

## Flexible remedies and judicial support

Why England remains a leading centre for international disputes.

The English court has long been a leading forum for the resolution of international disputes, and London is a global centre for international arbitration.<sup>1</sup> This is a function of several factors, including the dominance of English law in international commerce and the perception of judicial reliability and neutrality. However, an important additional factor is the range of powerful remedies available from the English court in cross-border disputes, and the willingness of the English court to act creatively and pragmatically in assisting parties, including where the underlying proceedings are arbitral proceedings, or litigation in another jurisdiction.

This article is a practical overview of some of the flexible remedies and judicial support that is available in England, covering recent developments and practical strategies which non-UK parties should keep in mind.

### ENFORCEMENT

The English courts have recently re-affirmed their commitment to assisting the enforcement of English judgments and arbitration awards against assets, including foreign assets, held by recalcitrant defendants. One of the most flexible tools available to a claimant in such a situation is the appointment of equitable receivers.<sup>2</sup> This can be a highly effective way to monetise a damages award where the defendant's assets are held through a complex offshore corporate structure.

In *Cruz City 1 Mauritius Holdings v Unitech Ltd and*

*others*, the English court has deployed this remedy to assist the claimant in enforcing its LCIA arbitration awards.<sup>3</sup> The first defendant's assets included shareholdings in four companies which were all incorporated outside England. Many of the ultimate assets were held by subsidiaries of these companies. Other methods of recovery of the award debt has not proved practicable.

The judge helpfully summarised the relevant principles as follows:

- ~The overriding consideration was the demands of justice. These include the policy that English judgments and awards should be enforced.
- ~The jurisdiction must be exercised in accordance with established principles, but these could develop incrementally.
- ~The jurisdiction will not be exercised unless there is some difficulty with the usual process of execution, but there are no rigid rules as to the nature of the difficulty required.
- ~A receiver may be appointed if there is a reasonable prospect that the appointment will assist enforcement.
- ~Receivers can be appointed to exercise the rights of shareholders, such as the sale of shares, voting powers, the appointment of directors, and the winding up of companies.

The judge in this case was prepared to assist the claimant by making an order appointing receivers who were empowered to obtain information about the defendant's underlying assets and to step into the defendant's shoes and take the necessary steps

to exercise his rights to realise value from the shareholdings.

The flexibility of this equitable remedy has been further illustrated recently in three other decisions of the English court.

In *JSCVTB Bank v Skurikhin and others*<sup>4</sup> the claimant had obtained money judgments against the Russian-domiciled first defendant which it was struggling to enforce. The court was prepared to appoint receivers over the first defendant's interest in the second defendant, an English LLP, even though he held those interests as a nominee for a Liechtenstein company. The court held that property subject to a trust, or similar arrangements, would be regarded as assets of the judgment debtor if he had the legal right to call for those assets to be transferred, or if he had de facto control of the assets.

In *Merchant International Company Ltd v Naflogaz*<sup>5</sup> the English court appointed a receiver with power to recover monies paid by the defendant to Bank of New York Mellon for interest on loan notes, despite the defendant having no legal enforceable rights against the money held by the bank.

Receivers may also have a role to play outside the enforcement context. Recently, the English court appointed accountancy firm BDO LLP as receivers to manage the claim brought by the Libyan Investment Authority (the "LIA") against Goldman Sachs and Société Générale. The LIA's claim had effectively ground to a halt because rival factions both claimed to be in control of the LIA but were giving contradictory instructions to the LIA's London lawyers. The court was prepared to appoint BDO as receivers over the claim to allow it to continue.<sup>6</sup>

### FREEZING ORDERS, AND INFORMATION GATHERING

English freezing orders continue to be widely used by those seeking to preserve a defendant's assets until judgment can be enforced. For more than twenty years, the English court has been willing to make such orders, even where some of the assets are outside the jurisdiction (worldwide freezing orders). Recently, the court has shown itself willing to make such orders even in proceedings where all the assets which will be frozen are outside the UK.<sup>7</sup>

In addition to its broad powers to make freezing orders in support of English and foreign proceedings, the English court has substantial powers to as-



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sist foreign litigants in obtaining evidence and information located in England required for proceedings abroad.

