Asset Recovery Magazine

ISSUE 2 - THE INTERNATIONAL EDITION

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Asset Recovery Series

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12TH – 14TH MAY, SINGAPORE

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INTRODUCTION

We are very pleased with the positive response to the first issue of the Asset Recovery Magazine and delighted to bring you our 2nd edition.

We welcomed over 280 practitioners from around the world to Dublin and you can see the highlights in this issue. The diversity of specialisms, backgrounds and expertise present is a prime example of a growing and thriving practice area.

Given this exciting international audience and speaker faculty we have made this issue truly international with coverage ranging from Cayman, Venezuela, and New York to France, England, Guernsey and Asia.

Read on to take an Asset Recovery trip around the world, take a peek at the Dublin highlights and find out more about our upcoming programmes in Singapore, Sao Paulo and New York.

The Asset Recovery Hub Team

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ASSET RECOVERY INTERNATIONAL DUBLIN REVIEW

Danushka De Alwis
Head of Asset Recovery Series

From 27 February to 1 March 2019, specialists and practitioners from around the world congregated in Dublin to discuss various subjects related to asset recovery, fraud litigation, enforcement and contentious insolvency at the 2nd Annual Asset Recovery International conference.

Having survived the snowy 'beast from the east' in 2018, this year we marked our return to Dublin in true Irish fashion with a Welcome Drinks Reception hosted by Carey Olsen on the evening of the 26th at the Conrad Hotel's Lemuel bar. This relaxed evening brought speakers and delegates traveling from near and far together for a chat and a drink before main conference.

A particularly interesting aspect of this year's event was the diversity of presentations and speakers, with over 50 speakers from more than 25 countries represented on the speaking faculty over the two days.

Day 1 was heavily focussed on asset recovery and fraud, with sessions ranging from a morning breakfast briefing on the investigation of Russia's Otkritie $150 million fraud case, to a panel on how the courts approach fraud disputes where both the claimant and defendant are dishonest, which addressed five jurisdictions - France, US, UK, Liechtenstein and Mexico.

Dishonesty seemed to be a recurring theme through many of the sessions with featured keynotes from "The Original Rogue Trader" Nick Leeson who infamously lost £860m, bankrupting 233-year-old Barings Bank; Psychotherapist Ahi Wheeler who examined the psychology of lying; and "Lucifer's Banker" Brad Birkenfeld the most significant financial whistle-blower in history.

As Nick took to the stage to tell his tale, the packed room was struck by his honest, humble and raw account of events. He came across as likable and down to earth, someone who was covering up for a young colleague who had made an honest mistake. He described the bank's toxic culture of greed and fear and as he spoke, the audience began to pity the young man who had seemingly painted himself into a corner. However, this perception was later questioned as Harley Street Psychotherapist Ahi Wheeler explained the psychology behind why we lie. She spoke about how to spot a liar explaining the use of non-contracted denials, qualifying and distancing language and subjective truth and body language.

A highlight of the conference was a panel on freezing and enforcing against unusual assets which discussed a distressed trading oil and gas port in the Arctic Circle, the impracticalities of freezing cryptocurrencies, art and diamonds.

Stephenson Harwood hosted the drinks reception on the evening of the 27th at an Irish-style pub at the Conrad Hotel, which was followed by the official conference dinner in the main ballroom. With conversation and alcohol flowing, our almost 300 attendees had the chance to connect and catch up on the day's sessions, with many analysing and dissecting Nick Leeson's performance in light of what Psychotherapist Ahi Wheeler had presented about the psychology of lying.

"A PARTICULARLY INTERESTING ASPECT OF THIS YEAR'S EVENT WAS THE DIVERSITY OF PRESENTATIONS AND SPEAKERS, WITH OVER 50 SPEAKERS FROM MORE THAN 25 COUNTRIES REPRESENTED ON THE SPEAKING FACULTY OVER THE TWO DAYS."

Day 2 covered contentious insolvency and strategy, featuring a forum shopping case study that considered the use of a multijurisdictional approach to safe guarding, tracing and recovering assets in Germany, Singapore, Mexico and the Cayman Islands. Also, we enjoyed a lively and entertaining debate on whether English Common Law jurisdictions are winning the battle against fraudsters.

I would like to thank all those who attended Asset Recovery International 2019 and helped make it such a dynamic and interesting event.

We are very proud of the growth of the event, the seniority of the audience and the quality of content that our speakers produced this year. I would like to give special thanks to our speakers and sponsors for supporting the event as well as our chairs David Standish of KPMG, Rebecca Hume of Kobre & Kim, Ros Prince of Stephenson Harwood and Bernard O'Sullivian of CMS who worked tirelessly to shape, populate and moderate the programme. We will be returning to Dublin in 2020 and hope that you are all able to join us.

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We look forward to catching up with our friends and colleagues at Asset Recovery events worldwide in 2019, including São Paulo this summer, and updating you on our recent endeavors. More information on KRyS Global can be found at **www.KRyS-Global.com**

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JUDICIAL TRIO IN LIVELY DUBLIN DEBATE

David Doyle
Cains Advocates Isle of Man

It was a real pleasure and privilege to share a platform at the well-attended Asset Recovery International Conference at the Conrad Hotel in Dublin between 28 February and 1 March 2019 with Edward Bannister CMG QC a former Commercial Court Judge from the Eastern Caribbean Supreme Court and Mr Justice David Barniville, a Judge of the High Court of Ireland and a Middle Temple Bencher.

The Honourable Mr Justice Barniville kicked the session off with a very helpful update of the relevant Irish developments including the high profile *Quinn* litigation and made brief reference to his impressive judgment in *Trafalgar Developments Limited v Mazepin* [2019] IEHC 7 delivered on 17 January 2019, a judgment I had read with great interest because it usefully summarised the relevant legal principles applicable to post-judgment asset freezing orders. I had also enjoyed reading the Honourable Edward Bannister's judgment in the *Black Swan* case in respect of free-standing asset freezing orders.

A question was then put to the panel and a discussion followed on the difficulties created by the concept of beneficial ownership in the context of the recovery of assets. During this discussion issues surrounding *Prest v Petrodel Resources Limited* [2013] 2 AC 415 were raised and reference made to *DPP v Jugnauth* [2019] UKPC 8 which had been handed down on the Monday prior to the conference beginning on the Thursday.

The discussion centred around the difficulties created by the distinction between legal and beneficial ownership principally in the areas of trust law and company law.

The hot topic of the importance of judicial co-operation in multi-jurisdictional asset recovery and insolvency cases was then raised. We all referred to the increasing international flavour of the litigation coming before our respective courts.

Edward, whilst recognising the need for judicial co-operation, understandably wished for it to be kept within appropriate parameters. He was also concerned as to the protection of local creditors.

After the other judges confessed as to their daily newspaper reading habits I confessed that I was a big fan of Lord Hoffmann's approach to modified universalism (see *Cambridge Gas Transport Corp v Navigator Holdings plc Creditors Committee* [2007] 1 AC 508, *Re HIH Casualty and General Insurance Limited, Re McMahon v McGrath* [2008] 1 WLR 852, and see also *Impex Services Worldwide Ltd* 2003-05 MLR 115 and *Interdevelco Ltd v Waste2Energy Group Holdings plc* 2012 MLR 521 available at www.judgments.im). *Cambridge Gas* was sadly held by the majority in *Rubin v Eurofinance SA* [2012] UKSC 46 to have been wrongly decided but in *Singularis Holdings Limited v PricewaterhouseCoopers* [2014] UKPC 36 it was partially resurrected albeit in a more restricted form. Edward seemed to prefer the conservative and traditional approach of the likes of Lords Collins and Walker. This lively debate continues and judgments of the members of the Judicial Committee of the Privy Council in *UBS AG New York and others v Fairfield Sentry Ltd (in liquidation)* heard on the Tuesday of the conference week will make very interesting reading, once available.

