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. 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.

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 award. 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 JSC VTB Bank v Skurikhin and others 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 Sibigaz 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.

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.

In addition to its broad powers to make freezing orders in support of English and foreign proceedings, the English court has substantial powers to assist 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 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. In order to make such an order, the court must be satisfied that (i) there has arguably been wrongdoing; (ii) there is...
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Pharmacal order where information could be obtained through the ordinary disclosure process or in the possession of a party to 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.  

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 Netwoes S.A. and other companies the joint administrators 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.

In the case of African Minerals Limited, 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.

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In his decision, the judge cited the Supreme Court’s judgment in AES Ust-Kamenogorsk Hydropower Plant LLP v Ust-Kamenogorsk Hydropower Plant JSC, 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 arbitration 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 English court had jurisdiction to restrain proceedings which were foreign: http://www.portland-communications.com/downloads/portland_who_uses_the_commercial_court.pdf

Notes

1 60% of litigants in the English Commercial Court in 2014 were foreign: http://www.portland-communications.com/downloads/portland_who_uses_the_commercial_court.pdf
2 The court’s jurisdiction in this regard derives from section 57(7) of the Supreme Court Act 1981.
3 Cruz City 1 Mauritius Holdings v Unitech Limited and others [2013] EWHC 1315 (Comm).
4 [2015] unreported
5 [2013] EWHC 1515
6 1 July 2013, unreported
7 UrM Mining Embu Ltd v Kodoho Copper Mines Plc [2014] EWHC 7210 (Comm)
8 17/6/2015/EC
9 (1952) AC 153
10 Bankers Trust Company v Shiga (1980) 1 WLR 1274.
12 15th April 2015, Solicitor Mr Justice Newey, unreported. The applicant administrators were represented by Akin Gump LLP.
13 In this case, the Hong Kong court declined to make the order requested by the English court.
14 [2015] ENCA 130
15 Jersey is included for these purposes.
16 [2013] EWHC 1515 (Comm)
17 [2013] 1 WLR 1889 (SC)