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ENFORCEMENT PACK

Second Edition

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BARRISTERS

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01

ENFORCEMENT

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INTRODUCTION

This Pack is the second edition of the enforcement series and has been produced as so often our clients go through expensive and time-consuming litigation only to be left stuck with an English Court judgment or arbitration award which they are unable to enforce.

What this version of the Pack aims to do is to initially advise of the general steps that a party needs to take to enforce its English Court judgment or arbitration award in England, whilst also briefly reminding readers of the avenues available to them in relation to enforcement.

The Pack then goes on to look at our experiences with the use of freezing and disclosure orders, which personalise enforcement as a result of the potential criminal sanctions for non-compliance with such orders and we discuss HFW's *Bunge v Huaya* case where there was success for clients in terms of recovery following the securing of a freezing and a consequent committal order.

We then focus in on third party debt orders and how to secure the same – a gentle reminder that action against the parties who are in possession of a defendant's assets should continue to be borne in mind.

Continuing on in the line of inventive ways to enforce your order or award, we then look at three cases where the Courts have provided guidance on not going after the defendant directly but those around him in order to assist with enforcement.

The public policy defence in avoiding enforcement of orders and awards is an all too common one and we analyse the Supreme Court's decision of *Patel v Mirza* and look in detail at a HFW case of the Court of Appeal (*RBRG v Sinocore*) where the Court of Appeal refused to set aside the enforcement of a CIETAC arbitration award in England where there was an underlying fraud, favouring enforcement under the New York Convention instead.

In light of the current Brexit discussions, we could not produce this Pack without at least commenting on the impact of Brexit on the *Recast Brussels Regulations* which relates to the enforcement of English Court judgments in the EU.

Nearing the end of the Pack, we then go through a comprehensive review, including tips and novel ideas on enforcing your English Court judgments and arbitration awards in jurisdictions which our clients have often found difficult, including: Switzerland, USA, Nigeria, India, Saudi Arabia, Iran and China.

Finally we conclude the Pack with some suggestions on preventative measures you can take in advance at the proceedings stage, whilst keeping one eye on enforcement.

ENFORCEMENT OF AN ENGLISH COURT JUDGMENT OR ARBITRATION AWARD IN ENGLAND – GENERAL POWERS

Introduction

Judgments are not enforced automatically by the Court. It is up to the judgment creditor to decide when and how to enforce the judgment. In general, enforcement proceedings must be brought within 6 years of the judgment or award becoming enforceable[1].

The first thing the judgment creditor needs to know is what assets the judgment debtor has and where they are. The Court can order the judgment debtor to attend Court to provide information, on oath, about anything which is needed to enforce the judgment. A judgment debtor in England can be examined about assets situated abroad as well as in the United Kingdom, but no order to attend Court can be made against an individual who is not within the United Kingdom[2].

Writs and warrants of control

If the judgment debtor has goods, the Court can make orders, usually without notice, for taking control of goods by an enforcement agent and then selling them[3]. The enforcement agent acts for the judgment creditor who may be responsible and accountable for their actions[4].

Third party debt orders, charging orders, and stop orders

If the judgment debtor is owed money, the Court can make a third party debt order, which will require the debtor (typically a bank but it can also be a trade debtor) to pay the debt directly to the judgment creditor[5] – we will look into this in more detail later in the Pack. If the judgment debtor owns an interest in land, the Court can issue a charging order which attaches the interest[6]. If the judgment debtor owns shares or similar securities, the Court can issue a stop order which prevents dealing with the securities until they can be sold by order of the Court[7]. In all of these cases the Court first makes an interim order without notice to prevent the judgment debtor from dealing with the debt or property, and later makes the order final unless there is shown to be good reason not to do so.

Receivers and liquidation

In some instances the Court might appoint a receiver over the judgment debtor's assets when a charging order is not available because of the nature of the judgment debtor's interest, such as a life interest in trust property.

The judgment creditor can also consider serving a statutory demand with a view to the liquidation or the bankruptcy of the judgment debtor. However, a judgment creditor has no priority over any other unsecured creditor, and ranks behind secured and preferential creditors, as well as the liquidator's costs and expenses, so careful thought needs to be given to whether a winding up is in the judgment creditor's best interest.

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[1] Limitation Act 1980, section 24(1) (action on a judgment) and section 5 (action on an award).
[2] CPR Part 71
[3] CPR Parts 83 and 84
[4] Although the enforcement agent may be an independent contractor: *Kafagi v JBW Group* [2018] EWCA Civ 1157
[5] CPR Part 72
[6] CPR Part 73 Chapter I
[7] CPR Part 73 Chapter II

Arbitration awards

Arbitration awards are not judgments, but the Court can give permission for an award to be enforced in the same manner as a judgment, so that all the normal methods of enforcing a judgment of the Court become available to enforce the award[8]. Such an order giving permission can be made summarily without notice and can be served on the judgment debtor out of the jurisdiction. Service of the order will force a respondent who did not participate in the arbitration to raise any challenges to the jurisdiction of the arbitrators, or the award, promptly and at the latest within the time limit set by the Court for any application to set aside the order for enforcement.

The enforcing party may (but does not have to) also apply for the Court to enter judgment in terms of the award[9]. This permanently merges the award into the judgment so that the enforcing party becomes a judgment creditor. But this also has the result that there is no longer any award that can be enforced under the provisions of the New York Convention, so careful thought needs to be given to whether it will be easier to enforce the award, or a judgment, in the country where enforcement is likely to take place.

Awards to which the New York Convention applies can be recognised in England and may be enforced in the same way as an English award[10]. A party seeking the recognition or enforcement of a New York Convention Award must produce the original or a certified copy of both the award and the original arbitration agreement[11]. The latter requirement can be difficult if the arbitration clause was only incorporated into the contract by reference, so it pays to have a clear record of the arbitration agreement or of the original contract in which it was contained or incorporated.

