

BURFORD BAROMETER

2016 Judgment Enforcement Survey

*Inside: New research on unlocking the value of unenforced
litigation and arbitration judgments*



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|---|----|
| Putting a price tag on the enforcement challenge | 3 |
| Collection risk must be considered at the outset of proceedings | 5 |
| Offshore and other challenging jurisdictions | 7 |
| Essentials of enforcement | 9 |
| Litigation funding for enforcement | 12 |

Introduction: Overcoming the “legal paper” challenge

Securing a successful litigation or arbitral judgment or award should be a time for celebration. After investing years of effort and millions in legal fees, victory has been secured—and the damages awarded means it was all worth it. Right?

For some, it will be only a matter of time before a judgment is paid in full to the claimant: reputable public corporations will not hesitate to pay their judgment debts.

Sadly, this is not always the case. As the results of the 2016 Judgment Enforcement Survey prove, in too many instances a judgment is merely a piece of legal paper—until it is enforced.

Indeed, 58 percent of in-house lawyers surveyed in April 2016 by The Lawyer Research Service for this study said that their corporations have not been paid the full face value of judgments secured in the last five years. Of this number, 38 percent have been able to secure just 70 percent or less of their judgment—and 19 percent were only able to secure 50 percent or less.

Put simply, unenforced judgments are

a problem affecting the majority of corporations—a problem worth millions to individual businesses and billions of cumulative corporate value. As a result, lawyers and in-house counsel must do better at understanding what to do about it.

It is in that spirit that we commissioned the 2016 Judgment Enforcement Survey.

As we explore below, lawyers should consider the cost and likelihood of enforcement before commencing proceedings. For some cases, such as those involving complex international fraud, enforcement is a significant consideration. Indeed, some lawyers reported that their clients have set aside multiple times the amount budgeted to secure the judgment just to enforce it.

Fortunately, there are a variety of options available to do so, from freezing and disclosure orders to researching public records to locate, track and then recover assets. The tactics that should be used depend very much on the individual case, but typically combine legal measures with

asset tracing investigatory services from a specialist. It's best practice to start this process even before a judgment is secured.

Interestingly, although the majority of lawyers surveyed are aware of asset tracing and enforcement specialists, only about one in ten (11 percent) are aware that funding can be secured specifically for enforcement. How does this financing work? Just as in the more familiar types of litigation finance, an outside funder might be prepared to fund the legal and other associated costs of enforcement in return for a percentage of the damages recovered. Currently, Burford is the only company that is able to provide both judgment enforcement services and funding of those services.

Given the significant challenge that so many clients face in transforming “legal paper” into the full value of their opponents’ judgment debts, we predict that this emerging form of financing will soon become mainstream.

— *Christopher Bogart,*
Chief Executive Officer, Burford Capital

58% of corporations have not been paid the full value of judgments in the last five years

Putting a price tag on the enforcement challenge

Contrary to popular belief, the full value of litigation judgments and arbitration awards is rarely paid out in full to claimants: 58 percent of surveyed corporates have not secured the full face value of a judgment or arbitration award in the last five years; 86 percent of surveyed lawyers have had at least one client that was not paid the full face value of a judgment or award in the last five years.

How much money are successful claimants

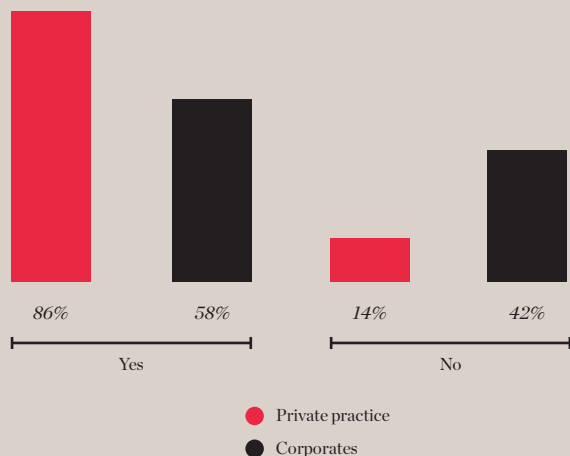
missing out on? The majority of surveyed law firms (62 percent) said their clients are typically able to recover over 70 percent of a judgment or award—likely after a lengthy and expensive asset recovery process. But a notable number—nearly one in five (19 percent)—reported that their clients typically recover under 50 percent of the value of a judgment or award.

