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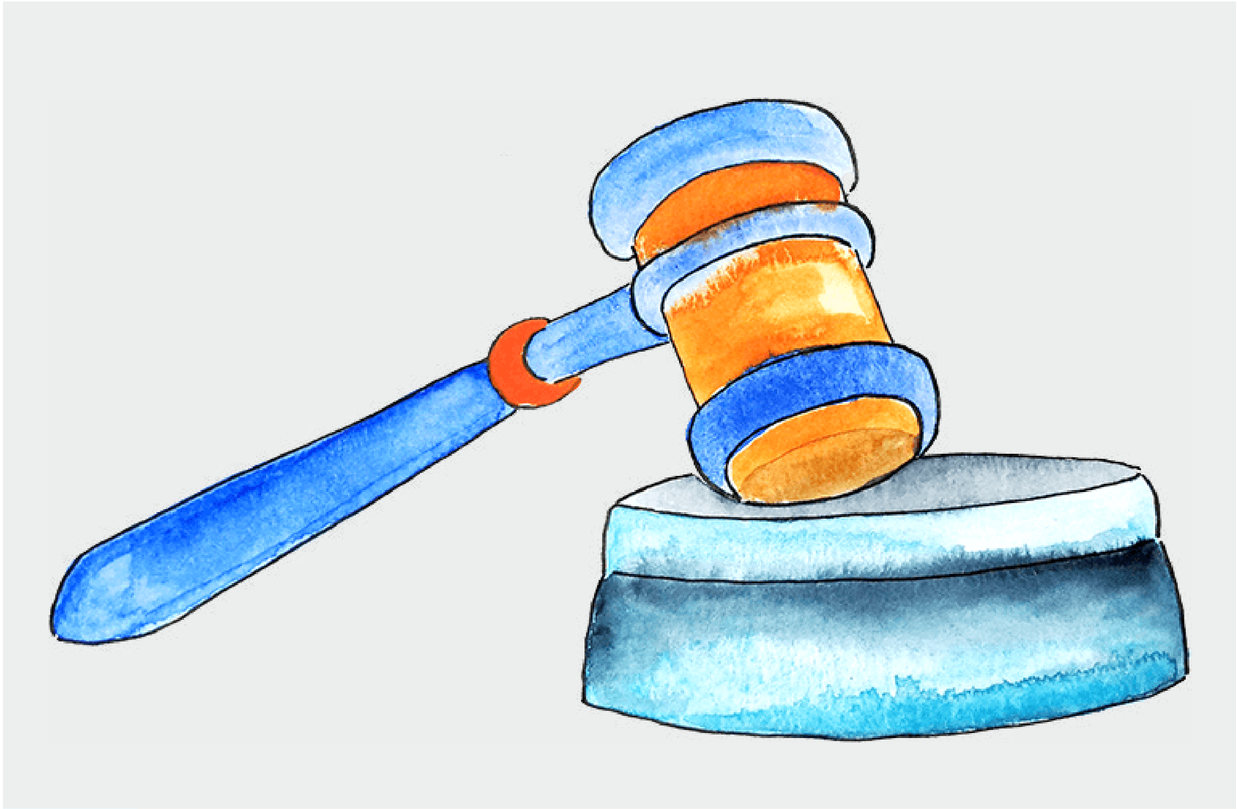

## Post-Brexit Roadmap to Enforcing EU Judgments in the UK Courts

Calum Cheyne & Lucy Noble

**PAGE 2**



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# CONTENTS



# POST-BREXIT ROADMAP TO ENFORCING EU JUDGMENTS IN THE UK COURTS

*Written by Calum Cheyne & Lucy Noble*

At 11 p.m. on the 31st of December 2020 (GMT), the 11-month transition period following the UK's formal exit from the EU lapsed, prompting the inauguration of a new era of UK and EU relations.

Broadly, the new order is defined by an overarching governance framework concluded in the EU-UK Trade and Cooperation Agreement (the "Withdrawal Agreement"). While the Withdrawal Agreement brings much-needed finality and clarity to previously unresolved questions of trade, movement of persons and general economic cooperation, it was never intended to set out conclusive guidance on each and every aspect of the new relationship.

One such area with no conclusive guidance is the enforcement of civil EU Judgments in the UK Courts. The implication is that what was once a clear and certain path from judgment to enforcement is now a more complex process requiring detailed care and attention.

**Pre-Brexit UK Position:**

Before the Withdrawal Agreement, enforcing a Judgment from an EU state was relatively straight-forward.

The Recast Brussels Regulation, since 2015 in its current form, creates a mechanism of reciprocal enforcement between EU Member States. The regime provides for a summary procedure whereby a party, after receiving a judgement from the court of one EU Member State, does not need to commence additional proceedings before the court of another EU Member State for enforcement.

**Current Position:**

Following the Withdrawal Agreement, the Civil Jurisdiction and Judgements (Amendment) (EU Exit) Regulations 2019 (the "Regulations") are in force. The Regulations effectively revoke the Brussels Regulation and its precursors and all other EU-specific enforcement mechanisms – but what is left in their place?

## THE HAGUE CONVENTION?

Where the proceedings were commenced pursuant to an exclusive jurisdiction provision, the 2005 Hague Convention on Choice of Court Agreements ("Hague Convention") will apply. The EU is a member of the Hague Convention, a membership that applies without interruption to the UK since the UK has acceded in its own right. The Hague Convention generally requires courts of the acceding states to enforce judgments in a manner not dissimilar to the Brussels Regulation.

Two issues arise with respect to the Hauge Conventions:

1. So called "*asymmetric*" jurisdiction provisions, which require one party to commence proceedings in a particular state, but which leave the other party open to commence in one of many jurisdictions. It is not clear whether such jurisdiction provisions are captured by the Hague Convention, and accordingly whether a successful claimant can benefit from the enforcement regime of the Hague Convention in circumstances where the underlying dispute was commenced pursuant to such a provision.

