FIRE MAGAZINE

Fraud • Insolvency • Recovery • Enforcement

ISSUE 13

THE FLAGSHIP ASSET RECOVERY EVENT FOR THE FRAUD & INSOLVENCY COMMUNITY

INTRODUCTION

"The world is a book and those who do not travel read only one page."

Saint Augustine

We are delighted to present Issue 13 of FIRE Magazine in conjunction with the flagship Asset Recovery event for 2023, FIRE International in Vilamoura, Portugal.

In this FIRE International edition, our authors dive into all the topical issues facing our practitioners, including the consequences of the war in Ukraine, tales from our investigators, the latest on crypto, and more.

For those in Vilamoura, we look forward to bringing together the FIRE community, and for those unable to join us, we hope you enjoy this thought-provoking issue. Thank you to all of our partners, authors and members for their ongoing support to this ever-growing community.

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Upcoming Events

Contentious Trusts: Trusts under Attack
27th June 2023 | The Clermont Hotel (Charing Cross), London, UK

The 2nd Annual Crypto in Disputes
28th June 2023 | Leonardo Royal Tower Bridge, London, UK

FIRE Summer School: The Ultimate Insider's Guide
23rd - 25th August 2023 - Kings College, Cambridge, UK

FIRE: CI & IOM
27th - 28th September 2023 | Duke of Richmond, Guernsey

FIRE UK: Welcome Back
September | London, UK

FIRE Middle East
13th - 15th November 2022 | Shangri-La Hotel, Dubai, UAE

FIRE Starters Global Summit: Dublin
21st – 23rd February 2024 | Conrad Hotel, Dublin, Ireland

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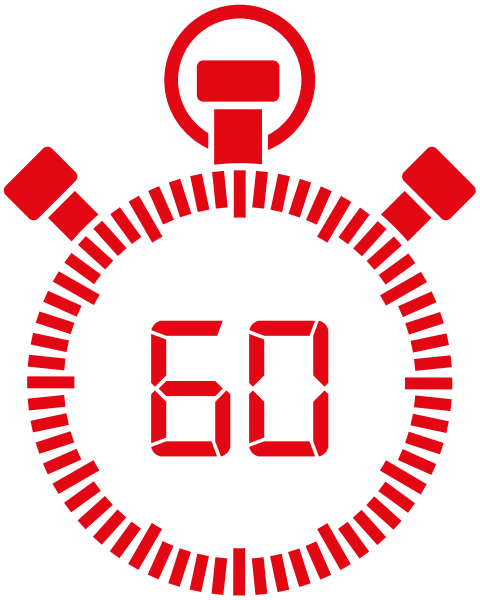

Q **Imagine you no longer have to work. How would you spend your weekdays?**

A In part, I'd expand what I do pro bono here and there already – support a local cause via investigative advisory and try to even some playing fields.

There should still be plenty of time for long lunches, adventurous travel, and hiking with my wife and sheepdog.

Q **What do you see as the most important thing about your job?**

A To happily do what we do, I think it's ideal to be a natural problem solver. I like learning and solving puzzles. And it's pretty great to get to do that for a living.

Q **What motivates you most about your work?**

A I feel lucky to work in an industry which requires that we continuously learn – about new industries, characters, cultures, and schemes. Relatively few occupations have this variety so built in.

Q **What is one work related goal you would like to achieve in the next five years?**

A I am instinctively drawn to efficiencies and innovation. As an example, I am the co-founder of an app which streamlines the process of investigative field reporting (it's called Bird Dog Investigator). I hope in the next five years to work towards establishing new and innovative methods to conducting dispute resolution, corporate investigations, and general due diligence.

Q **What has been the best piece of advice you have been given in your career?**

A How important it is to keep an open mind – and to make up your own mind. The truth often appears as a messy, inconvenient shade of grey. But there are always lessons and insights to be drawn.

Q **What is the most significant trend in your practice today?**

A I believe we are seeing a return to clients preferring to work with bespoke investigative agencies – as opposed to larger corporate risk management providers. With the right boutique firms you get the efficiency in process of a larger firm – but the creativity of a small team. I think clients are starting to bet again on the investigators that generate the majority of revenue through investigation.