There was also a brief discussion over the importance of open justice and concerns expressed in respect of the increasing number of without notice hearings held in the absence of the other side and gagging orders being made.

To keep us on our toes we were then asked to outline our top tips as to how those seeking asset recovery relief could persuade judges to give them what they wanted. The top tips included:

i keep it simple;
ii keep it concise;
iii see the issues through the eyes of the judge;
iv comply with deadlines;
v read *Making your Case the Art of Persuading Judges* by Antonin Scalia and Bryan Garner;
vi produce helpful legible paginated bundles in robust files;
vii be open with the judge and do not mislead the court; and
viii have fun along the serious journey to justice.

All in all it was a lively and friendly session which hopefully covered in a frank, informative and entertaining way some of the pressing legal issues of the day in respect of asset recovery litigation.

In addition to thanking my fellow speakers and all the delegates I would like to give a special thank you to the efficient conference organisers so ably led by Danushka De Alwis of Knect365Law. I also express my appreciation to Ros Prince of Stephenson Harwood and Bernard O'Sullivan of CMS Cameron McKenna Nabarro Olswang for so effectively chairing our View from the Bench session and getting the best out of us.

MADOFF, FROM A FEEDER FUND PERSPECTIVE, 10 YEARS LATER

Kenneth Krys
Krys Global

I read with interest a weekend interview in the Wall Street Journal on December 1-2, 2018 titled "The Amazing Madoff Clawback". The interview is with Mr. Irving Picard, the court-appointed trustee of Bernard L. Madoff Investment Securities LLC, who oversees the recovery of assets stolen by Bernard L Madoff, currently serving a 150 year sentence for running the largest Ponzi scheme in history, and David Sheehan, a senior partner in Baker Hostetler who leads the litigation strategy. The interview explores how the two lawyers have recovered 75 cents on the dollar of the money Madoff stole – many times more the usual rate in such cases.

"THE CLAIMS BY IRVING PICARD WERE THE FIRST PRIORITY. WITHOUT A RESOLUTION, IN THEORY, ANY RECOVERIES THE LIQUIDATORS MADE WOULD ONLY BENEFIT THE MADOFF TRUSTEE."

That article made me wonder whether there was a different story to be told from the feeder funds' perspective. The feeder funds did not have the good fortune to have a multi-billion dollar Picower-type settlement nor an organization like the Securities Investor Protection Corp to pay the bill for the liquidator's fees and expenses. Indeed, Mr Picard was something of an adversary to the feeder funds, having filed claims in the Southern District of New York against them for six years' of redemptions, notwithstanding that many of these feeder funds were net losers in Madoff. In many instances, the defrauded investment in Madoff Ponzi scheme represented the feeder funds' largest, if not only asset. This meant there was limited or no assets to take on Irving Picard and his army of lawyers, who had unlimited resources on their side.

Fairfield Sentry Ltd., incorporated in the British Virgin Islands (BVI), was the largest of the feeder funds to invest in Bernard L. Madoff Investment Securities LLC. As at 31 October 2008 about 95% of its assets, amounting to some US$7.2 billion, were invested with Madoff. Fairfield Sentry was put into liquidation in July 2009, eight months after Madoff was but into bankruptcy. Its two underlying feeder funds, Fairfield Sigma Ltd and Fairfield Lambda Ltd, were also put into liquidation.

There were also no known assets available to the Fairfield funds. The only cash comprised $71 million and it was subject to a freezing injunction.

The claims by Irving Picard were the first priority. Without a resolution, in theory, any recoveries the Liquidators made would only benefit the Madoff Trustee. With his global reach, it was likely that had the Liquidators been successful in making realisations, Mr Picard would have been able to enforce against them, almost in whatever foreign jurisdiction this occurred. With limited resources to pursue and defend claims, spending the money to benefit the Madoff Trustee was not a viable objective. But more difficult, we had no tangible money or assets to settle his claim.

That is where ingenuity came in. We knew that we ourselves had clawback claims against the redeeming investors and former investors of Fairfield, somewhat akin to the clawback claims which were being made against the direct Madoff investors by Picard. We also had potential claims against some of the professional advisors. We knew that by working cooperatively with the Madoff Trustee, and supporting his subsequent transferee claims against our same redeemers, whilst we might forego some of our potential recoveries we might also bring in some significant collections. The last hurdle was cash. The Madoff Trustee wanted the $70 million in the Irish account as a non-negotiable term, notwithstanding that we did not have access to those funds due to the freezing injunction. The Liquidators persuaded Picard to allow Fairfield a SIPC claim of $230 million as a part of a complex settlement agreement with him, which included Picard and the Liquidators sharing proceeds of certain of each other's litigation recoveries. Now, at that time, allowed SIPC claims in BLMIS were being traded on the secondary claims market at around 30% of their value, therefore an allowed $230 million claim could be traded for a value of about $70 million, the cash amount that Picard was insisting on as part of a settlement. The Liquidators also were able to obtain Irving Picard's positive support to obtain recognition in the United States of the Fairfield Funds' BVI liquidation proceedings pursuant to Chapter 15 of the U.S. Bankruptcy Code, something which may have been nigh on impossible to achieve had Picard objected to the Liquidators' petition.

Having locked up the Picard claims and protected themselves from any further risk in the United States, the Liquidators could focus on Fairfield's other assets: the new SIPC claim of $230 million and the Irish bank account. Each would require a different degree of perseverance and creative thinking.

Recovering Fairfield's cash of $71 million in Citco Bank Ireland proved problematic. In the days following the Madoff collapse, an investor, Stichting Shell Pensioenfonds (Shell), a Dutch pension fund incorporated in the Netherlands, had submitted a redemption request for its investment of $45 million plus interest. Days later, Shell applied in the Amsterdam District Court for permission to obtain a pre-judgment garnishment or conservatory attachment over all assets of Fairfield Sentry held by Citco Bank up to a value of US$80m. An order in those terms was made on the following day. In accordance with that order, three separate attachments were made totaling about US$71m. Another investor, a Panamanian entity, also sought relief in the Netherlands. Efforts by Fairfield's directors, prior to the Liquidators' appointment, to set aside the injunction in Amsterdam had failed. Legal proceedings brought by the Liquidators to have themselves recognized in Ireland, while successful, did not result in the stay being lifted. The risk was that if the two investors were successful, they would be able to collect on the encumbered bank account ahead of and to the detriment of the remaining shareholders.

Lead counsel in the BVI convinced the Liquidators to file an anti-suit injunction in the BVI restraining Shell from prosecuting its proceedings in the Netherlands and requiring it to take all necessary steps to procure the release of the attachments. While initially denied by the High Court of BVI, the Liquidators were successful in reversing this decision on appeal and subsequently reconfirmed this in the Judicial Committee of The Privy Council (JCPC), the court of final appeal for the UK overseas territories and Crown dependencies, including BVI. The result was that Shell withdrew from prosecuting its claim in the Netherlands, and more importantly, released its attachment on the Irish bank account.

The admitted claim in the Madoff bankruptcy also became an opportunity to bring in additional recoveries to creditors and shareholders of Fairfield. The timing of the negotiating the admitted SIPC claim of $230 million and the prospective agreement to sell it at 32.125% occurred just days before the infamous Picower recovery. When the $7.2 billion settlement was made public, the value of the SIPC claims almost doubled overnight, meaning that the sale of the SIPC claim at 32.125% was now woefully at an undervalue.

