Enforcing a New York Judgment in the English Jurisdiction in the Digital Age

By Adam Erusalimsky

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The most commonly designated jurisdictions to resolve disputes, arising out of or in connection to all manner of contracts, are either England and Wales or the State of New York in New York City. It is therefore unsurprising that these are the only two jurisdictions used as examples for the model form exclusive jurisdiction clauses suggested under the guidance set out in the *2018 ISDA Choice of Court and Governing Law Guide*.[1] This is to be anticipated, given both jurisdictions are renowned for the fairness and independence of their judges, the dominance of London and New York as finance hubs, and the ubiquity of the English language. But what happens when a creditor obtains a judgment from a court in New York against a debtor whose only assets amenable to enforcement are located in the jurisdiction of England and Wales? This article answers that question and also considers the latter jurisdiction's ability to adapt to the challenges arising from an age when social media is rampant and cryptocurrency transactions may become so.

The United Kingdom is made up of three legal jurisdictions: (i) England and Wales; (ii) Scotland; and (iii) Northern Ireland. For brevity, references in this article to "the English jurisdiction" or "the jurisdiction of the English courts" shall refer to the jurisdiction of England and Wales, and references in this article to the "New York jurisdiction" or the "jurisdiction of the New York courts" shall, albeit imperfectly, refer to the jurisdiction of the courts of the State of New York and the United States District Court located in the borough of Manhattan in New York City.

The private international law of the United Kingdom, and specifically its law on the recognition of foreign judgments, is the result of an iterative patchwork of sources whose iterations largely span from (i) initiatives at the colonial and Commonwealth level;[2] (ii) bilateral treaties, such as those concluded with Canada (though not covering judgments from Québec), Australia, and certain other common law countries;[3] (iii) and multilateral treaties, such as—at least until the United Kingdom leaves the EU[4] —the Lugano Convention, the Treaty on the Functioning of the European Union, and the latter's jurisdictional progeny, the Brussels Regulation Recast.[5] Each of those patches is stitched to the other and given legal effect in the United Kingdom by primary and/or secondary legislation enacted by the United Kingdom's Parliament.

This example of parliamentary sovereignty might give a foreign lawyer the impression that this patchwork is comprehensive since, if it is all woven together by the United Kingdom's Parliament, it might have been designed to be an all-encompassing quilt and provide an avenue for recognition of many foreign states' judgments. Yet this all-encompassing quilt has only been made possible by the common law, in the judge-made sense of the term. Without this common law, the United Kingdom's legislature would have had also to enact legislation as to the recognition of judgments of all those states for which there is no reciprocal regime, either because they were not part of the Commonwealth and colonial initiatives, or because they did not enter into the relevant bilateral or multilateral treaties. Therefore, whether a judgment of the New York courts is recognized in England is determined by the English common law rules of recognition; it is those rules that are summarized in the first part of this article.[6]

Recognition of Foreign Judgments in England

To register a foreign judgment in England under the common law regime, the judgment creditor will need to bring a fresh proceeding in England to demonstrate that the foreign judgment satisfies the following criteria:

1. it is the final and conclusive decision of a court;
2. as a matter of English private international law, that court had what is termed "international jurisdiction" to make the judgment; and
3. there is no defence to recognition.

Looking at the first limb of the test, one would be forgiven for thinking that the word "final" in this context means that all appeals have been exhausted. As noted by Briggs, "the terminology is more easily used than it is defined,"[7] since,

1. "final" in this context means that the decision cannot be reconsidered in the court which made the ruling, even though there are still unexhausted rights of appeal to higher courts; and

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2. "conclusive" means that it represents the court's settled answer on the point, rather than, for example, an interim answer made at an interlocutory hearing.