Q **Who has been your biggest role model in the industry?**

A I am hesitant around any sort of 'hero' worship in all aspects of life – so I'll cop out of this question a bit. There are many past colleagues, clients, and sources who have influenced my professional strategies and ethics. Some of my current Vantage colleagues were actually some of my very first colleagues and I have learned a lot from them and admire their grit, savvy, and sense of humor. I can be a bit too serious and watching them helps to remind me to take a breath and enjoy the ride.

Q **What is one important skill that you think everyone should have?**

A I am a strong believer in source assessment – for quality and legitimacy of information. In our industry this is of course essential. But I think it is too for all walks of life. It can help people understand what news stories are real – and which are just PR spin or motivated by corporate actors and billed as news. It can help people choose an (actually) great school for their kids or an (actually) locally owned restaurant.

Q **What cause are you passionate about?**

A I am a writer, editor, and designer of sorts and really enjoy assembling effective presentations of complex materials. I get great satisfaction from concise, clear delivery of narratives in concert with eye-pleasing charts. I take a lot of pride in work product. Separately, I'm also a sucker for justice.

Q **Where has been your favourite holiday destination and why?**

A I will always hold great nostalgia for summers in Nantucket as a child – swimming, crabbing, and riding bikes everywhere. As an adult, I often find myself thinking of a wine holiday my wife and I took to Saar in the Mosel Valley in Germany. People kept asking us (in a nice way) why on earth we were there. It was new and out-of-the-way to us, and the wine, cuisine, and people were wonderful.

Q **Dead or alive, which famous person would you most like to have dinner with, and why?**

A I am a fan of long dinners with flawed, honest people – so I'd lean towards an evening with George Carlin, the great comedian. To me, he was a brilliant social critic who used his intellect to challenge authority – and to make people laugh. A great dinner guest!

Q **What aspect of FIRE International are you most looking forward to as an attendee?**

A I'm looking forward to meeting new people in a new place, and hearing about the fascinating and challenging issues people have been tackling.

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CONSEQUENCES OF THE WAR IN UKRAINE ON RUSSIA-FOCUSED INVESTIGATIVE RESEARCH

Authored by: Andre Martirosyan (Manager) - Grant Thornton

Russia's invasion of Ukraine in February 2022 has had a substantial impact on corporate intelligence and investigations work in relation to Russia. Investigative firms focusing on the post-Soviet area were required to rapidly adapt to the region's new war-torn reality.

Dropping Russian clients

The need to comply with wide-ranging international sanctions against Russia, which include a ban on the provision of various professional services to Russian clients, represented an immediate challenge faced by Western investigative firms.

The sanctions have prompted firms to thoroughly review relationships with Russian clients and has, in many cases, resulted in the end of such business relationships. In situations where existing business links do not constitute an immediate breach of sanctions, many firms are still reluctant to bear the reputational risk of associating themselves with clients linked to Russia.

An increase in sanctions-related work

While exposure to Russian clients has decreased dramatically, Russia-focused work continues to be relevant in the corporate intelligence and investigation realm.

Following the start of the war, international companies and organisations hired investigative firms for various sanctions advisory projects while urgently scrutinising their existing relationships with Russian entities and individuals. Many of those with operations in Russia ordered investigations into their Russian subsidiaries and business partners in order to determine whether to leave the Russian market altogether.

Moreover, in litigation support, investigative firms are increasingly focused on uncovering potential sanctions exposure or links to the Russian state for parties opposing their clients in court. Such findings would be reputationally damaging and could be used as leverage during legal proceedings.

Other types of investigative work have also emerged following the imposition of asset freezes as part of the international sanction regimes against Russia, with some firms having re-oriented their investigative efforts towards helping Western governments conduct global searches for frozen assets belonging to the Russian state (c. USD300 billion in Russian foreign reserves) or numerous sanctioned Russian entities and individuals.

Other firms are said to have obtained government contracts to investigate Western companies' interactions with their Russian counterparts for possible sanction violations.

The potential circumvention of import sanctions through some neighbouring countries which continue to trade freely with Russia, such as Armenia and Kazakhstan, has also constituted a focus point of recent Russia-related research.

Restrictions on public record research

Despite this, investigative research in Russia has been hit with an increasing number of restrictions and challenges, most of which are directly related to the war in Ukraine.

Somewhat counterintuitively, prior to the war, Russia was a transparent jurisdiction when it came to public record research. The country's corporate records comprised detailed information, including ownership and directorship data, for most Russian companies. Other useful sources included accessible land registry information, civil litigation records, government contracts database, as well as numerous online investigative media outlets independent from the Russian state.