A critical provision of the prospective sale contract, drafted by US counsel, was that it was subject to approval of the BVI Court and U.S. Bankruptcy Court. Clearly, a sale of the SIPA claim at the now abysmal price of 32.125% was not in the interest of the stakeholders. Despite this, the BVI Court approved the sale, on the basis that the Liquidators had entered the contract in good faith and that at the time the contract was entered into, the proposed sale was in the best interest of the estate. The BVI Court, however, gave the Liquidators permission to seek direction from the U.S. Bankruptcy Court.

"TO DATE THE LIQUIDATORS OF FAIRFIELD HAVE RECOVERED ASSETS NEARING $500 MILLION."

It took a while, but eventually the United States Courts of Appeals for the Second Circuit held that the Liquidators were not bound by the terms of the trade confirmation and remanded the matter to the U.S. Bankruptcy Court for reconsideration, directing it to assess the sale contact pursuant to section 363 of the U.S. Bankruptcy Code which requires amongst other provisions, that the Liquidator be able to demonstrate a "substantial business justification" for the sale. Ultimately the U.S. Bankruptcy Court disapproved the contract, and that determination was then upheld by the District Court and Second Circuit, with, as the final act in this story, the U.S. Supreme Court denying review of the Bankruptcy Court's decision in October 2017. Accordingly, the Liquidators were permitted to hold the SIPC claim, benefit from Mr. Picard's recoveries and recover another $100 million for creditors and shareholders of Fairfield.

To date the Liquidators of Fairfield have recovered assets nearing $500 million. They have paid all the funds' trade creditors, except that which is due pursuant to the Picard settlement, and started distributing monies to the funds' registered shareholders. While $500 million is a fraction of the $13 billion recovered to date by Picard, it is difficult to conduct a meaningful comparison of success in the Madoff bankruptcy to the Fairfield liquidation. The means of adjudicating claims and paying victims is different in the two jurisdictions. The Madoff Trustee pays victims based on net losses and excludes the claims of the feeder funds' investors. The Liquidators pay shareholders based on the number of shares held as at the date of their appointment.

Indeed, it may well be too early to do that comparison. The story's end, at least from Fairfield's perspective, remains unfinished and unwritten. Despite the litigation being pursued for almost a decade, Fairfield's clawback recovery actions are still in their relative infancy in the United States. On 6 December 2018 the Liquidators received a long awaited decision from the U.S. Bankruptcy Court on the defendants' objections to their revised complaints and motions to dismiss. The U.S. Bankruptcy Court permitted the Liquidators to proceed with 305 clawback actions for $6 billion brought against foreign banks and investors. In addition, a decision is pending on Mr. Picard's appeal of the subsequent transferee claims (which includes claims against Fairfield's redeemers) in the Second Circuit. Coupled with the Liquidators' recent victory in the Bankruptcy Court, there may be a number of redeemed investors who may feel it worthwhile to settle and move on. Otherwise, with the resources available to the Liquidators and Trustee, there is sufficient impetus to continue the litigation and bring recoveries for victims of Madoff's historic fraud.

ENFORCING FOREIGN JUDGMENTS IN NEW YORK: ARE NY COURTS STILL FAVORABLE TO FOREIGN MONEY JUDGMENT HOLDERS?

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Having a foreign money judgment recognized and enforced has always been a fairly straightforward task for judgment creditors in New York. However, New York's First Department Court of Appeals recently raised some new issues and laid the foundation for a significant change in how New York courts recognize and enforce money judgments of foreign countries by requiring personal jurisdiction over a judgment debtor when substantive defenses are made under the recognition act.[1] *AlbaniaBEG Ambient Sh.p.k. v Enel S.p.A.*, 160 A.D.3d 93 (N.Y. 1st Dep't 2018).

[1] (a) No Recognition. A foreign country judgment is not conclusive if:

1. the judgment was rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law;
2. the foreign court did not have personal jurisdiction over the defendant.

(b) Other Grounds for Non-Recognition. A foreign country judgment need not be recognized if:

1. the foreign court did not have jurisdiction over the subject matter;
2. the defendant in the proceedings in the foreign court did not receive notice of the proceedings in sufficient time to enable him to defend;
3. the judgment was obtained by fraud;
4. the cause of action on which the judgment is based is repugnant to the public policy of this state;
5. the judgment conflicts with another final and conclusive judgment;
6. the proceeding in the foreign court was contrary to an agreement between the parties under which the dispute in question was to be settled otherwise than by proceedings in that court;

Prior to *Enel*, personal jurisdiction over the judgment debtor or its property was not a prerequisite to recognition in New York. In other words, the judgment debtor did not need to have a connection to, or property in (*quasi in rem* jurisdiction), New York for the recognition of a judgment, and to survive a motion to dismiss. *Abu Dhabi Commercial Bank PJSC v Saad Trading, Contr. & Fin. Servs. Co.*, 117 A.D. 3d 609 (N.Y. 1st Dep't 2014). Thus, judgment creditors could rather easily have their judgments recognized and then take discovery and execute on assets—especially deposits and securities—held by the many financial institutions found in New York.

"AFTER SOME OF THE DUST HAS NOW SETTLED, AN IMPORTANT QUESTION TO ASK IS HOW FUTURE COURTS WILL INTERPRET ENEL: WILL IT BE VIEWED AS A BROAD HOLDING WHERE ANYTIME A JUDGMENT DEBTOR RAISES ANY SUBSTANTIVE CHALLENGE THE JUDGMENT CREDITOR WILL BE REQUIRED TO ESTABLISH PERSONAL JURISDICTION?"

The court in *Enel* faced a unique fact pattern and procedural posture that included significant prior litigation and arbitration in multiple foreign jurisdictions over a decade-plus period, resulting in a favorable judgment for the plaintiff. The court in New York, relying on federal due process law, held that personal jurisdiction was required to recognize a foreign judgment in New York *if* the judgment debtor raises non-frivolous, substantive challenges to recognition. Without delving into the details of the reasoning in *Enel*, the ruling was based on the judgment debtor's multiple credible defenses to the underlying award, and the court finding that to force the defendant to litigate such substantive defenses, without an adequate basis for personal jurisdiction, would violate U.S. Constitutional due process.

After some of the dust has now settled, an important question to ask is how future courts will interpret *Enel*: will it be viewed as a broad holding where anytime a judgment debtor raises any substantive challenge the judgment creditor will be required to establish personal jurisdiction? Or, will it be of minimal relevance and only applicable to judgments from questionable jurisdictions and/or with a complex and significant history of foreign due process? Of course, with New York

being the global financial hub that it is, the stakes are high for global foreign money judgment holders.

One-Year Later

In May 2018, a New York trial court heard a case where a plaintiff sought to have a Venezuelan judgment recognized. The debtor put forth no substantive challenges to the procedure, but moved to dismiss the case on the grounds that the debtor had inadequate "contacts" with New York, depriving the court of jurisdiction. *Diaz v. Galopy Corp. Intl., N.V.,* 61 Misc. 3d 429 (Sup. Ct. N.Y. Co. 2018). In citing *Enel*, the court accepted the judgment noting that only when a judgment debtor "asserts substantive statutory grounds for denying recognition, must there be either *in personam* or *in rem jurisdiction* in New York." Because no substantive challenges were raised, the Venezuelan judgment was accepted.

7. in the case of jurisdiction based only on personal service, the foreign court was a seriously inconvenient forum for the trial of the action; or
8. the cause of action resulted in a defamation judgment obtained in a jurisdiction outside the United States, unless the court before which the matter is brought sitting in this state first determines that the defamation law applied in the foreign court's adjudication provided at least as much protection for freedom of speech and press in that case as would be provided by both the United States and New York constitutions.