Preventative orders

Whatever method of enforcement is chosen, the judgment creditor must always be aware of the risk that judgment debtor might try to hide or dissipate assets to frustrate the enforcement of a judgment or award. Various orders can be obtained to freeze or attach assets, or for their detention, custody, or preservation. These orders are more readily obtained after judgment than before and one such experience will be discussed in more detail later in the Pack.

[8] Arbitration Act 1996, section 66(1)
[9] Arbitration Act 1996, section 66(2)
[10] Arbitration Act 1996, section 101
[11] Arbitration Act 1996, section 102(1)(b)

PERSONALISING ENFORCEMENT

Freezing, disclosure and committal orders and a look at *Bunge v Huaya*

Failure to adhere to a London arbitration award or English Court judgment, if certain steps are taken, can lead to criminal implications for the defendant and the defendant's directors.

The tale

In one particular example, HFW were asked to assist with the enforcement of a LMAA arbitration award[12]. The defendant participated in the arbitration, but failed to pay the fairly modest sum due to clients, the claimant, despite numerous demands to do so. Through investigation we found out that the defendant, based in the Marshall Islands, had a Chinese parent which opened up subsidiary companies in various "closed" jurisdictions and ceased using them (and potentially dissipated assets) once a liability had accrued.

As a result of this evidence of evasion of an award, the English High Court granted a worldwide freezing order (WFO). Upon a failure to comply with certain obligations under the WFO, including a requirement for disclosure of assets, the claimant pursued the defendant and the defendant's director for contempt of Court.

The bite

The claimant secured the contempt of Court order against both the defendant and the director – against the director on the basis that he was the "directing mind" of the defendant and so must have known about the obligations that come under the WFO. As a result, the director was sentenced to 18 months' imprisonment. The implication of this was that, if the director ever travelled to the UK, he would have been arrested and imprisoned.

The effect

These types of freezing orders (and consequent contempt orders), although potentially last-resort remedies, are often quite effective.

In another contempt of Court order secured by HFW for non-compliance with a WFO, a director of the defendant in that case was sentenced to prison. As expected, this was ignored by the director, based in the Ivory Coast. However, there came an occasion a short while after the contempt of Court order was secured and served where that director needed to travel to London and so requested the assistance of HFW and our clients to discharge the contempt order in return for payment of the sums due to our clients.

Therefore, once secured, non-compliance with a WFO could have serious ramifications for the defendant and their directors and so could be useful in securing payment.

A look at standalone worldwide disclosure orders

The Court's power to order disclosure orders of assets worldwide is well established under section 37(1) of the Senior Courts Act 1981[13]. Under section 37(1), when considering whether it is "just and convenient" to

[12] *Bunge SA v Huaya Maritime Corp* [2017] EWHC 90 (Comm)
[13] "The High Court may by order (whether interlocutory or final) grant an injunction or appoint a receiver in all cases in which it appears to the Court to be just and convenient to do so."

order a disclosure order, Field J in *Cruz City 1 Mauritius Holdings v Unitech Ltd* [2013] EWHC 1323 at [31] summarises the relevant principles in the context of an arbitration award:

"I accordingly hold that the court has jurisdiction to make the order sought under s. 37 (1) of the 1981 Act and I now consider whether it is just and convenient to do so. By virtue of the awards themselves, the Claimant has a contractual right to be paid the sums awarded. The Claimant has also been granted permission by the court to enforce the awards as judgements. As I have already observed, it is the policy of the law that judgments of the court and arbitration awards should be enforced, and this applies a fortiori where the award in question, as here, was made in an arbitration whose seat was within the jurisdiction... In my view, the order sought has the potential for materially assisting the Claimant in enforcing [the awards] and I readily find that it is just and convenient that the Defendants should be ordered to provide disclosure verified by an affidavit of a proper officer of their assets worldwide."

Therefore in a similar vein to freezing orders, parties should bear in mind the possibility of securing standalone disclosure orders in aid of enforcing arbitral awards. The benefit of applying for just a disclosure order is that the multiple steps required in securing a freezing order (*inter alia*, establishing dissipation of assets) do not need to be satisfied. The disclosure order will still contain the same penal notice to disclose assets within a certain period of time in a certain format (usually an affidavit), which if ignored can lead to criminal sanctions against the defendant and/or those assisting or in knowledge of the breach. It should be noted however that the case law has clarified that the relief is only available post-award, but still remains a vital tool for enforcement at that stage.

GOING AFTER ASSETS NOT IN THE DEFENDANT'S CONTROL

A look at the availability and procedural steps for third party debt orders

Introduction

Very often scenarios occur where third parties owe sums to a judgment debtor or are holding sums or assets on behalf of a judgment debtor. In such scenarios, a successful third party debt order would require the third party debtor of the judgment debtor to make direct payment to the judgment creditor instead. Such payment discharges the third party from its debt and reduces or extinguishes the judgment.

Basic principles and procedure

The procedure is set out in CPR 72. Upon a without notice application by the judgment creditor, the Court may make an interim third party debt order. Once the interim order has been served on the third party and the judgment debtor, a hearing will be held during which interested parties will have an opportunity to present their objections. A final third party debt order may then be made.

In *Société Eram Ltd v Cie International* [14], Lord Bingham identified the following principles:

- A third party debt order is a proprietary remedy which operates by way of attachment against the property of the judgment debtor;
- The property of the judgment debtor so attached is the chose in action represented by the debt of the third party to the judgment debtor;
- On making the interim order that chose in action is (as it has been variously put) bound, frozen, attached or charged in the hands of the third party. Subject to any monetary limit which may be specified in the interim order, the third party is not entitled to deal with that chose in action by making payment to the judgment debtor or any other party at his request;
- When a final order is made, the third party is obliged (subject to any specified monetary limit) to make payment to the judgment creditor and not to the judgment debtor, but the debt of the third party to the judgment debtor is discharged *pro tanto*.