Additionally, due to widespread corruption and a lack of effective personal data protection regulations, personal information of Russian citizens was frequently leaked through online sources, such as anonymous Telegram bots, and used for investigative research.

This data included dates of birth, addresses, phone numbers, car number plates, traffic fines, as well as phone billing records and detailed train / flight data. Such details were famously retrieved and used by investigative media outlets and the jailed Russian opposition leader Alexey Navalny to identify and track the individuals responsible for the latter's state-sponsored poisoning in 2020.

In the recent years, however, the Russian government has introduced laws to restrict publicly available data and clamp down on investigative media, which intensified after the start of the war in Ukraine.

In May 2022, it was reported that Russia was planning to classify ownership and directorship information of over 10,000 Russian companies. These were deemed to be at risk of potential 'secondary sanctions' due to their affiliation or close business relationship with sanctioned entities and individuals.

This is now happening, as ownership information for some companies in the Russian corporate registry is now redacted.

In May 2022, information concerning real estate ownership in Russia, which had been widely used for investigative purposes, was also classified. Another example of a substantial decrease in transparency was President Putin's permission for Russian officials to stop publishing details of their annual income and property ownership. The annual declarations had been useful for source of wealth analysis of current or former Russian 'politically exposed persons' interacting with Western financial institutions.

Many Russian resources also became unavailable without using a Russian VPN, which is, in turn, increasingly difficult to maintain due to potential exposure to cybersecurity risks.

Difficulties obtaining human source commentary

Another aspect of investigative research which has become more difficult since the start of the war is obtaining human source commentary to complement public record findings.

Due to the deteriorated relationship between Russia and the West, it is generally no longer considered safe to travel to Russia, especially for investigative projects. At the same time, following the imposition of sanctions, many Western investigative firms became unable to pay, and consequently work with, Russian subcontractors, who would be able to gather the commentary on their behalf.

Many subcontractors overcame this challenge by re-locating to neighbouring countries. However, in some instances, the quality of the commentary decreased substantially. It appears that the subcontractors, both inside and outside Russia, are finding it increasingly difficult to speak to people willing to provide non-public information or their honest opinion. Even when the commentary is provided, it often lacks criticism and rarely contains information which is not available in the public domain.

Such self-censorship is commonplace in authoritarian post-Soviet states, where paranoia prevents people from sharing information due to the perception of omnipresent surveillance and fear of potential espionage or treason accusations.

Conclusion

Despite the war in Ukraine, or perhaps because of it, investigative work in Russia remains highly sought after. However, in recent times the types of projects have become primarily sanctions-oriented.

While the research possibilities have been restricted by the Russian government, useful resources are still available, including the partially redacted corporate filings, litigation records, previous leaks of personal data, and investigative media reports. Therefore, investigative research is still possible in Russia, although it requires innovative approaches to public record research and increased caution, especially when it comes to human source commentary.

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A TRUSTEE'S RIGHT TO VIEW PRIVILEGED MATERIAL

A LONG-AWAITED DECISION ON THE PRINCIPLES

Authored by: Bill Geiringer (Associate) - Pinsent Masons

In Re Ho Wan Kwok[1], the High Court has recently reviewed the principles relating to disclosure of privileged material to trustees in bankruptcy.

In the well-known cases of Re Shlosberg[2] and Leeds v Lemos[3], the Court of Appeal and High Court scrutinised a bankrupt's right to assert privilege against a trustee in bankruptcy. Those decisions established that a trustee in bankruptcy is unable to deploy a bankrupt's privileged material in a way that would serve to waive the bankrupt's privilege in those documents. In the seven and six years respectively since these decisions, there have been few reported cases on a trustee's ability to view a bankrupt's privileged material, until now.

Although there are some differences with the previous cases, Judge Parfitt's decision in Re Ho Wan Kwok provides welcome guidance to office holders where the question of using privileged material arises in a personal bankruptcy context, as well as to clients instructing solicitors on a joint retainer.

Background

In February 2022 Mr Kwok (who has recently made headlines following his arrest in the US on fraud and conspiracy charges[4]) petitioned for his own bankruptcy pursuant to chapter 11 of the US Bankruptcy Code. Mr Despins was appointed as his trustee (the "Trustee"). Separate legal proceedings had been commenced by Mr Kwok and two BVI companies against UBS in the English High Court seeking damages of c.$500 million in relation to failed investments. The Trustee had applied to the High Court for several orders, one of which was for disclosure of the litigation file in the UBS proceedings, including privileged material, held by solicitors acting jointly for Mr Kwok and the two BVI companies[5].