N.Y. CPLR § 5304.

A few months later, in November 2018, New York's First Department Appellate Division evaluated, among other things, the weight of a challenge to a foreign tribunal's application of due process standards in deciding whether to recognize a judgment from the Czech Republic. *Harvardsky Prumyslovy Holding, A.S. v. Kozeny*, 166 A.D.3d 494 (1st Dep't 2018). There, the debtor defendant challenged recognition on the grounds that the Czech court—which found the defendant guilty of fraud and embezzlement and awarded the plaintiff $400 million in damages—did not provide procedures compatible with New York's due process requirements because the Czech court never had custody of the defendant and he was tried in absentia. The court determined that if the foreign tribunal's procedures are compatible with due process, even if they are not strictly followed, it is insufficient for the court to deny the recognition request.

Thus, while there's been limited interpretation of *Enel* since it was decided, New York continues—at least for the moment—to remain a favorable jurisdiction for foreign judgment creditors.

Conclusion

In sum, while practitioners and creditors of foreign judgments remain optimistic one-year after *Enel*, a healthy dose of skepticism may be appropriate—especially where the underlying proceedings involve multiple prior suits, nuanced procedural postures, or emanate from jurisdictions with dubious legal systems. As always, interested stakeholders should continue to monitor how courts manage the evolving landscape.

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RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS IN GUERNSEY

Karen Le Cras
Carey Olsen

This article provides an overview of the procedures and mechanisms available for the recognition and enforcement of judgments obtained in other jurisdictions in Guernsey. It should be noted at the outset that as Guernsey is not part of the EU, conventions such as the Brussels Regulation and Lugano Convention, with which many practitioners will be familiar, do not apply. Enforcement of foreign judgments is either under statute, or at common law.

Statutory Registration of Foreign Judgments

The Judgments (Reciprocal Enforcement) (Guernsey) Law 1957 (the "Law") provides for the registration of qualifying foreign judgments in the Royal Court of Guernsey (the "Royal Court"). To be eligible for registration under the Law, the foreign judgment must:

i have been obtained in a reciprocating country ;
ii be a judgment of a superior court having jurisdiction;
iii be final and conclusive;
iv be for a sum of money payable, and not relating to taxes, fines or other penalties;
v be unsatisfied and capable of execution in the country of the original court;
vi not be in respect of a matrimonial cause or proceedings in connection with the administration of the estates of deceased persons, insolvency, winding up of companies, lunacy or guardianship of infants; and
vii not be more than six years old.

The foreign court is deemed to have jurisdiction in relation to an in *personam* claim if the judgment debtor submitted to the jurisdiction of the foreign court (i.e. by voluntarily appearing in the proceedings other than for the purpose of contesting jurisdiction or to protect or obtain the release of property, or by expressly agreeing to submit to the foreign court's jurisdiction (e.g. by a choice of jurisdiction clause), or was resident in the foreign country (or if a company has its principal place of business there). In relation to an action in *rem*, or in relation to immovable property, the foreign court will have jurisdiction if the property in question was situated in the foreign country in which judgment was obtained at the time of the proceedings.

Procedural Steps

The procedure for registration is relatively straightforward. The application for registration may be made ex parte and must be supported by an affidavit exhibiting a certified and sealed copy of the judgment and deposing to certain facts, including that the judgment creditor is entitled to enforce the judgment and the judgment has not been satisfied (or, if satisfied in part, the amount outstanding). If granted, the resulting Order giving leave to register the judgment must state the period within which an application may be made by the judgment debtor to set aside the registration, and a notice that execution on the judgment will not be permitted until after the expiry of that period[3].

> **"THE FOREIGN COURT IS DEEMED TO HAVE JURISDICTION IN RELATION TO AN IN PERSONAM CLAIM IF THE JUDGMENT DEBTOR SUBMITTED TO THE JURISDICTION OF THE FOREIGN COURT"**

Notice of the registration must then be served on the judgment debtor. Leave to effect service out of the jurisdiction is not required (unless substituted service is necessary). If no application to set aside the registered judgment is made by the judgment debtor within the specified timeframe, a further application can then be made to the Royal Court for leave to enforce the registered judgment. That application must be supported by proof of service of the notice of registration and the manner of enforcement must be specified.

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[2] Reciprocating jurisdictions include England and Wales, Scotland, Northern Ireland, Isle of Man, Jersey, Israel, Italy, the Netherlands, the Netherlands Antilles and Surinam.

[3] Where the judgment debtor is not in Guernsey, that period will be calculated according to his whereabouts and may be extended on application.

Setting Aside a Registered Judgment

A registered judgment can be set aside only in certain limited circumstances, including where the Royal Court is satisfied that:

i it is not a judgment to which the Law applies, or it was registered in contravention of the provisions of the Law;

ii. the courts of the originating country did not have jurisdiction;

iii. the judgment debtor did not receive notice of the proceedings in sufficient time to enable him to defend the proceedings and he did not appear;

iv. the judgment was obtained by fraud;

v. the enforcement of the judgment would be contrary to public policy in Guernsey;

vi. the rights under the judgment are not vested in the person applying to register it; or

vii. the matter in dispute was the subject of an earlier final and conclusive judgment by a court which also had jurisdiction.

Common Law Enforcement of Foreign Judgments

Where the Law does not apply, the foreign judgment can be enforced under common law by suing on the judgment and seeking summary judgment if it is defended. The foreign court must be of competent jurisdiction, and the Royal Court will apply Guernsey conflict of laws rules to assess whether or not this is the case.

Where a foreign judgment is sued upon, it can be challenged only on limited grounds, namely where:

i the foreign court did not have jurisdiction to give judgment;

ii the judgment was obtained by fraud by the judgment creditor, or by the foreign court;

iii enforcement would be contrary to public policy in Guernsey; or

iv the proceedings before the foreign court were contrary to natural justice.

Enforcement

A foreign judgment which has been registered under the Law, or one has been successfully sued upon at common law, may be enforced by Her Majesty's Sheriff, which mechanisms include the seizure and sale of the debtor's personalty, and a wage arrest. The judgment can also be registered in the *Livre des Hypothèques, Actes de Cour et Obligations* providing a form of security against any real property owned by the judgment debtor and situate in Guernsey. Enforcement of the judgment against the debtor's real property takes place under a customary law process known as *saisie*.

Pauline Action

In certain circumstances a creditor may be entitled to bring an action (known as a Pauline action) seeking to set aside a fraudulent transfer of assets. The availability of this remedy was recognised by the Royal Court in *Flightlease Holdings (Guernsey) Limited and Ors v International Lease Finance Corporation*.[4] In essence, this action is concerned with setting aside a transaction undertaken to defraud creditors, and for a successful action to be brought the plaintiff must be able to establish:

[4] Guernsey Law Reports 2005-06 Note 11

i that he was a creditor at the time of the transaction;

ii the debtor was insolvent at the time of the transaction, measured on the balance sheet test of insolvency;

iii the transaction must have been carried out by the debtor with the intention, or for the substantial purpose of, defrauding his creditors; and

iv that the transaction has caused the plaintiff actual prejudice.

Possible defences to a Pauline action include unjust continuing enrichment and change of position. Where an action is successful, the transaction will be set aside, but the action does not give rise to any entitlement to compensation.

FRENCH PROTECTION OF TRADE SECRETS

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Before the transposition in French law of the European directive 2016/943[5], there was no legal definition of trade secrets. The French Conseil d'Etat made in that sense the following observation before transposition: *"the protection offered (was) the result of the application of civil liability and criminal offences case-law that could only lead to an imperfect protection of trade secrets"*[6].