2. The Hague Convention does not apply to "interim" orders. Importantly, this means that a party cannot rely on the Hague Convention for the enforcement of interim injunctions and freezing orders.

Aside from the issues expressed above, the Hauge Convention provides the best starting place for a successful claimant in an EU Court, looking to enforce in the UK in this new-age of EU/UK relations.

## BILATERAL TREATIES?

For the enforcement of judgements outside the scope of the Hague Convention, the path becomes more uncertain.

The first question is whether there is any bilateral treaty in place between the specific EU Member State and the UK with respect to enforcement. Typically these bilateral treaties pre-date the sweeping EU wide reciprocity regimes. Now that those regimes have been undone, they come back into play pursuant to the Foreign Judgments (Reciprocal Enforcement) Act 1933 (the "**FJA**").

The key EU states to which this may apply are: Austria, Belgium, France, Germany, Italy, and The Netherlands, each of which has a pre-existing bilateral treaty with the UK. Do not expect this list to grow – any future agreement for reciprocity of enforcement is likely to be agreed at a pan-EU level, rather than state by state.

# CONTENTS



## COMMON LAW

If the Hague Rules do not apply, and if there is no bilateral treaty, the fallback position is that a successful claimant in a foreign court can sue under the foreign judgment in the English Courts.

Effectively, the foreign judgment is not directly enforceable, but is recognised as giving rise to a debt in favour of the successful claimant. The English Court may then find for the claimant, provided that the foreign judgment is final and conclusive.

Often this process can be dealt with by way of summary judgment. However, the English Court will not simply "rubber stamp" the foreign court's decision. Issues can be tried relating to the jurisdiction of the foreign court, issues of UK public policy in enforcing the foreign judgment, whether the foreign judgment was obtained by fraud or whether there are any issues of *natural justice.*

## A NOTE OF CAUTION

A note of caution here: if the FJA applies, then pursuant to Section 6 of the FJA the foreign judgment is to be *registered* in the UK. Critically, registration is the *only* mechanism by which to enforce a judgment. Any other attempt to claim in respect of a foreign judgment (e.g., under common law) is impermissible.

A similar regime exists in relation to the Hague Rules. The Hague Rules were incorporated into English law pursuant to the Civil Jurisdiction and Judgments Act 1982 (the "**CJJA**"). Pursuant to the CJJA, the only proceedings that can be commenced in England in relation to a foreign judgment that *is* enforceable in England are proceedings for registration of the foreign judgment.

Therefore, if the foreign judgment falls into the "bilateral treaty" camp, or the "Hague Rules" camp, the only appropriate method for enforcement is registration under the relevant Act. The question of what to do in a situation (as set out above) is left open as to where the Hague Rules *may or may not* apply. The CJJA says that if the Hague Rules apply, then registration is the only permissible approach. However, if the Hague Rules do not apply, then nor does the CJJA and the claimant must look to the common law.

A Claimant may choose to back one of these "horses" or alternatively to commence both registration proceedings and a claim on the foreign judgment at common law. Until the Courts resolve the issues surrounding the applicability of the Hague Rules, the position is unsatisfactorily uncertain.

## FINAL THOUGHTS

Brexit leaves a number of lacunas in the UK's legal structures. The pathways for UK enforcement of foreign judgments are one such example. Old legislation is being dusted off to deal with circumstances that, until recently, were dealt with quickly by EU-wide reciprocity regimes.

In some circumstances, parties are back to the 'square one' of enforcement at common law. In others, conflicting legislation provides a situation where a party may be required to commence dual proceedings, with the certainty that one set of proceedings will be wrongly commenced, but with commensurate uncertainty as to which set of proceedings will be right and which will be wrong.

This will inevitably impact the costs and time of enforcing in the UK a judgment obtained in an EU court. The analysis may not be straightforward, and the steps that must be taken to enforce any judgment should be analysed before parties embark on the initial litigation.

Meanwhile, a quick word for the world of arbitration, where the New York Convention continues to apply and arbitral awards are enforceable exactly as they would have been in pre-Brexit times. Simplicity, as they say, is the ultimate sophistication.

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**Additional content on this topic:**

## CONTENTS



# ENFORCEMENT OF UK JUDGMENTS IN AUSTRIA POST-BREXIT: AN INTRICATE INTERPLAY OF NATIONAL, PUBLIC INTERNATIONAL AND SUPRANATIONAL LAW

*Written by Alexander Zojer & Thomas Herbst*

## FAREWELL BRITANNIA

Under the Brussels I Recast Regulation ((EU) No 1215/2012), recognition and enforcement of judgments in civil and commercial matters is quite a simple endeavor: judgments rendered in a Member State are 1) recognized in other Member States without any special procedure and 2) enforceable in other Member States without any declaration of enforceability.

Although the UK already left the European Union on 31 January 2020, it is only as of 1 January 2021 that the Brussels I Recast Regulation no longer applies to UK judgments. One day before the UK left the EU, it had ratified the Withdrawal Agreement. Under its Article 67(2)(a), the EU and the UK agreed to continue applying the provisions on recognition and enforcement of the Brussels I Recast Regulation during a transition period that ended on 31 December 2020.

Since 1 January 2021, a provisionally applied EU–UK Trade and Cooperation Agreement governs the relations between the UK and the EU. However, that agreement does not specify any rules on recognition and enforcement of judgments in civil and commercial matters.

Following the expiry of the transition period, and without alternative regulations in place, UK judgments can no longer be recognized and enforced by Austrian Courts under the straightforward regime of the Brussels I Recast Regulation.

Lacking a basis in European law, the question arises if and how UK judgments can be recognized and enforced in Austria.

## ENFORCEMENT OF FOREIGN JUDGMENTS IN AUSTRIA

Recognition and enforcement of foreign judgments in Austria is governed by Sections 403 et seqq. of the **Austrian Enforcement Act** ("**EO**"). Sections 403 and 416 EO stipulate that foreign titles need to be declared enforceable by competent Austrian state courts before they can be enforced (*exequatur*) unless they are to be enforced on the basis of an international treaty or a European legal instrument.

