

# ENFORCEMENT OF 'UNENFORCEABLE' FOREIGN JUDGMENTS AT COMMON LAW



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Currently the common law rules of enforcement will apply by default to the enforcement of a foreign judgment in the UK should any of (i) the legacy EU regime, (ii) the Hague Convention on Choice of Court Agreements 2005, (iii) the Administration of Justice Act 1920, or (iv) the Foreign Judgments (Reciprocal Enforcement) Act 1933 not apply.



To enforce a foreign money judgment at common law, the enforcing party must sue on the foreign judgment as a judgment debt and must satisfy the English court that the foreign judgment is final and conclusive in its jurisdiction of origin. A foreign judgment will be incapable of enforcement at common law if the English court determines that: (i) the foreign court lacked competent jurisdiction, according to English rules

of private international law; (ii) the judgment was obtained by fraud; or (iii) enforcement would be contrary to public policy or the requirements of natural justice.



There is, however, no rule of the common law that a foreign judgment which has res judicata effect in its jurisdiction of origin is incapable of enforcement by the English court simply because it is not presently or fully capable of enforcement in the jurisdiction of origin. This was the finding of Stephen Houseman KC sitting as a Deputy High Court Judge in *Invest Bank PSC v Ahmad Mohammed El-Husseini* and others [2023] EWHC 2302 (Comm), wherein res judicata judgments of the Abu Dhabi court were deemed capable of enforcement in England despite them not being enforceable in Abu Dhabi.



## Background

The case dealt with two credit facilities given to two UAE companies by Invest Bank, both of which were secured by a personal guarantee provided by Mr El-Husseini. Invest Bank brought claims against the borrowers and guarantors in Abu Dhabi in 2021, securing monetary judgments for a total sum roughly equivalent to £20 million. With these judgments, Invest Bank pursued enforcement proceedings in Abu Dhabi and then in England.

Invest Bank's enforcement action in England resulted in a default judgment against Mr El-Husseini, who failed to file a defence. Invest Bank's claim also consists of a claim under the guarantees, and a claim against the family members of Mr El-Husseini under section 423 of the Insolvency Act 1986.



In September 2022, while the English proceedings were underway, the UAE Federal Decree Law No 14 of 2018 was amended to introduce Article 121 bis, which required that financial institutions obtain “in-kind” security to enforce any claims under credit agreements against individuals or sole enterprises. A personal guarantee, such as the one provided to Invest Bank, was not considered to be “in-kind” security without more.

Mr El-Husseini then secured execution judgments in Abu Dhabi which declared that by reason of Article 121 bis, the monetary judgments obtained by Invest Bank were unenforceable against the guarantor as the guarantees were not deemed to be ‘sufficient security’. The enforcement actions by the Bank were therefore vacated.

In the English proceedings, the Sixth Defendant applied to set aside the default judgment and have the issue of D1’s liability under the UAE judgments determined as a preliminary issue to the trial listed in July 2024. Essentially, the Sixth Defendant argued that Article 121 bis rendered the monetary judgments unenforceable in the UAE and therefore they could not be enforced in England.



## The Decision

Stephen Houseman KC, sitting as a Deputy High Court Judge, found that the monetary judgments were final and conclusive as to liability within the UAE. The UAE execution judgments were procedural and did not interpret or amend the final determinations made on the merits in the monetary judgments. The judge found that there was no rule under the common law that prevented a foreign money judgment from being enforced in England as a result of its lack of enforceability in its jurisdiction of origin. As such, the monetary judgments were res judicata in the UAE and enforceable by the English court, whilst the execution decisions were irrelevant to that enforcement.

The judge further found that Mr El-Husseini was liable to the Bank under the guarantees, which remained valid under UAE law despite Article 121 bis. He refused to set aside default judgment, finding that Mr El-Husseini had no reasonable prospect of defending the enforcement claim.

The decision is valuable confirmation that once a party obtains a res judicata judgment, the common law will enforce it (subject to its other requirements). The ratio of this decision may have a more limited impact given that it is a more unusual case where a res judicata judgment is unenforceable in the country of origin. That said, and as was recognised by the court, the decision results in the common law providing a more favourable route for enforcement than the statutory regimes under the Foreign Judgments (Reciprocal Enforcement) Act 1933, which requires local enforceability as a condition of recognition and enforcement in England and Wales.

## Looking Forward

The judgment was not appealed and sits as an authoritative exposition of this narrow question of private international law. The judge, however, noted that the issues were perhaps suitable for consideration by an appellate court, so this may not be the final word on the issue should the opportunity arise.

Whilst this decision helpfully confirms the position at common law, the ambit of the common law rules of enforcement is likely to be redefined in the near future with the UK having signed the Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters 2019 on 12 January 2024. Although the Convention only comes into force roughly a year after ratification or accession, these rules will come to govern enforcement of judgments from the EU (except for Denmark) in proceedings commenced after 31 December 2021 and a potentially growing list of countries, including Israel, the Russian Federation and the United States which have all signed (but not yet ratified) the Convention. The signatories are only likely to increase over the coming years, making for a more streamlined, statutory process to enforce foreign judgment in the UK and UK judgments abroad. In the meantime, the unenforceable can be enforceable at common law.

