought to be enforced: *Vervaeke v Smith* [1983] 1 AC 145 HL (irreconcilable judgments). See further on the preclusive effects of judgments at 2.2).

Recognition of judgments. No special procedure is required for recognition (cf. *delibazione*). A foreign judgment can be relied on during proceedings, notably as a defence to an action where the claim contradicts the foreign decision. The jurisdictional critera and defences available are the same as those discussed above in relation to enforcement.

Administration of Justice Act (AJA) 1920 and Foreign Judgments (Reciprocal Enforcement) Act (FJ(RE)A) 1933. There is also legislation governing the recognition and enforcement of foreign judgments (outside the scope of the EU and EEA regimes). The main role of the legislation is to provide a registration (*exequatur*) procedure, rather than requiring a new action to be brought. Recognition is justified by the principle of reciprocity, rather than the doctrine of obligation. The 1920 Act establishes a scheme for the enforcement in the United Kingdom of certain judgments from colonial and Commonwealth countries to which Part II of the Act extends.[101] The 1933 Act provides rules for the registration in the United Kingdom of money judgments from countries to which Part I of the Act has been extended by an Order in Council.[102]

[101] These include a considerable number of Caribbean and African states and several South Eat Asian states: e.g. British Virgin Islands, Cayman Island, Ghana, Hong Kong, Kenya, Malaysia, Nigeria, Singapore, Tanzania, Uganda, Zambia, Zambia. New Zealand is also covered by the 1920 Act.

[102] These include Australia, Canada (except Quebec), India, Pakistan, Israel and some European countries to the extent that the judgment is not within the BIA or the Lugano Convention (Austria, Belgium, France, Germany, Italy, the Netherlands, Norway)

A distinctive feature of the AJA 1920 is that, on application by the foreign judgment creditor, the court may order the registration of the judgment "if in all the circumstances of the case they think it just and convenient that the judgment should be enforced in the United Kingdom".[103] There is thus an element of discretion, and the Act is also limited to enforcement, rather than recognition for preclusive effects.[104] Section 9(2) provides a list of considerations relevant to registration which broadly correspond with the principles applicable at common law. Where the statute does not precisely reproduce the common law, the 'just and convenient' test provides scope for an interpretation which conforms to the common law.[105]
The 1933 Act lacks the element of discretion included in the 1920 Act,[106] and it is clearly intended to provide for the preclusive effects of judgments falling within its scope, rather than just for enforcement.[107]

(ii) *ACTIONS* IN REM

As far as movable and immovable property are concerned, the court of 'competent jurisdiction' is the court for the *situs* of the property. Disputes concerning status in family matters fall beyond the scope of this questionnaire. There are also particular considerations that arise in admiralty matters.[108] A final and conclusive judgment on the merits issued by a court of competent jurisdiction is capable of producing preclusive effects as discussed below 2.2.

[103] Section 9(1).
[104] This latter point is reinforced by the title to s.9 and by further references within the section to the registering court having control and jurisdiction over the judgment 'but in so far only as it relates to execution …' The time limit for registration is also short, only 12 months – but this can be extended on application.
[105] Peter Barnett, *Res Judicata, Estoppel, and Foreign Judgments* (OUP 2001) 56.
[106] Section 2(1)states that the court 'shall .... order the judgment to be registered'. There is no 'just and convenient' discretion as in s.9(1) of the AJA 1920.
[107] The way that it does this is somewhat tortuous, since the main purpose of the act is to allow registration of money judgments for enforcement. See further below at 2.2 in relation to s.8(1) of the FJ(RE)A 1933.
[108] Barnett, *op.cit.* n.107 at 77 ff.

2.2 Concepts of 'recognition' and 'enforcement'

As noted above, in general English law has been more restrictive in its approach to enforcement of foreign judgments than recognition of such judgments. For enforcement, an action on the judgment is required (subject to the procedural changes made by the AJA 1920 and the FJ(RE)A 1933), whereas the courts have been prepared to recognize preclusive effects to a foreign judgment where it has been raised in the course of litigation without the need for any special 'recognition' procedure.

Under English law a matter is 'res judicata' and will give rise to preclusive effects if it is the result of adjudication[109] by a court of competent jurisdiction,[110] and is final and conclusive and on the merits.[111] Preclusive effects may arise in four different ways:

i. cause of action estoppel,[112]
ii. former recovery,
iii. issue estoppel, and
iv. an "extended doctrine of *res judicata* based on abuse of process" whereby "a party may *also* be precluded in later litigation from raising subject-matter which the parties, by the exercise of due diligence, could and should have brought before the court in the earlier proceedings."[113]

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[109] This can also include consent judgments and default judgments: see Barnett, *op. cit.* at 14-15.
[110] This includes domestic and arbitral tribunals.
[111] Peter Barnett, *Res Judicata, Estoppel and Foreign Judgments* (OUP 2001) 11. Spencer Bower and Handley identify six constituent factors for a res judicata: (1) the decision, whether domestic or foreign was judicial in the relevant sense; (2) it was in fact pronounced; (3) the tribunal had jurisdiction over the parties and the subject matter; (4) the decision was both (i) final and (ii) on the merits; (5) the decision determined a question raised in the present litigation; and (6) the parties are the same or their privies or the earlier decision was in rem (*Res Judicata*, 4th ed, Wildy & Sons 2009 at para.1.02)
[112] Estoppel is defined in Halsbury's Laws as follows: "'Estoppel' has been described as a principle of justice and equity which prevents a person who has led another to believe in a particular state of affairs from going back on the words or conduct which led to that belief when it would be unjust or inequitable (unconscionable) for him to do so. The person making the statement, promise or assurance is said to be estopped from denying or going back on it; 'estopped' means 'stopped'. The doctrine of estoppel has developed in a number of separate are, both common law and equitable. Estoppel by record is more properly regarded as part of the law of evidence." (*Halsbury's Laws*, Vol 47 (2014) (consultant ed. E Cooke) para.301. Estoppel by record is another name for estoppel *per rem judicatam*.
[113] Idem at 9-10.

Cause of action estoppel arises if the judgment is recognised as a *res judicata*, and the subsequent domestic proceedings involve the same claim[114] and the same parties[115]

Former recovery. The former recovery rule deals with the possibility that a claimant may seek to sue on the same cause of action twice. Thus where a party has obtained a judgment in their favour on a claim or cause of action, the cause of action is said to be 'merged' in the judgment and they are "precluded from afterwards recovering before any English tribunal a second judgment for the same civil relief in the same cause of action" (*Republic of India v India Steamship Co Ltd; The Indian Endurance and the Indian Grace* [1993] AC 410 (HL) (*The Indian Grace*) per Lord Goff of Chieveley at 417).

The distinction between these two is that in the case of cause of action estoppel it is the **principle of law** that must not be contradicted in later proceedings, whereas in the case of former recovery it is the claim for further relief that is precluded.

Issue estoppel. While cause of action[116] estoppel represents a form of preclusion known to both common law and civil law jurisdictions, issue estoppel is a particular feature of the law in common law jurisdictions. Cause of action estoppel applies in the limited cases where one of the parties seeks to raise against the other a cause of action, the existence or non-existence of which has been determined as between the same parties in previous litigation. The rules on issue estoppel prevent the same issues of fact or law (including preliminary issues (*Vorfragen*)) being raised again in later litigation.

> "There are many causes of action which can only be established by proving that two or more different conditions are fulfilled. Such causes of action involve as many separate issues between the parties as there are conditions to be fulfilled by the plaintiff in order to establish his cause of action; and there may be cases where the fulfilment of an identical condition is a requirement common to two or more different causes of action. If in litigation upon one such cause of action

[114] Barnett, *op.cit.* 117 ff.
[115] For further discussion of what is meant by 'same parties', see Barnett, *op.cit.* Ch.3.
[116] The nearest equivalent to the cause of action would be the *Streitgegenstand* of German law.

> any of such separate issues as to whether a particular condition has been fulfilled is determined by a court of competent jurisdiction, either on evidence or on admission by a party to the litigation, neither party can, in subsequent litigation between them on any cause of action which depends on the fulfilment of the identical condition, assert that the condition was fulfilled if the court has in the first litigation determined that it was not, or deny that it was fulfilled if the court in the first litigation determined that it was." (*Thoday v. Thoday* [1964] P 181 per Diplock LJ. at 198)

The availability of issue estoppel arises from the detailed discussion of issues in English judgments. It is possible to identify from the judgment the precise issues that have been considered and decided as steps in reaching the overall decision on the merits.

Abuse of process. Preclusion on the basis of abuse of process further emphasises the significance attached to the finality of proceedings, a desire for efficiency, and the duty on the parties to participate fully in proceedings. A party who does not present their whole case in one set of proceedings may not be permitted to raise later points that could have been raised in the earlier proceedings. The classic statement of the law on this point is found in *Henderson v Henderson* [1843-60] All E.R. Rep. 378 per Sir James Wigram V-C.

> "[W]here a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonably diligence, might have brought forward at the time."

The scope of this rule was further clarified in *Hoystead v. Taxation Commissioner* [1926] A.C. 155 by Lord Shaw in the House of Lords:

> "… [I]t is settled, first, that the admission of a fact fundamental to the decision arrived at cannot be withdrawn and a fresh litigation started, with a view of obtaining another judgment upon a different assumption of fact; secondly, the same principle applies not only to an erroneous admission of a fundamental fact, but to an erroneous assumption as to the legal quality of that fact. Parties are not permitted to begin fresh litigations because of new views they may entertain of the law of the case, or new versions which they present as to what should be a proper apprehension by the court of the legal result either of the construction of the documents or the weight of certain circumstances. … Thirdly, the same principle - namely, that of setting to rest the rights of litigants - applies to the case where a point, fundamental to the decision, taken or assumed by the plaintiff and traversable by the defendant, has not been traversed.[117] In that case, also a defendant is bound by the judgment …. The same principle of setting parties' rights to rest applies and estoppel occurs."

So English law vigorously encourages parties to settle all their differences in one set of proceedings.[118] Having said this, however, an estoppel will not arise unless the question determined in the earlier proceedings is the **same question** that arises for decision in the later proceedings, and it will not arise unless the question determined in the earlier proceedings was **fundamental to the decision** in the sense that the decision could not stand if that question was determined in a different way. A **preliminary issue which is implicitly raised** in the earlier proceedings - in the sense that it is an unexpressed assumption on which the plaintiff's case is based - **can nevertheless be fundamental to the decision in the case**. This is notably true of issues concerning the formation and validity of a contract, when the plaintiff is suing for performance of that contract. The fact that no point was ever taken about the validity of the contract does not prevent an estoppel arising on that issue in later litigation.[119]

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[117] A traverse is simply a contradiction of the facts alleged or assumed by the plaintiff.

[118] The same principle can be found in the rules on joinder of parties and actions, which allow liberal joinder to ensure that all connected matters can be dealt with in one set of proceedings.

[119] This point was established in *Humphries* v *Humphries* [1910] 2 KB 531 CA.

Preclusive effects of foreign judgments. Given the broad preclusive effects recognized to judgments under English law, the question arises how far similar effects are recognized to foreign judgments. The fact that a foreign judgment can be recognized as a *res judicata* if it is a final and conclusive decision on the merits by a court of competent jurisdiction (as determined by reference to the criteria in 2.1 above) is not in doubt. But the question of the precise effects to be given to such a judgment is less easily answered.

> "There has rarely been an investigation into the effects of the foreign judgment in the foreign country, since parties have rarely argued that those effects are relevant. It is therefore not settled what effects recognized foreign judgments have in English proceedings if such an argument is raised. Scholarly debate is equally scant."[120]

It is only in a context where foreign procedural laws have become more familiar, comparison is more frequently undertaken, and there are few obstacles to recognition of judgments, that the question whether English law adopts an extension of effects or an equalisation approach has invited discussion.

Cause of action estoppel. The decision of the House of Lords in In *Carl Zeiss Stiftung v Rayner & Keeler Ltd* [1967] 1 AC 853 established conclusively that a foreign judgment can support cause of action estoppel. For example, Lord Hodson in that case stated: "The modern doctrine accepted since the decision in *Godard v Gray* is that a foreign judgment may be pleaded and is conclusive. If this is so, I see no reason why the rule estoppel *per rem judicatam* should not be applied …" (at 926).

Former recovery. Although in purely domestic cases, a cause of action merges in the judgment on the claim, at common law the same is not true for a foreign judgment. It was sought to abrogate this rule by s. 34 of the Civil Jurisdictions and Judgments Act (CJJA) 1982, which states:

> No proceedings may be brought by a person in England and Wales or Northern Ireland on a cause of action in respect of which a judgment has been given in his favour in proceedings between the same parties, or their

[120] S. Harder, 'The Effects of Recognized Foreign Judgments in Civil and Commercial Matters' (2013) 62(2) *International and Comparative Law Quarterly* 441–461.

> privies, in a court in another part of the United Kingdom or in a court of an overseas country, unless that judgment is not enforceable or entitled to recognition in England and Wales or, as the case may be, in Northern Ireland.

In fact, the interpretation of this section has given rise to difficulty. The House of Lords in *The Indian Grace* concluded that s.34 did not abrogate the non-merger rule (with the result that there was no longer any cause of action to assert), but rather created a bar against proceedings ("no proceedings may be brought …"), which could then be excluded by waiver, estoppel or contrary agreement.[121]

Issue estoppel. In *Carl Zeiss Stiftung v Rayner & Keeler Ltd* [1967] 1 AC 853, the majority of the House of Lords concluded that a foreign judgment could, in principle, give rise to an issue estoppel.