In the absence of a European legal instrument, the first question is whether there is an international treaty that could serve as a basis for the enforcement of UK judgments. Otherwise, Austrian courts would need to resort to national enforcement rules, and consequently conduct exequatur proceedings (i.e., declare foreign titles enforceable). However, Section 406 EO contains considerable obstacles in this regard. Most prominently, as providing by rule that foreign judgments can only be declared enforceable where international treaties or domestic regulations guarantee reciprocal enforcement. Consequently, Austrian courts only enforce foreign judgments if the courts of the other state are generally required by an international treaty to enforce judgments rendered in Austria as well.

## MULTILATERAL INTERNATIONAL TREATIES ON RECOGNITION AND ENFORCEMENT

As a fallback option, it has been suggested that the 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters ("**1968 Brussels Convention**") could serve as such a treaty, mandating reciprocity. Both the UK and Austria have ratified the predecessor to the first Brussels I Regulation of 2001 (Council Regulation (EC) No 44/2001 of 22 December 2000). The question in the face of Brexit is whether the 1968 Brussels Convention still (or again) applies between the UK, a former EU Member State, and Austria, a current Member State.

Article 68 of the Brussels I Regulation (as well as Article 68 of the Brussels I Recast Regulation) provides that, except for certain overseas territories, the regulation *"shall, as between the Member States, supersede the 1968 Brussels Convention"*.

There is an ongoing discussion amongst scholars about the legal consequence of a supranational act "superseding" an international treaty. One of the main arguments of proponents of the termination theory is that EU Member States have impliedly terminated the 1986 Brussels Convention by subjecting themselves to the Brussels I Regulation. However, Article 59(1) of the Vienna Convention on the Law of Treaties ("**VCLT**"), which governs the implied termination of international agreements, provides that *"a treaty shall be considered as terminated if all the parties to it conclude a later treaty relating to the same subject matter […]"*. The counterargument is that the Brussels I Regulation is not an international treaty but a European legal act. Thus, the requirements

# CONTENTS



for implied termination under Article 59(1) VCLT are not fulfilled. Consequently, following this line of argument, the 1968 Brussels Convention is still in force and – since the UK is no longer a Member State – now (again) applies to the UK and the 14 EU Member States that have ratified it.

Another candidate for an international multilateral treaty to take precedence over Austrian enforcement law is the **Lugano Convention 1988**, which was ratified by both the UK and Austria. Yet, again, it is unclear whether the Lugano Convention has been terminated - although it seems rather likely: In this case, its successor, the **Lugano Convention 2007** (which was formally ratified by the EU on behalf of its Member States and constitutes another international treaty as opposed to subsequent EU legislation) stipulates in its Article 69(6) that the new Convention "shall replace the [Lugano Convention 1988] as of the date of its entry into force […]".

A clear answer as to whether or not UK judgments will be enforced under these treaties in Austria is yet to be given by the courts however unsatisfactory this may be to the reader.

Insofar as the proceedings were initiated pursuant to an exclusive jurisdiction provision, the 2005 Hague Convention on Choice of Court Agreements ("**Hague Convention**") might provide some relief. Following the UK's accession to the Hague Convention on 28 September 2020, as of 1 January 2021 judgments rendered by UK courts will generally be recognized and enforced by Austrian courts (see "Post-Brexit Roadmap to Enforcing EU Judgments in the UK Courts" by Calum Cheyne & Lucy Noble in this Bulletin). Uncertainty, however, still exists whether Austrian courts will apply the Hague Convention to exclusive jurisdiction provisions that have been concluded prior to the UK's recent accession to the Convention as a Contracting Party in its own right.

## BILATERAL INTERNATIONAL TREATIES ON RECOGNITION AND ENFORCEMENT

Last, it is worth noting that back in the pre-Brussels, Lugano and EU days, the UK and Austria concluded a bilateral treaty providing for the reciprocal recognition and enforcement of judgments in civil and commercial matters (the "**UK-Austria Treaty**"). Also, the legal status of this treaty is debatable:

Article 69 of the first Brussels I Regulation provides that it "*supersedes*" certain treaties and conventions concluded between Member States to the extent that these treaties apply to the same subject matter as the Regulation. Specifically, Article 69 expressly listed the UK-Austria treaty. Interestingly, Article 69 of the Brussels I Recast Regulation did not simply include the same list of treaties of the predecessor regulation. Instead, it required the Member States to notify the Commission of any such conventions. Austria notified the Commission of the UK-Austria Treaty.

The requirement to notify the Commission of treaties and conventions that have already been superseded by the first Brussels I Regulation raises the question whether superseded agreements resurge from a suspended status once the superseding legal act ceases to apply. Arguably, if Member States would have considered the listed treaties terminated by the first Regulation's entry into force, such notification would not have been necessary. Again, commentators have raised arguments in favor and against the re-application of the UK-Austria Treaty in the light of Brexit.

Further, also in this context, the same unanswered question, whether supranational acts like the Brussels Conventions superseding a bilateral treaty lead to implied termination under Art 59(1) VCLT, arises.

In summary: If the aforementioned conventions and the UK-Austria Treaty have been terminated, the reciprocity rule under Austrian enforcement law would currently not allow for the recognition and enforcement of any UK judgments in Austria. This might be different where the parties entered into an exclusive jurisdiction agreement.

## CONCLUSION

While it seems somewhat accidental and frustrating that UK judgments cannot be enforced by Austrian courts, as of 1 January 2021, this is not an unlikely result in many scenarios. Following the UK's withdrawal from the European Union, the Brussels Regime governing the judgments' recognition and enforcement until then is no longer applicable. Whether international treaties and conventions preceding the Brussels regime are still in force is unclear and doubtful. This also holds true for the 1962 treaty on recognition and enforcement that has been concluded between Austria and the UK. Only where the Hague Convention applies to a specific dispute will Austrian courts regularly enforce judgments originating from the UK. Where no international instrument between the UK and Austria exists that guarantees reciprocal enforcement, Austrian law prohibits the enforcement of foreign judgments originating from the UK.