1 Re Ho Wan Kwok [2023] EWHC 74 (Ch)

2 Avonwick Holdings Limited v Shlosberg [2016] EWCA Civ 1138

3 Leeds v Lemos [2017] EWHC 1825 (Ch)

4 https://www.theguardian.com/world/2023/mar/15/ho-wan-kwok-arrest-fraud-conspiracy-steve-bannon

5 The other order sought recognition of the US bankruptcy proceedings as foreign main proceedings under the Cross Border Insolvency Regulations 2006.

The disclosure question

The Trustee sought disclosure of the litigation file on the basis that (i) Mr Kwok's interest in the UBS proceedings vested in the Trustee as part of the bankruptcy proceedings and (ii) access to the privileged material was necessary to consider the nature and merits of the UBS claim before determining whether it was in the Trustee's interests to pursue it. The basis on which the relief was sought was under Articles 21(1)(d) and (g) of the UNCITRAL Model Law and sections 311, 312 and 366 of the Insolvency Act 1986.

The Trustee's request for disclosure was opposed by the BVI companies. The objection was based on the argument that the litigation file was subject to privilege belonging to Mr Kwok and the two BVI companies, which they were entitled to assert against the Trustee.

The Court's decision

Articles 21(1)(d) and (g) of the UNCITRAL Model Law provide that the court may grant relief to a foreign representative in foreign main proceedings, including relief that may be available to a British insolvency office holder. Judge Parfitt found that relief under the UNCITRAL Model Law may extend to orders made by the court that enforce the Trustee's investigatory powers under sections 311, 312 and 366 of the Insolvency Act. As a result, powers which would be available to a trustee in bankruptcy under the Insolvency Act were available to the Trustee in the US chapter 11 bankruptcy proceedings.

Judge Parfitt confirmed that the joint engagement between Mr Kwok and the BVI companies meant that each party had a joint interest in any privileged material. The BVI companies argued that they should be entitled to assert that privilege against the Trustee to prevent disclosure. However, the court found that the BVI companies' right to assert privilege was shared with Mr Kwok as joint clients. The court considered therefore that the BVI companies could not assert the privilege against Mr Kwok to prevent him having possession or control of the privileged material.

As a result, the privileged material was deemed to be within Mr Kwok's control or possession and therefore within the scope of sections 311 and 366 of the Insolvency Act, meaning the Trustee could take possession and review the material.

The court was satisfied that the UBS litigation represented a substantial asset for the benefit of Mr Kwok' creditors. The Trustee could not be expected to participate in the UBS litigation without full knowledge of the facts and merits, otherwise the estate could have been exposed to a significant adverse costs order.

However, although the Trustee was entitled to inspect the privileged material for the purpose of assessing the nature and merits of the UBS proceedings, the Trustee did not obtain the privilege. He could not use the privileged material in a way that would waive the privilege held by Mr Kwok and the BVI companies.

Lessons

The decisions in Re Shlosberg and Leeds v Lemos made clear that merely because privilege is held by a bankrupt, the trustee does not "automatically step into his shoes" for privilege purposes. Section 311 gives a trustee in bankruptcy the power to see and consider documents in the bankrupt's possession or control over which the bankrupt or a third party would usually be entitled to assert privilege. However, the trustee himself does not obtain that privilege or the right to use the material in such a way that privilege would be waived, even if this would benefit the bankrupt's estate.

In Re Ho Wan Kwok, Judge Parfitt has affirmed that privilege is not a bar to the disclosure of a bankrupt's privileged material to a trustee in bankruptcy. The judgment has also emphasised, however, that although a trustee in bankruptcy has a right to review the privileged material, he cannot use that material in a way that would waive the privilege. A trustee would have to return to court for approval before doing so.

Any office holder should therefore ensure suitable safeguards are in place to make sure the privilege in the material being disclosed is not lost.

The decision also has implications for those instructing solicitors on a joint retainer. Instructing solicitors on a joint retainer where several clients' interests are aligned is commonplace in litigation. However, such clients should be aware that the bankruptcy of one client could have consequences for disclosure of privileged material.