Abuse of process. Although there are strong arguments for restricting the application of an abuse of process approach to preclusion in relation to foreign judgments (notably given that the litigants in the foreign proceedings are unlikely to have had this feature of English law in mind), the limited case law on this topic indicates that the courts have been willing to take this step.[122] Academic comment on the case law highlights the confused reasoning of the courts.[123] Indeed, the cases seem to blur the lines between *Henderson v Henderson* abuse of process, and a broader concept of abuse of process.[124] Clarification is needed.

Extension of effects or equalisation of effects. The effects to be accorded to a foreign judgment may differ depending on the set of rules on recognition and enforcement at issue.

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[121] The case and its sequel – between the same parties – which resulted in a further House of Lords decision ([1998] AC 878, raised a number of additional important issues and is discussed by P Barnett, *op. cit.* at 100-116.

[122] *House of Spring Garden v Waite* [1991] 1 QB 241, CA; *Owens Bank Ltd v Etoile Commerciale SA* [1995] 1 WLR 44, PC*; Desert Sun Loan Corp v Hill* [1996] 2 All ER 847, CA; *The Indian Grace (No.2)* [1996] 2 Lloyd's Rep 12, CA; *Fennoscandia Ltd v Clarke* [1999] 1 All ER (Comm) 365, CA.

[123] Barnett, *op. cit.* at 224 ff.; A Briggs, "Foreign Judgments and *res judicata*" (1997) 68 British Yearbook of International Law 355

[124] General principles concerning abuse of process are stated in *Hunter v Chief Constable of the West Midlands* [1982] AC 529

In *Carl Zeiss*, in connection with issue estoppel, the view was expressed that "generally, it would seem unacceptable to give to a foreign judgment a more conclusive force in this country than it has where it was given". This suggests an "extension of effects" approach to the effect of a foreign judgment. But the court elaborated on the approach to be taken in a way that continues to reflect an English law perspective. For example, Lord Wilberforce suggested that in order to identify the issue decided for the purposes of issue estoppel, the courts should look not only at the judgment, but also at "the pleadings, evidence and other material" submitted to the foreign court.

Nevertheless, their Lordships were in agreement that the courts should exercise considerable caution before accepting the existence of such an estoppel in any given case. Lord Guest (in fact one of the dissenting judges) pointed out that "[w]e are not familiar in this country with the practice and procedure in foreign countries, and it may be a matter of considerable nicety in certain cases to find out what issues were determined and whether they were incidental or collateral to the main decision."[125] These considerations, while not considered determinative by the majority, remain significant and mean that the existence of an issue estoppel has been found in very few cases involving foreign judgments.[126]

However, the wording of the legislation on registration of judgments for enforcement (the AJA 1920, and the FJ(RE)A 1933) arguably provides for the assimilation of effects. Thus, s.9(3)(a) of the Administration of Justice Act 1920 provides that a foreign judgment registered in the High Court under that Act shall 'be of the same force and effect' as if it had been originally obtained in the High Court. Sirko Harder questions whether this provision 'concerns only the execution of the foreign judgment in England or whether it extends to wider (possible) effects of the judgment such as an issue estoppel in English proceedings between the same parties involving a different cause of action'.[127]

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[125] Ibid. at 918.

[126] For rare examples, see *The Sennar (No.2)* [1985] 1 Lloyd's Rep. 521 and *Helmville Ltd v Astilleros Espanoles SA (The Jocelyne)* [1984] 2 Lloyd's Rep 569 (QB).

[127] Harder *op. cit.* at 446. But cf. Briggs, who takes the view that similar wording in the Civil Jurisdiction and Judgments Order 1991 (applicable in relation to B IA) does apply solely to execution (see further at 3.2.2).

Similarly, s.8(1) of the 1933 Act provides, in essence, that a judgment that has been, or could be, registered under that Act "shall be recognized in any court in the United Kingdom as conclusive between the parties thereto in all proceedings founded on the same cause of action and may be relied on by way of defence or counter-claim in any such proceedings".[128] The House of Lords in *Black Clawson Innternational Ltd. v Papierwerke Waldhof-Aschaffenburg A.G.* [1975] A.C. 591 concluded that this wording means that the judgment should be given the same effects as at common law.[129] Harder suggests that this is a decision in favour of equalisation of effects.[130]

See further also at 3.2.2. for a discussion of the approach to be adopted under B IA.

2.3 Main features of procedure for recognition

A foreign judgment may be recognised as a preliminary issue in pending litigation, but it may also be the subject of an application for a declaration.
In the case of an application for registration of a foreign judgment, under the AJA 1920, the FJ(RE)A 1933, the Brussels Convention 1968, Lugano Convention 2005 or Hague Convention 2005, enforcement applications are directed to the Enforcement Office in the High Court – providing for specialisation in this area (Civil Jurisdiction and Judgments Act (CJJA) 1982 ss.4-4B). The procedure for registration is set out in CPR r.74.3 and especially sub-rules (3),(4) and (6) which detail the evidence required to accompany an application, and the obligations in relation to the drawing up and service of a registration order.

2.4 Jurisdiction in matters of recognition and enforcement (substantive and territorial)

Registration of foreign judgments, in the cases where such registration is provided for, takes place in the High Court. Registers are maintained in the Central Office of the Senior Courts at the Royal Courts of Justice in London. Enforcement out of the High Court is then available, although if appropriate the judgment could also be transferred to the County Court for enforcement.

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[128] The wording of s.8 is very convoluted. For discussion, see Barnett, *op.cit.* at 57 f.
[129] In that 'cause of action' was interpreted as meaning the matter adjudicated on, including the relevant facts, rather than simply the decision on the claim.
[130] Harder, *op.cit.* at 446.

If a common law action on the judgment is brought for enforcement of a money judgment, the question of the competent court, as between High Court and County Court, will depend on the amount in dispute. There is considerable flexibility to transfer proceedings between courts where appropriate.

Where incidental recognition of a judgment is sought during the course of other litigation, it is the court hearing that other litigation that will have jurisdiction.

2.5 Types of decision

Technically, a judgment is a decision that finally disposes of a claim, while an order is an interim decision. However, there is no practical difference between the two. The general approach of English law is to minimise technical and jurisdictional complexity at the commencement of a claim or application, but to allow flexibility in the decision-making process, rather than prescribing particular forms of procedure for different challenges to the recognition and enforcement of foreign judgments. See above generally at 1.15 on the different forms of order that may be made.

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Part 3: Recognition and Enforcement in B IA

3.1 Certification or declaration of enforceability in Member States of origin (Art. 53. B IA)

"Article 53
The court of origin shall, at the request of any interested party, issue the certificate using the form set out in Annex I."

Preliminary comment

The logic of B IA seems to be that the certificate should be determinative of all issues concerning the merits of the dispute, and that any challenges should be brought in the State of origin. Challenges to enforcement in the State addressed would then be confined to the grounds of non-recognition, events arising subsequent to the decision on the merits, and obstacles to enforcement in the State addressed (e.g. those relating to the protection of vulnerable debtors).

3.1.1 Requirements for certification

The legislation implementing B IA in the UK is brief. In relation to the certificate of enforceability, CPR Part 74 r.12(2) states:

> "(2) A judgment creditor who wishes to enforce in a foreign country a judgment obtained in the High Court or in the County Court—
>
> (a) must apply for a certified copy of the judgment; and
>
> (b) if applying under article 53 of the Judgments Regulation, must apply to the court which gave the judgment by filing a draft of the certificate in the form in Annex I to the Judgments Regulation.
>
> (3) The application may be made without notice."

CPR Part 74 r.13 provides further details of the documentation that must be provided in order to obtain a 'certified copy of the judgment' – the same provision being applicable to several other enforcement regimes in addition to B IA:

> "(1) The application must be supported by written evidence exhibiting copies of –
>
> (a) the claim form in the proceedings in which judgment was given;
>
> (b) evidence that it was served on the defendant;
>
> (c) the statements of case; and
>
> (d) where relevant, a document showing that for those proceedings the applicant was an assisted person or an LSC funded client, as defined in rule 43.2(1)(h) and (i).
>
> (2) The written evidence must –
>
> (a) identify the grounds on which the judgment was obtained;
>
> (b) state whether the defendant objected to the jurisdiction and, if he did, the grounds of his objection;
>
> (c) show that the judgment –
>
> (i) has been served in accordance with Part 6 and rule 40.4, and
>
> (ii) is not subject to a stay of execution;
>
> (d) state –
>
> (i) the date on which the time for appealing expired or will expire;

(ii) whether an appeal notice has been filed;
(iii) the status of any application for permission to appeal; and
(iv) whether an appeal is pending;

(e) state whether the judgment provides for the payment of a sum of money, and if so, the amount in respect of which it remains unsatisfied;
(f) state whether interest is recoverable on the judgment, and if so, either –

(i) the amount of interest which has accrued up to the date of the application, or
(ii) the rate of interest, the date from which it is recoverable, and the date on which it ceases to accrue."

Practice Direction 74A sets out in more detail where the application must be made, since this depends on the court in which the judgment intended for enforcement abroad was given (para.4.2). As in relation to other applications relating to the implementation of B IA, the application is governed by CPR Part 23.[131] If the application is granted, then, the court must send a sealed copy of the judgment to the person making the application, accompanied by a certificate in the form required by Annex I to B IA signed by a judge.[132] Where the application is refused, the court must give reasons for the refusal, and may give further directions.

Critical assessment: There is no evidence here of simplification of the evidential requirements for obtaining a certificate for cross-border enforcement under the B IA as compared to other statutory schemes for cross-border enforcement outside the UK.[133] Some of the required evidence is certainly necessary for the proper completion of the Art.53 certificate, but it is not apparent that all elements are necessary. The evidential requirements instead are geared to obtaining a Form 110 certificate for enforcement in a foreign country.

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131 The relevant court form is PF 163. CPR Part 23 is a general provision governing the procedure for all applications.
132 Paras. 6D.2 and 7.1,2 and 4 of the Practice Direction. Para 7.4 refers to Annex V of the Judgments Regulation, rather than Annex I, and so appears not to have been updated to refer to B IA.
133 Cf. The approach adopted in relation to cross-border enforcement within the United Kingdom.

3.1.2 Challenges to the certificate of enforceability in the Member State of origin

No specific legal remedy exists. The general provisions on applications found in CPR Part 23, which are used for challenging enforcement, can presumably be used to challenge the certificate of enforceability.

3.1.3 and 3.1.4 Setting aside the certificate

There is no specific provision in English law to govern the situation where the court, as the court of the Member State of origin, certifies the enforceability of a judgment which has not yet in fact acquired this effect. Following general principles, if the legal requirements for issue of the certificate have not been met, it should be possible to have the certificate of enforceability set aside. Certificates can be set aside in other contexts (e.g. costs certificate).

Nevertheless, it should be noted that in so far as the requirements that have not been met are purely procedural[134] English law takes a flexible approach to curing defects if the party relying on the defect has not in fact been disadvantaged. CPR Part 3.10 states:

> "Where there has been an error of procedure such as a failure to comply with a rule or practice direction –
>
> (a) the error does not invalidate any step taken in the proceedings unless the court so orders; and
> (b) the court may make an order to remedy the error."

A typical situation in which this can arise is where there has been a lack of formally correct service, but it is apparent that the addressee of the document(s) to be served was aware of those documents and sufficiently aware of their content to take any appropriate procedural steps (see also 1.17)

[134] The procedure for obtaining the certificate is set out at CPR 74.12-13 (see above at 3.1.1)

3.1.5 Effects of the certificate

As the result of a judicial decision-making process, the certificate would produce preclusive effects in relation to any matters that arose for decision. But also in the case of a refusal to issue a certificate, PD 74A para.6D(2) provides: "Where the application is refused, the court must give reasons for the refusal and may give further directions." The existence of a judgment giving reasons for refusal to issue to the certificate may also therefore produce effects.

3.1.6 Challenge to errors in the certificate

Under PD 40B 4.1, where a judgment or order contains an accidental slip or omission a party may apply for it to be corrected. This can be done through an informal application which can be dealt with without a hearing (e.g. where the error is obvious), unless the court considers that a hearing would be appropriate.

3.1.7 Multiple copies of certificate

No difficulty is envisaged in obtaining additional copies of the certificate if they are needed for enforcement in different jurisdictions.

3.1.8 Legal nature of the certificate of enforcement.

It is apparent from the procedure for obtaining a certificate of enforceability that the certificate is a form of judgment under English law,[135] even though it is regarded as a 'mere' public document with evidential value in some other European jurisdictions.

3.1.9 Post festum cancelation or withdrawal of certificate of enforceability in Member State of origin.

Since the issue of a certificate of enforceability is a judicial act in England and Wales, setting aside the certificate of enforceability would in principle remove the legal basis

[135] Again, an analogy may be drawn with a costs certificate which despite its name is clearly a form of judgment (see CPR Rule 47, PD 47 and court forms N255 and 256). Certificates for enforcement are sealed in the same way as any other judgment.

for any enforcement action founded on that certificate. However, if the order setting aside the certificate was being challenged, in appropriate circumstances one might expect protective measures to be sought or maintained.