Pre-conditions

Certain conditions must be satisfied for any such application to succeed.

a. Jurisdiction of the third party

   First, the third party must be within the jurisdiction: CPR 72.1. Following the decision in *SCF Finance Co Ltd v Masri (No 3)*[15], physical presence within the jurisdiction at the time of making the interim order is sufficient. Jurisdiction is not lost by the third party's subsequent departure. A third party is also within the jurisdiction where it agrees to submit to the jurisdiction before the interim order is made.

b. "Debt due or accruing due"

   Second, there must be a "debt due or accruing due" to the judgment debtor from the third party: CPR 72.2(a). An order may therefore be made in respect of both debts presently owing and debts payable in the future provided that, in each case, the debt is in existence (and so represented by an

[14] *Société Eram Ltd v Cie International* [2004] 1 AC 260 at 275
[15] *SCF Finance Co Ltd v Masri (No 3)* [1987] 1 QB 1028

existing obligation) at the time the interim order is made. In practice, such orders are most commonly directed at bank accounts. However, an order might also be considered where the judgment debtor is owed money under a contract of sale or other trading contract with the third party. Each case will turn on its own facts and it will be important to distinguish between cases (i) where a debt has not accrued and there is no actual debt and (ii) cases where there is an existing debt, payment of which is simply deferred.

c. Jurisdiction of the debt

Third, the debt must be situated in the jurisdiction: *Société Eram Ltd v Cie International*. The Court has no jurisdiction to make an order in respect of a debt situated in a foreign jurisdiction and governed by a foreign law. There may be an exception to this principle where (under the foreign law) the English order would be recognised as discharging the liability of the third party: *Société Eram* at [26]; *Taurus Petroleum Ltd v State Oil Marketing Co*[16]. But the practical utility of this exception (considered "*of little or no practical importance*" by Lord Bingham in *Société Eram*) remains to be seen. If the debt is situated in a Member State, the English Court will be bound to decline jurisdiction in accordance with Article 24(5) of the Recast Brussels Regulation. It provides that, "*in proceedings concerned with the enforcement of judgments*", the Courts of the Member State in which the judgment has been or is to be enforced shall have exclusive jurisdiction, regardless of domicile. An equivalent provision in the Lugano Convention was considered and applied in *Kuwait Oil Tanker Co SAK v Qabazard*[17]: since a third party debt order was properly to be considered enforcement of the judgment *in rem* against the debt and the debt was situated in Switzerland, the Lugano Convention conferred exclusive jurisdiction upon the Swiss Courts.

In an international context, identifying the *situs* of the debt is therefore important. But it is not straightforward. In *Société Eram Ltd*, Lord Hobhouse approved a formulation according to which "*choses in action generally are situate in the country where they are properly recoverable or can be enforced*"; and more specifically "*a debt is [generally] situate in the country where the debtor resides*". In cases concerning the debts of banks to their customers, the debt is (absent some special agreement) "*repayable at the branch where the customer's account is kept and the situs of the debt is in that country*". The application of these principles in the letter of credit (LoC) context was considered in *Taurus Petroleum Ltd v State Oil Marketing Co*[18].

Interesting questions also arise where the third party is present in the jurisdiction at the relevant time but is domiciled in another Member State. It seems clear that if (by making a third party debt order) the English Court is being asked to enforce a judgment from the Courts of another Member State, Article 24(5) confers exclusive jurisdiction upon the English Court regardless of domicile, such that an application under CPR 72 must succeed. The position is less clear, however, where the judgment being enforced is a judgment of a non-Member State.

Discretion

Even if all pre-conditions are satisfied, it ultimately lies in the discretion of the Court whether to make a final third party debt order. The burden of showing why an interim order should not be made final is on the judgment debtor. An order will not be made where it would be inequitable to do so and it will generally be inequitable to do so where there is a real or substantial risk of the third party being required to pay twice over. This was the position in *Deutsche Schachtbau v Shell International Petroleum Company Ltd* [1990][19], even though (in compelling the third party to pay) the foreign Court would have been exercising jurisdiction which, from an English perspective, was exorbitant. As a general rule, however, commercial pressure is not of itself enough to render the making of a final order inequitable.

[16] *Taurus Petroleum Ltd v State Oil Marketing Co* [2017] 3 WLR 1170 at [29]
[17] *Kuwait Oil Tanker Co SAK v Qabazard* [2003] UKHL 31
[18] The Supreme Court in that case clarified that the *situs* of a debt under a LoC is the location of the issuing bank and not where payment is intended to be made.
[19] *Deutsche Schachtbau v Shell International Petroleum Company Ltd* [1990] 1 AC 295

UNORTHODOX APPROACHES TO ENFORCEMENT

Taking action against those who assist with dissipation of assets and locating dissipated assets

Introduction

What is to be done against those who are intent on hiding their assets from judgment creditors? Possible answers to this perennial question are provided by this selection of recent cases, each of which arises in quite a different factual and legal context.

In each of these cases, questions of asset recovery and the prevention of asset dissipation are of principal concern. But perhaps a more striking feature of the judgments is the ingenuity with which those general aims are pursued. The lesson, in other words, is that legal and procedural creativity – "thinking outside the box" – is often a key factor when faced with defendants, or other third parties, whose own ingenuity is often employed to try to frustrate the intentions of both the judgment creditor and the Court.

JSC v Krapunov – going after those who assist with the dissipation of assets

In *JSC v Krapunov*[20], the claimant bank had been granted a worldwide freezing order against a Mr Ablyazov in support of proceedings to recover large amounts of allegedly stolen money. Mr Ablyazov promptly breached this order, dealt with his assets, and fled to France. It was alleged that the defendant (Mr Ablyazov's son-in-law) had assisted him in dealing with those assets.