Simply put, the quantum of damages that are not paid out is staggering. A third of

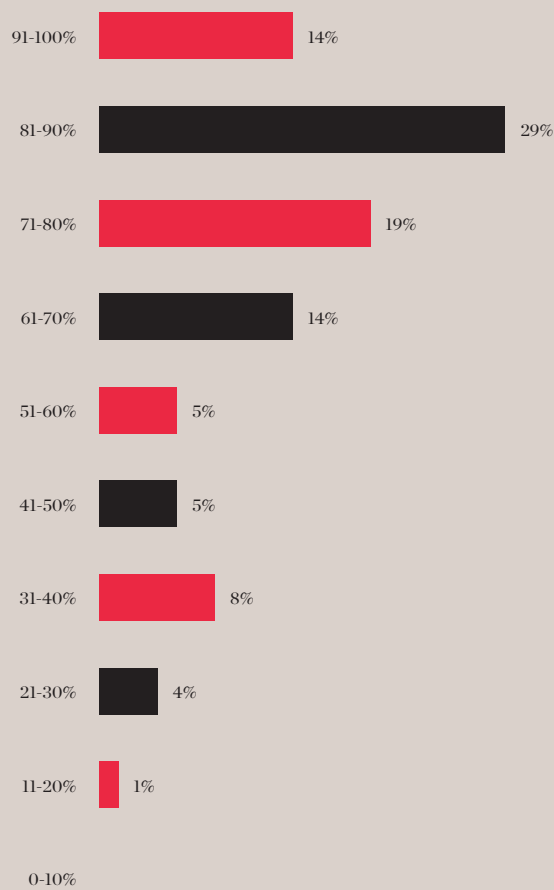
surveyed law firms stated that the combined potential value of their clients' unenforced judgments in the last five years exceeds \$10 million. Some 14 percent said this figure exceeds \$50 million.

Clearly, full enforcement is far from inevitable—and if one were to tally up the lost value experienced by companies around the world when judgments go unenforced, the collective price tag likely represents billions.

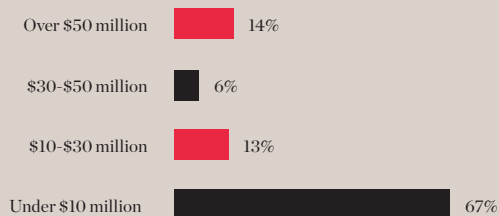
In the last 5 years, have you/your clients ever not been paid the full face value of a successful litigation or arbitration judgment or award?



What was your typical recovery of the enforcement/recoveries secured in the last five years? (Private practice)



What is the potential value of your clients' unenforced judgments in the last five years? (Private practice)



Assessing collection risk at the outset

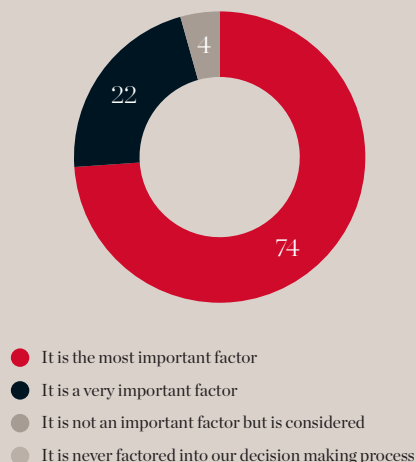
An overwhelming majority report that enforcement is part of their decision-making process. Some 96 percent of in-house counsel that commenced proceedings in the last five years rated the enforcement factors as very important in determining whether litigation and arbitration are pursued. Similarly, 94 percent of surveyed law firms said they discuss enforcement and recovery with clients at the outset of all or most litigation and arbitration.

Interviews conducted in conjunction with the research, however, suggest that many clients nonetheless decide to enter proceedings based on the likelihood of securing a judgment, rather than whether that judgment can actually be enforced.