The consequences in England of the setting aside of a European Enforcement Order Certificate in another Member State were considered in *Lothschutz v Vogel* [2014] EWHC 473 (QB), a case concerning an EEO. The EEO was based on a notarial authentic instrument establishing maintenance obligations. The certificate of enforceability was issued by a colleague of the notary who originally drew up the instrument, and it was cancelled when the matter came to the latter's notice. Enforcement proceedings had been commenced in England and the maintenance debtor had incurred costs contesting enforcement. When the certificate was set aside, the debtor sought to recover his costs on the basis that there had been no justification for the proceedings.[136]

> "There is no mechanism for a challenge in this court to the validity of the European Enforcement Order Certificate. Article 21 in paragraph 2 provides in terms that the Member State of enforcement (in this case, this court) cannot in any circumstances review as to its substance the European Enforcement Order or its certification."[137]

> "The proper focus of attention on this application, as it seems to me, is, first, whether the effect of the withdrawal of a European Enforcement Order Certificate is that the debtor is entitled to be put in the position in which he or she would have been if the certificate had never been issued, and that, so far as this court is concerned, is a matter outwith the jurisdiction of this court. Paragraph 2 of Article 10 of the Regulation plainly, in my judgment, determines that it is the law of the Member State of origin, that is to say, in this case, the Federal Republic of Germany, which is to apply to the rectification or withdrawal of the European Enforcement Order

[136] The submission was that "all of the costs orders which had been made against Mr Vogel consequent upon there being in existence a valid European Enforcement Order Certificate could be undone and all of the relevant orders discharged". (para 20 of the judgment).
[137] At para.21.

> Certificate, and I may add, including the consequences of such a withdrawal and not merely whether such a withdrawal is appropriate."[138]

The result was that the debtor was liable to pay the costs incurred in disputing enforcement in England and would have to bring proceedings in the State of origin in relation to the consequences of withdrawal of the certificate.

Since the wording of B IA is different from that of Regulation 805/2004, and other National Reports suggest that the issue of the certificate of enforceability is an administrative rather than a judicial matter in their jurisdiction, the courts may well reach a different view of the effect of setting aside/withdrawal of a certificate of enforceability. Nevertheless, the *Lothschutz* case is indicative of the weight potentially attributed by the English court to a certificate issued in another Member State.

3.1.10 Service of the document on the judgment debtor

According to CPR Part 74.12(3) an application for a certificate can be made without notice, so the judgment debtor does not need to be informed in advance about the application. If an order is made by the court, however (whether granting or dismissing the application) CPR Part 23.9 provides as a general rule that a copy of the application notice and any evidence in support must be served with the order on any party or other person –

> (a) against whom the order was made; and
> (b) against whom the order was sought.

Furthermore, the order must contain a statement of the right to make an application to set aside or vary the order within 7 days of the date of service pursuant to CPR Part 23.10.

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[138] At para.22. The application ultimately failed on several grounds relating to the jurisdiction of the court to decide the matters raised, and the failure of the defendant to raise potentially relevant issues at an earlier stage in the proceedings.

Of course, this general rule is subject to any specific order on the matter made by the court, which may be particularly relevant where an element of surprise is sought in relation to an evasive debtor.

3.1.11 Service of declaration of enforceability

No declaration of enforceability exists as a matter of domestic law. The nearest analogy would be to service of the sealed order of the court, which is sought to be enforced. Evidence of service of this document is required as part of the evidence to be included in an application for a certificate of enforceability.

See at 3.1.10 above for the question of service of the certificate of enforceability issued under Art.53 B IA.

3.1.12 Critical assessment of Art. 40 B IA

"Article 40

An enforceable judgment shall carry with it by operation of law the power to proceed to any protective measures which exist under the law of the Member State addressed."

The role of protective measures in the enforcement process is one that may vary considerably from one Member State to another, and an appreciation of the differences in approach to enforcement between Member States may promote reflection on whether and how the law ought to be adapted to take account of these differences.

As a general rule, the position in England and Wales is that the judgment of the court is final as soon as it has been handed down. CPR 40.7(1) states that "[a] judgment or order takes effect from the day when it is given or made, or such later date as the court may specify" – although under CPR 40.11 a judgment debtor has 14 days within which to comply with a money judgment before enforcement becomes due. There is no 'ordinary appeal' against the judgment of a County Court or the High Court. On the rare occasions when an appeal is lodged, or an application is made to set aside a default judgment, a stay of enforcement can be sought.

The way that enforcement of judgments is conceptualised in other European jurisdictions is different. Since appeals from a first instance judgment in other EU Member States are much more common than in England and Wales, such judgments enjoy only 'provisional' enforceability. They do not become final until the time has elapsed for lodging an appeal, or, if an appeal is lodged, until the appeal has been decided. Nevertheless, the meaning of provisional enforcement, and the conditions under which it may be permitted, vary significantly between jurisdictions.

In some EU Member States, the practical situation is not dissimilar to the position in England and Wales – provisional execution is the norm, and there is no need for the judgment creditor to provide security against the risk of the judgment being overturned on appeal. In others, provisional execution may be dependent on the provision of security. In yet others, provisional enforcement of a judgment means only that protective measures can be adopted to secure the debtor's assets against future execution.[139] Moreover, in the latter case, in principle it must be plausibly demonstrated to the enforcement court that without such measures there is a risk that enforcement will be unsuccessful or significantly more difficult, although there are several exceptions to this principle. If an appeal is lodged, in any of these cases, the law of the relevant Member State may allow a stay of enforcement or a rescission of the order for provisional enforcement.

In these circumstances the protective function of enforcement measures is perhaps more prominent than it is in England and Wales. Furthermore, given the wide powers of professional enforcement agents in many European jurisdictions, such agents may play a more prominent role in the protective securing of assets. Rather than seeking a protective order from a court, it may be possible to approach an enforcement agent directly with a request for provisional measures. In France, for example, a *titre exécutoire* creates an automatic right to protective measures (*saisies conservatoires*), entitling the holder of the title to approach a *huissier de justice*, and the latter to undertake such measures without the intervention of a court. But judgments that are not yet enforceable, accepted bills of exchange, and an unpaid cheque or rental payment also provide grounds for a creditor to approach a *huissier de justice* directly to obtain protective measures. And, as a matter purely of French law, a judgment of a foreign court is a 'décision de justice' for the purposes of Article L511-

[139] Austria, Slovenia.

2 of the Code des procédures civiles d'exécution, with the result that it provides grounds for a *huissier* to proceed to protective measures.

Given these differences in approaches to enforcement, and the scope and use of protective measures, it is worth drawing attention to the distinction in English law between interim remedies (CPR Part 25) and enforcement measures. Interim (protective) remedies, including freezing injunctions, are of particular significance prior to the commencement of litigation, but they may also be sought after judgment has been given – and so overlap with enforcement measures. A seizure of goods, or of a bank account, may thus be either an interim protective measure, or a formal step in the process of execution of a judgment. This has consequences for the form of any application for such measures, the institution to which they should be addressed, and the likely costs involved.

A two stage process for enforcement measures – one which freezes the assets in question, and a second that realises those assets – is as much a feature of English law as it is of the law in other European jurisdictions: goods are made subject to control by an enforcement agent before they are removed and sold; a bank account may be frozen as part of the procedure for a third party debt order before notice of the procedure is served on the judgment debtor (CPR Part 72.3); a charge may be granted over immovable property rights before notice is given to the debtor (CPR Part 73.3 and 4). An application for the appointment of a receiver can also be made without notice to the debtor (CPR Part 69.3). A question for the English courts to address is therefore whether these measures are 'protective' measures within Article 40 of the Judgments Regulation (recast), which can be used by the judgment creditor where appropriate, or whether an interim measure within the meaning of CPR Part 25 must be sought. If 'protective measures' for the purposes of Article 40 have to be interim measures under CPR Part 25, there is certainly a difference in treatment of judgments between England and Wales and other jurisdictions with a broader view of the operation of protective measures.

The difficulty that English courts face in applying the European rules is, however, amply illustrated by the recent decisions of the High Court and Court of Appeal in *Cyprus Popular Bank Public Co Ltd v Vgenopoulos* ([2016] EWHC 1442 (QB) and [2018] EWCA Civ 1). The case, decided under Brussels I rather than Brussels I bis, concerned the enforcement of an *inter partes* asset freezing order issued by a Cypriot

court. Registration of the order[140] was contested. Pending the appeal, therefore, no measures of enforcement might be taken 'other than protective measures against the property of the party against whom enforcement is sought' (Art.47(3) of Brussels I). But the court ran into two difficulties in interpreting this provision. First, the rules of court implementing Art.47(3) indicate that no measures of enforcement will be taken pending an appeal 'other than measures ordered by the court to preserve the property of the judgment debtor'.[141] The English rules thus presuppose the need of court orders to define the appropriate protective measures – although the European rules do not impose such a requirement and in many European legal system such orders would not be necessary, as illustrated above by reference to the measures that can be adopted by a *huissier de justice*. But then secondly, and inconsistently, the freezing order could in fact be given effect without any further court order. Since the Cypriot freezing order was to be given the same effect as an English order, it was binding on third parties – such as banks holding assets of the defendants in the main (Cypriot) proceedings – if notice of the order was served on the third party. And such service was not undertaken by the court, but by solicitors acting for the claimant in the main proceedings: illustrating the point made above at 1.6 that solicitors may play an important role in the enforcement process. In these circumstances, the Court of Appeal concluded that service of notice of the freezing order on a third-party bank was not a 'measure of enforcement' at all. It was only if the third-party failed to comply with the asset freezing order, such that court sanctions were required, that any 'measure of enforcement' would be taken. This seems a perverse interpretation of Brussels I and does not augur well for any interpretation of Brussels I bis – given the opaque approach to implementation of the regulation adopted in the United Kingdom. On the other hand, it is probable that Brexit will obviate the need for such an interpretation.

[140] The equivalent of a declaration of enforceability: Art.38(2) of Brussels I.
[141] CPR Part 74.6(3)(e)

Finally, still pursuing the thought that the 'protective' phases of enforcement measures such as third-party debt orders and seizure of goods could implement Art.40, some further thought should be given to their suitability in this context. Given that the freezing of bank accounts is a particularly important protective measure, the similarities and differences between an asset freezing order under CPR Part 25, and a third-party debt order under CPR Part 72 should be noted:

- A freezing injunction can be obtained pre- and post-judgment whereas a third-party debt order is only available to a judgment creditor.
- A freezing injunction operates *in personam* and does not confer proprietary rights on the judgment creditor, whereas a third-party debt order operates *in rem* and has "the proprietary effect of charging the debt owed to the judgment debtor in favour of the judgment creditor" (*Masri v Consolidated Contractors International Company SAL and another* [2007] EWHC 3010 (Comm) per Gloster J). The *in personam* nature of freezing injunctions means that they can be issued in cases where the defendant – who is personally within the jurisdiction of the English courts – has assets abroad (see further above at 1.9 and 1.18.2), whereas a third-party debt order is limited to debts in England (*Société Eram Shipping v Cie Internationale de Navigation* [2004] 1 AC 160)
- A freezing injunction is a discretionary remedy (equitable), whereas a third-party debt order is available to a judgment creditor as of right.
- A freezing injunction, even if obtained post-judgment, is a measure ancillary to the claim on the merits, and is therefore covered by the rules relating to jurisdiction over the merits (*Masri v Consolidated Contractors International UK Ltd and others* (No 2) [2008] EWCA Civ 303 per Lawrence Collins LJ at [94] ff). The jurisdiction to issue such an injunction is therefore not within Art.22(5) of Brussels I or Art.24(5) of Brussels I bis (exclusive jurisdiction of the courts of the Member State in which the judgment has been or is to be enforced).

It is also worth drawing attention to the reform of the rules on enforcement against goods (Taking Control of Goods Regulations 2013), which require 7 days' notice of enforcement to be given before an enforcement agent takes control of goods (reg.6). The element of surprise for this method of enforcement that previously existed has

therefore been reduced, but not eliminated: the court may order that a specified shorter period of notice may be given to the debtor (reg.6(3) and (4)) where it is satisfied that, if the order is not made, it is likely that goods of the debtor will be moved to premises other than relevant premises, or otherwise disposed of, in order to avoid the goods being taken control of by the enforcement agent.

3.1.13 Certifying the amount of interest: the problem of determining statutory interest rates in cross-border cases

With respect to statutory post-judgment interest, it seems clear that the amount of interest to be charged on a judgment debt should be readily calculable by the enforcement agent – and the position under Regulation 805/2004 is more straightforward in principle than the position under B IA. On the other hand, in so far as interest is calculated by reference to the law of the State of origin, a statement of the rate in the certificate of enforceability will potentially render the certificate inaccurate if the rate changes.[142]

As far as English law is concerned, changes in the rate of post-judgment interest are infrequent. Interest on High Court judgments was set at four percent by s.17 of the Judgments Act 1838. The power to amend the rate by delegated legislation was introduced by the Administration of Justice Act 1940, s.44. In 1971 it was raised to eight percent. A series of five changes in the late 1970s and early 1980s took the interest rate as high as 15 percent and then gradually lowered it. The current rate, established by the Judgment Debts (Rates of Interest) Order 1993 (SI 1993/564), is once again eight percent.