Given this legal uncertainty, it remains to be desired that the UK and Austria will soon clarify maintaining the status quo – either by the UK acceding to an existing instrument, such as the Lugano Convention 2007, or by concluding a new treaty, if necessary. Until then, or at least until courts have finally ruled on the matter, enforcing UK judgments on civil and commercial matters in Austria will remain a risky affair.

# CONTENTS



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**Additional content on this topic:**


# CASE LAW AND LEGISLATIVE UPDATES ON RECOGNITION AND ENFORCEMENT OF FOREIGN MONEY JUDGMENTS IN NEW YORK, TEXAS, AND ILLINOIS

*Written by Nicholas Paine*

Since the United States is not a party to any international judgment recognition treaties, and no federal statute directly addresses recognition of foreign country money judgments, enforcement of foreign country money judgments is a matter of State Law, codified in so-called Foreign Country Money-Judgment Recognition statutes. Several states, including as relevant to Zeiler Floyd Zadkovich (ZFZ) office locations and jurisdictional practices, Texas and Illinois, have adopted a "Uniform Act" for recognition of foreign money judgments, and as such their provisions are nearly identical. Also relevant to ZFZ's stateside practice, New York's current statute is very similar to Texas' and Illinois' Uniform Acts, and New York may soon revise its statute to conform with the language of the Uniform Act, but as of this article, the New York statute is significantly distinct from the other statutes.

Procedurally, New York, Texas, and Illinois filing requirements are similar for foreign country money judgment recognition and enforcement claims: generally, they require a party seeking to have a judgment recognized and enforced to authenticate, if necessary translate, and provide supporting affidavits attesting to the validity of the judgment for the purposes of the states' statute. Further, the foreign judgment debtor must be put on notice of the proceeding. However, as the states' statutes and associated case law are in fact different, it is important to note these differences, in particular as it relates to the parties' burden of proof, when considering where to file a recognition and enforcement claim. For instance, in Texas a foreign country's failure to recognize Texas judgments is statutory grounds for nonrecognition in Texas, and this must be made as an initial showing by the party seeking recognition, rather than raised by a judgment debtor as an affirmative defense. In New York a foreign judgment on a defamation claim must have met state and federal constitutional freedom of speech protections in the country in which it was issued, and further, the court must be satisfied that on its initial review that none of the other statutory grounds for nonrecognition are present. Thus, the differences between the state laws can affect the parties' initial burden of proof in obtaining recognition and enforcement of a foreign country judgment, and are important considerations prior to filing a claim.

This article discusses three recent cases in New York, Texas, and Illinois, addressing issues related to the recognizability of foreign country judgments. While these cases highlight different issues to consider when bringing an action for recognition of a foreign money judgment in each state, each exemplify the importance recognizability plays in the courts' evaluation of a claim for recognition and enforcement of a foreign country money judgment. The specific issues addressing recognizability include: the importance courts place on principals of comity and *res judacata*, the importance of obtaining a final judgment from a foreign court as opposed to provisional orders for preliminary relief, and the distinction between a foreign arbitral award versus a

# CONTENTS



judgment-on-award in a foreign court.

## NEW YORK: SERVIPRONTO DE EL SALVADOR, S.A. V. MCDONALD'S CORP., NO. 20-1503-CV, 2020 WL 7051809 (2D CIR. DECEMBER 2, 2020) (UNREPORTED SUMMARY ORDER).

In *Servipronto* the plaintiff was awarded $23,977,493.40 (the "principal amount") by an El Salvadorian civil court, and the award was ultimately upheld on appeal through the El Salvadorian appellate courts. The award did not include pre- or post-judgment interest. After exhausting its ability to pursue further appeal, the defendant deposited the principal amount in the Treasury Department of El Salvador. As a result of delays in releasing the principal amount, the plaintiff brought further proceedings in El Salvador for release of the principal amount, and again seeking post judgment interest. This request for interest was denied by the El Salvadorian courts on procedural grounds, and the litigation was closed on October 23, 2019.

In New York, the plaintiff had sought enforcement of its foreign money judgment on June 1, 2011, pursuant to New York's Foreign Country Money-Judgment Recognition Act, Article 53 of New York Civil Practice Law and Rules ("CPRLR"), for the principal amount and interest from the date of the original civil court award, December 6, 2005, through the release of the funds on September 11, 2019. The New York proceeding had been stayed pending the outcome of the El Salvadorian litigation and appeals. Following the resolution of the El Salvadorian proceedings plaintiff moved for summary judgment in the New York proceeding and defendant moved to dismiss. The New York federal trial court dismissed the case as moot in light of the El Salvadorian proceedings, and the Second Circuit Court of Appeals affirmed the dismissal.

Importantly, the Second Circuit found that the original judgment awarding plaintiff the principal amount had been satisfied, and that neither the original judgment, nor the El Salvadorian courts' ruling on the release of the principal amount from El Salvador's Treasury, allowed plaintiff to recover pre- or post-judgment interest. Thus, despite the fact that New York's case law has allowed for parties seeking to domesticate an *unsatisfied* foreign judgment pursuant to Article 53 of the CPLR to obtain interest in New York courts, under the circumstances of this case the doctrine of comity dictated that the New York court must honor the El Salvadorian courts' decisions denying interest. (Emphasis in opinion). The Second Circuit reasoned that Article 53 was designed to promote enforcement of New York judgments abroad, and to award interest to the plaintiff would therefore contravene the principles of comity codified in the statute.

The Second Circuit noted further that its decision to affirm the New York trial court's denial of an interest award was consistent with El Salvadorian principals of *res judacata*, since the court in the second El Salvadorian proceeding had recognized it could not award plaintiff interest it might otherwise have been entitled to and thereby contradict the original judgment denying pre- and post-judgment interest.