The Supreme Court decided that a claim against the defendant in unlawful means conspiracy, the 'unlawful means' being contempt of Court, would (if proved) be made out on the facts. The Court held that there was no rule to the effect that conspiracy to commit contempt of Court was not actionable as being contrary to public policy; the event that set the tort in motion, being the combination, had taken place in England, which was thus an appropriate venue for suit to be brought.

Therefore the defendant was held to be in contempt of Court for permitting the breach of the freezing order against Mr Ablyazov.

This decision illustrates one of many different avenues those seeking enforcement of a judgment debt might take – i.e. pursuing an accomplice under a somewhat imaginative claim in conspiracy in circumstances where the primary defendant has absconded.

Kerman v Akhmedova - compelling a party's legal advisor to disclose information about assets belonging to the defendant

In *Kerman v Akhmedova*[21], the circumstances were different. There, the context was ancillary relief proceedings between a husband and wife, where the key issue was the attempt to locate assets which had been hidden via complex corporate structures abroad by the husband.

In the Court of Appeal, the President of the Family Division had to review the first instance judge's decision, *inter alia*, to require the husband's solicitor to give evidence as to the whereabouts of certain assets. The Court found there to be no substance in the appellant's complaints, and the appeal was dismissed. It found that the procedure followed was entirely appropriate, barring two matters which are not material and did not affect the result of the appeal. Further, issues relating to legal professional privilege were said to be irrelevant in circumstances where the role of the solicitor had been that of a 'man of business', and where the questioning to which he was subjected related to factual matters over which privilege could not have been asserted anyway.

[20] JSC BTA Bank v Khrapunov [2018] UKSC 19
[21] Kerman v Akhmedova [2018] EWCA Civ 307

Therefore, in this case the solicitor was required to attend a hearing to give evidence on his former client's dealings with third parties.

Here, then, we see a certain amount of procedural (as opposed to purely legal) creativity; calling a party's solicitor to give evidence may be considered unusual but, in this case, was deemed eminently justifiable. As with *JSC v Krapunov*, a willingness to pursue unorthodox means in pursuit of assets (or alternative means of recovery) owed to a judgment creditor was upheld, unanimously, on appeal.

Merchant International – making permission for an appeal subject to the granting of security

Finally, in *Merchant International Company Ltd v Ukrainy*[22], the factual situation was as follows. A company (M) had obtained a judgment for CAD25m against another company (N) which it had been unable to enforce; M was aware that N was holding USD25m in a UK bank account. Accordingly, on M's application, the Court appointed a receiver over N's rights in that sum. N applied for, and obtained, permission to appeal that appointment.

M brought an application to the Court of Appeal for an order that a condition be placed on N's permission to appeal: viz., that N should provide security for (a) the full amount of the unpaid judgment debt plus interest down to the date fixed for the hearing of the appeal; (b) historic unpaid costs; and (c) estimated costs of the appeal, amounting in total to USD28.5m.

Christopher Clarke LJ acceded to that application. Amongst other reasons for doing so, the judge held that N clearly had no intention of paying the judgment debt unless forced to do so; that it was unacceptable that N should invoke the appellate jurisdiction whilst failing to comply with the outstanding judgment against it; and that there was a real risk that N would dispose of its assets otherwise than in the ordinary course of business and make them unavailable for execution.

This decision again shows the successful application of a familiar tool (i.e. an application for security) used in a novel and legally creative fashion: that is, that such security be the condition for a judgment debtor's appeal against a receivership imposed on its assets.

Conclusions

As this and the other cases above show, the Courts are readily sympathetic to novel attempts to protect judgment creditors by guarding against the risk of the judgment debtor dissipating his assets, or otherwise seeking to evade justice.

[22] *Merchant International Company Ltd v Ukrainy* [2016] EWCA Civ 710

THE "PUBLIC POLICY" DEFENCE FOR NOT ENFORCING ARBITRATION AWARDS

The impact of *Patel v Mirza* – and a note on *Sinocore v RBRG*

Introduction

The Court may refuse to recognise or enforce a New York Convention Award if it would be contrary to public policy to do so[23].

Public policy in this context is subject to a restrictive interpretation, applying only if the award is contrary to the fundamental conceptions of morality and justice. The exception "*was not intended to furnish an open-ended escape route for refusing enforcement*"[24]. The starting point therefore is that there is strong international policy in support of enforcement of an award and the Courts will only refuse enforcement in a clear case.

Either the underlying contract or the award, or both, might be contrary to public policy.

In the case of the underlying contract, it is likely that the public policy issues were raised in the arbitration and determined by the award. If so, the English Court will be careful not to allow the facts to be re-opened, save possibly in exceptional circumstances. If those issues were not raised, the English Court will be astute not to allow defences to be raised during the enforcement process that should have been raised during the arbitration.

Contracts, illegality and the impact of public policy

If the allegation is that the underlying contract was illegal, differing considerations apply depending whether the contract is illegal by its applicable law, or by English law, and whether it is illegal by the law of the place of performance. Where the contract was lawful under its applicable law but illegal under English law, public policy will only be engaged where the illegality reflects considerations of international public policy rather than purely English domestic public policy. But if it is clear that the contract was made with the intention of violating the law of a foreign friendly state, then enforcement of an award upholding the contract may be refused on the grounds of public policy.