In the County Court, interest on judgment debts is governed by s.74 of the County Courts Act 1984 – which establishes the framework for delegated legislation concerning such interest – and the County Courts (Interest on Judgment Debts) Order 1991 (SI 1991/1184). According to the 1991 Order, County Court judgments over £5000 attract the same rate of interest as High Court judgments.

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[142] For a more detailed comparative discussion of this problem, see W Kennett, "Adaptation Measures: Art.54-55 Brussels I Recast" in V Rijavec et al (eds) *Remedies concerning enforcement of foreign judgements, Brussels I Recast* (Kluwer) forthcoming.

For the purposes of determining interest under s.17 of the Judgments Act 1838, costs orders are also judgment debts.

Section 17 states that interest runs "from such time as shall be prescribed by the rules of Court". This is now governed by CPR Part 40.8 which states:

> (1) Where interest is payable on a judgment pursuant to section 17 of the Judgments Act 1838 or section 74 of the County Courts Act 1984, the interest shall begin to run from the date that judgment is given unless –
> (a) a rule in another Part or a practice direction makes different provision; or
> (b) the court orders otherwise.
> (2) The court may order that interest shall begin to run from a date before the date that judgment is given.

The court thus has a discretion to decide the time from which statutory interest runs, although in practice much of the case law relates to interest on costs orders. Important guidance on the exercise of the discretion in this context was given in *Involnert Management Inc v Aprilgrange Ltd* [2015] EWHC 2834. Leggatt J considered that, in the light of the "overriding objective" of dealing with cases justly (CPR Part 1.1) "I do not think it just to make an order under which interest begins to run at the rate appropriate for unpaid judgment debts before the paying party could reasonably be expected to pay the debt; and, in a case where the court has ordered a suitable interim payment to be made on account of costs, I do not think it reasonable to expect the party liable for costs to pay the balance of the debt until it knows exactly what sums are being claimed by the party awarded costs and has had a fair opportunity to decide what sums it accepts are properly payable". In the event, Leggatt J postponed the date from which statutory interest began to run by three months.

CPR Part 40.8(2), allowing the court to order that interest shall begin to run from a date before the date that judgment is given, also seems to be intended to be applied to costs orders (see also CPR Part 44.2(6)(g) which expressly relates to costs orders), to allow interest to be claimed in relation to disbursements made during the proceedings.

Thus, while the rate of interest is fairly stable under English law, attention needs to be paid to the question of the date from which judgment interest should run, which may be controversial.

It should be noted that interest applies only to a final judgment for a quantified sum. In cases where there has been an initial decision on liability, with damages or debt assessed later, judgment interest is thus only payable in respect of this later judgment or order (*Thomas v Bunn* [1991] 1 AC 362).

Two further points are worth highlighting in relation to post-judgment interest. The first relates to the relationship between contractual interest and post-judgment interest. In this context the 'merger' principle applies: in the absence of specific contractual provision the right to contractual interest ends at judgment. Contractual terms may seek to preserve the right to contractual interest post-judgment. But it will take clear words for such a term to be interpreted as depriving a party of the statutory rate if the contractual rate is lower than the statutory rate. A contract term will not readily be interpreted as depriving a debt ordered to be paid by the court of its status as a judgment debt, with the concomitant right to judgment interest.[143]

Secondly, in the case of judgment debts in a currency other than sterling, a separate rule is stated in s.44A(1) of the Administration of Justice Act 1970. According to that provision 'the court may order that the interest rate applicable to the debt shall be such rate as the court thinks fit'. The court can thus take into account the factors relevant to that foreign currency.[144]

3.1.14 Effect of party succession on content of certificate and overall procedure

The impact of party succession on enforcement proceedings in England has already been described above at 1.14. Since the certificate of enforceability is a form of court order, involving a Part 23 application and the production of evidence, issues relating to party succession can be dealt with in the context of that application.

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[143] See *Director-General of Fair Trading v First National Bank Plc* [2001] UKHL 52; *Standard Chartered Bank v Ceylon Petroleum Corp* [2011] EWHC 2094 (Comm).

[144] For some recommendations on how this discretion might be exercised, see Law Commission, *Private International Law – Foreign Money Liabilities (Law Com No 124 (1983), Cmnd 9064)* paras 4.1-4.15.

3.2 Recognition and enforcement in Member State of enforcement

3.2.1and 3.2.2 The concept of 'recognition' (Art. 36(1)) and the scope of a judgment's authority and effectiveness

"Article 36

1. A judgment given in a Member State shall be recognised in the other Member States without any special procedure being required"

Recognition can take place incidentally during proceedings in England. As to whether this results in an extension of the effects of the foreign judgment, or equalisation of effects with an English judgment, it was seen above at 2.3 that this question gets a variable answer. In the European context, however, it is widely accepted that an extension of effects approach has been endorsed by the CJEU.[145] To the extent that an equalisation approach or a 'maximum-effect' approach[146] may seem to have been adopted in some English cases, without investigating whether the foreign judgment had that effect in the rendering Member State,[147] Harder notes that it was not argued in any of those cases that the effects of the foreign judgment in England depended upon its effects in the rendering Member State. Furthermore, English courts have explicitly denied judgments from other Member States an effect they did not have in the State of origin but which a comparable English judgment would have had.[148]

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[145] In Case 145/86, *Hoffman v Krieg* [1988] ECR 645; Case C-420/07, *Apostolides v Orams* [2009] ECR I-3571 Case; C-456/11 *Gothaer Allgemeine Versicherung AG v Samskip GmbH* ECLI:EU:C:2012:719. See S Harder, *op.cit.* at 447; A Layton, S O'Malley and H Mercer (2nd ed Sweet & Maxwell 2004) para 24.010; A Briggs *Civil Jurisdiction and Judgments* (6th ed, 2015) (hereafter *Civil Jurisdiction and Judgments*) para 7.24; PR Barnett, *op.cit.* at 274-276; JJ Fawcett and JM Carruthers, Cheshire, North & Fawcett on Private International Law (14th edn, OUP 2008) 604

[146] S Harder, *op.cit.* at 443: "A foreign judgment can have both the effects that it has in the foreign country and the effects that a comparable domestic judgment would have in the forum. This approach, which shall be called the 'maximum-effect approach', affords foreign judgments the greatest effect possible. By contrast, a foreign judgment can have only those effects that equally obtain in the foreign country under the foreign judgment and in the forum under a comparable domestic judgment. This approach, which shall be called the 'minimum-effect approach', affords foreign judgments the narrowest effect possible."

[147] *Marc Rich & Co AG v Societa Italiana Impianti PA (No 2)* [1992] 1 Lloyd's Rep 624 (CA); *Berkeley Administration Inc v McClelland* [1995] I L Pr 201 (CA) 214, 221; *Berkeley Administration Inc v McClelland (No 2)* [1996] I L Pr 772 (CA) 781–2.

[148] *ABCI v Banque Franco-Tunisienne* [2002]1Lloyd's Rep 511 (Comm) 538; *Air Foyle Ltd v Center Capital Ltd* [2002] EWHC 2535 (Comm), [2003] 2 Lloyd's Rep 753. See further S Harder, *op.cit.* at 447

The Civil Jurisdiction and Judgments Order 1991 (as amended) prescribes an equalisation approach to in relation to the enforcement of judgments under B IA,[149] but Briggs concludes that this relates specifically to the "basis for measures of execution to be taken. It does not mean that the judgment has the same legal consequences for other purposes (such as its effect on non-parties) as it would have had if given by an English court, for this would be to confuse execution with the nature of the obligation to recognize a foreign judgment under the Regulation"[150] Thus the Order should not be read as contradicting an extension of effects approach. In fact, the CJEU has given some guidance on the effects to be attributed to judgments in the context of enforcement. In *Apostolides v Orams* [2009] ECR I-3571 it said:

> "[A]lthough recognition must have the effect in principle of conferring on judgments the authority and effectiveness accorded to them in the member state in which they were given, there is however no reason for granting to a judgment, when it is enforced, rights which it does not have in the member state of origin or effects that a similar judgment given directly in the member state in which enforcement is sought would not have.[151]

Harder describes this as a 'minimum effects' approach, whereas, Briggs treats this as an issue of the enforceability of the judgment in the State of origin, rather than its effect. This seems to be the better view.

While an extension of effects approach is accepted for cause of action estoppel, the application of English law principles has been advocated in answer to the question whether a judgment of a Member State can also give rise to issue estoppel. [152] In particular, it has been argued that this is a matter for English law, since it is not governed by Regulation 44/2001 or B IA.[153] The practical significance of this

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[149] According to Sch.1 para.2(2) of the Civil Jurisdiction and Judgments Order 2001 (SI 2001/3929), as amended by Sch.2 para. 3(3)(b) of the Civil Jurisdiction and Judgments (Amendment) Regulations 2014 (SI 2014/2947): "A judgment to be enforced under the Regulation shall for the purposes of its enforcement be of the same force and effect, the enforcing court shall have in relation to its enforcement the same powers, and proceedings for or with respect to its enforcement may be taken, as if the judgment had been originally given by the enforcing court."

[150] Briggs, *Civil Jurisidction and Judgments* 670 at fn 269. The Regulation discussed by Briggs in this context is Regulation 44/2001, but the same considerations apply to BI A.

[151] At para. 66 (citations omitted).

[152] Harder, *op. cit.* at 452, Briggs, *Civil Jurisdiction and Judgments*. at 666, Barnett, *op. cit.* at 286 ff.

[153] Briggs, *Civil Jurisdiction and Judgments* at 666: "the applicable principles will be those of English law rather than European law".

approach is necessarily limited, since the English courts take the view that a foreign judgment should not be given "a more conclusive force in this country than it has where it was given",[154] and issue estoppel is not generally accepted in continental EU Member States. On the other hand, in a small number of cases decided outside the context of Regulation 44/2001 and B IA, the judgments of EU Member States have been found to give rise to issue estoppel.[155]

3.2.3 and 3.2.4 Relationship between protective and enforcement measures and the requirement of service

"Article 43

1. *Where enforcement is sought of a judgment given in another Member State, the certificate issued pursuant to Article 53 shall be served on the person against whom the enforcement is sought prior to the first enforcement measure. The certificate shall be accompanied by the judgment, if not already served on that person."*

"Article 53

The court of origin shall, at the request of any interested party, issue the certificate using the form set out in Annex I."

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[154] *Carl Zeiss Stiftung v Rayner and Keeler Ltd* [1967] 1 AC 853 per Lord Wilberforce. See also *Boss Group Ltd v Boss France SA*.[1997] 1 WLR 351 (CA) 359 where an it was found that an interlocutory order issued by a French court did not give rise to issue estoppel, since it would not have a binding effect in France. Cf. For the perspective of English law, *The Sennar (No.2)* [1985] 1 WLR 490, HL.

[155] *The Sennar (No. 2)* [1985] 1 WLR 490 is somewhat ambiguous on this point since the decision of the Dutch court on an issue of jurisiction was treated as being a decision 'on the merits' – an approach which in effect has also been adopted by the CJEU in relation to a decision on the validity of a jurisdiction agreement: Case; C-456/11 *Gothaer Allgemeine Versicherung AG v Samskip GmbH* ECLI:EU:C:2012:719. In *Helmville Ltd v Astilleros Espanoles SA (The Jocelyne)* [1984] 2 Lloyd's Rep.569 Lloyd J concluded that the defendants could rely on issue estoppel in relation to findings made in a judgment of the Antwerp Court of Appeal. This decision was based on the opinion of an expert on Belgian law (an advocate at the Antwer Bar) to the effect that the issues decided by the Court of Appeal could not be relitigated in Belgium. In *Yukos Capital Sarl v OJSC Rosneft Oil Co* [2012] EWCA Civ 855 Hamblen J at first instance found that a Dutch judgment could create an issue estoppel in English proceedings, also having taken account of expert evidence (this decision was quashed on appeal because the Court of Appeal concluded that the issue in the English proceedings was different from the issue in the Dutch proceedings).

As noted above at 3.1.12, protective measures are generally thought of in English law as interim measures within CPR Part 25, rather than as part of the enforcement process. Such measures can be obtained post-judgment and so an asset freezing order could be sought *ex parte* prior to service of the certificate issued pursuant to Article 53.

It is worth considering whether an element of surprise at the enforcement stage could also be preserved through the alternative route of a grant of an enforcement measure which includes an asset freezing stage. National laws may nevertheless vary as to whether a court has any discretion at this stage, and a Europe-wide rule permitting enforcement measures to be granted without notice to the debtor could have unanticipated effects.

3.2.5 Procedure for raising the grounds for refusal of enforcement in Art.45 B IA

Under the Brussels I Regulation as originally formulated, an application for a declaration of enforceability is directed to the High Court in London. As a result of the registration procedure the foreign judgment is registered and thereafter treated as a judgment of the English Court. This channelling of applications through the High Court has the great merit of concentration of expertise.

Amendments to the CPR to implement Brussels I bis were effected in November 2014 by the Civil Procedure (Amendment No.7) Rules 2014.[156] CPR 74, entitled Enforcement of Judgments in Different Jurisdictions, is the principal provision affected by these changes. The rules as amended omit any reference to registration of a judgment enforceable under Brussels I (recast), and previous reference to 'registration' are altered to read 'enforcement'. Thus CPR rule 74.4A states that "a person seeking the enforcement of a judgment which is enforceable under the [Brussels I] Regulation [(recast)] must, except in a case falling within Article 43(3) of the Regulation (protective measures), provide the documents required by Article 42 of the Regulation".