Where a witness in England is unwilling to give evidence voluntarily, a foreign litigant may seek the assistance of the English court pursuant to a letter of request from a foreign court.

The English court's jurisdiction to assist a foreign court derives (in the EU context) from the Taking of Evidence Regulation<sup>8</sup> and (outside the EU) from the Evidence (Proceedings in Other Jurisdictions) Act 1975.

Subject to restrictions on, for example, "fishing expeditions", or on requests which do not properly particularise the documents sought, the English court will generally make the order requested if it is proper and practicable to do so. The evidence that can be obtained from witnesses in this way is not limited to that which is admissible under English law and the English court will seek to give the foreign court its fullest help, including by giving effect to the foreign court's rules of evidence.

Where a foreign (or domestic) litigant wishes to obtain information held by a party in England who will not be a witness to proceedings but who is "mixed up" in a wrongdoing, it may be able to obtain such information by applying to the English court for a *Norwich Pharmacal* order.<sup>9</sup> In order to make such an order, the court must be satisfied that (i) there has arguably been wrongdoing; (ii) there is

a real prospect that the respondent is “mixed up” in the wrongdoing; (iii) there is a real prospect that the respondent has relevant information which can be the subject of such order; and (iv) such order is a “necessary and proportionate response in all the circumstances”. The court will not grant a Norwich

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Pharmaceutical order where information could be obtained through the ordinary disclosure process or where the respondent would be a witness in the proceedings. A similar type of relief known as a Bankers Trust order can be used by claimants against a third party bank to require disclosure of documents necessary to identify and prevent the disposal of property obtained by a fraud.<sup>10</sup>

### ASSISTANCE IN CROSS BORDER INSOLVENCIES

The English courts have also recognised the difficulties which can arise in multi-jurisdiction insolvency situations, and are willing to assist the insolvency practitioners, whether appointed in England or overseas, in efficiently and effectively managing the process.

In *Re Nortel Networks SA and other companies*<sup>11</sup> the joint administrators were concerned that the opening of secondary insolvency proceedings outside England (which could have been possible where the companies in question had assets or operations in other countries) would be likely to obstruct the planned global restructuring of the Nortel Group and reduce the value that could be realised for cred-

itors. Accordingly, the administrators applied to the English court for letters of request to be sent to the courts of a number of European Member States. The purpose of the letters of request was to ask those courts to put in place arrangements requiring the administrators to be notified of any application to open secondary insolvency proceedings in respect of Nortel group companies in administration so that the administrators could make submissions to those courts on the damage which could be caused to creditors by the opening of secondary proceedings.

The administrators’ application was successful. The judge held that it was ‘highly desirable’ that the requested assistance from the foreign courts be sought and that liquidators in main and secondary proceedings cooperate.

In the case of *African Minerals Limited*,<sup>12</sup> the English administrators of a Bermudian mining company were concerned that a security agent based in Hong Kong was proposing to sell certain shares, charged by the company in support of borrowing arrangements, at an undervalue. They therefore applied to the English court for a letter of request asking the Hong Kong court to recognise and give effect to the statutory moratorium on security enforcement under paragraph 43 of Schedule B1 to the Insolvency Act 1986. The letter of request was duly issued by the English court.<sup>13</sup>

In the case of *HSBC Bank v Tambrook Jersey Ltd*,<sup>14</sup> a Jersey company wished to avoid insolvency proceedings in Jersey as they would have the effect of terminating key contracts but would not provide the benefit of a moratorium. As Tambrook did not have its centre of main interests in England, it could not apply directly to the English court for an administration order. An indirect appointment was therefore sought via a letter of request from the Jersey court to the English court. Section 426 of the Insolvency Act 1986 provides that the “United Kingdom courts shall assist the courts having the corresponding jurisdiction in any other part of the United Kingdom or any relevant country or territory”.<sup>15</sup>

At first instance the judge held that in the absence of local proceedings in Jersey, the English court could not assist by making an administration order. Overturning the first instance decision, the Court of Appeal held that there was no good reason to deny assistance and proceeded to grant the order sought.