Whichever of those issues arise, whether a contract or its performance involves illegality can be a delicate question, but even more difficult is the separate question whether a claim in connection with the contract should nevertheless be enforced. Public policy is not always a matter of fixed or customary law, and is capable of differing between different jurisdictions as well as between different generations, so the older authorities may not be reliable guides to how the same issue would be resolved today. In general under English law two questions must be asked when considering whether a claim that involves an element of illegality should be allowed: first "What is the aspect of public policy that founds the defence?" and second "But is there another aspect of public policy to which the application of the defence would run counter?" Those issues are normally for the arbitration tribunal to resolve. At the stage of enforcement of an award the mere fact that English law would have arrived at a different result from the law applied in the arbitration, or that the English Court would have arrived at a different result from the decision made in the award, does not of itself necessarily justify the application of English public policy to refuse recognition of enforcement of the award.

If it is the award itself that is said to be contrary to public policy, this is typically because it is said to have been obtained by fraud, or because the process of the arbitration breached the rules of natural justice. Issues then arise as to what evidence may properly be adduced to prove the allegations. The Courts have refused to allow introduction of evidence alleging that one or more of the successful party's witnesses had been guilty of perjury, but the Court might allow evidence to be given that a party had procured an award

[23] Arbitration Act 1996, section 103(3)
[24] *IPCO (Nigeria) Ltd v Nigerian National Petroleum Corporation* [2005] 2 Lloyd's Rep 326, 329 [13] per Gross J

as a result of reprehensible or unconscionable conduct on its part in conducting the reference, especially if the tribunal was not aware of that conduct and could not address it.

Allegations that the arbitral process breached the rules of natural justice will only be allowed in very clear cases, and not merely because English law would have dictated a different procedure. Two particularly relevant matters are the significance of finality in international arbitration, and the local availability of remedies. Accordingly, if the Courts with supervisory jurisdiction over the arbitration have ruled that an award should stand, such a ruling would be a very strong policy consideration in favour of recognition or enforcement. An application of these principles is discussed in more detail below in the case of *RBRG v Sinocore*[25].

RBRG v Sinocore - illegality and enforcement

The English Court of Appeal handed down a unanimous judgment dismissing an appeal from the earlier Commercial Court decision of Phillips J upholding the enforcement of a New York Convention CIETAC Arbitration Award for a significant US dollar sum.

The case related to a contract to sell rolled steel coils shipped from China to Mexico. Payment was to be made by an irrevocable LoC. It then transpired that forged or misdated bills of lading were presented in order to comply with a *purported* amended shipment date under the LoC. Payment under the LoC against the misdated bills of lading was prevented by an injunction. Sinocore, the sellers of the rolled steel coil, purported to terminate the sale contract due to the appellants/buyers' repudiatory breach. The appellants commenced CIETAC Arbitration and Sinocore counterclaimed for damages claiming that the appellants breached the sale contract by their unilateral attempt to amend the shipment date under the LoC.

The CIETAC Award concluded that the appellants had breached the sale contract in instructing the bank to issue an amendment to the LoC, which was itself not compliant with the terms of the sale contract. The Tribunal awarded damages to Sinocore and dismissed the counterclaim against Sinocore.

Sinocore then received permission to enforce the award by way of a judgment of Phillips J which was subsequently appealed.

The appellants appealed the judgment of Phillips J on four grounds, including that the judge had applied the wrong legal test, and that he should have applied the more flexible approach established by the Supreme Court in *Patel v Mirza*[26], and that the Judge was wrong to find that Sinocore's claim was not "based on" its own illegality.

The Court of Appeal addressed section 103 of the Arbitration Act 1996, which states that recognition or enforcement may be refused if it would be contrary to public policy to recognise or enforce the award.

The Court of Appeal made clear in a judgment of commendable clarity that section 103 of the Act embodies a pre-disposition to favour enforcement of New York Convention Awards. The Court acknowledged the well recognised distinction between an award enforcing a contract to bribe (which would not be enforced), and an award where it is alleged that the underlying contract was as a result of bribery (which the Courts have enforced) [27].

In respect of *Patel v Mirza* the Court stated that there was nothing in the judgment to suggest that the Supreme Court contemplated that the approach it set out might also be applicable in the context of section 103.

Dealing with the facts of this appeal, the Court concluded that there were a number of reasons why Sinocore's attempted fraud in presenting forged bills of lading and their claim for enforcement of the CIETAC Award was not sufficiently connected to engage the public policy exception, or, if it was engaged,

[25] *RBRG Trading UK Ltd v Sinocore International Co Ltd,* [2018] EWCA Civ 838
[26] *Patel v Mirza* [2016] UKSC42 [2016] 3 WLR 399
[27] *National Iranian Oil v Crescent Petroleum*[2016] 2 Lloyd's Rep 147

to justify refusal of enforcement on public policy grounds. In particular, the CIETAC Tribunal had expressly considered the causal significance of forged bills of lading, but found that there was none as the appellants had not been deceived and they had in fact prevented payment under the LoC. The Court of Appeal recognised that in reality the appellants needed to go behind the findings made by the Tribunal in order to pursue the causation arguments they sought, something that was inappropriate.

Materially, this was at most a case of a failed attempt at fraud. The appellants were not deceived nor was the bank; the bank did not pay, and forged bills did not go into circulation. Sinocore obtained no benefit from their attempted wrongful act. The Court concluded "*In enforcing the Award the Court is not allowing its process to be used by a dishonest person to carry out a fraud". In the event, there was no fraud; only an attempt at fraud. There is no public policy to refuse to enforce an award based on a contract during the course of the performance of which there has been a failed attempt at fraud.*" (Hamblen LJ).

The English Court of Appeal accepted Sinocore's submission that, on the Tribunal's findings, the attempted fraud was not the basis of their claim or loss and was essentially "collateral" to the claim. Even if *Patel v Mirza* was relevant, under that approach, the attempted fraud was far from central and was again essentially collateral.