Turning to the second limb, "international jurisdiction" is established if the foreign judgment debtor either submitted to the foreign court's jurisdiction or was present within the jurisdiction of the foreign court when the proceedings were commenced—which is likely to mean when process was deemed served.[8] It does not consider other principles of the English common law on jurisdiction, such as *forum non conveniens*. This omission might be considered counterintuitive since the English private international law has well-established common law rules which determine whether an English court has jurisdiction over a defendant. This becomes more intuitive, however, when one considers that the English rules recognize that, as a matter of comity, it would be wrong for an English court to hold that a foreign court had surpassed its jurisdiction if, had the roles been reversed, the English court would have declined to exercise its jurisdiction over a matter. Support for this principle also exists on the American side of the pond: "we are not so provincial as to say that every solution of a problem is wrong because we deal with it otherwise at home."[9]

The English court has held that the relevant territorial jurisdiction is defined by reference to the jurisdiction of the court seized, so that a defendant sued in a state court must be within the territorial jurisdiction of the state, but if sued in a federal court all that is required is that the defendant be within the federation.[10] The presence of individuals can usually be established by reference to the stamps in their passports, airline tickets etc., but whether a corporation is present can be trickier to determine. A company is present if it has a reasonably fixed and definite place of business, maintained by the company and from which its business is done.[11] Temporary visits by officers or agents of the company will not suffice, even if—again, counterintuitively—a foreign court may regard such visits as sufficient to exercise its jurisdiction against the company. It is, therefore, important that a New York attorney wishing to bring proceedings against an English company in New York, with a view to enforcing the ensuing judgment in England, ensures that the New York courts' jurisdiction over the defendant will satisfy both the New York test of jurisdiction and the English concept of "international jurisdiction."

Turning now to the final limb, recognition of the foreign judgment in England will be denied if the judgment debtor can make out any one of the following defences:

1. The foreign court had no jurisdiction. This is a more theoretical defence than a practical one, since the foreign judgment will be deemed valid by an English court unless and until action is successfully taken in the foreign court to set it aside; once set aside, there is no valid judgment to recognize in England.
2. The foreign court exercised its jurisdiction in contravention of an arbitration or jurisdiction clause—which is the case even if the foreign court addressed the very issue and concluded, entirely and correctly in accordance with its own law, that there was no breach.[12]

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3. Fraud. It is an ancient principle of the English common law that fraud unravels everything.[13] If the judgment debtor can demonstrate that the foreign court was either party to, or the victim of, a fraud, whether because the claim was false, or the testimony or documentary evidence was false or both, then recognition of the foreign judgment in England will not be granted. For these purposes, the English court will allow what is effectively a rehearing of any issues relevant to the allegations of fraud that have already been decided against the defendant in the foreign court. Somewhat controversially, the evidence required by the English court to clear this hurdle will vary depending on the foreign court in question; for example, much more persuasive evidence that a New York judge was bribed into granting a fraudulent judgment will be required by the English court than if the allegation concerned, for instance, a Venezuelan judge.
4. Breach of standards of procedural fairness. This encapsulates complaints such as, (i) the defendant was not notified of the proceedings or was not represented in the proceedings and was not afforded

the opportunity to be heard, or (ii) the foreign court violated the principle of finality by reopening a final decision without good reason. Many of these complaints will now be grounded in arguments made under the Human Rights Act 1998 (which must be observed by all UK courts), but their availability have always existed under the common law.

5. Existence of a prior English judgment. If a prior English judgment is inconsistent with the foreign judgment, then the foreign judgment cannot be recognized in England.

6. The recognition of the judgment would be contrary to public policy. Judgments giving effect to laws that are repugnant to human rights will be denied recognition, either as a matter of the pre-existing common law rules or as incompatible with the Human Rights Act 1998.

It is important to note that the circumstances described in paragraph 6, above, are very narrowly circumscribed and so it is very rare that an application to set aside is made by a New York judgment debtor and rarer still that it is successful.

The procedural significance of recognition is that once a foreign judgment is recognized by an English court, it creates an English obligation that can be enforced in England by way of an action for debt. Accordingly, only final judgments for fixed sums of money are amenable to a process of execution once recognized without a further application for an appropriate remedy (such as would be the case for a foreign non-money judgement for, say, specific performance or delivery up).

How Will the English Jurisdiction Cope in the Digital Age?

