Kluwer Arbitration Blog

Contempt of Court for Breach of Asset Disclosure Orders: How Can You Use It to Enforce Arbitral Awards in England?

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Securing a favourable arbitral award is not trivial. It involves a lot of work, a wait of, potentially, several years and the expense of the arbitral process. After all this, when a favourable award has, hopefully, been obtained, the last thing any client wants is to enter into yet another fight to enforce the award.

Thankfully, in the majority of cases, this is not necessary. Among the many advantages of arbitration is the general likelihood that losing parties in most cases will voluntarily comply with arbitration awards.

That being said, sometimes an unsuccessful party does not comply with an arbitral award, forcing the prevailing party to commence enforcement proceedings. This is what happened in ADM v GHI & others.

As enforcement proceedings will be subject to the procedural law of the jurisdictions in which they are pursued (and assuming, of course, the jurisdiction in question is a signatory to the 1958 New York Convention or will otherwise recognise the validity and enforceability of an arbitral award), it is crucial that such jurisdictions offer efficient mechanisms to satisfy the prevailing party's rights. Pertinent considerations may include:

1. does the relevant jurisdiction provide for a mechanism to efficiently identify the losing party's assets?
2. does the relevant jurisdiction provide for a mechanism to freeze the losing party's assets?
3. what sanctions does the relevant jurisdiction provide for against losing parties who refuse to cooperate with the terms of an unfavourable award?

Earlier this year, a decision rendered by the High Court in ADM v GHI & others saw the Court utilise power tools under English law to enforce arbitral awards. The defendant company, against which an unfavourable arbitral award had been made, was found to be in contempt of court for breach of asset disclosure orders and world-wide freezing orders. The defendant company was ordered not only to pay all the outstanding amounts under the arbitral award, but the Court also: (i) levied a £75,000 fine on the defendant company and (ii) handed down a 12-month custodial sentence to the president of the company for breach of an asset disclosure order.

In this post, we discuss (i) the factual background of the case, (ii) the legal reasoning of the court,

and (iii) suggest a few key takeaways.

Background

In December 2017, ADM (the "**Claimant**"), a Swiss agricultural company, brought arbitral proceedings against GHI (the "**First Defendant**"), a Moroccan importer of cereal grains, for failure to pay certain amounts under various sales agreements. The arbitration was commenced under the Grain and Free Trade Association ("**GAFTA**") Arbitration Rules. In 2018, the arbitral tribunal rendered an award ordering the First Defendant to pay approximately USD$ 4 million to the Claimant (the "**Award**").

The Claimant made an application to the English High Court pursuant to s. 66 of the Arbitration Act 1996 to enforce the Award against the First Defendant. Upon further applications, the Court granted an asset disclosure order (the "**ADO**") against the First Defendant to serve an affidavit disclosing all its world-wide assets above certain financial values. In addition, the Court also granted a world-wide freezing order against the First Defendant up to the amount roughly corresponding to the debt (the "**WFO**").

The First Defendant, however, did not comply with the orders made against it. Consequently the Court handed down additional asset disclosure orders and world-wide freezing orders. However, the First Defendant once again failed to comply with the orders made against it.

The Claimant therefore brought committal proceedings (the "**Committal Proceedings**") against not only the First Defendant but also against its president (the "**Second Defendant**") and one of its directors (the "**Third Defendant**") (jointly, the "**Defendants**").

Reasoning of the Court

Applying Sarayiah v Williams, the Court firstly established that the criminal standard of proof will be applied to an allegation of contempt of court, even where it is brought in the course of a civil case. That is, an allegation of contempt must be proven "beyond a reasonable doubt" (instead of merely "on the balance of probabilities," which is the standard of proof for civil cases).

The Court also explained that, in order to succeed in committal proceedings, a claimant must demonstrate that (i) the defendant knew of the terms of the court order that has been breached, (ii) the defendant acted (or failed to act) in a manner which involved a breach of the court order, and (iii) the defendant knew of the facts which led to the breach.

In this case, the allegations brought in the Committal Proceedings centred on four grounds: (i) breach of the ADO by failing to provide credit facilities; (ii) breach of the ADO by failing to provide all ordered bank statements; (iii) breach of the ADO by failing to disclose relevant assets in Morocco; and (iv) breach of the WFO by dealing and/or disposing assets restrained by the order.

It is worth mentioning that the First Defendant partially complied with the Court's Orders by presenting some assets. However, many of those assets were already subject to encumbrances. In its defence, the First Defendant alleged that the court had ordered it to disclose all other assets

exceeding certain amount “in value,” without specifying whether the assets should be delivered free of encumbrances or not.

Relying on Aspinall v Lim and PJSC Commercial Bank Privatbank v Kolomoisky, the Court found that the purpose of an ADO is “the identification of sums to satisfy a judgment” (or an arbitral award) and, therefore, the term “value” in the ADO issued by the Court clearly meant “unencumbered value.” By presenting encumbered assets, the Defendants breached the ADO.

The Court was alive to the fact that in certain contexts a non-English speaker might misconstrue parts of a court order. However, in the present case, the Court found that, given the obvious purpose of the order in question, it was impossible to understand how anyone could have reached a conclusion that the disclosed assets could be encumbered.

While there may be scope for debate as to what the exact purpose of a given court order is, what this judgment makes clear is that parties should be very cautious about putting forward overly literal or overly technical interpretations of a court order. In this regard, the Court also highlighted that the First Defendant had access to sophisticated legal counsel, which rendered unacceptable any attempt to restrictively interpret the language used in the orders.

The Court also discussed how asset disclosure orders and world-wide freezing orders should be served on defendants. This is because the Second and Third Defendant argued that they were not personally served with the ADO. Relying on BMBF 4 PLC v Rizwan Hussain to interpret s. 81.4(2) of the Civil Procedural Rules, the Court understood that its power to dispense personal service could be exercised retrospectively.

In other words, even if the Court did not expressly authorise the service of process by e-mail at the time of the issuance of the ADO, the Court may dispense personal service later on in the proceedings, even after the service deadline has passed, with retrospect effects, as long as there are “good reasons” for doing so. Applying MBR Acres Ltd v Maher, the Court reached the conclusion that there were good reasons to dispense with personal service, as it was plain that the ADO did come to the Second and Third Defendant’s attention such that they were aware of its existence and its terms.

Takeaways

The decision in ADM v GHI & others shows that, under English law, the courts have the power to impose not only fines, but also custodial sentences on defendants in breach of asset disclosure orders and world-wide freezing orders. These are powerful tools at the Claimant’s disposal to enforce arbitral awards (and judgements).

As above, all those in receipt of a favourable arbitral award will hope that the losing party will comply with the award without issue. However, where the English court has supervisory jurisdiction, those who find themselves in the unfortunate scenario where enforcement proceedings are necessary can take some comfort from the fact that the Court will act robustly towards those who seek to frustrate such enforcement proceedings. The judgments in ADM v GHI and others reinforce the pro-creditor characteristics of English law and English courts, which also benefits arbitration.

This case also demonstrates that those attempting to resist such orders need to be mindful of the intended purpose of those orders and not seek to frustrate that purpose through overly technical or restrictive interpretations. Moreover, the Court will be prepared to allow the service of process by e-mail, even retrospectively, which is particularly important for cases in which the defendants are located overseas.

The decision may work as a further incentive to prevailing parties to come to England to enforce their arbitral awards and also as a deterrent effect on losing party trying to escape from its liabilities.

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