"THE TRADE SECRETS LAW DEFINES AS TRADE SECRETS ANY INFORMATION THAT IS NOT ACCESSIBLE TO ALL, HAS AN EFFECTIVE OR POTENTIAL COMMERCIAL VALUE AND IS PROTECTED."

In 1986, a statutory instrument[7] had introduced protective provisions allowing the President of the competition & market authority to refuse disclosure of documents involving trade secrets to certain parties. In 2009, a decree required the competition & market authority to publish its decisions while protecting any trade secrets content[8]. Meanwhile, the case law of the Court of cassation considers that *"trade secret does not constitute itself an obstacle to the application of article 145[9] of the Code of civil procedure"*[10]. Today, this case law may be contrary to the protection of trade secrets provided by the trade secrets law of 30 July 2018. However, in a recent case[11], the Court of cassation considered that the judge seized of an article 145 pretrial investigation shall take into consideration the interests of both parties and the potential risk of trade secrets disclosure in order to take appropriate measures. It will be interesting to follow-up the evolution of the case law on that point.

The existing protections of trade secrets before the law of 30 July 2018 were limited in scope and confined to specific areas, hence there was neither trade secrets definition nor specific protective measures. The new trade secrets law has compensated this lack of protection by introducing real legal tools.

5 Directive 2016/943 of the European parliament of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against unlawful acquisition, use and disclosure.

6 CE, 15 mars 2018, opinion n° 394422.

7 Ord. n° 86-1243, 1er déc. 1986, art. 23.

8 D. n° 2009-186, 17 févr. 2009, art. 1.

9 Gives litigants the possibility to request a judge to order – before any legal proceedings on the merits – investigations in order to preserve or establish "the evidence of facts upon which the resolution of a dispute might depend".

10 Cass. 2e civ., 7 janv. 1999, n° 95-21.934 ; Cass. com., 10 févr. 2015, n° 14-11.909.

11 Civ. 1ère, 22 juin 2017, 15-27845.

Trade secrets

The trade secrets law defines as trade secrets any information that is not accessible to all, has an effective or potential commercial value and is protected[12]. In order to protect these trade secrets, companies are invited to identify, classify and put in place security tools . To this end, a trade secrets adviser can be appointed within the company.

Violation of trade secrets is constituted by unlawful acquisition, use and disclosure of trade secrets[14]. The acquisition of a trade secret shall be considered unlawful, whenever carried out by unauthorized access to documents containing the trade secret or from which the trade secret can be deduced. It can also result from any conduct which, under the circumstances, is considered contrary to honest commercial practices.

The use or disclosure of a trade secret shall be considered unlawful whenever carried out, without the consent of the trade secret holder. For example, the production, placing on the market or importation of infringing goods shall also be considered as an unlawful use of trade secret when the person carrying out such activities knew, or ought, to have known that the trade secret was used unlawfully.

On December 11, 2019, the French government issued a decree[15] detailing the powers of the French judge to take provisional and precautionary measures to stop the unlawful use and disclosure of trade secrets. These measures could also, potentially become a legal tool limiting the article 145 pretrial investigations.

[12] Article L 151-1 of the French Commercial Code

[13] Practical guide for companies use (in French), Cci Paris Ile-de-France.

[14] Article L 151-4 à L 151-6 of the French commercial Code.

[15] Décret n°2018-1126 du 11 décembre 2018 relative to trade secrets.

Powers of the judge

The judge is empowered to accord provisional and precautionary measures that can consist inter alia in:

- The cessation or prohibition of the use or disclosure of the trade secret.
- The prohibition of the production, placing on the market or use of suspected infringing goods.
- To seizure or delivery up of the suspected infringing goods, so as to prevent their entry into or circulation on the market.

The judge can also, while according provisional and precautionary measures, require from the plaintiff the lodging of guarantees intended to ensure the potential harm suffered by the defendant. He also can, instead of according provisional and precautionary measures, require from the defendant the lodging of guarantees intended to ensure the potential harm suffered by the trade secret holder[16].

The judge is also empowered to sequestrate exhibits in order to protect the trade secret[17]. This measure is automatically lifted within one month from the date of decision. Besides these measures, damages can be awarded to the trade secret holder for the harm he suffered.

The practice of communication and production of exhibits has also been secured. The party requesting the protection of trade secrets must communicate to the judge the exhibit containing the secret in three different nature:

- The original and complete version of the exhibit.
- A non-confidential version resumed.
- A note enlightening the reasons why the exhibit shall be considered as a trade secret.

The judge will therefore rule on the type of communication regarding the circumstances of the case. In a case where the exhibit is not necessary to the dispute resolution, the exhibit can be kept secret and not communicated to the opposing party.

"THE JUDGE CAN ALSO, WHILE ACCORDING PROVISIONAL AND PRECAUTIONARY MEASURES, REQUIRE FROM THE PLAINTIFF THE LODGING OF GUARANTEES INTENDED TO ENSURE THE POTENTIAL HARM SUFFERED BY THE DEFENDANT."

Finally, the decree protects trade secrets till the publication of the decision to the public. This way, it is a confidential version of the decision that will be published online.

Conclusion

In a nutshell, the trade secrets law enables any trade secret holder to engage a rapid action to stop the unlawful use or disclosure of its trade secret and restrict as much as possible the irreversible consequences of the harm suffered on top of damage awards. These measures could also, potentially become legal tools limiting the article 145 pretrial investigations.

The application of the trade secrets legal actions to the business practice has yet to prove its worth and we are waiting for the first applications by the French courts.

[16] C. com., art. R. 152-1, II, al. 1er, implemented by D. n° 2018-1126, 11 Dec. 2018, art. 1er.

[17] C. com., art. R. 153-1, implemented by D. n° 2018-1126, 11 déc. 2018, art.1er.

ENGLISH FREEZING INJUNCTIONS IN SUPPORT OF FOREIGN PROCEEDINGS: WHAT YOU NEED TO KNOW

Alexander Halban
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> **"FOREIGN INVESTORS OFTEN BUY ASSETS IN THE UK, PARTICULARLY LONDON RESIDENTIAL PROPERTY. IF THEY BECOME INVOLVED IN LITIGATION IN ENGLAND, THEY WILL PROBABLY KNOW THAT THE HIGH COURT HAS THE POWER TO FREEZE THEIR ASSETS."**

Foreign investors often buy assets in the UK, particularly London residential property. If they become involved in litigation in England, they will probably know that the High Court has the power to freeze their assets. However, they might not know that the court can also freeze their assets if they become involved in proceedings abroad, in their home countries or elsewhere. This article examines this latter power – freezing orders and order interim relief in support of foreign proceedings – which can be a valuable tool for claimants and lawyers in international fraud cases.

The legal principles

The English High Court has the power to grant interim relief in support of foreign proceedings under section 25 of the Civil Jurisdiction and Judgments Act 1982.

This power previously only covered proceedings in another EU member state. The original jurisdiction was conferred by article 35 of the EU Judgments Regulation. However, the power under English law was broadened in 1997 to cover proceedings anywhere in the world. The High Court will retain this power when (or if) the UK leaves the EU.

Section 25(2) provides an important safeguard. The court can refuse the application if it is 'inexpedient' to grant relief. This applies in applications against defendants resident abroad, over whom the court would not otherwise have jurisdiction apart from under section 25 itself.