Now that the common law rules of recognition have been briefly sketched out, the scene is set to consider the English jurisdiction's ability to adapt to the challenges arising from the digital age. In particular, consider a hypothetical New York judgment for the payment of 100 bitcoin, where the initial summons commencing the hypothetical proceedings had been served via Facebook only, in breach of a New York court's direction for alternative service via Facebook as a backstop to the service upon the defendant at his or her known email address (as was allowed in the case in *F.T.C. v. PCCare247 Inc.*).[14] There are two issues in play under this scenario, each of which is dealt in turn below:

1. Is a judgment for 100 bitcoin a judgment for a fixed sum of money such that once recognized by the English court, there will be no need for a further application for an appropriate remedy in order for the judgment to be executed?

2. Does non-compliance with the New York court's order for service by alternative means give rise to the English common law defence to recognition that there has been a breach of the standards of procedural fairness in the foreign proceedings?

This article need not introduce cryptocurrencies and the blockchain technology, since that has already been done admirably by this journal.[15] Whilst cryptocurrencies such as bitcoin are still in their nascent stages, the English court has already recognized their value and utility. Although more commonly featured in the criminal courts, in the context of offences under the Computer Misuse Act 1990,[16] or as demonstrating the ability to evade justice as a consideration relevant to the grant or denial of bail,[17] the use of a cryptocurrency in and of itself is by no means illegal. Adopting the English common law principle that everything which is not forbidden is allowed,"[18] there is no prohibition against cryptocurrencies in England. As such, unless and until the United Kingdom's legislature outlaws cryptocurrencies, there is nothing illegal about buying or using cryptocurrencies as a means to effect payment between willing contracting parties. That is not to say it is legal tender; a judgment debtor does not satisfy a debt in pounds sterling if he pays the judgment creditor in bitcoin, but there is nothing to suggest that a contract where the contract price was to be paid in bitcoin would not be enforced. However, as set out in paragraph 11 above, only final judgments for fixed sums of money can be executed once recognized. Is the sum of 100 bitcoin a fixed sum of money? If bitcoin is to be treated as analogous to a foreign currency, the answer to this question can be found in the House of Lords decision in *Miliangos v. George Frank Ltd*.[19] Until that decision, a long line of English jurisprudence held that all contractual debts for a liquidated sum in a foreign currency were to be paid in pounds sterling at an exchange rate calculated at the date of breach. That rule prejudiced *Miliangos*, who was owed a sum in Swiss francs, since during the life of the English litigation there was a steep fall in the value of the pound against the franc—such that, by the time of judgment, the judgment sum (in pounds) was worth much less than the original Swiss franc debt. Accordingly, the issue before the House of Lords was whether the English courts were able to order a judgment in any currency other than pounds sterling. The Lords held that judgments may be given in an English court in a foreign currency, or the sterling equivalent, at the date the court authorizes enforcement of the judgment. The court has widened the scope of the rule in *Miliangos* in subsequent judgments. It now applies to claims for damages for breach of contract (both liquidated and unliquidated) and tortious claims governed by English law.

The English court's ability to recognize judgments in one currency, as an English judgment for a debt in an-

other currency, gives the process of enforcing the debt in England a degree of pragmatism. For example, if a judgment creditor wishes to enforce his judgment against the judgment debtor's English bank account, he can apply to the court for a third party charging order against the bank in question and ensure that the currency expressed on the judgment matches the currency of the bank account. Where the English judgment is given in a foreign currency, the order should state, "It is ordered that the defendant pay the claimant (sum in foreign currency) or the Sterling equivalent at the time of payment."[20] Accordingly, if the New York judgment was for U.S. $100, upon the order for recognition being made in England, the court would order the payment of U.S. $100 or the Sterling equivalent at the time of payment. So, assuming the English court would treat the sum of 100 bitcoin as being analogous to a foreign currency, it could carry out the same exercise using the conversion rate applicable at the time ordered for payment. But is that a likely analogy?