[156] SI 2014/2948

The effect of this seems to be that a judgment creditor should provide the documents required by Article 42 of the Regulation on each occasion that an enforcement measure is sought.

The removal of any requirement of registration is particularly noteworthy when it remains the case that the enforcement of judgments from Scotland or Northern Ireland involves a process of registration,[157] but Franzina, Kramer and Fitchen take the view that it is necessitated by the removal of *exequatur*:

> "Recital (8) of that Regulation *[European Enforcement Order]* records that in relation to this principle of equality, arrangements for the enforcement of judgments should continue to be governed by national law. It provides the example of the legal systems of the UK, where the judgment rendered in another Member State should follow the same rules as the registration of a judgment from another part of the UK. This example, however, appears misplaced, as the applicable UK legislation imposes additional requirements of certification and registration for judgments from other UK legal systems, which do not apply to judgments delivered in the UK legal system in which enforcement is sought. This is out of line with the principle of equality and, whatever interpretation of the European Enforcement Order Regulation may be supportable by reference to its Recital (8), cannot be extended to the Recast Regulation."[158]

But it is possible to challenge this view. In my opinion it does insufficient justice to the role of the court as the enforcement authority. Just as with a *huissier de justice*, or with an administrative authority such as the Swedish *kronofogdemyndighet* the judgment to be enforced needs to be submitted to the enforcement authority and recorded or registered in some way to facilitate effective processing by that authority. There needs to be a central point of reference to ensure that any measures adopted, or disputes or problems relating to enforcement can be filed in one place. In relation

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[157] Civil Jurisdiction and Judgments Act 1982, s.18 and Sch.6 and 7.

[158] In Ch. 13 "The Recognition and Enforcement of Member State Judgments" of Andrew Dickinson and Eva Lein, *The Brussels I Regulation recast* (Oxford University Press 2015) 419, and see Civil Jurisdiction and Judgments Act 1982, s 18 and Sch 6–7 for the UK legislation governing registration of a judgment from another part of the UK.

to judgments from other parts of the UK, Sch.6[159] of the Civil Jurisdiction and Judgments Act 1982 states:

> "A certificate registered under this Schedule shall, for the purposes of its enforcement, be of the same force and effect, the registering court shall have in relation to its enforcement the same powers, and proceedings for or with respect to its enforcement may be taken, as if the certificate had been a judgment originally given in the registering court and had (where relevant) been entered."

Domestic judgments are recorded on the Register of Judgments, Orders and Fines maintained by Registry Trust Ltd,[160] which also maintains records for judgments in Scotland, Northern Ireland and other jurisdictions in the British Isles. In the light of the limited information available to creditors about debtors' assets, it seems inappropriate if the latter's liabilities arising as a result of the judgment of another Member State become less transparent following the amendment of the Brussels I Regulation.

[159] Schedule 6 relates to money judgments. Schedule 7, which relates to non-money judgments, is in very similar terms.

[160] Under contract with the Ministry of Justice (http://registry-trust.org.uk/). Judgments from other parts of the UK should also be recorded with judgments from England and Wales after they have been registered with the High Court under Sched.6 or 7 to the Civil Jurisdiction and Judgments Act 1982.

As far as challenges to the recognition and enforcement of judgments under Brussels I bis are concerned, these are also affected by the Civil Procedure (Amendment No.7) Rules 2014. Part 23 of the CPR permits a great variety of procedural applications to be made, and is identified as the provision under which applications to refuse recognition or enforcement are to be made. The same provision is also to be used in the case of applications for suspension of proceedings under article 38 of the Regulation, and in the case of applications for an adaptation order pursuant to article 54 of the Regulation (or challenges to such an order). In so far as national grounds for refusal of enforcement are relevant to a judgment from another Member State,[161] these will also be raised in a Part 23 application. Franzina, Kramer and Fitchen note that:

> "Domestic enforcement rules relating to, for example, lapse of time, disproportionality of enforcement means, abuse of rights, prohibitions to seize certain (primary) goods, set-off, or other specific procedural or material (temporary) obstacles to enforcement may be invoked in relation to a judgment originating from another Member State—as they may in relation to a domestic judgment. If, on the other hand, such grounds would, for example, run counter to or overlap with Art 45(1)(b) on default of appearance and defective service or with Art 45(1)(c) and (d) on irreconcilability with another judgment, or involve an assessment of the jurisdiction of the court of the Member State of origin other than on the basis set out in Art 45(1)(e) and (2), they are not permitted to be applied under the Regulation, even if available for an equivalent domestic judgment."

[161] Brussels I Regulation recast, 420

Part 23 applications can be made in the High Court or the County Court. According to CPR rule 74.7A, an application under article 45 or 46 of the Judgments Regulation that the court should refuse to recognise or enforce a judgment must be made "to the court in which the judgment is being enforced or, if the judgment debtor is not aware of any proceedings relating to enforcement, the High Court." The court may require the judgment creditor to disclose to the judgment debtor the court or courts in which any proceedings relating to enforcement of the judgment are pending in England and Wales (CPR rule 74.7A(5)).

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Part 4: Remedies

4.1 General observations on the system and availability of national remedies.

Remedies include **appeals** and applications to **set aside** a judgment.

Appeals. There is a strong public interest in regarding a judicial decision as final and binding, and so there are significant limits on the availability of an appeal. English law does not know the system of ordinary and extraordinary appeals common in continental legal systems. Provision is made for this within BIA. Article 51(2) states:

> "2. Where the judgment was given in Ireland, Cyprus or the United Kingdom, any form of appeal available in the Member State of origin shall be treated as an ordinary appeal for the purposes of paragraph 1."

Appeal routes are now established by the Access to Justice Act 1999 (Destination of Appeals) Order 2016:

- County Court District Judges may be appealed to the County Court Circuit Judge
- High Court masters and District Judges may be appealed to a High Court judge

- County Court Circuit Judges may be appealed to a High Court judge
- High Court judges may be appealed to the Court of Appeal; and
- The Court of Appeal may be appealed to the Supreme Court

But, where the decision of the County Court judge was itself and appeal then appeal will be to the Court of Appeal.

Permission to appeal. CPR Part 52.3 provides that an appellant or respondent requires permission to appeal from a decision of a judge in the County Court or the High Court. Exceptions to this rule are specified in cases involving an order for imprisonment, or a refusal to release from imprisonment – although the rule notes that other enactments may also provide that permission is required for particular appeals. An application for permission to appeal may be made to the lower court at the hearing at which the decision to be appealed was made, or to the appeal court in an appeal notice. Where the lower court refuses an application for permission to appeal a further application for permission may be made to the appeal court.

For an appeal to the Supreme Court, permission must be obtained from either the Court of Appeal or the Supreme Court. If the Court of Appeal refuses permission, it is still possible to apply to the Supreme Court for permission. Permission to appeal is granted for applications that raise an arguable point of law of general public importance. It is worth noting that "the law of procedure and practice … has traditionally been regarded as the province of the Court of Appeal rather than the House of Lords (or, now, the Supreme Court)" (per Lord Walker of Gestingthorpe in *Roberts v Gill and Co* [2011] 1 AC 240)

In cases where it is considered that an appeal will raise an important point of principle or practice, or there is some other compelling reason for the Court of Appeal to hear it, the Circuit Judge or High Court judge who would otherwise hear the case may order it to be transferred to that court under CPR Part 52.14(1) (a so called **'Leapfrog Appeal'**). In rare cases involving a point of law of general public importance, a direct appeal from the High Court to the Supreme Court is possible

under the Administration of Justice Act 1969, ss.12, 13 and 15, if the parties consent and permission is given.[162]

An appeal[163] should normally be lodged within 21 days of the date of decision of the lower court (CPR Part 52.4(2)(b)). However, a different time may be established by the lower court, or a party may apply to the appeal court for an extension of time (CPR Part 52.6)

An appeal does not operate as a stay of a decision or order unless either the appeal court or lower court orders otherwise (CPR Part 52.7)

Setting aside. 'Setting aside' a judgment is effectively a way of saying that the judgment is annulled. The primary provisions in the Civil Procedure Rules that deal with setting aside are CPR Part 13 and CPR Part 39.

CPR Part 13 is not a comprehensive code for setting aside judgments generally. It is confined to the setting aside of a default judgment which has been obtained pursuant to CPR Part 12 (see above at 1.15).

A court *must* set aside a judgment entered under Part 12 where certain of the conditions for the entering of a judgment were not satisfied (CPR Part 13(2)(a) and (b)) or where the whole of the claim was satisfied before judgment was entered (CPR Part 13(2)(c). Foremost among the conditions for entering a judgment under CPR Part 12 is the proper service of the claim form. Thus a default judgment must be set aside if the claim has not been served[164] (although the English courts take a generous approach towards curing defective service if there is evidence that the defendant is, in fact, aware of the pending proceedings: see above at 1.17 and 3.1.4).[165]

According to CPR Part 13.3(1), a court also has a *discretion* to set aside or vary a judgment entered under Part 12 if the defendant has a real prospect of successfully defending the claim, or if it appears to the court that there is some other good

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[162] Further criteria relate to the nature of the point of law. Leapfrog appeals to the Supreme Court can also be made from certain appeal tribunals (Criminal Justice and Courts Act 2015, ss.64-66).
[163] Or an application for permission to appeal.
[164] *Credit Agricole Indosuez v Unicof Ltd* [2003] EWHC 77 (Comm); [2003] All E.R.; *Shiblaq v Sadikoglu (Application to Set Aside) (No.2)* [2004] EWHC 1890 (Comm).
[165] *Phillips v Symes (No.3)* [2008] 1 WLR 180 (HL); *Integral Petroleum SA v SCU-Finanz AG* [2014] EWHC 702 (Comm).

reason why the judgment should be set aside or varied or the defendant should be allowed to defend the claim. Prompt action on the part of the defendant once the grounds for setting aside have become known is essential (CPR Part 13.3(2)).

If a defence is filed and the case comes to trial, CPR Part 13 will not apply, but a judgment may nevertheless be set aside if it is handed down where either one of the parties has not appeared. This situation is governed by CPR Part 39. An application to set aside a judgment must, as in the case of CPR Part 13.3, be supported by evidence demonstrating that applicant acted promptly on discovering the grounds for setting aside, had a good reason for not attending the trial, and has a reasonable prospect of success at the trial (CPR Part 39(5)).

It is noteworthy in this connection, that service of a claim form in the County Court (so for the majority of debt collection claims) is by first class post. There is therefore a risk that the defendant will not have received the claim form. Furthermore, according to CPR Part 52.11(1) an appeal will normally be limited to a review of the decision of the lower court – not a rehearing of the case – and according to paragraph 2 of CPR Part 52.11 the appeal court will not usually receive oral evidence or any evidence that was not before the lower court. There are exceptions to this general position in an appellate setting, but the possibility of setting aside a judgment provides the systematically appropriate remedy in cases where, for justifiable reasons, no initial trial has taken place: 'setting aside' opens the way to fresh proceedings and a full hearing of the merits.

4.2 Remedies in enforcement procedure

4.2.1 Description of remedies available during enforcement procedure

Since there is no separate enforcement court, legal remedies in enforcement proceedings follow the same pattern as in other proceedings (CPR Part 23 applications, appeals etc). However, the distinction between different methods of enforcement to which attention was drawn above at 1.3(i), 1.4 and 1.6 remains relevant. Thus, writs and warrants (for seizure of movable property) – the commonest methods of enforcement – differ from other methods of enforcement in that they are issued to an enforcement officer on request. Other methods of enforcement involve proceedings between the judgment creditor and debtor

(although the initial enforcement order may be granted without notice, and a hearing may occur only after service of the order). In the case of such *inter partes* proceedings, since the judgment debtor can be represented, **the final decision as to whether to allow the relevant enforcement method to proceed will take into account the arguments for and against the issue of an order**.

Against this background, CPR Part 40.8A provides in general terms that:

> "a party against whom a judgment has been given or an order made may apply to the court for—
> (a) a stay of execution of the judgment or order; or
> (b) other relief,
> on the ground of matters which have occurred since the date of the judgment or order, and the court may by order grant such relief, and on such terms, as it thinks just."

This broad provision goes beyond a stay of enforcement, but is limited to matters occurring after the judgment or order. It is, however, without prejudice to CPR Part 83.7, which is concerned specifically with the stay of execution of a writ or warrant (of control, possession, delivery or sequestration).[166] Since writs and warrants are issued without a hearing, more extensive provision is made for the judgment debtor to take steps to obtain a stay of execution of the writ or warrant. Until 2014, there were separate High Court and County Court procedures for this, but they were unified by the Civil Procedure (Amendment) Rules 2014.[167] The possibility of applying for a stay is in both cases regulated by CPR Part 83.7.

[166] See also s.70 of the TCEA 2007, which concerns more specifically the stay of "execution of any writ of control issued in the proceedings, for whatever period and on whatever terms it thinks fit" if the High Court is satisfied that a party to proceedings is unable to pay the sum recovered against him or an instalment thereof.
[167] SI 2014/407

According to CPR Part 83.7(4) If the court is satisfied that—

> (a) there are special circumstances which render it inexpedient to enforce the judgment or order; or
> (b) the applicant is unable from any reason to pay the money,
> … the court may by order stay the execution of the judgment or order, either absolutely or for such period and subject to such conditions as the court thinks fit.