The best practice is to consider enforcement challenges at the outset, and potentially allocate resources to determining just how significant that challenge might be. For cases where the

defendant's assets are not primarily in the jurisdiction where proceedings are taking place, or proceedings involving fraud, it is absolutely essential to evaluate the potential likelihood and expense of enforcement should a judgment be secured. Lastly, it's worth noting that defendants should also consider the ability to recover costs from the claimant should they decide to fight proceedings.

*To what extent did the ease and likelihood of recoverability influence your decision on whether litigation/arbitration was pursued?
(In-house & C-level executives)*



*How often do you discuss judgment/award enforcement and recovery with clients at the outset of litigation or arbitration?
(Private practice)*



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Most of the time law firms and their clients don't really think about enforcement at the outset of litigation. If we start a fraud litigation our main task is obviously to obtain a judgment in the first place, but rather than just have a framed judgment on the wall we need to also recover assets for our clients.

— Michele Caratsch, Partner, Baldi & Caratsch

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Enforceability must be the first question when thinking about whether to pursue a fraud case. Clients always have to remember that a judgment is just a piece of paper, and paper doesn't put bread on the table—cash does. [I often tell clients to] go to a corporate intelligence company first and actually work out if there are any assets that can actually be recovered.

— Bernard O'Sullivan, Partner, Olswang

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You have to think about enforceability right at the outset. [Enforcement is] also a defendant issue. Should you decide to fight proceedings rather than settle, you are looking at material cost. You need to think about whether that cost can be recovered and whether an order for security can be obtained.

— Ben Davies, Partner, Byrne and Partners

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Offshore and other challenging jurisdictions

Some of the most bedevilling enforcement challenges comes in cases in which a judgment debtor—whether an individual, corporation or even government—has taken significant steps to conceal assets by moving them into offshore jurisdictions, where they are hard to identify, let alone recover. Made infamous most recently by the revelation of the “Panama Papers”, this happens far more frequently than the

headlines report. Indeed, over 60 percent of surveyed lawyers have had clients whose judgments or awards could not be satisfied because assets were hidden in offshore jurisdictions.

Even if assets are not deliberately concealed in offshore jurisdictions, enforcement is still challenging if the defendant’s assets are not located in the jurisdiction in which litigation or

arbitration proceedings were undertaken. According to survey respondents, the most problematic jurisdictions for enforcement are Russia and the former Soviet Union, Caribbean offshore jurisdictions and Asia.

In the US there are often unforeseen costs and time associated with domesticating judgments under state law where the defendant’s assets are located.

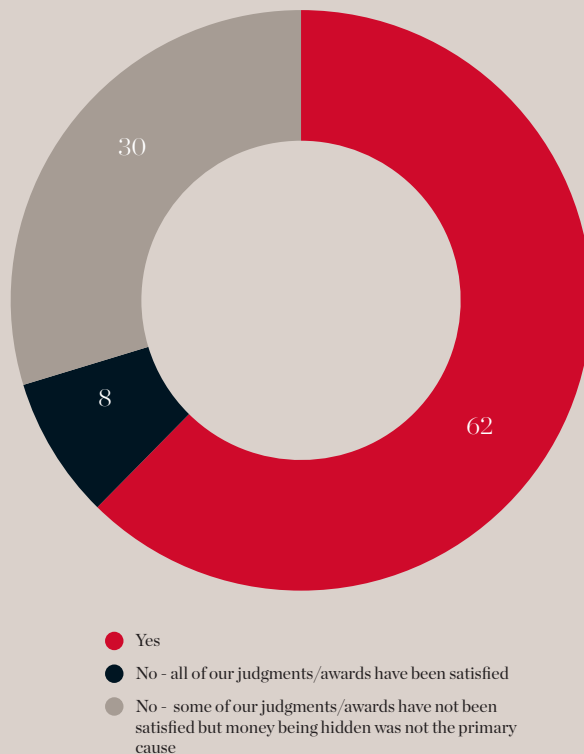
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Offshore trusts are frequently used. In a commercial fraud case worth more than £10 million you would often expect the defendant to claim that they have no assets at all and that everything is held in offshore structures. They will often engage bona fide trustees, a bona fide offshore structure with a bona fide trust and arrange matters so that they have the power to tell the trustees what to do. You need to track down what the structure is, obtain documentation and put together an argument that the fraudster still has control of the assets.