There is no English authority on this question. The jurisprudence of the European Court of Justice has recognized cryptocurrencies as a contractual means of payment between consenting parties, as part of an examination of their treatment for certain tax purposes, but the law has not gone further than this. In *Skatteverket v. Hedqvist*,[21] the European Court of Justice was required to give a preliminary ruling on a reference from the Swedish court concerning the interpretation of Directive 2006/112 (Principal VAT Directive) and whether transactions to exchange a traditional currency for bitcoin, or vice versa, were subject to VAT.[22] In her advisory opinion to the European Court of Justice, Advocate General Kokott observed that,

> virtual currency has no purpose other than to be a means of payment . . . the "bitcoin" virtual currency, being a contractual means of payment, cannot be regarded as a current account or a deposit account, a payment or a transfer. Moreover, unlike a debt, cheques and other negotiable instruments referred to in Article 135(1)(d) of the VAT Directive, the "bitcoin" virtual currency is a direct means of payment between the operators that accept it.

But unlike air miles, Amazon credits or another retailer's loyalty points, which are all centralized with supply controlled by the issuer of the so-called virtual currency, cryptocurrencies such as bitcoin are decentralized and not created or controlled by a single central entity. This helps to explain why the value of cryptocurrencies is so volatile; with price being purely driven by demand, unmitigated by the interventions of monetary policymakers, a cryptocurrency's price is a pure function of market demand. It is that feature which may make an English court reluctant to recognize a bitcoin judgment as a matter of course and simply convert it into sterling at the date of payment. If, as had been the case up until January 2018, bitcoin has risen in value sharply between the time the foreign proceedings were commenced and the foreign judgment recognized, then such an automatic conversion would risk being unfair to the judgment debtor. On the other hand, the judgment creditor could argue that the volatility and speculative nature of bitcoin is well known, and the judgment debtor should not have agreed to pay a contract sum expressed in bitcoins if he or she did not want to be so bound. It is these competing arguments that may call for a judicial inquiry into the proper conversion rate. Such an inquiry is available to the judgment creditor since he or she could commence a claim in the English court against the judgment debtor and, unless an exception to the doctrine applies,[23] the New York judgment will be recognized as *res judicata* as to the merits of the underlying claim, leaving the English court to order the enquiry.

What about asset classes other than currency? This journal has already explored how,

1. regulatory agencies in the United States have argued, with some success, that in spite of a lack of significant legislation or regulatory frameworks, "[b]itcoin and other digital currencies are subject to their jurisdiction because they are . . . simultaneously commodities, money, property, and (sometimes) securities,"[24] and
2. unlike in the United States, "the Cayman Island's Securities Investment Business Law narrowly defines securities subject to that law, which does not cover cryptocurrencies," although the authors note that cryptocurrency trading could "easily be captured by existing regulatory regimes" in the Cayman Islands and would "probably fall under the control of the Cayman Island's Money Services Law."[25]

In comparison, the United Kingdom lags behind with one of its principal regulators, the Financial Conduct Authority (FCA), only announcing in April of this year that it would unveil "*guidelines*" on cryptocurrency policy later this year.[26] The FCA's website still acknowledges that "cryptocurrencies are not currently regulated by the FCA provided they are not part of other regulated products or services."[27] The absence of a regulatory or statutory framework for the classification of cryptocurrency as a commodity, security or other asset class, however, should not complicate recognition proceedings per se. If the English court was not willing to consider bitcoin as a currency, taking it out of the scope of the *Miliangos* rule described above, the judgment creditor could still commence a claim in the English court and, as before, unless

an exception to the doctrine applies, the New York judgment will be recognized as res judicata, as to the merits of the underlying claim, leaving the judgment creditor free to apply for an order for delivery up of the bitcoins. Unless and until Parliament makes cryptocurrencies illegal, such that recognition of the foreign judgment would be contrary to public policy, a judgment creditor will at least be able to convert his or her foreign bitcoin judgment into an order for delivery up.

We turn now to the second question of whether a defence exists to deny recognition on the basis that there has been a breach of the standards of procedural fairness in the foreign proceedings. Although there is little case law on the point, commentators agree that an argument that there has been a technical breach in the mode or manner of service in the foreign court is insufficient.[28] The judgment debtor needs to show that he has not been made aware of the commencement of the foreign proceedings.[29] So if the judgment creditor can persuade the court that the judgment debtor did access his or her Facebook account on a sufficiently regular basis so as to have received the summons in good time, arguments that the judgment creditor failed to also serve by email are likely to fall on deaf ears and recognition would not be denied on this basis.