Our Comments

A useful by-product of this litigation is the Court of Appeal's reaffirmation of the importance (and public policy in favour) of enforcing New York Convention Arbitration Awards even in circumstances where the conduct of one party is found to be unacceptable, and the English Court's confirmation of its robust "pro-enforcement" attitude towards arbitration awards, which is most welcome, Brexit or no Brexit[28]. We are sure this decision will be welcome by our clients in China, and by those engaged in international arbitration.

[28] "*Myths of Brexit*" speech at Brexit Conference in Hong Kong - The Right Honourable Lord Justice Hamblen (2 December 2017)

THE EFFECT OF BREXIT ON ENFORCEMENT OF ENGLISH COURT JUDGMENTS AND ARBITRATION AWARDS

The legislative negotiations between the EU and the UK following Brexit are likely to involve an agreement to continue the current regime for choice of jurisdiction and the enforcement of judgments within EU Member States (Recast Brussels Regulations)[29]. However, in any interim period where such an agreement is being negotiated, or if the UK does not become an independent signatory to the Lugano Convention 2007[30], an alternative way of ensuring the continuity of the current enforcement regime between the UK and EU Member States will no longer be automatic. The enforcing party will need to bring proceedings to enforce the judgment in the relevant local Court which may result in the reappearance of the "torpedo" action[31].

On the service of legal proceedings, if a reciprocal agreement is not agreed in place of the current EU Service Regulation[32], claimants would have to apply to the UK Courts for permission to serve English Court proceedings on a party located in an EU Member State. To ensure timely service of litigation proceedings, parties should consider inserting local process agent clauses in existing and new contracts to avoid issues with service.

Arbitration will fall outside the issues Brexit may create especially on enforcement, due to the UK's membership of the New York Convention, which will continue to apply to the other 159 signatories, including the EU Member States.

[29] Regulation (EU) 1215/2012 on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters
[30] Convention on Jurisdiction and the Recognition of Enforcement of Judgments in Civil and Commercial Matters 2007
[31] I.e. parallel Court proceedings commenced primarily in order to create delay.
[32] Council Regulation (EC) 1393/2007 on the Service in the Member States of Judicial and Extra Judicial Documents in Civil or Commercial Matters

PRACTICAL TIPS AND NOVEL IDEAS: HOW TO ENFORCE IN...

Spotlight on Switzerland – William Hold, Senior Associate, HFW Geneva

Question	English Court Judgment	English Arbitration Award
Generally enforceable in the jurisdiction? **Yes or no**	Generally yes under the Lugano Convention (with the exception of judgments relating to insolvency or a limited number of other matters).	Yes (under the New York Convention).
General steps in the enforcement process	Apply to the English High Court for a certificate in the form of Annex V to the Lugano Convention. Apply to the Swiss Court to get the judgment and Annex V certificate recognised in Switzerland (often done in conjunction with enforcement proceedings). The Annex V certificate, together with the original judgment (or a certified copy) must be produced together with the application for recognition of the judgment. No other formalities are generally necessary, and the substance of the judgment will not be reviewed. Start (or continue) actual enforcement proceedings once the judgment and Annex V certificate are recognised by the Swiss Court.	Apply to the Swiss Court for the award to be recognised under the New York Convention (often done in conjunction with enforcement proceedings). Start (or continue) actual enforcement proceedings once the award is recognised by the Swiss Court.
Estimated/usual timeframe from initial application to the local Court to an enforcement judgment/order	5 to 15 months, depending on how vigorously the enforcement proceedings are defended.	5 to 15 months, depending on how vigorously the enforcement proceedings are defended.
Estimated costs for the enforcement process	CHF7,000 to CHF20,000 depending on how vigorously the enforcement proceedings are defended.	CHF7,000 to CHF20,000 depending on how vigorously the enforcement proceedings are defended.
Anything specific/unusual to note in relation to the enforcement process in the jurisdiction?	It is unusual for a judgment not to be recognised – recognition can only be refused on very limited grounds (for example public policy). The Lugano Convention can under some circumstances be used to obtain a worldwide freezing order or other interim measure recognised and enforced in Switzerland.	The party requesting the recognition of the award must produce the duly authenticated original award (or a certified copy). Some Swiss Courts require a certified translation of the award into the relevant official language of the Court (i.e. French), but this requirement is frequently waived for awards drafted in English. The recognition proceedings are generally straightforward (but can be challenged under the New York Convention), and can be sought either separately from encroachment proceedings, or as a preliminary issue in enforcement proceedings.
Any steps that should be / should not be taken in advance to assist enforcement in the jurisdiction?	Once the judgment is recognised, it is enforceable as if it were a final and binding Swiss judgment. Debt-collection proceedings can already be started before the judgment has been formally recognised/enforcement order handed down.	Once the award is recognised, it is enforceable as if it were a final and binding Swiss judgment. Debt-collection proceedings can already be started before the award has been formally recognised/enforcement order handed down.

Spotlight on US – Michael Wray, Partner, HFW Houston

Question	English Court Judgment	English Arbitration Award
Generally enforceable in the jurisdiction? **Yes or no**	Yes, under the relevant state's law.	Yes, under the New York Convention.
General steps in the enforcement process	File an "original proceeding" (i.e. new claim) in a Court of appropriate jurisdiction, in either state or federal Court, under the applicable statute.	Yes, the US is a party of the New York Convention, which permits a federal Court action to enforce a valid, final foreign arbitration award.
Estimated/usual timeframe from initial application to the local Court to an enforcement judgment/order	A safe estimate is 6 months to a year, depending on whether the matter is contested, amount of discovery and potential defences.	A safe estimate is 6 months to a year, depending on whether the matter is contested, amount of discovery and potential defences.
Estimated costs for the enforcement process	Between USD10,000 and USD50,000.	Between USD10,000 and USD50,000.
Anything specific/unusual to note in relation to the enforcement process in the jurisdiction?	As enforcement actions are often resolved via summary judgment, certified copies of the judgment and declarations are typically required. A foreign legal expert's opinion may also be required. The enforcement process has very limited defences, typically tied to fraud, due process, and notice issues.	As enforcement actions are often resolved via summary judgment, certified copies of the award and declarations are typically required. A foreign legal expert's opinion may also be required. The enforcement process has very limited defences, typically tied to fraud, due process, and notice issues.
Any steps that should be / should not be taken in advance to assist enforcement in the jurisdiction?	The selection of the jurisdiction to file an enforcement action is extremely critical. Practically speaking, a suit should be filed where assets can be seized and/or garnished. Accordingly, when considering an enforcement action, an asset search should be conducted so that once obtained a US judgment can be satisfied.	The selection of the jurisdiction to file an enforcement action is extremely critical. Practically speaking, a suit should be filed where assets can be seized and/or garnished. Accordingly, when considering an enforcement action, an asset search should be conducted so that once obtained a US judgment can be satisfied.