## TEXAS: LMS COMMODITIES DMCC V. LIBYAN FOREIGN BANK, NO. 1:18-CV-679-RP, 2019 WL 1925499 (W.D. TEX. APRIL 30, 2019)

Plaintiff in this case alleged it had obtained a $108,700,000.00 judgment against the defendant in the Court of Appeals for the Republic of Tunisia and sought to enforce the judgment in Texas pursuant to the Texas Uniform Foreign Country Money-Judgment Recognition Act (Tex. Civ. Prac. & Rem. Code Sections 36A.001 et seq.) ("TUFCMJRA"). After working through procedural issues, the court ultimately granted the defendant's motion to dismiss because the relief awarded by the Tunisian appellate court was not a final judgment on the merits.

In considering the motion to dismiss, the Texas federal trial court noted that it was permitted to consider evidence beyond the pleadings as such material was relevant for resolving questions of foreign law. Defendants submitted an affidavit from a Tunisian attorney, in which the attorney averred that a Tunisian court had ordered a freeze on defendant's assets in the possession of third parties in Tunisia, and the order had been affirmed by a Tunisian appellate court. The Tunisian attorney represented that such a freeze order was not a final judgment on the merits, nor was it a money judgment, but rather a provisional order in anticipating of a ruling on the merits. Defendant's later filed a translated opinion from the Tunisian Court of Appeals indicating Plaintiff's claims on the merits had been rejected and the freeze on defendant's assets had been lifted.

Because the Tunisian judgment was for provisional relief, the judgment was neither a grant of money, nor final and enforceable under Tunisian law, and thus it was not a judgment to which TUFCMJRA applied.

## ILLINOIS: NATIONAL ALUMINUM CO. LTD. V. PEAK CHEMICAL CORP., 132 F.SUPP.3D 990 (N.D. ILL. 2015)

Plaintiff had won a $4,004,120.78 plus interest arbitral award ("Arbitral Award") under India's Arbitration and Conciliation Act, which was challenged and ultimately upheld in Indian courts; however, the Indian appellate court, in dismissing the appeal to overturn the Arbitral Award, noted that defendant's failure to post security threatened to leave

# CONTENTS



plaintiff "high and dry" without the possibility of recovery. Plaintiff sought to enforce the Indian appellate court's dismissal ("Appellate Judgment") in federal court in Illinois under the Illinois Uniform Foreign-Country Money Judgements Recognition Act (IUFCMJRA), 735 ILCS Section 5/12-661 *et seq.*, because the Appellate Judgment effectively upheld the Arbitral Award.

In the Illinois proceeding the defendant argued that the Federal Arbitration Act ("FAA") 9 U.S.C. Section 1, *et seq*. preempted recognition of the Appellate Judgment under the IUFCMJRA, because the underlying Arbitral Award that was subject to the FAA's three-year limitation was time-barred. The court also considered defendant's arguments that the Arbitral Award was not an award granting "a sum of money" under Illinois law, as well as arguments that the Arbitral Award impermissibly included interest as a penalty, and violated public policy. The court ultimately upheld the enforceability of the Appellate Judgment in the amount of $4,010,227.78 with interest.

The court first dispensed with the argument that the FAA's three-year statute of limitations on the enforcement of foreign arbitration awards preempted the IUFCMJRA's 15-year limitation for recognition of a foreign-country judgment (provided the judgment is still enforceable in the foreign country). Citing to other federal circuit appellate decisions, the court noted that federal uniformity considerations for the FAA did not trump the need to encourage parties to elect arbitrations because the New York Convention (codified in FAA Chapter 2) expressly preserved the right to rely upon more favorable domestic laws to enforcement of awards. Thus, the court found that the doctrine of conflict preemption did not apply to bar plaintiff's IUFCMJRA action.

The court then considered defendant's arguments that certain aspects of the Arbitral Award and Appellate Judgment violated IUFCMJRA requirements. In particular, that (1) the Arbitral Award's inclusion of interest violated a requirement that the foreign judgment needed no further calculation as the final judgment amount to be recognizable, (2) that the interest was a "penalty" expressly prohibited by the provisions of IUFCMJRA, and (3) that the Appellate Judgment was actually a dismissal, not an award of judgment. The court was unpersuaded by these arguments as each was based on case law that did not support defendant's position. Finally, the court tersely rejected defendant's arguments that delays in enforcement violated due process and public policy, noting that the delays were largely of defendant's own making.

Thus, the Appellate Judgment upholding the Arbitral Award was deemed to be recognizable and enforceable, and the Illinois trial court granted summary judgment in favor of the plaintiff.

## ZFZ FINAL REMARKS

Obtaining a final, money judgment in a foreign country is, on its own, of paramount importance to realizing recovery of the judgment amount. However, if it is impossible to secure the amounts owed under the foreign country judgment in the foreign country itself, prevailing parties should also consider enforcement options through State Laws in the United States. Further, foreign arbitral awards that have been upheld by a foreign country judgment may likewise be enforceable under the applicable statutes in these states, and this may be used to cure time bar issues related to foreign arbitration awards. In seeking recognition and enforcement in the United States, it is important to ensure to determine in which states the judgment might run afoul of the state statute governing enforcement of the judgment; one state may be preferable to another in this regard. However, with the benefit of so many states providing recognition and enforcement options, and underlying principles that encourage recognition and enforcement of valid foreign judgments, the various State Laws regarding foreign money judgment recognition and enforcement offer several options to efficiently pursue and retrieve assets owed under foreign judgments.

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**Additional content on this topic:**

## CONTENTS



# ENGLISH INVESTMENT DISPUTE FAILS HIGH BAR OF CPR 52.30

*Written by Luke Zadkovich & Lucy Noble*

Rule 52.30 of the English Civil Procedure Rules ('**CPR**') – the ground of appeal for reopening a final determination – is supported by a long line of precedent strictly confining its use to exceptional circumstances. This principle was given a fresh outing in late 2020, where a decision relating to the application of the rule against reflective loss in the subject investment dispute snowballed into a hard-fought submission to reopen a permission to appeal application.