The rule is thus worded in general terms that cover events occurring after the judgment was handed down, or the writ or warrant issued, and other issues that may arise. These may include the fact that the judgment debtor is seeking to have the judgment set aside or is lodging an appeal against it. They may also include lack of money – and in such a case the judgment debtor must disclose income, assets and liabilities.

In applying this provision, the courts have balanced the risks of granting a stay of execution against the risk of non-payment (or repayment), depending on the circumstances.[168] The stay may be subject to various conditions, such as an agreement by the judgment debtor to make regular payments on instalment terms.

An application for a stay or other remedy must be made under CPR Part 23. An appeal will lie against the decision on such applications. In addition to an appeal, in certain circumstances a decision may be set aside as invalid (e.g. for lack of proper service of the application on the respondent).

4.2.2 Characteristics of legal remedies in enforcement procedure.

As noted above at 4.1 and 4.2.1 any objection or challenge to enforcement follows the same system of applications that is used in other civil proceedings. Lodging a challenge or appeal, or seeking to have a judgment set aside, does not automatically effect a stay of enforcement proceedings. A separate application for a stay must be

[168] Note that in certain cases a stay of the enforcement proceedings is automatic: (i) on the issue of a third party claim to goods taken into the control of a HCEO or County Court bailiff (TCEA 2007, Sch.12 para 60); (ii) where a court order for the payment of a judgment debt by instalments is in force.

made. This can be made in the first instance court when seeking permission to appeal (CPR Part 52.3(2)(a)), or may be made to the appeal court.[169]

The court has an 'unfettered' discretion as to whether or not to grant a stay.

The hierarchy of appeal courts is set out in the Access to Justice Act 1999 (Destination of Appeals) Order 2016. The basic principle is that decisions from one court in the court hierarchy should be appealed to the next level in the hierarchy. In the county court, appeal will lie from a decision of a Circuit Judge to the High Court (article 5(1)) and a decision of a District Judge to a Circuit Judge (article 5(3)), subject to certain company law exceptions. Appeals from decisions of Masters, Registrars and District Judges of the High Court will lie to a judge of the High Court (article 4(1)).[170] Decisions in the High Court are appealed to the Court of Appeal, and from thence to the Supreme Court. However, an appeal from a decision of the county court or the High Court which is itself made on appeal, will lie to the Court of Appeal (article 6). A leapfrog procedure also exists, allowing a civil appeal from a court or tribunal other than the Court of Appeal.[171]

4.2.3 Absence of specialist enforcement court

As noted above at 4.2.1., there is no specialist enforcement court in England and Wales. Challenges to enforcement may arise either as a defence to an application for a particular method of enforcement, where a court hearing is integral to the enforcement procedure (e.g. third-party debt order, charging order), or by way of a separate application, such as that authorised by CPR Part 40.8 (see above at 4.2.1).

[169] An application for a stay may be included in an application for permission to appeal lodged with the appeal court. An application made after the filing of an appeal notice is made in accordance with CPR Part 23.

[170] There is an exception to this in relation to decisions in small claims allocated to the Intellectual Property Enterprise Court.

[171] Supreme Court PD 1, at 1.2.17 and legislation there cited

4.3 Opposition in enforcement

4.3.1 to 4.3.3 Options available to the judgment debtor for challenging enforcement on the basis of grounds that arose after the enforcement title was acquired (nova producta) or because of defects in the enforcement procedure

As described above at 4.2.1 and 4.2.3, enforcement may be challenged **during the proceedings on an application for the grant of a particular method of enforcement**, or through a **separate application**. While there are various legal provisions that provide the grounds for challenge, the approach of English law is rather flexible as to the way in which applications can be brought before the court – Part 23 of the CPR providing a general procedure for applications of all kinds.

In relation to grounds that have arisen after the enforcement title was acquired, it should be noted that if payments have been made by the debtor, the judgment creditor is required to acknowledge these in any application for a method of enforcement.[172]

Given the importance of seizure of goods (under a writ or warrant of control) as a method of enforcement, and the limited supervision of enforcement agents by the courts, or by any other regulatory body, it is not surprising that a significant reason for challenging enforcement has been a failure by an enforcement agent to comply with the requirements of the law.[173] The TCEA 2007 has replaced the previous common law remedies with statutory ones, to be found in Sch.12 of the Act – which provides many of the rules on taking control of goods (seizure of movable property).[174] Paragraph 66 of Sch.12 thus provides:

> "This paragraph applies where an enforcement agent—
> (a) breaches a provision of this Schedule, or

[172] See for example Form No.53 (writ of control), or form N349 (application for a third party debt order (see Appendix)

[173] See J Kruse, *Taking Control of Goods* (PP Publishing 2014) Ch 13 for a detailed examination of the remedies that may be available to debtors in the case of wrongful action by enforcement agents and other participants in enforcement proceedings.

[174] Kruse, *op. cit.* argues that medieval statutory remedies may still survive. It seems unlikely that the law will in fact be interpreted in this way, however.

> (b) acts under an enforcement power under a writ, warrant, liability order or other instrument that is defective.
> (2) The breach or defect does not make the enforcement agent, or a person he is acting for, a trespasser.
> (3) But the debtor may bring proceedings under this paragraph.
> …
> (5) In the proceedings the court may—
> (a) order goods to be returned to the debtor;
> (b) order the enforcement agent or a related party to pay damages in respect of loss suffered by the debtor as a result of the breach or of anything done under the defective instrument."

Proceedings under para.66 are again initiated by a Part 23 application.

Where an enforcement agent has committed serious breaches of the rules regulating execution, a debtor may bring a complaint against the certificate issued to an individual enforcement by the County Court, alleging that the certificated person is not a fit person to hold a certificate. CPR Practice Direction 84 provides guidance on how this should be done. If the complaint is found to be justified, the judge may suspend or cancel the certificate, and may award compensation to the complainant.

Third parties. If the enforcement agent seizes goods owned by a third party, para.60 of Sch.12 to the TCEA 2007 provides the framework for the third party to bring proceedings in which they can claim ownership. Details of the procedure can be found in CPR Part 85.3 – 85.5. Paragraph 60 of Sch.12 provides that after receiving notice of the application the enforcement agent must not sell the goods, or dispose of them, unless directed by the court.

Time limits.[175] The rules on time limits may be of interest in relation to resisting enforcement. Section 24(1) of the Limitation Act 1980 states that "an action" cannot be brought on any judgment after six years from the date that the judgment became enforceable. There is, however, clear case law to the effect that enforcement proceedings are proceedings by way of execution rather than a fresh action (*Lowsley v Forbes (T/A LE Design Services)* [1999] 1 AC 329, in which applications were made for a charging order and a garnishee order (now third party debt order)).

[175] See generally Allinson, *op. cit.* at 42 ff.

The elapse of six years thus does not prevent enforcement, but an unjustified delay in taking any enforcement steps may lead to the application for an enforcement measure being denied. This is clear from the case law relating to permission to issue a writ or warrant of control. Although permission to issue is not required in most circumstances (see above at 1.6), there is a requirement under CPR Part 83.2(3) that a writ or warrant of control may not be issued without the permission of the court if six years or more have elapsed since the date of the judgment or order. Leave to issue was denied in *Patel v Singh* [2002] EWCA Civ 1938 where the judgment creditor had failed to take any enforcement action for ten years. To obtain permission, the creditor must thus present facts that take the case out of the general rule that execution will not be allowed after six years (*Society of Lloyd's v Longtin* [2005] EWHC 2491 (Comm)).

4.4 Domestic law remedies in context of recognition and enforcement of foreign judgments

4.4.1 Types and main features of legal remedies

Since the method of enforcement at common law is to bring an action on a judgment – the remedies available are those available in the case of a normal civil action.

Where there is provision for the registration of a foreign judgment under the AJA 1920 or the FJ(RE)A 1933 or the Civil Jurisdiction and Judgments Act 1982 (CJJA 1982) – which provides the rules on registration for the Brussels Convention, the Lugano Conventions 2007 and the Hague Convention 2005 – an application can be made for registration without giving notice to the judgment debtor (CPR Part 74.3). The appropriate remedy in the case of registrations under the CJJA 1982 is an appeal against the registration order (ss.6-6B CJJA 1982), whereas in the case of the AJA 1920 and the FJ(RE)A 1933 an application should be made to set aside the registration (CPR Part 74.7)

4.4.2 Grounds for challenging foreign judgment

Recognition of a foreign judgment (the necessary precursor to enforcement) will be refused where the foreign court did not have jurisdiction in the sense described above at 2.1. There are various defences to recognition of a foreign judgment, for

the purposes of an action on a judgment. Furthermore, a foreign judgment will only be enforced if it is final. These grounds are also described above at 2.1.

4.4.3 Differences in comparison to the grounds in B IA

The approach adopted by English law to recognition of foreign judgments is significantly different to that in B IA. Major points of difference include:

- The requirement that the foreign court should have had jurisdiction on a basis recognised as sufficient by English law (indirect jurisdiction), and the limited bases of jurisdiction accepted by English law for this purpose (residence, submission)
- A wider range of defences to recognition. Although there is some significant overlap in the defences available (public policy, natural justice, res judicata), the details of each defence are different, and English law has additional grounds of non-recognition.[176]

4.5 Remedies in relation to the enforcement of foreign judgments under B IA following the abolition of exequatur

4.5.1 Remedies in the Member State of origin regarding the enforcement title itself

The effect of a remedy sought in the Member State of origin will depend on the particular remedy concerned. Thus, if the enforcement title ceases to be enforceable as a result of the remedy, it will no longer be entitled to enforcement under art.39 B IA. In other cases, the debtor could resist an application for an enforcement measure in England, or apply for a stay of execution (in the case of a writ or warrant of control) on the basis of the challenge in the State of origin. It would be a matter for the discretion of the court, in all the circumstances, as to whether such a stay should be granted (under CPR Part 83.7).

[176] E.g. the defences available under s.5 of the Protection of Trading Interests Act 1980 and s.32(4) of the Civil Jurisdiction and Judgments Act 1982. Fraud is also a specific head of defence under English law, but arguably subsumed under public policy in the context of B IA. See generally above at 2.1.

4.5.2 Procedural aspects of proceedings pursuant to Art. 47 of Regulation 1215/2012

"Article 47

1. The application for refusal of enforcement shall be submitted to the court which the Member State concerned has communicated to the Commission pursuant to point (a) of Article 75 as the court to which the application is to be submitted.

2. The procedure for refusal of enforcement shall, in so far as it is not covered by this Regulation, be governed by the law of the Member State addressed.

3. The applicant shall provide the court with a copy of the judgment and, where necessary, a translation or transliteration of it.

The court may dispense with the production of the documents referred to in the first subparagraph if it already possesses them or if it considers it unreasonable to require the applicant to provide them. In the latter case, the court may require the other party to provide those documents.

4. The party seeking the refusal of enforcement of a judgment given in another Member State shall not be required to have a postal address in the Member State addressed. Nor shall that party be required to have an authorised representative in the Member State addressed unless such a representative is mandatory irrespective of the nationality or the domicile of the parties."

According to CPR Part 74.7A

> "(1) An application under article 45 or 46 of the Judgments Regulation that the court should refuse to recognise or enforce a judgment must be made—
>
> (a) in accordance with Part 23; and
>
> (b) to the court in which the judgment is being enforced or, if the judgment debtor is not aware of any proceedings relating to enforcement, the High Court."

There is an inconsistency between the CPR and the information submitted to the Commission and available on the European Judicial Atlas. The CPR provide for the possibility of proceedings in the County Court if a judgment is already in the process

of enforcement there. The European Judicial Atlas lists only the enforcement office of the High Court as the court to which applications for refusal of recognition or enforcement of a judgment shall be made.

4.5.3 Documents pursuant to Art. 47(3) of Regulation 1215/2012

According to PD 74A para. 6B.1, an application for refusal of enforcement must be accompanied by a copy of the judgment, any other documents relied upon and any necessary translations, and be supported by written evidence showing why the court should find that one of the grounds referred to in article 45 of the Judgments Regulation exists.

4.5.4 Service of documents and representation

Applications challenging enforcement under CPR Part 23 must comply with the rules on service in para.7 of that Part. A copy of the application notice must normally be served as soon as possible after it is filed and at least 3 days before the court is to deal with the application. Practice Direction 6B.7, accompanying CPR Part 6 on service of documents, refers to a table that establishes, by country, the number of days allowed for respoding to a notice where service abroad is required.

The application notice should be accompanied by any written evidence in support of the application, and a copy of any draft order which the applicant has attached to his application.

The general rules on service of documents in CPR Part 6 apply (see above at 1.17).

4.5.5 Challenges to recognition

Recognition of a foreign judgment may be sought 'incidentally' as part of a claim or defence. Similarly, an objection to recognition of a foreign judgment may be made in this manner. See further above at 2.1 and 2.2.

An application for refusal of recognition under Art.45 B IA is provided for by CPR Part 74.7A. Such an application "must be made—

> (a) in accordance with Part 23; and
> (b) to the court in which the judgment is being enforced or, if the judgment debtor is not aware of any proceedings relating to enforcement, the High Court."