Spotlight on India – with thanks to Mr Zarir Barucha (Partner) of Zarir Barucha & Associates, Mumbai, India

Question	English Court Judgment	English Arbitration Award
Generally enforceable in the jurisdiction? **Yes or no**	Yes, under the Indian Code of Civil Procedure, 1908.	Yes, under the New York Convention.
General steps in the enforcement process	Since the UK is a reciprocating territory, one simply has to file execution proceedings (no need to file recognition proceedings). Execution application is served on the opposing party and heard by the Court. If the application is allowed, the Sheriff, or any other officer of the Court is appointed to carry out execution, depending on the mode of execution sought.	Only execution proceedings have to be filed in the case of awards under the New York Convention. Execution application is served on the opposing party and heard by the Court. If the application is allowed, the Sheriff, or any other officer of the Court is appointed to carry out execution, depending on the mode of execution sought.
Estimated/usual timeframe from initial application to the local Court to an enforcement judgment/order	3 to 4 months if not heavily contested.	3 to 4 months if not heavily contested.
Estimated costs for the enforcement process	Would vary from case to case, but generally not excessive.	Would vary from case to case, but generally not excessive.
Anything specific/unusual to note in relation to the enforcement process in the jurisdiction?	Requires: A certified copy of the foreign judgment, duly notarised and apostilled (by the consulate in the foreign country). Translations of any part of the judgment which is not in English.	Requires: An original award or a duly authenticated copy. The original arbitration agreement or a duly certified copy. Any evidence necessary to prove that the award is a foreign award. For example, correspondence exchanged between the parties *inter se* or with the arbitrator, minutes of the arbitration proceedings, documents exhibiting the manner in which the arbitrator was appointed, etc.
Any steps that should be / should not be taken in advance to assist enforcement in the jurisdiction?	Security should be attempted to be obtained in advance of filing execution proceedings. The enforcement proceedings should be filed within 3 years of judgment.	Security should be attempted to be obtained in advance of filing execution proceedings, The enforcement proceedings should be filed within 3 years of award.

Spotlight on China – Jenny Chester, Senior Manager, HFW Shanghai

Question	English Court Judgment	English Arbitration Award
Generally enforceable in the jurisdiction? **Yes or no**	No	Yes, under the New York Convention
General steps in the enforcement process	N/A	The award (and supporting documents), the original arbitration agreement, Power of Attorney/Certificate of Legal Identity of the Applicant/Certificate of Incorporation of the Applicant – all need to be notarised and legalised before submission to the Chinese Court. A written application for recognition and enforcement of the award (in Chinese) is to be submitted along with the above documents to the intermediate people's Court of the place where the party against whom the enforcement is sought is domiciled or of the place where the assets against which enforcement is to be carried out are located.
Estimated/usual timeframe from initial application to the local Court to an enforcement judgment/order	N/A	In theory, Court ruling confirming recognition and enforcement shall be granted within 2 months; Court ruling rejecting recognition and enforcement shall be approved by the PRC Supreme Court before the local Court's refusal of recognition and enforcement, which has no time limit. In practice, the average time for a local Court to decide whether to grant an order recognising and enforcing a foreign arbitration award is just under one year.
Estimated costs for the enforcement process	N/A	Court fees for recognition application are RMB500 (i.e. GBP50). Court fees for enforcement application are calculated based on the amount of the claim. Legal costs vary from place to place and also depend on whether the application is contested.
Anything specific/unusual to note in relation to the enforcement process in the jurisdiction?	N/A	In accordance with the PRC Civil Procedure Law, the applicant must make an application for recognition and enforcement of an arbitral award within two years of the expiration of the performance period set out in the award and in the event of performance in instalments, the two-year time limit will be calculated from the expiration of the performance period for each instalment. In the absence of such clear provisions, the time period runs from the date on which the award becomes effective.
Any steps that should be / should not be taken in advance to assist enforcement in the jurisdiction?	N/A	A Chinese Court may deny recognition and enforcement of a foreign arbitral award if one or more of the grounds set out in Article V of the New York Convention are met.