Conclusion

Although it remains to be seen how the English courts will react to a claim for recognition of a New York judgment for the payment of a sum in bitcoin, the English courts have at their disposal the necessary machinery to deal with such a problem. To facilitate an enforcement action taken against assets in the United Kingdom, lawyers drafting a contract for a counterparty who wishes the contract sum to be expressed in bitcoin should include a liquidated damages clause stipulating that the bitcoin sum is convertible to a recognized traditional currency upon proceedings being issued to recover that sum. The clause should also provide a mechanism for determining the applicable exchange rate and the date of conversion. This will either (i) enable the court first seized with the matter to make its award in a recognized traditional currency, such that enforcement in England is possible immediately after recognition; or (ii) failing an award being made in a recognized traditional currency, enable the English court to conduct its enquiry at the proper conversion rate. In the absence of such a clause, the English court will still recognize the judgment creditor's entitlement to the bitcoins, but proceedings will need to be brought for an order for delivery up of the bitcoins.

A judgment debtor may cry foul in respect of any aspect of the foreign proceedings, but the English court is accustomed to such ploys and will accordingly only refuse recognition on the basis of some irregularity if it has caused real injustice.

Endnotes

1. Int'l Swaps and Derivatives Ass'n, Inc., *2018 ISDA Choice of Court and Governing Law Guide,* (2018), https://www.isda.org/a/7YsEE/180130_ISDA-Choice-of-court-and-governing-law-guide-prepublication-fina.._02262018.pdf.
2. Enacted as the Administration of Justice Act 1920 and currently in effect under the Reciprocal Enforcement of Judgments (Administration of Justice Act 1920, Part II), (Consolidation) Order 1984 (SI 1984/129)), as amended by SI 1985/1994, SI 1994/1901 and SI 1997/2601. A judgment creditor holding a judgment from many colonial and Commonwealth territories such as Malaysia, Nigeria, New Zealand, and Singapore (and, at one time, Hong Kong) are able to register the foreign judgment for enforcement in the United Kingdom within 12 months of the foreign judgment being delivered under Part II of the Administration of Justice Act 1920.
3. i.e. India, Israel, Pakistan, Guernsey, and the Isle of Man. These bilateral treaties enable judgment creditors holding judgments from the foreign court to register the foreign judgment under the Foreign Judgments (Reciprocal Enforcement) Act 1933. However, it only applies to courts of those countries identified in the domestic legislation which implements the relevant bilateral treaty.
4. It is not clear what arrangements will be made following the United Kingdom's Brexit. Although in September, 2018, the United Kingdom's government issued guidance on which cross-border arrangements would apply vis-à-vis recognition and enforcement of judgments under a "no deal" Brexit-scenario, all this guidance did was confirm that it would repeal the domestic rules implementing the Brussels Regulation Recast and the Lugano Convention and instead accede to the 2005 Hague Convention (which does not require the consent of the other contracting parties). Whilst this will ensure that choice of court agreements in favour of the English courts in commercial cases are respected and judgments given on their basis are enforceable, the Hague Convention is very limited in scope and does not even begin to placate the holes left by the automatic exit from the Brussels and Lugano regimes; for example, where there is no exclusive jurisdiction clause, the Hague Convention does not apply. At present, the only parties to the Hague Convention are the European Union, Singapore, Mexico, and Montenegro (as of April, 2018). In the future, the Hague Convention may gain further importance as the following countries have signed it but not yet ratified it: China, the United States, and Ukraine.
5. 2012 O.J. (L 351) (pertaining to jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast)).
6. A fuller analysis is beyond the scope of this article. See Adrian Briggs, The Conflict of Laws ch. 3 (3d ed. 2013) and Adrian Briggs, Civil Jurisdiction and Judgements ch. 7 (6th ed. 2015), for a thorough examination of the English common law rules of recognition of foreign judgments.
7. *Id.*
8. *Adams v. Cape Industries PLC* [1990] Ch 433 (UK).
9. Adrian Briggs, The Conflict of Laws 171 (3d ed. 2013) (citing Loucks v. Standard Oil Co. of New York, 224 N.Y. 99 (1918)).
10. *Id.* at 170.
11. *Adams v. Cape Industries, PLC* [1990] Ch 433 (UK).
12. Adrian Briggs, The Conflict of Laws 179 (3d ed. 2013) (citing Civil Jurisdiction and Judgments Act 1982, § 32; *AES Ust-Kamenogorsk Hydropower Plant, LLP v. AES Ust-Kamenogorsk Hydropower Plant JSC* [2011] EWCA Civ 647).
13. *Id.* at 179 (citing *HIH Cas. and Gen. Ins., Ltd. v. Chase Manhattan Bank* [2003] UKHL 6).