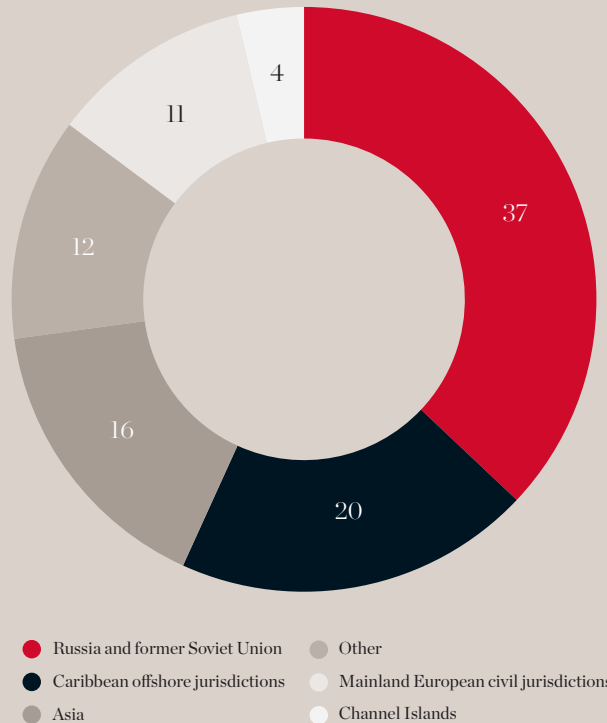
— Tim Penny QC, Wilberforce Chambers

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Have you ever had a judgment/award that could not be satisfied primarily because money was hidden in offshore jurisdictions? (Private practice)



In your experience which region presents the most barriers to enforcement? (Private practice)



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Some judgment debtors take steps to move assets to jurisdictions where they can't be directly enforced or where it is more difficult to enforce. Whilst there are mutual recognition and enforcement regimes in Europe and many Commonwealth countries which can simplify the process, prima facie, you can only enforce an English judgment against assets in the jurisdiction. A judgment creditor who is intending to apply to enforce its judgment abroad should consider applying for a worldwide freezing injunction in the English action, which can help both with locating assets as well as preserving them.

— Paul Brehony, Partner, Stewarts Law

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The most common enforcement challenge is when the defendant is based in a jurisdiction other than the primary piece of litigation. A judgment in New York against a defendant in Dubai will probably go unsatisfied—because they do the calculation and see the expense of enforcing a US judgment means it is more likely than not to go away.

— Michael Redman,
Director of Judgment Enforcement,
Burford Capital

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Domestic judgments can be just as hard and sometimes harder to enforce than judgments across country borders. In the US every state is a sovereign, so a Florida judgment has to be domesticated in Georgia or Delaware or wherever you are trying to enforce. States like Florida and Texas are very debtor friendly, and that makes it very difficult to collect. Some people get their judgment and then think they can go to a judgment ATM to collect their money. This is not the reality.

— Edward Davis, Founder,
Astigarraga Davis

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Essentials of enforcement

Freezing orders

Before embarking on an extensive asset recovery strategy it's worth evaluating whether the objective is to bring the defendant to the settlement negotiation table or whether this point has passed and the sole objective is asset seizure. The most effective course will depend on numerous factors (how and where the assets have been concealed, the defendant and the quantum of damages), but nearly always involves a combination of legal proceedings conducted in the jurisdiction where the assets have been hidden, in tandem with sophisticated investigative work often conducted by specialist agencies.

Freezing orders are commonly used pre-judgment and post-judgment for enforcement. In some cases, such as complex international fraud, obtaining a freezing order is a pre-requisite to commencing proceedings because enforcement risk is deemed so high. Some jurisdictions have lowered the threshold for securing freezing orders and widened their scope to counter the increasingly complex ways some defendants conceal their assets; the threshold is far higher in others.

Asset tracing

The legal process of obtaining a freezing order must be paired with investigative

work to identify and locate assets that can be frozen. "A freezing order is just a piece of paper if you don't have anything to freeze," explained Michael Redman of Burford.