In Motorola Credit Corp v Uzan (No. 2) [2003] EWCA Civ 752, [2004] 1 W.L.R. 113 the Court of Appeal gave a number of considerations to decide whether it is inexpedient to make an order:

(a) whether an order will interfere with the management of the case in the primary (foreign) court, e.g. by inconsistent or overlapping orders

(b) whether there is a policy of the primary court not to grant the relief sought: some courts refuse to grant worldwide freezing orders or asset disclosure orders

(c) whether there is a risk of conflicting or inconsistent orders with another, e.g. in the state where the defendant lives or other assets are located

(d) whether there is likely to be a challenge to the jurisdiction of the English court

(e) where jurisdiction is challenged and disobedience to the order is expected, whether the English court would be making an order it could not enforce.

The European Court has also held that 'provisional measures' under article 35 of the Judgments Regulation could only be granted where there is a 'real connecting link' between the subject of the measures sought and the territorial jurisdiction of the court in which the application is made: C–391/95 *Van Uden Maritime BV v Firma Deco-Line* [1998] E.C.R. I–7091, [1999] Q.B. 1225 at [37] – [40]. There will be such a link with England where relief is sought against assets in England, or where the defendant is present in England (and thus is subject to the court's enforcement jurisdiction).

Application to international fraud cases

The most common relief sought in fraud cases are freezing orders and asset disclosure orders. An applicant for a freezing order in support of foreign proceedings must show:

(a) The relief is sought in support of civil proceedings abroad and the applicant has a good arguable case in those proceedings. This is a relatively easy requirement.

(b) There is a real connecting link with the jurisdiction, at least in EU cases (as discussed above).

(c) There is a real risk of dissipation by the respondent. This involves real risk that the respondent will dissipate his assets so that a judgment will go unsatisfied, or deal with his assets to make enforcement more difficult.

(d) It is not inexpedient for the relief to be granted (as discussed above).

Under this power, the English court can freeze the assets of an English defendant or company on a worldwide basis. More critically, the court can also freeze a non-resident defendant's assets in England, even if the case is being litigated elsewhere and the defendant has no other connection to England. The freezing order will generally be confined to assets in England, because the court would have no other jurisdiction against a non-resident defendant.

However, some cases have gone further. In *Motorola v Uzan*, the court granted a worldwide freezing order against a non-resident defendant. This has been criticised but court was influenced by the fact that it was a serious international fraud case and there were substantial assets in England. The court would probably only make such a broad order in another case where both factors were present. In such cases, the English court is prepared to act as an 'international policeman'.

The court can also order a respondent to disclose his assets, to support a freezing order. This will often assist litigants in countries where this type of order does not exist, enabling them to discover assets to freeze.

"AS WITH ALL WITHOUT-NOTICE HEARINGS, THE APPLICANT HAS A DUTY OF FULL AND FRANK DISCLOSURE."

Practicalities

In fraud cases, an application for a freezing order will invariably be made urgently and without notice to the respondent. The first hearing will be made without the respondent. If the order is granted, there will be a further hearing with the respondent present, to decide whether to continue or discharge the injunction.

As with all without-notice hearings, the applicant has a duty of full and frank disclosure. He must present the case fairly and disclose all known matters which could affect the judge's view of the case, particularly adverse facts and defences which the respondent might raise.

The application will be made under the CPR Part 8 procedure and the applicant will need permission to serve the respondent out of the jurisdiction (CPR PD 6B, para. 3.1(5)). Permission to serve out can be sought from the court at the first, without-notice hearing. In urgent cases, the court can also grant permission to serve a respondent by alternative methods. This can be any method which will bring the application to the respondent's attention, so long as it is not unlawful in the respondent's country. Previous cases have permitted service at alternative addresses in England, service by email, and even service by Facebook.

Conclusion

The English court's power to freeze assets in support of foreign proceedings is a valuable tool in international fraud cases. It can offer greater protection than some other courts, which may not grant freezing orders at all, or may not grant worldwide orders. If strategically used, this relief can significantly increase the prospects of successfully enforcing a judgment against a foreign respondent.

STEPHENSON HARWOOD

Our fraud and asset tracing team is ranked in Tier 1 of The Legal 500. We work on some of the largest global fraud cases, which often have wide-ranging geopolitical repercussions. These claims are not simply large in value, many of them are 'bet the company' disputes for our clients: we are brought in where reputations are at risk, where clients risk losing their lives' work, or indeed insolvency if their case were to fail.

Most of our cases are international and we regularly work with lawyers all over the world. We have particular experience of fraud cases originating from emerging markets, and cross border cases involving parallel international proceedings. We often assist foreign lawyers enforcing judgments and arbitration awards, as well as helping them and their clients freeze assets in England in support of foreign proceedings.

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ON THE BRINK OF REGIME CHANGE IN VENEZUELA, HERE'S WHY CREDITORS SHOULD STILL WORRY

Allison Everhardt
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With regime change in Venezuela appearing imminent, international creditors and companies seeking compensation for government expropriations may feel more hopeful about their chances of recovery than at any time in recent memory. Unfortunately, for a variety of reasons, these hopes may be misplaced.

Venezuela has the world's largest proven oil reserves1 and has relied on its oil exports to prop up its economy for decades, even before they became the funding for former President Hugo Chavez's socialist agenda.[2] It's no surprise, then, that creditors and others seeking repayment have focused on its oil-related assets. And in at least one case last year, this strategy proved successful as ConocoPhillips won injunctions that froze assets of the state oil company, Petróleos de Venezuela ("PDVSA"), in the Caribbean before the parties reached a deal on repayment for the 2007 expropriation of the company's Venezuelan assets.[3]

While not every sovereign asset search presents the same challenges as Venezuela, they are all complex and frequently involve clearing a number of hurdles as the case proceeds. For example, a key part of the process involves identifying the pool of entities that may be holding assets on behalf of the country in question, such as wholly-owned state entities serving as alter egos of the sovereign. However, proving that a particular entity is an alter ego can require drawn out and expensive legal wrangling. In the Venezuelan context, US courts have historically seemed reticent to put Citgo in the crosshairs of creditors, but a ruling by the US District Court in Delaware last August was a gamechanger in that it accepted that PDVSA was an alter ego of the Venezuelan state.[4] The ruling allows for mining companies Crystallex, Rusoro and presumably others, to seize PDVSA assets in the US, putting Citgo at risk.[5]

But obtaining legal recognition of alter egos is only part of the process. Sometimes the most difficult task is proving the actual ownership of a particular asset. And in the event that ownership can be established, significant challenges remain. First, practicalities on-the-ground mean that assets in friendly jurisdictions with strong rule of law are the easiest to seize. It is widely known that China and Russia have provided Venezuela with significant financial assistance[6] and payments through a Russian bank partially owned by Venezuela's government have grown since the US imposed recent sanctions.[7] The international political climate being what it is, it seems unlikely that either China or Russia would be inclined to follow the US's lead in freezing or otherwise impeding Venezuela's assets in their spheres of influence.

That said, there are steps creditors can take. Focusing on assets in friendly jurisdictions outside the Western hemisphere is one option, as PDVSA subsidiaries or other state-owned entities that have received less attention than its US operations could provide useful leads to assets available for seizure.

Identifying ill-gotten gains by Maduro administration officials offers another possible lead to government assets. Others have already suggested repatriation of such funds as a way to alleviate some of the suffering of the Venezuelan people.[8] However, asset traces for individuals include many of the same challenges as those for sovereigns, such as establishing ownership and relying on friendly jurisdictions for attachment. Individuals are also likely to use relatives, trusts or other proxies like nominee accounts to conceal the true ownership of certain assets. Additionally, individuals may be more capable of building complex offshore holdings, in places where disclosure requirements are low, to further conceal their true holdings. They are also nimbler than sovereigns in moving assets around if their holdings seem threatened. Even if real property or other assets are identified, establishing that they were purchased with legitimate wealth or misappropriated funds may be a near impossible task.