Spotlight on Iran – with thanks to Mr Abbas Ramazani (Partner) of Ramazani & Associates, Tehran, Iran

Question	English Court Judgment	English Arbitration Award
Generally enforceable in the jurisdiction? **Yes or no**	Yes, but subject to a number of conditions including (i) that it should be final, definite and enforceable in the country of origin, (ii) a contrary judgment should not have been issued by the Iranian Courts, (iii) the judgment should not be connected to immovable property located in Iran and (iv) it should not be contrary to the laws of Iran.	Yes, under the New York Convention.
General steps in the enforcement process	The enforcement application will be registered with the Court enclosed with authenticated copy of the judgment and supporting documents (see below). The Court will review it and if it finds the content meets the above mentioned conditions, the Court issues a judgment, with leave to enforce the judgment.	Only execution proceedings have to be filed in the case of awards under the New York Convention. Execution application is served on the opposing party and heard by the Court. If the application is allowed, the Sheriff, or any other officer of the Court is appointed to carry out execution, depending on the mode of execution sought.
Estimated/usual timeframe from initial application to the local Court to an enforcement judgment/order	Within 2 to 6 months.	3 to 4 months if not heavily contested.
Estimated costs for the enforcement process	Depends on the judgment amount. It will generally be 2-6% of the claim amount, inclusive of legal fees.	Would vary from case to case, but generally not excessive.
Anything specific/unusual to note in relation to the enforcement process in the jurisdiction?	The following documents need to be presented to the Iranian Court and should be certified by the Iranian Diplomatic representative in England: 1. Power of Attorney issued at the business place of the claimant. 2. Judgment. 3. Enforcement Writ.	The following documents need to be presented to the Iranian Court and should be certified by the Iranian Diplomatic representative in England: 1. Power of Attorney issued at the business place of the claimant. 2. Award.
Any steps that should be / should not be taken in advance to assist enforcement in the jurisdiction?	No specific steps provided in the laws.	No specific steps provided in the laws.

Spotlight on KSA (Saudi Arabia) – Ziad El-Khoury, Partner, HFW Riyadh

Question	English Court Judgment	English Arbitration Award
Generally enforceable in the jurisdiction? **Yes or no**	Foreign Court judgments are usually enforceable subject to proving reciprocity. In cases with judgments from UK Courts, reciprocity has been difficult to prove and thus, UK Court judgments do present an enforceability challenge in KSA.	Yes, under the New York Convention, provided the award is not contrary to Sharia principles or public order.
General steps in the enforcement process	Note that, where reciprocity is proven, Court judgment enforcement follows the same procedure as for an arbitral award (right column).	The original (or certified) award shall be submitted to the competent KSA Court to obtain an "exequature" (i.e. a stamp) stating that the award shall become enforceable in KSA. Then the award along with the "exequature" shall be filed with the execution Court in charge of enforcement.
Estimated/usual timeframe from initial application to the local Court to an enforcement judgment/order	N/A	If exequature not challenged and assets are available, usually around 8 to 12 months.
Estimated costs for the enforcement process	N/A	No cost or duties.
Anything specific/unusual to note in relation to the enforcement process in the jurisdiction?	N/A	If certification is required, it must be done by the KSA Ministry of Foreign Affairs and KSA Embassy at country of origin. The award must state that it is final and binding. Claimant must also prove that the award was duly notified to defendant.
Any steps that should be / should not be taken in advance to assist enforcement in the jurisdiction?	N/A	Claimant must be able to prove that the defence rights of defendant have been safeguarded and that they had the opportunity to defend themselves. Default judgments may be accepted if the claimant can show that defendant was duly notified and had the opportunity to defend themselves.

Spotlight on Nigeria – Tunde Adesokan, Senior Associate, HFW London

Question	English Court Judgment	English Arbitration Award
Generally enforceable in the jurisdiction? **Yes or no**	Yes, under the Reciprocal Enforcement of Foreign Judgment Ordinance Cap 175 LFN 1958.	Yes, under the New York Convention.
General steps in the enforcement process	Judgments from principally Commonwealth countries including England may be enforced. An application with a supporting affidavit and exhibits must be brought to Court, accompanied by a certified copy of the judgment. If the Court finds merit with the claim (e.g. original Court acted within its jurisdiction and the judgment was not obtained by fraud etc.) the judgment will be registered and enforced.	The applicant must provide to the Court the original arbitration agreement and award, or certified copies of them, and if in a foreign language these require translation into Nigerian. If the Court finds merit with the claim the judgment will be registered and enforced.
Estimated/usual timeframe from initial application to the local Court to an enforcement judgment/order	Usually a fast process, but if registration is challenged, it may be prolonged for up to a year.	Again, usually a fast process, but if challenged, may encounter delays.
Estimated costs for the enforcement process	Approximately USD2,000.	Approximately USD2,000.
Anything specific/unusual to note in relation to the enforcement process in the jurisdiction?	The Nigerian Courts follow standard procedure for enforcing a foreign judgment. That is, the judgment must be a money judgment, final and conclusive, non-fraudulent and not against Nigerian public policy.	A major challenge is the high tendency for the unsuccessful party to the enforcement order to make an application to set aside the registered foreign judgment, thereby causing delays. Some grounds for set aside include (i) the judgment debtor did not receive notice of the proceedings in sufficient time to enable him defend and did not appear, (ii) the judgment is not final and conclusive or (iii) the judgment is for a tax, fine or penalty, etc.
Any steps that should be / should not be taken in advance to assist enforcement in the jurisdiction?	Take early advice on the jurisdiction of the Court and the process of enforcement. Ensure enforcement proceedings are commenced within 12 months of the judgment due to local time bar rules.	Take early advice on the jurisdiction of the Court and the process of enforcement. Ensure enforcement proceedings are commenced within 12 months of the award due to local time bar rules.

PREVENTION IS BETTER THAN ENFORCEMENT

- Give special attention to your law and jurisdiction clauses – be sure that your judgment or award will be enforceable.
- Consider taking security – whether for payment or for your claim.
- Identify assets – or the potential dissipation of those assets – early.
- Look after your original award/judgment – you might need to provide it (or a certified copy) for enforcement proceedings.
- Check your contract does not prohibit interim Court relief (for example anti-suit injunctions) which might prevent you effectively enforcing an arbitration agreement (e.g. FOSFA).
- Ensure your contracts are currently signed/stamped as necessary, with persons with authority signing the contracts – unsigned contracts and/or the argument that the person signing did not have authority are easy defences brought up later in the process.
- Ensure there are clear jurisdiction clauses. Some jurisdictions require jurisdiction clauses to be expressly signed so bear this in mind.

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