Because defendants are adopting increasingly complex ways of concealing their assets, claimants and their legal advisors may wish to appoint a specialised investigative agency to assist in the identification and location of assets in particularly complex enforcement scenarios.

Although the exact methods used for asset recovery depend on how the assets were concealed, where they reside and who the defendant is, one option that is gaining traction is the use of intermediary bank discovery to identify bank transfers in US dollars even if the bank of origination or beneficiary are not located in the US. This works by accessing the records of the intermediary banks that facilitate international money transfer in US dollars. Undertaking intermediary bank discovery can be authorised as part of US bankruptcy or litigation proceedings or for disputes outside the US through the 1782 provision.

Despite familiarity with specialist asset tracing services, the survey data indicates these solutions are being underutilised by claimants. Just over half (52 percent) of surveyed law firms have had a client that has used asset recovery services in the last

five years. This is significantly less than the 86 percent of firms whose clients have not been able to enforce judgments in full during the same period.

Act early

Whatever asset recovery methods are deployed, to make enforcement as easy as possible it is advisable to act early—even before a judgment is reached. In some jurisdictions, demonstrating that the defendant is dissipating assets during proceedings is crucial to secure freezing orders—and this can only be demonstrated by monitoring assets during proceedings. (Of course, demonstrating asset dissipation in court also aids the claimant's case.)

A few simple steps taken during proceedings will make enforcement easier. For example, tracing assets might result in the discovery of new corporations or individuals to include in proceedings that can be enforced against. It also might uncover banking and commercial relationships that can be used in the case. Being mindful of enforcement challenges helps ensure that claimants and counsel don't take steps that assist in getting a judgment but later make enforcement harder.

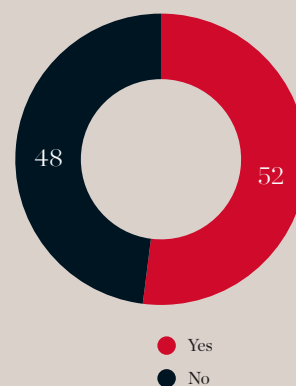
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A freezing order doesn't give you security and often isn't enough by itself to guarantee enforcement. It identifies assets, preserves them and retains the status quo, but in many cases it's just the first step. You still need to recover the frozen assets by whatever means are available. This may include an application under the Insolvency Act to set aside a transfer of assets, proceedings to unwind a sham trust or the appointment of an equitable receiver – all of which can involve complex issues and be both time consuming and expensive. In many cases a freezing order will only tell you whether you have a shot at enforcement, if you succeed in obtaining a judgment.

— Ben Davies, Partner, Byrne and Partners

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Have any of your clients used asset recovery services specifically for judgment enforcement in the past five years? (Private practice)



Case study: Enforcing an arbitration award against a former Soviet state

A company secured an international arbitration award against a former Soviet state and one of its now defunct trading partners following a straightforward trade dispute. But by the time proceedings had concluded, the trading arm had been wound down, so recourse lay with the state, which refused all requests to pay. Local courts similarly did not recognise the award. The client was then faced with the prospect of having to abandon its claim and write off its legal costs.

Burford Capital located significant assets attachable to the sovereign state that importantly were located in a third-party jurisdiction where the award could more readily be enforced. The assets also involved a trade partner that was politically sensitive to the state. Crucially, the assets were located outside the protections of sovereign immunity.

Burford provided actionable information that could be produced for legal purposes. It then advised on the selection of experienced local legal counsel to pursue enforcement. In parallel it identified a potentially sympathetic individual within the government in question who was able to highlight the negative implications of legal action being launched. This triggered state representatives to enter into settlement negotiations. A debt that was nearly written off in full was then recovered almost in full.

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In a lot of fraud cases the debtor and its affiliates were doing business in US dollars. All US dollar transfers from anyone in the world to anyone in the world, even if they don't nominally touch US bank accounts, are still processed in New York. So it is possible to recreate the financial history of virtually any person or entity in the world using that tactic.

— Warren Gluck, Attorney,
Holland & Knight

Very often the defendant takes steps to conceal assets before a judgment is reached, or even as soon as proceedings begin. They might divert the assets by assigning them to other companies or to jurisdictions that are less cooperative. So whenever a large dispute arises it makes a lot of sense to hire investigators at the outset so you can monitor those moves. Very often the steps taken to hide assets can be used in the context of judicial or arbitration proceedings to attack the credibility of witness statements by showing they are already taking steps to evade the possible consequences of the award. Judges or arbitrators hate this behaviour.

