HOT TOPICS

IN ENFORCEMENT IN ENGLAND AND WALES (NOT JUST BREXIT-RELATED!)

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Having seen a surge in recent enquiries in connection with the enforcement of overseas judgments and arbitral awards in England and Wales, it seems that non-compliance by judgment and award debtors is – perhaps unsurprisingly in the current economic climate – on the rise. This brings into sharp focus some of the points that need to be considered when enforcing (and resisting enforcement) in England and Wales as a favoured jurisdiction for enforcement – not all of which points are (for once) Brexit-related!

This article addresses a selection of hot topics in this regard: (i) how and what do you serve on a State, (ii) enforcement of ICSID awards, (iii) resisting enforcement in fraud cases, (iv) jurisdiction agreements, (v) enforcement of judgments from certain EU Member States, and (vi) enforcement of judgments on judgments. Notwithstanding the ongoing debate in relation to some of these topics, there is inevitably a way to cut through them and find a solution.

How and what do you serve on a State?

The courts have been grappling with the interplay between State immunity legislation – by which *"any writ or other document required to be served for instituting proceedings against the State"* must be served through the Foreign and Commonwealth Office (FCO) – and the procedural rules concerning applications for permission to enforce arbitral awards which, on the face of it, only require the order giving permission to be served on the award debtor.

The answer to the question is…. watch this space. In December 2020, the Supreme Court heard an appeal in the *General Dynamics v Libya case*[1] and judgment is awaited.

In the meantime, the current position is that, whilst it is the document that institutes proceedings, the arbitration claim form does not need to be served through the FCO (procedural rules only require the order to be served). Conversely, the order permitting enforcement must be served (in accordance with those rules) but as – unlike the claim form - it is not a document instituting proceedings, it does not need to be served through the FCO. Pending the Supreme Court's decision, the solution may be to try to serve all documents out of an abundance of caution.

However, that is sometimes easier said than done. Effecting service can be an issue when it comes to service on flawed States or States that are being evasive. The current position (again from the *General Dynamics* case) is that service of the order (i.e. the only document required to be served) can be dispensed with, but the State must be notified that the order has been made. On a related note, although some *obiter dicta* in *General Dynamics* could be construed as suggesting that alternative service is never possible, the case of *Union Fenosa Gas v Egypt*[2] did permit alternative service of the order, again on the basis that it is not a document instituting proceedings that is required to be served.

Enforcement of ICSID awards

Staying on the topic of enforcing against States, inevitably the State in question will vigorously resist. Two particular issues have been hot topics in this context: (i) whether payment of an award by an EU Member State will constitute illegal State aid, and (ii) the impact of the CJEU's infamous decision in the *Achmea* case which held that the arbitration mechanism in a bilateral investment treaty between two EU Member States adversely affected the autonomy of EU law and is therefore incompatible with EU law. Both of these are considerations in cases in which I

1 [2019] EWCA Civ 1110
2 [2020] EWHC 1723 (Comm)

am involved, but for present purposes I just want to focus on one point – and that is their relevance in ICSID cases when it comes to the grant of permission to enforce the ICSID award. The position there would appear to be a positive one. In the *Micula v Romania* case[3] the Supreme Court lifted a stay on enforcement, including because (i) the ICSID regime was embodied in UK legislation before the UK's accession to the EU – and the TFEU preserved such pre-existing obligations, and (ii) the grounds for a challenge to permitting enforcement are extremely narrow in ICSID cases and the issue of state aid was a substantive one. Not least in a post-Brexit world, this bodes well for the enforcement in England and Wales of ICSID (and perhaps non-ICSID) awards against EU Member States.

Resisting enforcement in fraud cases

Another hot topic relates to a recent case involving a State[4] (*Process & Industrial Developments v Nigeria*) but the issue is of wider application. Notwithstanding an unprecedented delay of 4.5 years since the liability award and 2.5 years since the final award, Nigeria was granted an extension of time to challenge the awards on the basis of an alleged fraud. Of many points of interest was a debate between the parties as to whether the Supreme Court's decision in *Takhar v Gracefield Developments*[5] had established a general principle - that a fraudster cannot resist a challenge to an arbitration award by alleging that a party failed to exercise reasonable diligence to uncover a fraud. In the event, the judge did not need to decide whether the "fraud unravels all" maxim applied. However, he commented that, had he needed to do so, the party looking to rely on the maxim had the better of the arguments. This will undoubtedly be seized upon in future cases where allegations are made that an award has been obtained fraudulently.