## BACKGROUND FACTS

UCP, its subsidiary and Nectrus entered into an Investment Management Agreement (the '**Agreement**') where Nectrus was engaged to provide investment advice. Under the Agreement, UCP, through its subsidiary, made various investments where a substantial cash balance was caused or permitted by Nectrus to be onward invested into a number of sham entities. The invested money to a tune of £5.8 million was not recovered.

In 2013, when UCP sought to sell the subsidiary to an external buyer, it was agreed that the purchase price would be discounted an amount equivalent to the unrecovered cash investment.

## PROCEDURAL BACKGROUND

In the first instance at the Commercial Court, UCP claimed damages for breach of the Agreement for the balance of the discount in purchase price. Nectrus argued on the basis of the rule against reflective loss, that the losses claimed by UCP were irrevocable. The claim was said to be reflective of the losses suffered by the subsidiary, which Nectrus, as an ex-shareholder, was blocked from claiming.

While Nectrus was unsuccessful on this argument, the Court granted contingent leave to appeal on the basis that a decision was shortly expected in the Supreme Court of *Marex v Sevilleja*, which would go to the question of reflective loss.

## SUPREME COURT IN *MAREX*

In *Marex*, the majority upheld a restrictive reading of the rule against reflective loss, limiting it to the circumstances described in *Prudential Assurance Co Ltd v Newman Industries (No 2)* ([1982] Ch 204).

The affirmed circumstances provided:

> '[A] shareholder cannot bring a claim in respect of a diminution in the value of his shareholding … which is merely the result of a loss suffered by the company in consequence of a wrong done to it by the defendant, even if the defendant's conduct also involved the commission of a wrong against the shareholder, and even if no proceedings have been brought by the company.'

*Marex*, in confirming the applicability of the rule against reflective loss to these circumstances, affirmed that it is not a general principle, but a highly specific rule of company law arising from the nature of the shareholders' investment in the circumstances described. Other claims thereby, should be dealt with in the ordinary way.

## PERMISSION TO APPEAL

Immediately following, solicitors for Nectrus wrote a letter to the Civil Appeals Office dated 17 July 2020. This letter comprised of submissions setting out why the Court should confirm permission to appeal in light of the Supreme Court judgement in *Marex*. It argued that the decision of the Supreme Court did not authoritatively deal with the circumstances of the current case where the shareholder of UCP was an *ex*-shareholder and was therefore '*ripe for resolution by the Court of Appeal*.'

After a letter from UCP to the opposite effect, on 24 July 2020, Lord Justice Flaux of the Court of Appeal made an Order dismissing Nectrus' application for permission to appeal (the '**July Order**').

## CPR 52.30 APPLICATION

After a two-month delay, Nectrus brought an application under CPR 52.30 to re-open the July Order. CPR 52.30 provides a limited basis for reopening an application for permission to appeal. It is only available to avoid real injustice in cases of exceptional circumstances. The tightly constrained jurisdiction is well supported by extensive precedent illustrating the high hurdle of truly exceptional circumstances.

In the hearing of the CPR 52.30 application, three matters arose for consideration.

1. **Natural Justice**
   The primary submission advanced on behalf of Nectrus

# CONTENTS



was that the integrity of the appeal process was undermined because the July Order was made without permitting Nectrus to make certain submissions.

Nectrus argued that the letter to the Civil Appeals Office was simply a brief letter sent to progress the appeal. In considering that the letter was contrarily arguing Nectrus' case for permission to appeal, it was contemplated by the Court that if Nectrus had wanted to put forward further submissions, they only had themselves to blame for not doing so before the July Order was handed down.

Further to this natural justice argument, Nectrus also presented that the July Order was made under the Court's own initiative, without Nectrus having the opportunity to make representations. In fact, the July Order was made after the invitation of written submissions. This essential ground was considered not to be made out to the standard required.

Even if Nectrus could establish that the litigation process was fatally undermined so as to invoke CPR 52.30 (which it was held they could not), they still needed to establish a powerful probability that the July Order was wrong.

2. **Interpretation of *Marex***
On this second element, Nectus extensively submitted that the Supreme Court in *Marex* had left open the possibility that the rule against reflective loss is applicable to an ex-shareholder in the position of UCP in this case. Contrary to the July Order, Nectus argued the correct application of the *Marex* decision was to apply the rule against reflective loss to an ex-shareholder just as much as a shareholder.

The Court found that Nectus' position was unarguable. There was nothing justifying the reopening of refusal of permission to appeal to clarify the law. The *Marex* decision was clear.

3. **Delay**
At the conclusion, it was considered that even if Nectus had been able to overcome the hurdles of CPR 52.30, delay was a factor weighing heavily against the application. On the facts, Nectus had ignored the direction which provided that any appeal application should be made by 31 July and instead brought their application two months later. There was no promptness and Nectus had proceeded at their own leisure.

It was accordingly held that none (or cumulatively) of the grounds brought by Nectus were sufficient to meet the uniquely high standard of CPR 52.30.

## CONCLUSION

The final lesson for this investment dispute is one rooted in English court procedure and the workings of the English common law. First, it is instructive that the courts may allow one case to be held in abeyance, pending the determination of a relevant legal principle in another case before higher English courts. The common law grows on a case by case basis. As such, the courts have deft and nuanced methods for ensuring consistency. Second, we learn that court timetables are of the essence. Failure to meet them has significant consequences, especially in the context of reopening appeal decisions. Third, even if the *Marex* decision had been favourable, Nectus would have had issues with this application because of its failure to take an opportunity to make full submissions when it could (and due to its delay in bringing the application).

If you have any questions about investment disputes or court procedure in England, the United States or Australia, please do not hesitate to contact our partner, Luke Zadkovich, at luke.zadkovich@zeilerfloydzad.com for further information. Luke is tri-qualified in those jurisdictions and regularly advises on complex disputes and projects across a range of investment asset classes. Many thanks to paralegal, Lucy Noble, for assisting with drafting this update.

