Kluwer Arbitration Blog

Current Trends in the Use of Worldwide Freezing Orders to Enforce Foreign Arbitral Awards: Powers of the English Courts

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The freezing injunction, famously referred to as one of the law's "nuclear weapons," is a remedy developed for the purposes of preventing a judgment debtor (or potential judgment debtor) from unjustly dissipating their assets so as to prevent the judgment made against them from being enforced. This post explores how post-award freezing injunctions can be used as a means of preserving assets against which an award can be enforced, so as to combat the risk of an unsuccessful party seeking to frustrate enforcement of an award.

Legal Framework

Sections 2(b) and 66 of the English Arbitration Act 1996 (the "AA 1996") allow the English Court to enforce arbitration awards, whether they be domestic or "foreign" (that is, arising out of an arbitration conducted in a seat other than England and Wales) as if they were judgments of the Court itself. These sections also empower the Court to use the tools available to it to enforce its own judgments in respect of arbitration awards. This includes the use of freezing orders. Sections 101-104 AA 1996 provide for the same powers in respect of awards granted in states that are signatories to the New York Convention 1958.

In particular, we will focus on the English Court's power to issue worldwide freezing orders ("WFO"), a freezing injunction that extends to assets outside of England and Wales, and how such orders can be used to enforce awards even where neither the respondent nor any of their assets are located in this jurisdiction.

The Grant of a Freezing Injunction

The Court's powers to grant freezing injunctions are set out in section 37(1) of the Senior Courts Act 1981 (the "SCA 1981"), which holds that the Court may grant an injunction "in all cases in which it appears just and convenient to do so." As well as the grant of a freezing injunction being "just and convenient," the following requirements must also be met: (i) the English Court must

have jurisdiction; (ii) the applicant must have a good arguable case; (iii) assets capable of satisfying the judgment (or award) must exist; (iv) there must be a real risk that the award will go unsatisfied by reason of the respondent's unjust disposal of their assets; and (v) the applicant must provide an undertaking in damages.

As well as the above, the applicant owes a duty of full and frank disclosure to the Court to present (in the "utmost good faith" (Alliance Bank JSC v Zhunus & Ors [2015] EWHC 714 (Comm)) not only its own case, but to highlight in a fair and even-handed way evidence and arguments that the applicant can reasonably anticipate the other side will make (Stephen Gee KC, Gee on Commercial Injunctions (7th edn, Sweet & Maxwell, 2022). Chapter 9). Failure to discharge this duty can lead to the application being refused.

These are (deliberately) onerous requirements. Freezing injunctions are extremely powerful tools which can result in potentially irrevocable damage to those against whom they are granted. The Court will therefore be very exacting in ensuring that the above conditions are met.

Worldwide Freezing Orders as a Means of Enforcement

When a freezing order is obtained, the respondent is restrained from disposing of or dealing with their assets (with certain carve-outs permitting reasonable expenditure on, for example, living costs and legal representation). The primary use of such an order is to preserve the respondent's asset position so as to ensure that sufficient assets are available against which any judgment eventually obtained can be enforced (*see* Broad Idea International Ltd v Convoy Collateral Ltd Convoy Collateral Ltd v Cho Kwai Chee (aka Cho Kwai Chee Roy) [2021] UKPC 24 and Wolverhampton City Council v London Gypsies and Travellers [2023] UKSC 47).

As mentioned, WFOs extend to assets located outside of England and Wales. They are therefore a very useful tool when faced with an award debtor who is refusing to comply with the terms of the award in question but who may not have any assets located in this jurisdiction. Although the English Court is very sparing in its use of freezing injunctions, and in particular WFOs, it is nonetheless willing to grant WFOs in order to aid the enforcement of a foreign arbitral award in certain circumstances (even where the seat of the arbitration is outside of England and Wales).

Applying for a WFO

As above, the jurisdiction for the grant of a WFO derives from section 37(1) SCA 1981. In the context of arbitration, there remains debate as to whether the Court's jurisdiction also arises from section 44 AA 1996 (*see* U&M Mining Zambia Ltd v Konkola Copper Mines Plc [2014] EWHC 3250 (Comm) ("*U&M Mining*")). As such, until the position is settled, best practice would dictate that award creditors apply under both section 37(1) SCA 1981 and section 44 AA 1996 to avoid any debate as to the Court's powers to grant the order sought.

"Just and Convenient": Is There a "Sufficient Link" with England and Wales?

For the Court to grant a WFO there must exist a "sufficiently strong link" with England and Wales for the Court to make such an order (*see* Company 1 v Company 2 and another [2017] EWHC 2319 (QB) [136] and Mobil Cerro Negro Ltd v Petroleos De Venezuela SA [2008] EWHC 532). However, recent jurisprudence has tested just how "strong" such a link must be. In circumstances where the arbitration is seated in England, even in the absence of a relevant individual in the jurisdiction or assets against which an award could be enforced, the "sufficient link" test will usually be met. For example, in *U&M Mining*, the Court was willing to continue a WFO in respect of an award granted in an English-seated arbitration in circumstances where neither the award debtor nor any of their assets was present in the jurisdiction (61-65).

The Court has also confirmed that, in certain circumstances, it will be willing to grant a WFO in aid of enforcement not only where the award debtor is neither domiciled in England nor holds any assets here, but also where the underlying award was made in respect of a foreign arbitration. In order for it to do so, the following requirements must be met: (i) there must be a real connecting link between the subject matter of the measures sought and the jurisdiction of the English Court; (ii) within the limits of comity, it is appropriate for the English Court to act as "international policeman"; and (iii) it is "just and expedient" for the Court to grant worldwide relief (*see* Conocophillips China Inc v Greka Energy (International) BV (X v E) [2013] EWHC 2733 (Comm) 41).

In cases involving "international fraud," for which there is no agreed definition under English law (although a "strong case of serious wrongdoing" will likely be sufficient, *see* ArcelorMittal USA LLC v Essar Steel Limited & Ors [2019] EWHC 724 (Comm)) ("*ArcelorMittal v Essar*") the Court may be willing to relax the "sufficient link" test (*see* Mobil Cerro Negro Ltd v Petroleos De Venezuela SA, [86]). This is what happened in Arcelormittal v Essar. The proceedings arose out of an ICC Award made following a Minnesota-based arbitration between ArcelorMittal (a Delaware-registered company) and Essar Steel (a Mauritian-registered company). Following an application for injunctive relief, a WFO was granted against the award debtor, Essar Steel, whom it was found had been "engaged in bad faith" to the "detriment of its creditors" so as to render the case analogous to a case of international fraud (42).

Essar Steel had no assets in England and Wales (save for two bank accounts containing very small sums), nor were any of its directors resident in the jurisdiction. However, Essar Steel had previously been provided professional services by an English-registered company. This meant that there were relevant documents and senior individuals within the jurisdiction who were likely to have knowledge of Essar Steel's assets. This was sufficient to provide "material connections" with the jurisdiction such that the Court found that it was "just and convenient" to continue the original WFO (78, 83).

Final Remarks

While the English Court will only utilise its power to grant WFOs sparingly, current jurisprudence demonstrates that, should the circumstances be right, the Court will be willing to utilise such methods in order to enforce foreign arbitral awards. This is potentially an extremely potent and useful tool for those in receipt of a foreign arbitral award who are struggling with enforcement of that award. Provided a "sufficient link" can be shown with this jurisdiction, such award creditors (particularly those that have been victims of fraud) could do much worse than consider launching

enforcement proceedings in this jurisdiction.

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