— Yves Klein, Partner,
Monfrini Crettol & Associés

It is important to litigate the merit proceedings with a view towards the enforcement phase. For example, many confidentiality agreements and protective orders are structured in a way that would not allow you to use information you have obtained for the purpose of enforcement proceedings. Just being alive to these issues can put you in a much better position for enforcement.

— Carrie Tendler,
Partner, Kobre & Kim

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Litigation funding for enforcement

Enforcement is essential—but it comes at a cost. How much? The vast majority of those surveyed (79 percent) estimated the total cost of enforcement at less than 50 percent of trial expenses. Some 20 percent said enforcement costs more than 50 percent of trial expenses, and one percent said enforcement costs more than the full price of the trial. Anecdotal evidence indicates that enforcement typically costs more than securing the judgment or award itself in complex cases of international fraud.

Given the high cost of enforcement, clients may seek funding specifically to transform “legal paper” into the payment of a judgment debt. Research suggests that this is still an untapped resource for clients and counsel: Only 11 percent of surveyed law firms have clients that have secured funding

specifically for enforcement in the last five years.

How does it work? The litigation finance provider will cover the costs of enforcement, including legal and other costs, in return for a proportion of the damages recovered. Importantly, the claimant does not pay any fees until cash proceeds are realised. The proportion of proceeds that must be allocated to the finance provider depends on the individual details of the case. Some funders are also willing to outright acquire judgments. In this scenario, the finance provider covers the entire cost of enforcement and retains any assets recovered. Claimants might prefer to sell a judgment rather than finance enforcement if it enables them to maintain a relationship with the defendant.

Given the sometimes substantial and unanticipated cost of enforcement once a judgment is obtained, not to mention the very real risk that only a fraction of the face value of a judgment might be secured, financing specifically for enforcement will surely become more widespread in the years to come.

Burford is recognized as a leading global finance firm focused on law and the largest provider of litigation finance in the world. It also offers world-class asset tracing and judgment enforcement capabilities along with a range of financing options—which clients and firms can deploy to transform legal paper without adding cost and risk to corporate balance sheets.

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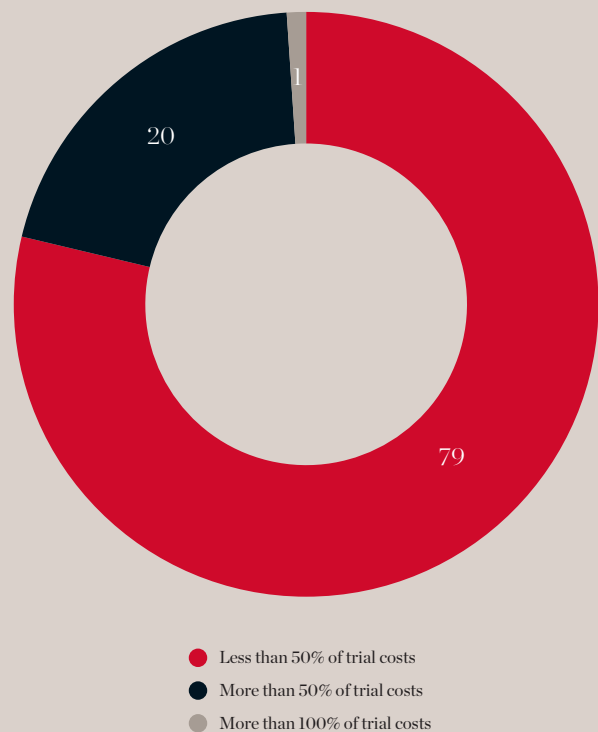
The cost of enforcement can easily be more than the cost of obtaining the judgment, partly because you often have to enforce in many different jurisdictions. It also depends on how determined your opponent is.

We are currently working on a complex case in Russia and have budgeted high single digit millions to get the judgment but triple that to enforce.