### ARBITRATION AND ANTI-SUIT INJUNCTIONS

As noted above, England is a popular choice as an arbitral seat. Partly, this is because English law, including the Arbitration Act 1996 (the “Arbitration Act”), provides a reliable framework and the English Commercial Court is highly supportive of and experienced in dealing with issues arising from arbitration. Section 44 of the Arbitration Act empowers the English court to make orders in support of arbitration, such as the granting of injunctive relief to restrain parties from pursuing litigation anywhere in the world in breach of an arbitration agreement and to require the preservation of evidence and the attendance of witnesses to give evidence.

In the recent case of *Southport Success S.A. v Tsing-shan Holding Group Co. Ltd*,<sup>16</sup> the claimant had commenced arbitration proceedings against the defendant in London. Whilst both parties had nominated an arbitrator, the tribunal had not been constituted and no steps had been taken in the arbitration. Some four months later, the defendant purported to serve on the claimant proceedings in the Xiamen Maritime Court in China.

In his decision, the judge cited the Supreme Court’s judgment in *AES Ust-Kamenogorsk Hydropower Plant LLP v Ust-Kamenogorsk Hydropower Plant JSC*,<sup>17</sup> distinguishing between the court’s powers under section 44 of the Arbitration Act 1996, under which the court has the power to restrain other proceedings “for the purposes of and in relation to arbitral proceedings”, and section 37 of the Senior Courts Act 1981, under which the court can restrain foreign proceedings to enforce the negative covenant contained in an arbitration agreement not to bring foreign proceedings. The defendant argued that the court’s jurisdiction to restrain proceedings was founded in section 44 of the Arbitration Act 1996, and since no tribunal had been constituted and no steps taken, no proceedings were, in fact, on foot. Phillips J held that the court had power, pursuant to section 37 of the Senior Courts Act 1981, to grant an anti-suit injunction whether or not actual or intended arbitration was in view. This power was in addition to that found in section 44 of the Arbitration Act to restrain ongoing foreign proceedings.

### CONCLUSION

In 2014, a judge of the English High Court remarked that overseas litigants came to London because it was a “safe and neutral forum” and because “English law provides litigants with a significant arsenal of powerful weapons including freezing injunctions and search orders”. The overview above demonstrates the extent to which the English courts are prepared to assist litigants to further the interests of justice and re-emphasises the importance of litigants and insolvency practitioners considering the assistance which they may be able to obtain from the English courts, whether or not the principal proceedings are taking place in England. ■

### ABOUT THE AUTHORS

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### Notes

- 63% of litigants in the English Commercial Court in 2014 were foreign: [http://www.portland-communications.com/downloads/portland\\_who\\_uses\\_the\\_commercial\\_court.pdf](http://www.portland-communications.com/downloads/portland_who_uses_the_commercial_court.pdf)
- The court’s jurisdiction in this regard derives from section 37(1) of the Supreme Court Act 1981
- Cruz City 1 Mauritius Holdings v Unitech Limited and others* [2014] EWHC 3131 (Comm)
- [2015] unreported
- [2015] EWHC 1930
- 2 July 2015, unreported
- U&M Mining Zambia Ltd v Konkola Copper Mines Plc* [2014] EWHC 3250 (Comm)
- 1206/2001/EC
- [1974] AC 133
- Bankers Trust Company v Shapira* [1980] 1 WLR 1274,
- [2009] EWHC 206 (Ch)
- 13th April 2015 (before Mr Justice Newey), unreported. The applicant administrators were represented by Akin Gump LLP
- In this case, the Hong Kong court declined to make the order requested by the English court.
- [2013] EWCA Civ 576
- Jersey is included for these purposes.
- [2015] EWHC 1974 (Comm)
- [2013] 1 WLR 1889 SC