Since the process of enforcement can involve both the *ex parte* issue of a writ and *inter partes* hearings (e.g. application for a charging order, third party debt order, attachment of earnings order), opposition by the defendant may either arise in the course of the *inter partes* proceedings or as a separate application (under CPR Parts 83 and 23) for a stay of execution. As with recognition, for the purposes of Art.45 and 46 B IA a specific application for refusal of enforcement may be brought under CPR Part 74.7A.

For further discussion see above at 3.2.5.

4.5.6 Third instance appeal: consideration of the facts

It is the court at first instance that determines the facts. An appeal is usually only on a point of law. In exceptional circumstances, further evidence as to the facts may also be submitted.[177] It is also possible for the appeal court to review the written evidence the proceedings at first instance and reach different conclusions as to the facts, although "an appellate court should not interfere with the trial judge's conclusions on primary facts unless it was satisfied that he was plainly wrong."[178]

4.5.7 Standing to apply for a refusal of recognition or enforcement

According to CPR Part 40.9 which relates to judgments and orders, a person who is not a party but who is directly affected by a judgment or order may apply to have the judgment or order set aside or varied. This provision will apply to orders made

[177] CPR Part 52.21(2), discussed by Sime, *op. cit.* at 576 and the White Book, Vol.1, A, 52.21.2 and 3.
[178] *Henderson v Foxworth Investments Ltd* [2014] 1 WLR 2600.

for the purposes of enforcement (e.g. charging order, attachment of earnings order, third party debt order)

CPR Part 83.7, dealing more specifically with a stay of execution of a writ or warrant, provides that at the time that a judgment or order for payment of money is made or granted, or at any time thereafter, the debtor or other party liable to execution of a writ of control or a warrant may apply to the court for a stay of execution.

Third parties affected by an enforcement order are therefore eligible to apply for the order to be set aside, varied or suspended, and as a matter of principle this seems to be the correct approach. The removal of the requirement for a declaration of enforceability means that an enforcement measure affecting persons other than the debtor may be obtained without the chance for any consideration of possible grounds for non-recognition. It is to be anticipated that decisions of the CJEU will clarify the law in this respect but given the differences in national laws any definition of affected third parties is likely to be in very general terms.

2.5.8 Suspension and limitation of enforcement proceedings (Art. 44)

"Article 44

1. In the event of an application for refusal of enforcement of a judgment pursuant to Subsection 2 of Section 3, the court in the Member State addressed may, on the application of the person against whom enforcement is sought:

(a) limit the enforcement proceedings to protective measures;
(b) make enforcement conditional on the provision of such security as it shall determine; or
(c) suspend, either wholly or in part, the enforcement proceedings."

2. The competent authority in the Member State addressed shall, on the application of the person against whom enforcement is sought, suspend the enforcement proceedings where the enforceability of the judgment is suspended in the Member State of origin.

Where a refusal of enforcement is sought, using the application procedure under CPR Parts 74.7A and 23, the courts have a broad discretion as to the form of any order to be made (there is no suggestion that the choice is limited to just one of the options in Article 44). They may make the grant a stay of enforcement subject to

the provision of security, or dependent on other undertakings by the debtor. Relief against enforcement under Article 44 is specifically regulated by CPR Part 74.7B:

> "(1) An application for relief under article 44 of the Judgments Regulation must be made—
>
> (a) in accordance with Part 23; and
>
> (b) to the court in which the judgment is being enforced or, if the judgment debtor is not aware of any proceedings relating to enforcement, the High Court.
>
> (2) The judgment debtor must, as soon as practicable, serve copies of any order made under article 44 on—
>
> (a) all other parties to the proceedings and any other person affected by the order;
>
> (b) any court in which proceedings relating to enforcement of the judgment are pending in England and Wales; and
>
> (c) any enforcement agent or enforcement officer (as defined in rule 83.1(2)) instructed by the judgment creditor,
>
> and any such order will not have effect on any person until it has been served."

4.6 Protective measures.

4.6.1 Availability of protective measures for the purposes of Art. 40

A natural interpretation of Art. 40 from the perspective of English law would be that an enforceable judgment assists the judgment credit in applying for interim measures, such as asset freezing orders, available under CPR Part 25. As noted above at 3.1.12 it is arguable that Art. 40 should also provide the power to proceed to enforcement measures that have a security function.

4.6.2 Prerequisites for the grant of such protective measures

See above at 1.18.1 and 2.

4.6.3 Duration of protective measures

A time limit for the protective measure will be stated in the order itself. If an order is made *ex parte*, it must contain a return date for a further hearing at which the other party can be present (PD 25A 5.1). The court can then consider whether to continue the measure *inter partes*.

4.6.4 Effects of protective measures

A wide variety of protective measures exist, including interim payments, injunctions prohibiting the defendant from effecting any disposition of property, detention of property or an order that rents from a property should be made to the applicant (CPR Part 25.1)

In so far as the interim measure at issue is an injunction directed at the debtor, it has a purely *in personam* effect (cf enforcement measures which have an *in rem* effect). See further above at 1.3 and 1.18.

4.6.5 Can an enforcement motion be refused entirely due to the objection regarding foreign enforcement title or is this just limited to the security measures?

If there is a challenge to the foreign enforcement title in the State of origin, clearly this may affect the enforceability of the title, and so its status as enforceable for the purposes of B IA. Where the enforcement title remains enforceable, but is the subject of dispute in the State of origin or State addressed, an English court would have a discretion as to whether to grant protective measures, allow enforcement to proceed, or stay any enforcement measures in progress, depending on the specific circumstances. See further above at 4.2.

4.7 Grounds for refusal

4.7.1 Past characteristics and new problems

In the light of the limited case law on this subject, it is difficult to suggest where problems might lie. Either they are few, or there are structural reasons why cross-

border enforcement in England and Wales is limited. Anecdotal evidence on the operation of the EEO is mixed. Some law firms have a successful record of enforcement (e.g. a firm specialising in the collection of the financial contributions of condominium owners in Spain). In other cases, the court approached refused to enforce the judgment because the judge was not familiar with the forms produced before it.

There is a significant case law on the Brussels I Regulation in England and Wales, but it is mainly confined to jurisdictional issues. The focus is on large scale commercial litigation. Many cases settle once the issue of jurisdiction is decided. Having said that there are significant numbers of cases on the enforcement of judgments in relation to parental responsibility under Brussels II bis.

4.7.2 Survival of grounds for refusal from Regulation 44/2001

In principle, the grounds should remain, but subject to an interpretation that ensures they are restrictively interpreted. In general, in Europe, disputes relating to proper service have been a major reason to challenge enforcement and this problem needs to be addressed both in terms of greater harmonisation and trust-building in the context of service of documents, and in the interpretation of Art.45(1)(b). The scope the *res judicata* defence is also an area of confusion.

4.7.3 Problematic grounds for refusal

See above at 4.7.1.

4.7.4 Grounds regarding related actions and irreconcilable judgements.

Case law does not disclose any particular problem areas.

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Part 5: Final critical evaluation of B IA – what necessary adaptations to national legislations need to be done?

5.1 Impact of B IA on speed, simplicity and cost of litigation in cross-border cases

While B IA undoubtedly can speed up and reduce the costs of litigation in cross-border cases – in an appropriate case and with good legal advice – in some legal systems of the EU it seems likely to add to complexity and confusion. In legal systems with relatively diffuse enforcement mechanisms, there is a greater likelihood that the enforcement agent (court, professional) will not be familiar with B IA and will commit errors.[179] Some mechanism of specialisation or concentration seems desirable.

5.2 Best alternatives for judgment creditors

As noted above at 5.1 and 4.7.1, there are examples where the solution of removal of *exequatur* as per Brussels I A has proved very successful. Nevertheless, in view of the complexity of English enforcement law and the number possible of participants in the process (courts, legal advisors etc), it may well be a lottery for a creditor as to whether they get an effective and low-cost service. There is much to be said for a

[179] See further W. Kennett, "General Context of Enforcement Systems" and "Adaptation measures: Art 54-55 Brussels I Recast" in V. Rijavec et al (eds) *Remedies concerning enforcement of foreign judgements, Brussels I Recast* (Kluwer) forthcoming.

reduction of the routes of entry into the system, which was formerly achieved by routing *exequatur* through the High Court Enforcement Office.

5.3 Language issues: Is it possible or advisable to choose the form in the language of the debtor?

This does not seem to have been an issue to date. Nothing in the Civil Procedure Rules provides for the issue of the form in a language other than English.

5.4 Impact of B IA on principle of national procedural autonomy

The point is rendered moot by the (probable) impending departure of the United Kingdom from the EU, but the flexibility of English procedures, and the level discretion available to the courts suggest that there would be scope within the system to incorporate the requirements of EU law. On the other hand, to the extent that EU law might reduce the level of discretion and flexibility available, English courts have shown themselves in the past to be reluctant to accept this albeit they have on the whole complied with the requirements.[180] More generally, the considerable difference in approach between English law and the laws of most EU Member States actually makes it quite difficult to appreciate the ways in which other Member States may interpret provisions of EU law. An interpretation that seems obvious, or is easily accommodated, in a civil law context may not occur to an English lawyer at all. The very language used to discuss problems of procedural law is also unfamiliar. In that sense, the impact on procedural autonomy emerges only very slowly. This will remain an issue for the remaining common law jurisdictions within the EU.

5.5 Costs of enforcement under B IA

Comment: *Try to indicate the specific costs which may arise in relation to the procedure envisaged under the B IA.*

Since the procedure envisaged allows applications to be made directly for various methods of enforcement some indications of fees for enforcement action are indicated below. Fees may include court fees, professional fees, and 'proportional fees' based on the amount recovered.

---

[180] A good example of this is in the context of the doctrine of *forum non conveniens*. English courts have been very reluctant to accept that it cannot be applied in an intra-European context, and a number of references to the CJEU have been made which have gradually restricted the field of application of the doctrine. The rulings of the CJEU have been applied, but new arguments have been devised so that the doctrine can continue to have a certain scope of operation. A similar situation has arisen in the context of anti-suit injunctions to restrain arbitration in breach of an arbitration agreement.

Fixed tariffs and proportional (percentage) fees are elements of the cost of enforcement in the case of execution against goods, performed by HCEOs and other enforcement agents. The regulated fees are set out at Tables 1 and 2 below.

Solicitors, who might be instructed in relation to various methods of enforcement such as third-party debt orders and charging orders, have traditionally charged by the hour. Other approaches to charging have more recently become permissible however.

Lawyers fixed fees: Lawyers who specialise in enforcement may advertise a fixed fee to cover court fees, their own fees, anticipated costs and VAT.

e.g. **Helpland Ltd** advertise the following fixed fees for domestic cases:

Third Party Debt Order	£449.95
Attachment of Earnings	£449.95
Enforcement via an HCEO	£399.95 To cover e.g. the court fee for issue of a writ, Helpland's own fees and costs, and a standard fee payable by the creditor even if the enforcement attempt is abortive. Where the enforcement action is successful fees will be levied according to the Taking Control of Goods (Fees) Regulations 2014 (see below)
Charging Order	£699.95
Debtor Tracing	£99.95 (only payable if successful)
A "no win, no fee" service is also offered for "cold" judgments.	Helpland retain 60 percent of any amount recovered.

Taking Control of Goods (Fees) Regulations 2014, reg.4 and Sch: Fees recoverable by reference to stage of enforcement

Table 1: Enforcement other than under a High Court Writ		
Fee Stage	**Fixed Fee**	**Percentage fee (regulation 7): percentage of sum to be recovered exceeding £1500**
Compliance stage	£75.00	0%
Enforcement stage	£235.00	7.5%
Sale or disposal stage	£110.00	7.5%

Table 2: Enforcement under a High Court Writ		
Fee Stage	**Fixed Fee**	**Percentage fee (regulation 7): percentage of sum to be recovered exceeding £1000**
Compliance stage	£75.00	0%
First enforcement stage (applies where a controlled goods agreement is made)	£190.00	7.5%
Second enforcement stage	£495.00	0%
Sale or disposal stage	£525.00	7.5%

A 'Damages Based Agreement (DBA)' (i.e. a form of "no win, no fee" agreement) has been permitted in relation to proceedings before the English courts from 1 April 2013.[181] In debt collection cases, the payment a lawyer may agree to receive under a DBA will be subject to a cap of 50 percent of the sums recovered by the client.[182]

Welbeck Solicitors specialise in cross-border debt recovery. They undertake most of their work through a 'Damages Based Agreement (DBA)'. Clients pay by results and only pay fees if a recovery is made. If possible all fees and costs will be recovered from the debtor. They claim to charge 'a lot less' than the 50 percent cap.

The liability of an unsuccessful party to pay the costs of an opponent who has entered into a DBA continues to be calculated in the usual way i.e. based on the lawyer's hourly rates.

[181] Damages-Based Agreement Regulations 2013 (SI 2013/609). Such agreements were previously permitted in employment matters. Statutory authorisation is provided by the Courts and Legal Services Act 1990, s.58AA.
[182] Reg,4

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Annex 1: Freezing Injunction

FREEZING INJUNCTION

IN THE HIGH COURT OF JUSTICE
[ ] DIVISION

Before The Honour able Mr Justice **[ ]**

Claim No .

Dated

Applicant

Seal

Respondent

Name , address and reference of Respondent

PENAL NOTICE

IF YOU [ ][1] DISOBEY THIS ORDER YOU MAY BE HELD TO BE IN CONTEMPT OF COURT AND MAY BE IMPRISONED, FINED OR HAVE YOUR ASSETS SEIZED.