Jurisdiction agreements

The first of two hot topics here concerns the enforcement of cases involving exclusive jurisdiction agreements falling within the 2005 Hague Convention, where those agreements were concluded between 1 October 2015 (when the UK acceded to the convention through its membership of the EU) and 31 December 2020 (when the Brexit transition period ended and the UK acceded in its own right). The UK's position appears to be settled by paragraph 7 of Schedule 5 to the Private International Law (Implementation of Agreements) Act 2020: exclusive jurisdiction agreements between the two dates are caught by the Convention. However, given the European Commission's position to the contrary[6], it seems that this issue may well be tested in the courts and give rise to an increase in anti-suit injunctions. A solution in the interim may simply be for the parties to jurisdiction agreements to restate them now that we are post 1 January 2021.

The second hot topic concerns asymmetric jurisdiction agreements, which do not provide the same jurisdictional rights for all contractual parties – for example by conferring exclusive jurisdiction on proceedings commenced by one party only. The question is whether the 2005 Hague Convention covers asymmetric clauses. Three recent cases contain obiter comments on the issue and reach conflicting decisions[7], with two High Court views in favour of such clauses falling within the Convention and the other (and a Court of Appeal view) reaching a view to the contrary. If the UK signs up to the Lugano Convention, this may become academic as this Convention will apply to all jurisdiction agreements in favour of member states.

Enforcement under the 1920/ 1933 Acts of judgments from certain EU Member States

Assuming the 2005 Hague Convention does not apply, then there are a number of EU Member States whose judgments were – at least until the Brussels I Convention in 1987 - subject to the provisions of the Administration of Justice Act 1920 or the Foreign Judgments (Reciprocal) Enforcement Act 1933. In the case of Norway, agreement has been expressly reached that the 1933 Act continues to apply to Norwegian judgments that do not fall within the transitional arrangements post-Brexit. As for the remaining countries, the question appears to be less certain. On the one hand, it is arguable that pre-Brussels Convention arrangements continue to apply as those bilateral treaties remain in force; on the other, it can be argued that the rules were displaced by Brussels I. If, however, the 1920 or 1933 Act is not available, then the simple answer is to rely upon the common law to enforce the overseas judgment.

Can you enforce a judgment on a judgment?

On the subject of the 1920 Act, the final hot topic concerns whether, if a judgment in one state is registered in a second state, that registered judgment can then be registered in England and Wales. Whilst the position under the 1933 Act is covered by the Act itself[8], the position under the 1920 Act is not, but was recently confirmed by the Court of Appeal[9]. In both cases, the answer is that it cannot be enforced. However, it is apparent from the judgment that the position under the common law (which applies to the enforcement of judgments from jurisdictions such as the USA and Russia where there are no reciprocal arrangements) has not been determined, and therefore that possibility remains.

Conclusion

Whilst some interesting issues remain to be resolved, England and Wales remains a jurisdiction of choice when it comes to the enforcement of judgments and awards. With disputes on the rise and judgment and award debtors becoming more incalcitrant, there will no doubt be a corresponding increase in enforcement cases as enforcement itself becomes the hot topic.

3 [2020] UKSC 5
4 [2020] EWHC 2379 (Comm)
5 [2019] UKSC 13
6 See section 3.3 of its Notice to Stakeholders dated 27 August 2020
7 Commerzbank Aktiengesellschaft v Liquimar Tankers Management and another [2017] EWHC 161 (Comm); Clearlake Shipping Pte Limited v Ziang Da Marine Pte Limited [2019] EWHC 1536 (Comm); Etihad Airways PJSC v Flother [2019] EWHC 3107 (Comm) and [2020] EWCA Civ 1707
8 See section 1(2A)(c)
9 See Strategic Technologies PTE Ltd v Procurement Bureau of the Republic of China Ministry of National Defence [2020] EWCA Civ 1604