

About that English Law and Arbitration Clause: Consider enforcement implications before signing

By Raymond L. Sweigart

As is frequently seen in international commercial contracts, parties with no operations or other relationship to England or the United Kingdom specify English law as controlling, with a clause providing for arbitration of disputes in London. In Cruz City v Unitech & Ors, [2014] EWHC 3131 (Comm), the English High Court was faced with a dispute over enforcement of an arbitral award between a Mauritian claimant and an Indian defendant. Noting the English law policy that judgments of the English court and English arbitration awards should be complied with, and under the principles set out in Masri v Consolidated Contractors International (UK) Ltd (No 2), [2008] EWCA Civ 303, the court held that it was appropriate to enforce an arbitral award by the appointment of receivers over the foreign defendant's assets.

Background

In 2012, the Claimant, a special purposes company established under the laws of Mauritius, was awarded US \$300 million against several defendants, including one of the largest property developers in India. The award was issued in three arbitration proceedings in London under the rules of the London Court of International Arbitration arising from the failure of Claimant's investment in a slum clearance and property development project in Mumbai, India. The defendants did not pay any part of the award and, according to the court, the first defendant had "for its part ... made clear by words and conduct that it will do whatever it can to avoid having to meet its liabilities" and will "thwart ... attempts at enforcement, in a variety of different jurisdictions by placing every obstacle in [the Claimant's] way".

The Claimant then sought enforcement in England by way of an application for the appointment of receivers pursuant to section 37 of the Senior Courts Act 1981 and equitable execution over the primary

defendant's assets, including its ownership interests in an Indian subsidiary company, two Cypriot companies and an Isle of Man company, and by restraining it from receiving any property subject to the court's order.

Decision

Applying the principles set out by the Court of Appeal in *Masri*, the High Court held that there was no jurisdictional impediment to prevent it from making the order sought in relation to foreign assets and that the requirement of a sufficient connection with English jurisdiction was satisfied since the application was made in order to enforce an English arbitration award.

The court based its decision to order the appointment of receivers on several factors, including the following:

- The principal defendant held its assets through “opaque” interlocking chains of multiple companies located in different jurisdictions, making it extremely difficult to identify and establish the value of those assets or to execute against them.
- The claimant faced serious delays and difficulties in attempting enforcement of the arbitration award by other processes in the countries where the defendant held assets, due to both complications inherent in those legal systems and the defendant's procedural efforts to thwart enforcement.¹
- The order was likely to be an effective remedy with the very real prospect that it would avoid many of the obstacles defendants were erecting against other means of enforcement.
- There was a realistic prospect of compliance. (The court appeared to assume that the defendant would not risk contempt proceedings by violating the order.)
- The appointment of receivers further supported the pre-existing freezing order, making it less likely that a breach thereof and dissipation of assets would occur or avoid detection.

Comment

An effective enforcement regime is of key importance in any arbitration. Otherwise a hard-fought victory may be of little real value in the end. The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards is generally recognised as providing the accepted international framework for the process of enforcement of arbitral awards; nevertheless, resort must still be had to various local courts for enforcement and defendants in some jurisdictions can utilise home court rules and procedures along with systemic delays to render an arbitral award practically and effectively unrecoverable. The *Cruz City* decision is an example of creative use of an English arbitral award with a sufficient connection to England to justify the exercise by the English court of its broad equitable powers in aid of enforcement. *An in personam* receivership over a recalcitrant defendant's assets may provide a centralized and effective

¹ The claimant had:

- a) commenced proceedings for enforcement of the awards in India, including an application to the Delhi High Court for the appointment of a receiver over all the defendants' assets, including shareholdings in various other companies; however, it appeared that a first instance decision on the enforcement of a foreign award can take at least 2-3 years in India, while an appeal could take in excess of a further 4-5 years to be decided; the evidence was that until a decision on enforcement is made, there would be no possibility of appointment of a receiver by the Indian court;
- b) obtained a final charging order in the Isle of Man over the first defendant's shareholding in a company registered there, as well as a freezing order against two of the defendants;
- c) begun enforcement proceedings in Cyprus; and
- d) obtained an interim worldwide freezing order in Mauritius.

counter to multi-jurisdictional gamesmanship. Conversely, a party who agrees to English arbitration with its corporate “fingers crossed” that it can ultimately avoid the consequences of an adverse award should consider that the English court may step in to provide additional remedies it had not contemplated.

If you have any questions about the content of this alert, please contact the Pillsbury attorney with whom you regularly work, or the authors below.

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