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**Additional content on this topic:**

## CONTENTS



# THE MEXICAN SUPREME COURT QUASHED PART OF THE MINISTRY OF ENERGY'S 2020 RESOLUTION

*Written by Andrea de la Brena*

On 3 February 2021, the Mexican Supreme Court (Second Chamber) decided on the Constitutional Controversy 89/2020 ("Decision"), partially invalidating the Ministry of Energy's 2020 Resolution ("SENER Resolution"). The Decision comes days after President López Obrador presented a bill to amend the electric industry's legal framework granting priority to the state-owned electricity company ("*Comisión Federal de Electricidad*" or "CFE") over private producers of electricity supply. Therefore, the Decision is relevant as it may have impact on the approval of this bill.

## BACKGROUND – A DISPUTED ATTEMPT TO REGAIN CFE'S POWER

On 15 May 2020, the Ministry of Energy issued the SENER Resolution establishing a new policy on the reliability, safety, continuity, and quality of the national electric system (for additional information on this policy, see our article Mexican Government's Recent Measures in the Private Renewable Energy Industry). The policy was subject to much debate and criticism because the measures allegedly favored CFE over private stakeholders, particularly those operating in the renewable energy sector.

On 22 June 2020, Mexico's antitrust watchdog, the Federal Antitrust Commission ("*Comisión Federal de Competencia Económica*" or "COFECE"), filed a constitutional controversy against the SENER Resolution at the Supreme Court. The basis of the controversy was that the SENER Resolution violated the free competition principle in the energy industry by unduly strengthening the CFE and hence, affecting COFECE's constitutional mandate.

## THE DECISION – A STEP TOWARDS FREE COMPETITION

On the one hand, the Decision quashed all relevant SENER Resolution sections, which grant undue priority to CFE over private companies. The Court stated that SENER could not prioritize specific projects and give them a preferential status for interconnection. The Decision also annulled the rule that prioritized "security" and "reliability" over cost in the dispatch of electricity. Furthermore, the Court ruled that it is invalid to require a positive feasibility opinion by the National Center of Energy Control ("*Centro Nacional de Control de Energía*" or "CENACE") as a precondition to allowing the interconnection of private parties. Finally, the Court ruled that certain factors included in the study to grant an interconnection permit were invalid. Among the most relevant invalidated factors are the following: the local demand and consumption of electricity; the congestion in the interconnection network; and, the interconnection's impact on the reliability of the electric supply.

On the other hand, the Decision upheld certain aspects of the SENER Resolution, mainly concerning the CFE's active role in designing the distribution networks' expansion and modernization.

Notably, the Court did not address the new early termination clauses advanced by the SENER Resolution. The clauses stipulate early termination of interconnection agreements and permits if their holders do not achieve interconnection and commercial operation within a specified timeframe.

The Decision was upheld by four justices and rejected by one justice appointed by President López Obrador. The dissenting justice announced she would issue a dissenting opinion. However, the Supreme Court has not published the Decision and the dissenting opinion's final texts on its website.

## THE DECISION'S IMPACT– A POWERFUL WARNING

The COFECE has also raised some similar antitrust concerns against the Presidential bill to amend the electric sector, currently discussed in Congress. The Decision sets a strong precedent on the Court's position regarding introducing restrictions to free competition in the electric sector. Therefore, this precedent might serve as a powerful warning that the judiciary might oppose the Presidential plans to wind back the 2013 energy reform, which opened up the industry to foreign and private companies.

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## CONTENTS



# PHOTOS, METADATA AND CAUSAL CONNECTIONS: PRIMA FACIE EVIDENCE IN AUSTRIAN CIVIL PROCEEDINGS

*Written by Alexander Zojer*

Navigating through evidentiary proceedings can be a complex endeavor. In this article we shed some light on a tool that – given the right circumstances – might just make things a little easier: prima facie evidence.

## METADATA IDENTITIES

Imagine visiting a website, and, to your great surprise, you find a photo to which you own the copyright. Since you have not granted a license for the use of the photo, the media owner of the website (i.e., the person responsible for the displayed content) infringes your exclusive right of communication to the public. The problem is, the website does not contain any information on the identity of the media owner. However, the metadata of the uploaded photo shows the identity of a person that has – at some point – saved the photo on their computer. Even though you cannot find any direct evidence revealing the identity of the media owner of the website (i.e., the person liable for the copyright infringement), you think that the person named in the metadata must also be website's media owner.

Is this form of "indirect evidence" sufficient to prove the identity of the media owner?

## THE BURDEN OF PROOF

The primary purpose of evidentiary hearings in civil proceedings is to establish the facts of a case. A fundamental issue in this respect is which party must provide evidence for a set of disputed facts (i.e., which party bears the **burden of proof** ("*Beweislast*")). Following a general principle, the party relying on the application of a legal provision to its benefit, must assert the underlying facts leading to the application of such provision. The same party must also present the evidence for these facts. Deviating from the general rule, substantive legal provisions may also provide for a different allocation of the burden of proof.

## THE STANDARD OF PROOF

The determination of the party which bears the burden of proof for a particular issue does, however, not provide an answer as to the applicable **standard of proof** ("*Beweismaß*"). The standard of proof determines the degree to which a judge needs to be convinced of a factual assertion to be considered proven. The general rule in Austrian civil proceedings states that an allegation is proven if there is a high degree of probability ("*hohe Wahrscheinlichkeit*") that it is true. While this does not mean that the alleged facts must be proven to the extent of near certainty, it is insufficient for an assertion to be more likely true than false. Notably, Austrian courts will apply Austrian standards of proof irrespective of the applicable substantive law since the standard of proof is considered a question of procedural law.

However, the comparatively high standard of proof does not apply universally. There are instances in which the standard is increased (for example, in parentage matters) and cases in which the applicable threshold is reduced.

## PRIMA FACIE EVIDENCE

One form of reduction of the standard of proof applies in the context of **prima facie evidence** ("*Anscheinsbeweis*"). Prima facie evidence is a strange procedural beast. It is not mentioned in the Austrian Civil Procedural Code ("*ZPO*") but was developed by jurisprudence (building on case law of German courts) for the application in cases in which the party that bears the burden of proof cannot be reasonably expected to provide the necessary evidence for its allegations.