As international creditors and others seeking repayment from Venezuela find themselves on the threshold of a new era, they should check their expectations. Putting aside political and ethical questions raised by collecting on the estimated $140 billion in outstanding debt[9] from Venezuela while its society faces dire conditions, we know from experience that finding and seizing assets, be they sovereign or otherwise, is not as easy as it may seem. As Simón Bolívar said, what perhaps is most needed now is *paciencia y más paciencia*.

ASSET PATHFINDING™

Peter Pender-Cudlip
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An early requirement when contemplating recovery under international arbitration or litigation is to assess the likely scale and jurisdictional spread of assets for potential attachment. Not so much a matter of who to sue but *'whether to sue, and where'?*

We have coined the phrase: 'Asset Pathfinding' to describe this. Like paratroopers dropped behind enemy lines our job as investigators is to go ahead and illuminate the way. More specifically, we advise law firms, their corporate clients and funders assess the breadth and extent of worldwide assets under the ownership and control of Sovereign, corporate or individual defendants and respondents before 'pressing the button' on litigation or arbitration proceedings. Asset Pathfinding falls short of a detailed asset search and the costs associated with one, but it does offer a clear sense of whether there are likely to be attachable assets, their probable value and, perhaps most importantly, the jurisdictions that will have to be considered for any enforcement recovery action. Familiarity with the provisions of the 1958 New York Convention in respect of arbitral awards helps prioritise assets according to the general friendliness of these and other countries and ultimately direct the claimant to a seizable asset in a legally friendly jurisdiction.

Asset Pathfinding can thus be seen as win-win. Either the exercise determines that there are sufficient assets for recovery, in which case the costs of pursuing litigation or arbitration may be justified, albeit that there are other considerations, not least the merits of the case. Alternatively, we find that the respondent is too indebted, its assets are too few or in a jurisdiction too difficult to access, or its list of other creditors too long to merit the cost of legal proceedings - thereby avoiding throwing good money after bad in an ultimately fruitless and expensive exercise.

Asset Pathfinding can also guide the legal strategy on what actions and dispute mechanisms to use – why for example start an action in a jurisdiction where the respondent may have no assets? Indeed, the costs of such a pathfinding exercise is usually a fraction of those to even start a civil claim in any one jurisdiction which can be typically upwards of US$50,000.

"ASSET PATHFINDING CAN ALSO GUIDE THE LEGAL STRATEGY ON WHAT ACTIONS AND DISPUTE MECHANISMS TO USE..."

On the other hand, investigators may find no assets but instead are able to establish an operational footprint which provides the basis for a disclosure order in a jurisdiction which in turn opens up information on assets elsewhere. In recent case, a disclosure order on an overseas bank branch in London produced detailed information on bank accounts belonging to the defendant in a Gulf country. At the other end of the spectrum, the pathfinding may help underpin a legal strategy built on commencing multiple legal actions in multiple jurisdictions – a 'shock and awe' strategy to paralyse the other side and destroy its will to fight the dispute.

Having a snapshot of your opponent's assets also has the advantage of uncovering possible leverage points which can be deployed to push for early settlement. In one example we were able to determine that a state-owned steel company was running low on its vital supplies of coal and iron ore and that the potential for disruption of seizing one of these shipments in Canada or Australia (where the raw material was purchased) was enough to put pressure on the Sovereign to settle. In another example the discovery of a cherished personal asset was enough to compel settlement.

We would not be the first to draw parallels between litigation strategy and Sun Tzu's Art of War and in this context Asset Pathfinding enables our clients to *"know the enemy"*, to choose the right battlefield and even in some cases to *"subdue the enemy without fighting"*.

HOW TO GET DOCUMENTS OR INFORMATION IN ENGLAND DURING DISPUTES

Ros Prince
Stephenson Harwood

Information and evidence is key when it comes to winning disputes. However, in civil law systems, it is often very difficult for a claimant to obtain information from the opposing side. In England, there are numerous routes to obtaining evidence, both for English and foreign proceedings – this note compares the key characteristics of these routes.

DISCLOSURE IN LITIGATION

Where a case is litigated in England, both parties normally have to disclose documents that help the other side's case, or which damage that party's own case. There have recently been some changes to the rules to make them more flexible, time and cost-efficient, but this general rule is likely to continue to apply.

When is it available?

Disclosure is often a key factor that determines the outcome of litigation, but in order to benefit from these wide ranging rules the case must be in contemplation or proceeding before the English Court. The full suite of disclosure rules is not available in support of foreign litigation.

What are its key advantages?

Disclosure in England is significantly wider than disclosure in most civil law systems. Where a claimant thinks that the defendant is likely to have many documents that will help the claimant's case, England is likely to be a good place to litigate.

What are its disadvantages?

The key disadvantage is that disclosure is reciprocal. Whilst a claimant may receive useful disclosure from a defendant, they will also have to give disclosure of its own documents, including unhelpful ones. Even where a claimant's documents are not problematic, the process of disclosure (i.e. the claimant's lawyers reviewing the documents before giving disclosure) can be expensive.

It is also important to bear in mind that while disclosure always happens before witness evidence is served, it may still take a number of months (and sometimes more than a year) from the time that proceedings start until disclosure is given. However, in certain circumstances it may be possible to obtain disclosure before a claim is issued, from someone who is likely to be a party to future proceedings.

Is there anything else foreign parties should be aware of?

Disclosure is, in most cases, limited to documents which the parties to litigation control. This can extend to documents held by their agents. However, it would not normally apply to third parties. For example, a claimant might be able to get disclosure from a defendant of their bank statements (even if the defendant has to print those from the bank's website); but they would not normally be entitled to disclosure from the bank of its own documents, for example its KYC file about the defendant.

The normal rule in England is that documents disclosed in proceedings should not be used for other purposes (for example, they cannot be provided to criminal authorities abroad, or used in other proceedings). However, it is possible to ask the Court for permission to do this.

DISCLOSURE IN SUPPORT OF FREEZING ORDERS

Where the Court grants a freezing order against a defendant, it will also usually make a disclosure order. This is different to the type of disclosure that normally is given in the course of the proceedings. Typically, a disclosure order requires a defendant to disclose (within a short period of time, usually 3-5 days) a list of all of their assets worldwide. The definition of an asset is very broad and includes assets that are owned by a defendant directly or indirectly, legally or beneficially, or which they have the power to dispose of or deal with.

When is it available?

An asset disclosure order is ordinarily granted as incidental to a freezing order. Normally, no separate or additional requirements need to be met by a claimant. Asset disclosure orders can also be granted by the English Court in aid of foreign proceedings or execution of a foreign Court's judgment.

What are its key advantages?

The key advantage is that a disclosure order obliges a defendant to tell a claimant about their assets. This enables a claimant take steps to prevent the dissipation of assets pending judgment. If a freezing and an ancillary disclosure orders are made in support of a proprietary claim, a claimant can require a defendant to answer questions necessary to trace misappropriated assets.

The sanction for non-compliance with a freezing order (including its

disclosure provisions) is contempt of Court, punishable by a fine or a term of imprisonment. Freezing orders have, for this reason, been described by the Court as the 'nuclear weapons' of English law.

What are its disadvantages?

Asset disclosure orders are ancillary to freezing orders. In order to get a freezing order, a claimant will normally have to satisfy onerous requirements: both legal (for example, giving extensive disclosure to the Court about its own case) and commercial (for example, having to pay money into court).

Is there anything else foreign parties should be aware of?