14. *F.T.C. v. PCCARE247, Inc.*, Case No. 12 Civ. 7189, 2013 WL 841037, at *5 (S.D.N.Y. Mar. 7, 2013); *see also, Ferrarese v. Shaw,* 164 F. Supp. 3d 361 (E.D.N.Y. Jan. 19, 2016).

15. *See* Mayme Donohue, *Blockchain and Cryptocurrency: An Introduction and Primer, in* 31 International Law Practicum 8 (2018).

16. *R v. Mudd* [2017] EWCA (Crim) 1395.

17. *U.S. v. Panovas* [2018] EWHC (Admin) 921.

18. It has been joked that in Germany, the opposite applies, so "everything which is not allowed is forbidden", in France "everything is allowed even if it is forbidden," and in Russia where "everything is forbidden, even that which is expressly allowed" *(see generally*, Jon P. Alston et al., A Practical Guide to French Business (2003); Kishor Bhagwati, Managing Safety: A Guide for Executives (2006)).

19. *Miliangos v. George Frank, Ltd*. [1976] AC 443 (UK). The House of Lords was, at the time, the highest appellate court in the United Kingdom. It was replaced by the Supreme Court on October 1, 2009.

20. CPR PD 40B (Foreign Currency) 10.

21. Case C-264/14, *Skatteverket v. Hedqvist*, 2016 S.T.C. 372.

22. The request was made in proceedings between the Swedish tax authority and Mr. Hedqvist concerning a preliminary decision given by the Swedish Revenue Law Commission that VAT did not have to be paid on the purchase and sale of bitcoin virtual currency units. The Swedish tax authority took the view that bitcoins should be treated like a commodity, making transfers of it subject to VAT, whereas Mr. Hedqvist, who intended to establish a business effecting transactions to exchange traditional currency for the Bitcoin virtual currency, submitted that the preliminary decision by the Revenue Law Commission finding the virtual currency VAT exempt should be confirmed. In that context, having doubts as to whether one of the exemptions for financial services laid down in Directive 2006/112 article 135(1) applied to such transactions, the Swedish court asked the European Court of Justice for guidance.

23. The exceptions are fraud or (for issue estoppel only) fresh evidence or a change in the law.

24. *See* David H. McGill et al., *Cryptocurrency Is Borderless—but Still Within the Grip of U.S. Regulators, in* 31 International Law Practicum 11 (2018).

25. Jalil Asif et al., *Cryptocurrencies: The Cayman Islands Is Open for Business, for Now, in* 31 International Law Practicum 42 (2018).

26. Anthony Cuthbertson, *Cryptocurrency: UK Regulator Focuses on Bitcoin Policy*, The Independent (April 9, 2018), https://www.independent.co.uk/life-style/gadgets-and-tech/news/cryptocurrency-bitcoin-regulation-fca-price-updates-market-a8296411.html.

27. Fin. Conduct Auth., *Cryptocurrency Derivatives,* FCA (Jun. 4, 2018), https://www.fca.org.uk/news/statements/cryptocurrency-derivatives.

28. Adrian Briggs, Civil Jurisdiction and Judgements § 7.71, n.600 (6th ed. 2015).

29. *See Maronier v. Larmer* [2002] EWCA (Civ) 774 (describing an analogous situation under the Brussels regime which held that, as a matter of public policy, it could not recognize a Dutch judgment which had been obtained pursuant to proceedings of which the judgment debtor was not aware).