ANY OTHER PERSON WHO KNOWS OF THIS ORDER AND DOES ANYTHING WHICH HELPS OR PERMITS THE RESPONDENT TO BREA CH THE TERMS OF THIS ORDER MAY ALSO BE HELD TO BE IN CONTEMPT OF COURT AND MAY BE IMPRISONED, FINED OR HAVE THEIR ASSETS SEIZED.

1 Insert name of Respondent .

THIS ORDER

1. This is a Freezing Injunction made against [ ] ('the Respondent') on [ ] by Mr Justice [ ] on the application of [ ] ('the Applicant'). The Judge read the Affidavits listed in Schedule A and accepted the undertakings set out in Schedule B at the end of this Order.

2. This order was made at a hearing without notice to the Respondent. The Respondent has a right to apply to the court to vary or discharge the order – see paragraph 13 below.

3. There will be a further hearing in respect of this order on [ ] ('the return date').

4. If there is more than one Respondent –

(a) unless otherwise stated, references in this order to 'the Respondent' mean both or all of them; and
(b) this order is effective against any Respondent on whom it is served or who is given notice of it.

FREEZING INJUNCTION

[For injunction limited to assets in England and Wales]

5. Until the return date or further order of the court, the Respondent must not remove from England and Wales or in any way dispose of, deal with or diminish the value of any of his assets which are in England and Wales up to the value of £ .

[For worldwide injunction]

5. Until the return date or further order of the court, the Respondent must not –

(1) remove from England and Wales any of his assets which are in England and Wales up to the value of £ ; or
(2) in any way dispose of, deal with or diminish the value of any of his assets whether they are in or outside England and Wales up to the same value.
[For either form of injunction]

6. Paragraph 5 applies to all the Respondent's assets whether or not they are in his own name and whether they are solely or jointly owned. For the purpose of this order the Respondent's assets include any asset which he has the power, directly or indirectly, to dispose of or deal with as if it were his own. The Respondent is to be regarded as having such power if a third party holds or controls the asset in accordance with his direct or indirect instructions.

7. This prohibition includes the following assets in particular –

(a) the property known as [title/address] or the net sale money after payment of any mortgages if it has been sold;
(b) the property and assets of the Respondent's business [known as [name]] [carried on at [address]] or the sale money if any of them have been sold; and
(c) any money standing to the credit of any bank account including the amount of any cheque drawn on such account which has not been cleared.

[For injunction limited to assets in England and Wales]

8. If the total value free of charges or other securities ('unencumbered value') of the Respondent's assets in England and Wales exceeds £ , the Respondent may remove any of those assets from England and Wales or may dispose of or deal with them so long as the total unencumbered value of his assets still in England and Wales remains above £ .

[For worldwide injunction]

8.

(1) If the total value free of charges or other securities ('unencumbered value') of the Respondent's assets in England and Wales exceeds £ , the Respondent may remove any of those assets from England and Wales or may dispose of or deal with them so long as the total unencumbered value of the Respondent's assets still in England and Wales remains above £ .

(2) If the total unencumbered value of the Respondent's assets in England and Wales does not exceed £ , the Respondent must not remove any of those assets from England and Wales and must not dispose of or deal with any of them. If the Respondent has other assets outside England and Wales, he may dispose of or deal with those assets outside England and Wales so long as the total unencumbered value of all his assets whether in or outside England and Wales remains above £ .

PROVISION OF INFORMATION

9.

(1) Unless paragraph (2) applies, the Respondent must [immediately] [within hours of service of this order] and to the best of his ability inform the Applicant's solicitors of all his assets [in England and Wales] [worldwide] [exceeding £ in value] whether in his own name or not and whether solely or jointly owned, giving the value, location and details of all such assets.

(2) If the provision of any of this information is likely to incriminate the Respondent, he may be entitled to refuse to provide it, but is recommended to take legal advice before refusing to provide the information. Wrongful refusal to provide the information is contempt of court and may render the Respondent liable to be imprisoned, fined or have his assets seized.

10. Within [ ] working days after being served with this order, the Respondent must swear and serve on the Applicant's solicitors an affidavit setting out the above information.

EXCEPTIONS TO THIS ORDER

11.

(1) This order does not prohibit the Respondent from spending £ a week towards his ordinary living expenses and also £ [or a reasonable sum] on legal advice and representation. [But before spending any money the Respondent must tell the Applicant's legal representatives where the money is to come from.]

([2) This order does not prohibit the Respondent from dealing with or disposing of any of his assets in the ordinary and proper course of business.]

(3) The Respondent may agree with the Applicant's legal representatives that the above spending limits should be increased or that this order should be varied in any other respect, but any agreement must be in writing.

(4) The order will cease to have effect if the Respondent –

> (a) provides security by paying the sum of £ into court, to be held to the order of the court; or
> (b) makes provision for security in that sum by another method agreed with the Applicant's legal representatives.

COSTS

12. The costs of this application are reserved to the judge hearing the application on the return date.

VARIATION OR DISCHARGE OF THIS ORDER

13. Anyone served with or notified of this order may apply to the court at any time to vary or discharge this order (or so much of it as affects that person), but they must first inform the Applicant's solicitors. If any evidence is to be relied upon in support of the application, the substance of it must be communicated in writing to the Applicant's solicitors in advance.

INTERPRETATION OF THIS ORDER

14. A Respondent who is an individual who is ordered not to do something must not do it himself or in any other way. He must not do it through others acting on his behalf or on his instructions or with his encouragement.

15. A Respondent which is not an individual which is ordered not to do something must not do it itself or by its directors, officers, partners, employees or agents or in any other way.

PARTIES OTHER THAN THE APPLICANT AND RESPONDENT

16. Effect of this order

It is a contempt of court for any person notified of this order knowingly to assist in or permit a breach of this order. Any person doing so may be imprisoned, fined or have their assets seized.

17. Set off by banks

This injunction does not prevent any bank from exercising any right of set off it may have in respect of any facility which it gave to the respondent before it was notified of this order.

18. Withdrawals by the Respondent

No bank need enquire as to the application or proposed application of any money withdrawn by the Respondent if the withdrawal appears to be permitted by this order.

[For worldwide injunction]

19. Persons outside England and Wales

(1) Except as provided in paragraph (2) below, the terms of this order do not affect or concern anyone outside the jurisdiction of this court.

(2) The terms of this order will affect the following persons in a country or state outside the jurisdiction of this court –

(a) the Respondent or his officer or agent appointed by power of attorney;
(b) any person who –
(i) is subject to the jurisdiction of this court;
(ii) has been given written notice of this order at his residence or place of business within the jurisdiction of this court; and
(iii) is able to prevent acts or omissions outside the jurisdiction of this court which constitute or assist in a breach of the terms of this order; and
(c) anyother person, only to the extent that this order is declared enforceable by or is enforced by a court in that country or state.

[For worldwide injunction]

20. Assets located outside England and Wales

Nothing in this order shall, in respect of assets located outside England and Wales, prevent any third party from complying with –

(1) what it reasonably believes to be its obligations, contractual or otherwise, under the laws and obligations of the country or state in which those assets are situated or under the proper law of any contract between itself and the Respondent; and
(2) any orders of the courts of that country or state, provided that reasonable notice of any application for such an order is given to the Applicant's solicitors.

COMMUNICATIONS WITH THE COURT

All communications to the court about this order should be sent to –

[Insert the address and telephone number of the appropriate Court Office]

If the order is made at the Royal Courts of Justice, communications should be addressed as follows –

Where the order is made in the Chancery Division

Room TM 5.07, Royal Courts of Justice, Strand, London WC2A 2LL quoting the case number. The telephone number is 020 7947 6322.

Where the order is made in the Queen's Bench Division

Room WG08, Royal Courts of Justice, Strand, London WC2A 2LL quoting the case number. The telephone number is 020 7947 6010.

Where the order is made in the Commercial Court

Room EB09, Royal Courts of Justice, Strand, London WC2A 2LL quoting the case number. The telephone number is 0207 947 6826.

The offices are open between 10 a.m. and 4.30 p.m. Monday to Friday.

SCHEDULE A

AFFIDAVITS

The Applicant relied on the following affidavits–

[name] [number of affidavit][date sworn][filed on behalf of]

SCHEDULE B

UNDERTAKINGS GIVEN TO THE COURT BY THE APPLICANT

(1) If the court later finds that this order has caused loss to the Respondent, and decides that the Respondent should be compensated for that loss, the Applicant will comply with any order the court may make.

[(2) The Applicant will –

> (a) on or before [date] cause a written guarantee in the sum of £ to be issued from a bank with a place of business within England or Wales, in respect of any order the court may make pursuant to paragraph (1) above; and

(b) immediately upon issue of the guarantee, cause a copy of it to be served on the Respondent.]

(3) As soon as practicable the Applicant will issue and serve a claim form [in the form of the draft produced to the court] [claiming the appropriate relief].

(4) The Applicant will [swear and file an affidavit] [cause an affidavit to be sworn and filed] [substantially in the terms of the draft affidavit produced to the court] [confirming the substance of what was said to the court by the Applicant's counsel/solicitors].

(5) The Applicant will serve upon the Respondent [together with this order] [as soon as practicable] –

(i) copies of the affidavits and exhibits containing the evidence relied upon by the Applicant, and any other documents provided to the court on the making of the application;
(ii) the claim form; and
(iii) an application notice for continuation of the order.

[(6) Anyone notified of this order will be given a copy of it by the Applicant's legal representatives.]

(7) The Applicant will pay the reasonable costs of anyone other than the Respondent which have been incurred as a result of this order including the costs of finding out whether that person holds any of the Respondent's assets and if the court later finds that this order has caused such person loss, and decides that such person should be compensated for that loss, the Applicant will comply with any order the court may make.

(8) If this order ceases to have effect (for example, if the Respondent provides security or the Applicant does not provide a bank guarantee as provided for above) the Applicant will immediately take all reasonable steps to inform in writing anyone to whom he has given notice of this order, or who he has reasonable grounds for supposing may act upon this order, that it has ceased to have effect.

[(9) The Applicant will not without the permission of the court use any information obtained as a result of this order for the purpose of any civil or criminal proceedings, either in England and Wales or in any other jurisdiction, other than this claim.]

[(10) The Applicant will not without the permission of the court seek to enforce this order in any country outside England and Wales [or seek an order of a similar nature including orders conferring a charge or other security against the Respondent or the Respondent's assets].]

NAME AND ADDRESS OF APPLICANT'S LEGAL REPRESENTATIVES

The Applicant's legal representatives are –

[Name, address, reference, fax and telephone numbers both in and out of office hours and e-mail]

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Annex 2: No. 53 - Writ of Control

In the High Court of Justice
[ ] Division
[ ] District Registry
High Court Claim No.
[County Court Claim No.]

Claimant
Defendant

ELIZABETH THE SECOND, by the Grace of God, of the United Kingdom of Great Britain and Northern Ireland and of Our other realms and territories Queen, Head of the Commonwealth, Defender of the Faith.

TO**:** *" ……, an enforcement officer authorised to enforce writs of control issued from the High Court."*
Or,
"The enforcement officers authorised to enforce writs of control issued from the High Court who are assigned to the district of[183] *…… in England & Wales.*[184]

IN THIS CLAIM a Judgment or Order was made as set out in the Schedule.

YOU ARE NOW COMMANDED to take control of the goods of the [claimant][defendant] authorised by law and raise therefrom the sums detailed in the Schedule, [together with fees and charges to which you are entitled]. And immediately after execution pay the [claimant][defendant] (name) the said sums and interest.

YOU ARE ALSO COMMANDED to indorse on this writ immediately after taking control of goods a statement of the manner in which you have done so and send a copy of the statement to the [claimant][defendant] (name).

THIS WRIT WAS ISSUED by the Central Office [the District Registry] of the High Court on (*date*) on the application of (*name*) of (*address*) [agent for (*name*) of (*address*)] legal representative of [the claimant] [*or* the claimant (*name*) in person] who resides at (*address*).

WITNESS (name) Lord High Chancellor of Great Britain, the (date)

The address[es] for enforcement are (address[es] including county and postcode).

SCHEDULE

1. Date of Judgment or Order: ……20		
2. Amount of Judgment or Order (including interest awarded by Judgment or Order)		£
3. Fixed costs on Judgment or Order		£
4. Assessed costs (if any) [by costs certificate dated (date)]		£
5. (If sent from County Court by certificate) Interest[185] post-Judgment or Order on County Court judgment or order over £5,000) until date of certificate		£
6. LESS credits or payments received since Judgment or Order		£
	Sub Total	**£**
7. Fixed costs on issue		£
	Total	**£**

Together with: -
A. Judgment interest[186] at [8]% from;_____20__
date of Judgment on sub-total above, or (if sent from County Court by certificate) date of County Court certificate on paragraphs 1,2 and 3 above until payment,
B. Fees and Charges to which you are entitled (where appropriate).

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[183] This should reflect the Districts as set out in the High Court Enforcement Officers Regulations 2004.
[184] Note if you have chosen this option you must send this writ to the National Information Centre for Enforcement for allocation (c/o Registry Trust Ltd, 153-157 Cleveland Street, London W1T 6OW).
[185] Interest under s.74 of the County Courts Act 1984.
[186] S.17 Judgments Act 1838

University of Maribor

Faculty of Law

MARIBOR, SEPTEMBER 2018