Normally, a claimant is not allowed to use the asset disclosure for any other purposes. For example, if the asset disclosure shows that a defendant has assets in other jurisdictions, the Court's permission will ordinarily be required before the claimant is able to take steps to preserve those assets there.

NORWICH PHARMACAL ORDERS ("NPO")

NPOs are a type of disclosure order typically obtained against a third party, e.g. a bank or an internet provider, which itself is not party to any wrongdoing and not a potential defendant to a claim, but is likely to have documents and information about the identity of the potential defendant and the circumstances of any wrongdoing.

When is it available?

NPOs are appropriate where a claimant is aware that wrongdoing has taken place, a respondent is likely to have relevant documents or information about it and no other relief is available. NPOs are ordinarily sought prior to the commencement of a claim to enable a claimant to plead the claim or trace stolen funds, but can be applied for at any stage of the proceedings.

What are its key advantages?

The NPO regime allows the claimant to obtain essential information for the progress of the case from a third party that is not a potential defendant to a claim even where there are no ongoing or contemplated proceedings.

Often third party respondents do no resist or take a neutral position in relation to the NPO application.

NPOs are often granted with a 'gagging order': the third party respondent then has to give disclosure to the claimant, but is prohibited from telling the defendants about the order for a fixed period. Put simply, it allows the claimant to investigate in secret.

What are its disadvantages?

An applicant will need good evidence to demonstrate that a third party respondent has relevant documents or information in its possession. An applicant will be subject to the duty of full and frank disclosure. In most cases, an applicant will be ordered to pay a third party respondent's costs of compliance with the order (although in most cases these costs are modest).

Is there anything else foreign parties should be aware of?

Save in exceptional circumstances, the Court will not grant a NPO in respect of a respondent based outside the jurisdiction or in support of foreign civil or criminal proceedings. Requests for mutual legal assistance should be used in such cases. It is however possible to obtain a NPO even if the ultimate wrongdoer is resident outside the jurisdiction, provided a respondent to the NPO is based in England or Wales.

UNEXPLAINED WEALTH ORDERS ("UWOS")

A UWO is a form of disclosure order, which can be made against an individual who is either (a) a Politically Exposed Person (from outside the European Economic Area) or (b) suspected of involvement in serious crime. These orders require the person to explain the source of the funds used to purchase particular assets.

In July 2018, it was reported in the press that a woman was the first subject of a UWO. The press said that she had spent £16 million in Harrods, and later revealed her to be Zamira Hajiyeva, the wife of a former state banker in Azerbaijan.

When is it available?

A UWO can be made in respect of any property valued at more than £50,000, situated anywhere in the world, where there are reasonable grounds to suspect that the subject (i.e. the criminal equivalent of a defendant) would not have been able to obtain that property using their own known assets.

What are its key advantages?

Controversially, a UWO reverses the traditional English burden of proof, i.e. the obligation on the prosecutor in criminal cases to prove guilt 'beyond reasonable doubt'. This is because pursuant to a UWO a respondent is required to prove within a short period of time that specific property was not obtained with the proceeds of unlawful conduct. In almost all cases, when the authorities obtain a UWO they will also obtain an Interim Freezing Order, preventing the dissipation of property while the UWO remains in force.

A respondent to a UWO can be obliged to disclose potentially vast amounts of information and documentation about personal or corporate finances, which may not be obtainable otherwise. When a respondent complies with a UWO, as a practical matter this may mean that they have to bring materials into England from overseas and serve these on the authorities.

Failure to comply with the terms of a UWO gives rise to a presumption that the property in question is "recoverable property". This means that ultimately the authorities can seize the relevant property. Failure to comply may also amount to a contempt of Court.

What are its disadvantages?

UWOs can only be obtained by the UK criminal authorities.

In the *Hajiyeva* case, there was an anonymity order, but this was ultimately lifted by the High Court (i.e. the information became public). This means that interested parties can follow the proceedings and use publically available information generated as a result.

Is there anything else foreign parties should be aware of?

As stated above, only the authorities can ask the Court for a UWO. However, a private individual or company can provide information to the authorities that may prompt an application for a UWO. While the authorities are not obliged to act upon (or even engage with the provider of) such information, where there is a strong case for a UWO this is a route to consider.

While claimants have no automatic rights to information from the authorities, there is some precedent in England to show that they may, in limited circumstances, be entitled to NPOs against some authorities. The combination of a UWO and a NPO could therefore in theory result in (a) a defendant having to bring documents to England about their assets to comply with the UWO and (b) a claimant being able to obtain some of those documents with a NPO against the investigating authority.

So far as we are aware, this has never been tested in the context of UWOs – the existing authorities have been limited to the police giving disclosure to victims. It will be interesting to see whether claimants proceed to test this strategy.

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CAYMAN COURT ISSUES FIRST MAJOR INTERNATIONAL SANCTIONS DECISION ON "USE" OF FUNDS IN AN ASSET FREEZE

Elaina Bailes
Stewarts

The Grand Court of the Cayman Islands has handed down an important decision in Palladyne International Asset Management B.V. v Upper Brook (A) Ltd and Others (FSD 68 of 2016) in relation to the meaning of "use" of funds subject to an asset freeze under a global sanctions regime. Elaina Bailes summarises the decision.

The UN-imposed sanctions in relation to Libya were implemented by the EU, UK and Cayman Islands in 2011. In the Cayman Islands, this was by way of the Libya (Restrictive Measures) (Overseas Territories) Order 2011 (the Sanctions Order).

The Sanctions Order imposed an asset freeze, providing that persons "shall not deal with funds or economic resources which are owned, held or controlled, directly or indirectly, by a designated person" (unless they held a valid sanctions licence).

Article 10(4) of the Sanctions Order provided that "to deal with", in respect of funds meant:

i to use, alter, move, allow access to or transfer;

ii to deal with in any other way that would result in any change in volume, amount, location, ownership, possession, character or destination; or

iii to make any other change that would enable use, including portfolio management".

In 2014, Palladyne International Asset Management (PIAM) was removed as a director of three Cayman Island funds by resolutions passed by the funds' shareholders. It sued the shareholders claiming that this was a breach of the Sanctions Order.

> **"PIAM ARGUED THAT THIS INTERPRETATION WAS SUPPORTED BY RELEVANT CASE LAW AND UN GUIDANCE ON THE MEANING OF TERMS IN ASSET-FREEZE MEASURES."**

PIAM's case was that the ordinary meaning of "use" is "the act of employing a thing for any purpose". The legislation was therefore wide enough to cover the exercise of voting rights by a shareholder. PIAM argued that this interpretation was supported by relevant case law and UN guidance on the meaning of terms in asset-freeze measures.

The defendants argued that PIAM's interpretation was contrary to the ordinary meaning of the legislation and inconsistent with the intention of the Sanctions Order. Their case was that the sanctions measures were intended to freeze assets to protect against dissipation. They were not meant to deprive people of property rights that do not involve dealing with/allowing access to the funds as financial assets.

The court applied a restrictive interpretation to international sanctions relating to Libya. It held that the adopting and passing of the resolutions did not constitute a breach and contravention of the Sanctions Order on dealing with the shares. The judge held that passing the resolutions did not constitute a use use, allowing of access to or the making of other changes that would enable the use of the shares or assets and investments held by or for the funds).

The case is likely to have wide significance for the interpretation of international sanctions regimes involving asset freezes. The judge's reading of the international sanctions regimes as a "single harmonious code" and the restrictive interpretation applied by the court is likely to be the subject of further debate. PIAM has appealed the decision.

Stewarts acted for PIAM, (alongside Cayman attorneys and counsel) in a team led by David Hughes that included Elaina Bailes, Joseph Rossello, Lucy Morgan, Frances Baird and Anna Freund.

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