— Bernard O’Sullivan,
Partner, Olswang

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What is the total cost (legal and other associated costs) of enforcing judgments when the other side does not immediately comply? (Private practice)



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Many of my clients have used funding for enforcement, either because they don't have the money or because they want to spread the risk. Once you reach the level of the defendant being unwilling or unable to pay you have entered into a whole different ball game.

Frankly it's very hard for corporate management without significant asset recovery experience to take a view on this, but funders that specialize in the area can.

— Warren Gluck, Attorney,
Holland & Knight

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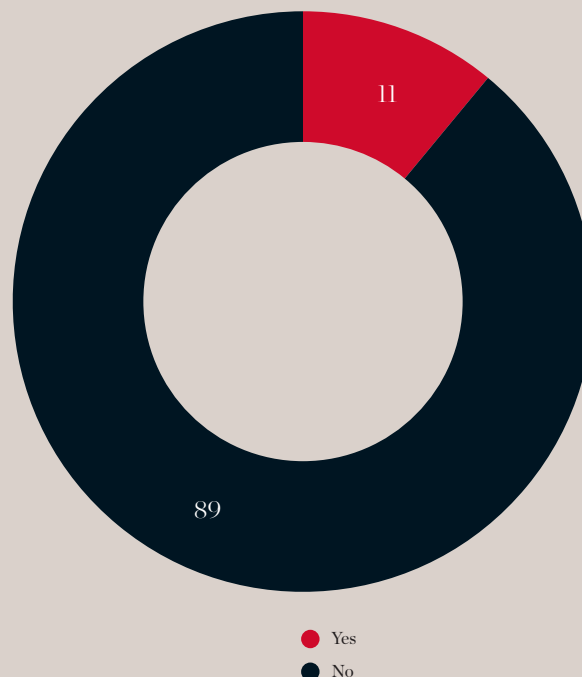
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People might sell their judgment because they want to have an ongoing commercial relationship with a debtor and have goals with respect to the judgment outside of pure monetisation. This happens a lot. Selling a judgment means they won't have to continue to take enforcement steps or have an adversarial relationship. Creditors might also want to sell a judgment due to internal politics at a particular company, and the management wanting to cut costs and not spend more money on enforcement. There is a decent market for selling judgments in the US but a lot of the product for sale is so devalued because judgments are often not put up for sale until lots of time has passed. Judgments sold right away are valued much higher.

— Carrie Tendler, Partner,
Kobre & Kim

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Have any of your clients used funding specifically for judgment enforcement in the past five years? (Private practice)



About the research

Burford Capital and The Lawyer Research Service, a division of The Lawyer, have collaborated to produce a series of reports on the UK litigation financing market. This report, the third in the series, focuses the legal processes and investigatory methods that can be deployed to enforce litigation judgments and arbitral awards. It also explores how litigation finance can be used to fund expenditure on enforcement.

The report is based on an online survey of over 200 private practice litigation and arbitration lawyers, in-house counsel and corporate C-level executives. The majority (61 percent) are private practice lawyers. The remainder are in-house counsel (32 percent) and C-level Executives (7 percent). In terms of geography, the majority (70 percent) of respondents are located in the UK. The remainder are located in North America, continental Europe and Asia. The survey was conducted in April 2016.

To complement the survey data, interviews were conducted with the following individuals, all of whom are quoted in the report:

Edward Davis, Founder, Astigarraga Davis

Michele Caratsch, Partner, Baldi & Caratsch

Michael Redman, Director, Judgment Enforcement, Burford Capital

Ben Davies, Partner, Byrne and Partners

Warren Gluck, Attorney, Holland & Knight

Carrie Tendler, Partner, Kobre & Kim

Yves Klein, Partner, Monfrini Crettol & Associés

Bernard O'Sullivan, Partner, Olswang

Paul Brehony, Partner, Stewarts Law

Tim Penny QC, Wilberforce Chambers

About Burford Capital

Burford Capital is a leading global finance firm focused on law. Burford's businesses include litigation finance, insurance and risk transfer, law firm lending, corporate intelligence and judgment enforcement, and a wide range of investment activities. Burford's equity and debt securities are publicly traded on the London Stock Exchange. We work with lawyers and clients around the world from our principal offices in New York and London.



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