Prima facie evidence therefore does not affect the allocation of the burden of proof. It does, however, simplify the task of providing evidence for the party bearing the burden of proof by allowing indirect evidence. A party relying on prima facie evidence does not need to establish that its allegation (that would trigger the application of a specific legal provision) is true with a high degree of probability. Instead, it needs to establish a set of related facts that is easier to prove and that – based on general experience – typically implies the correctness of the corresponding facts on which the party must rely to prevail with its legal argument. When relying on prima facie evidence, a party must therefore not provide direct evidence to prove its main allegation but must convince the judge that a series of (proven or undisputed) causally connected events implies the correctness of the main allegation. The standard of proof regarding the causality between the proven events and the connected alleged facts is reduced to a preponderance of probability. Prima facie evidence consequently alters the object of direct proof and reduces the standard of proof regarding the causal link between proven and alleged facts.

# CONTENTS



The opposing party can rebut prima facie evidence by demonstrating that the typical scenario relied upon by the other party as prima facie evidence can also lead to different results than the facts alleged by the other party. Importantly, the opposing party is not required to prove that the alleged facts are incorrect, which would constitute a much higher threshold for the opposing party compared to the party relying on prima facie evidence. In case the opposing party manages to rebut the prima facie evidence, the alleging party is left with the option of proving the actual allegation itself rather than causally connected facts and typical series of events.

When confronted with a party relying on prima facie instead of direct evidence, the court must assess two consecutive questions:

a) First, is the application of prima facie evidence admissible (i.e., do the specific facts of case typically imply a formulaic link between the proven and the alleged facts)?
b) Second, in the affirmative, has the prima facie evidence been established?

According to the Austrian Supreme Court, the determination of the admissibility of prima facie evidence constitutes a legal assessment. On the other hand, the analysis as to whether the prima facie evidence has been established in a specific case is subject to the court's the free consideration of evidence. This differentiation can be essential since the Supreme Court, as the third and last instance in civil proceedings, can only review legal assessments made by the lower instance courts, but not their assessment of evidence.

## A PRACTICAL EXAMPLE: PHOTO METADATA AND MEDIA OWNERSHIP

The Austrian Supreme Court recently ruled on a case concerning allegations of copyright infringement and, in this context, elaborated on the general application of prima facie evidence in civil proceedings (Austrian Supreme Court, docket no. 4 Ob 89/20x).

The Claimant – *inter alia* – alleged that by uploading a copyright-protected photo of a press secretary of an Austrian right-wing political party to a publicly accessible website, the Respondent had infringed the Claimant's exclusive right of communication to the public ("*Zurverfügungstellungsrecht*").

The Respondent argued that he lacked standing to be sued since he neither published nor distributed the content of the website nor was he the website's associated media owner ("*Medieninhaber*"), who – under Austrian law – is liable for any copyright infringing content. The Respondent contended that he merely saves screenshots of certain websites on a regular basis and uploads them to a private Facebook group (which spawned an interesting separate legal issue regarding the potential public status of private Facebook groups from a copyright perspective).

However, the metadata of the uploaded photo identified the Respondent as the "author" of the photo. Metadata of other - but not all - photos available on the website further identified the Respondent as the author. Therefore, the Claimant attempted to rely on prima facie evidence to prove that the Respondent was not only mentioned in the metadata of the photo but was also the media owner of the website. According to the Claimant, the – proven – fact that the metadata of several photos published on the website identify the Respondent as the author demonstrates prima facie that the Respondent is also the website's media owner.

The first instance court affirmed the admissibility of prima facie evidence but found that the Claimant failed to establish the required link between the authorship of the photos and the Respondent's alleged status as the website's media owner. The second instance court denied the admissibility of prima facie evidence.

Ultimately, the Supreme Court upheld the second instance court's reasoning and found that prima facie evidence was inadmissible. According to the Supreme Court, there was no typical link between the fact that a certain person appears as the author in the metadata of certain photographs published on a website (while there are also photographs with other author designations on the same website), and the fact that the same person is the media owner of said website. It is not unlikely that the Respondent had, for example, sent the photo to the actual media owner by private email and the media owner then uploaded it to the public website. The Claimant's allegations were merely assumptions which are not sufficient for the admissibility of prima facie evidence.

The Supreme Court's thereby adheres to its rather strict approach regarding the admissibility of prima facie evidence preventing it from becoming too easily admissible.

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# CONTENTS



# EVENTS

**| MAY**
**Disputes for Tea | Arbitration**
"False Friends in Arbitration: A (surprising) Comparative View of US and Austrian Law"
A discussion with Univ.-Prof. Hubertus Schumacher and Edward Floyd, moderated by Gerold Zeiler.
**Thursday, 20 May 2021**
**09:00 EST / 15:00 CET**

**| JUNE**
**Disputes for Tea | Shipping**
With Timothy S. McGovern and Luke Zadkovich.
**June 2021 - details coming soon**

**| SEPTEMBER**
**Disputes for Tea | Energy**
"Energy Disputes: Spotlight on LNG"
Hosted by Damon Thompson and Lisa Beisteiner.
**Thursday, 23 September 2021**

**| NOVEMBER**
**Disputes for Breakfast | Intellectual Property**
"The Human Factor – Creation, Ownership and Infringement of IP Rights in the Age of AI"
With Alexander Zojer and Lukas Hutter.
**Thursday, 18 November 2021**

**| DECEMBER**
**Disputes for Tea | Litigation**
"US Class Action and European Representative Action compared"
With Edward Floyd and Alfred Siwy.
**Thursday, 9 December 2021**

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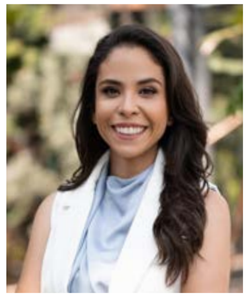


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