It is well established that where a law firm represents several clients on a joint retainer, each client has a joint interest in privileged material. This judgment clarifies that a client cannot then assert that privilege against a co-client to prevent disclosure to a trustee in bankruptcy of that co-client. Anyone instructing representatives on a joint retainer must be aware that privilege may not provide protection if one of the joint clients becomes bankrupt and the trustee is collating books and records.

It is hoped that the decision in Re Ho Wan Kwok will open the door to more judicial consideration of a trustee's ability to view a bankrupt's privileged material, in particular the circumstances in which that material may be used and what safeguards are required.

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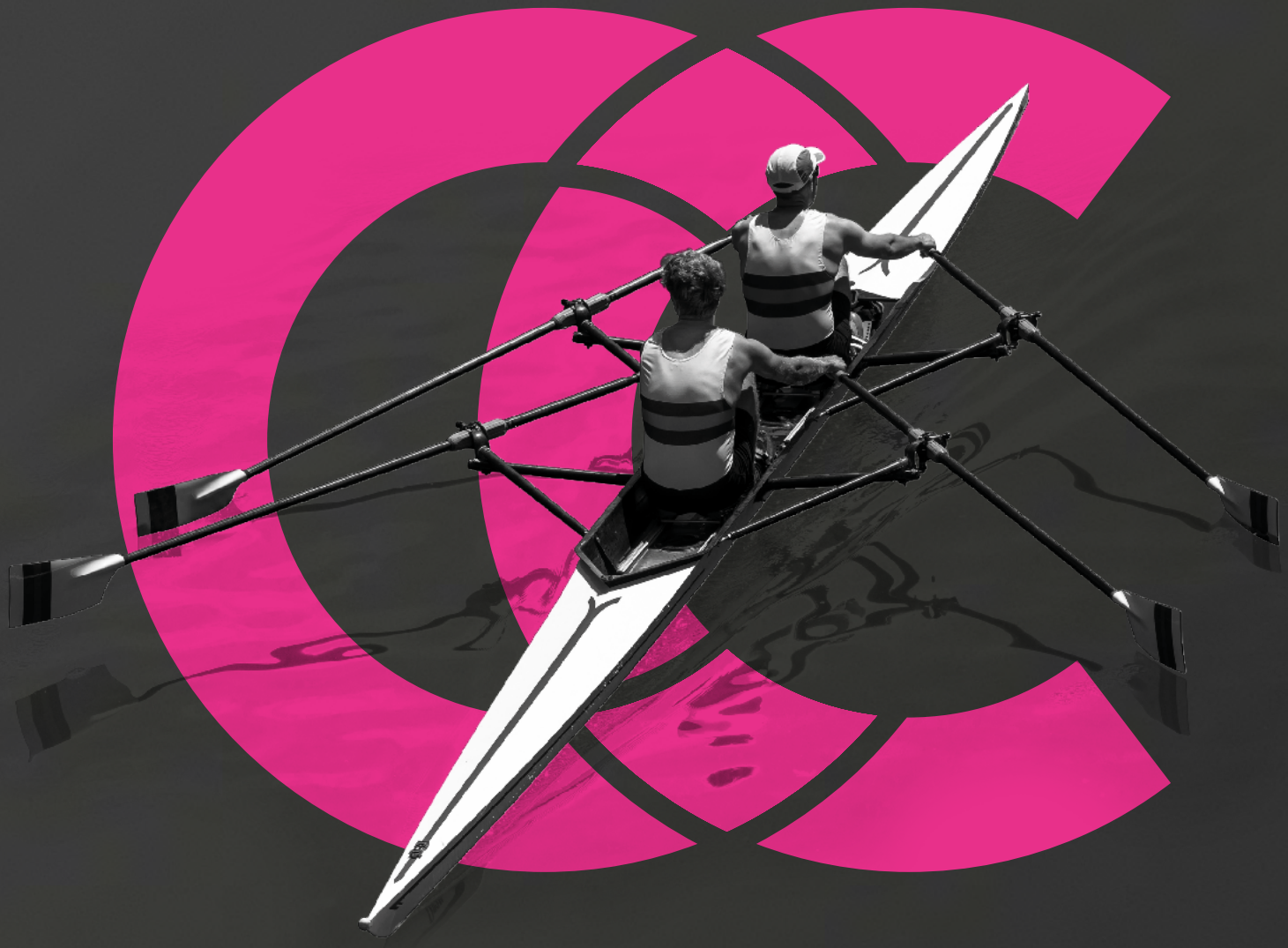

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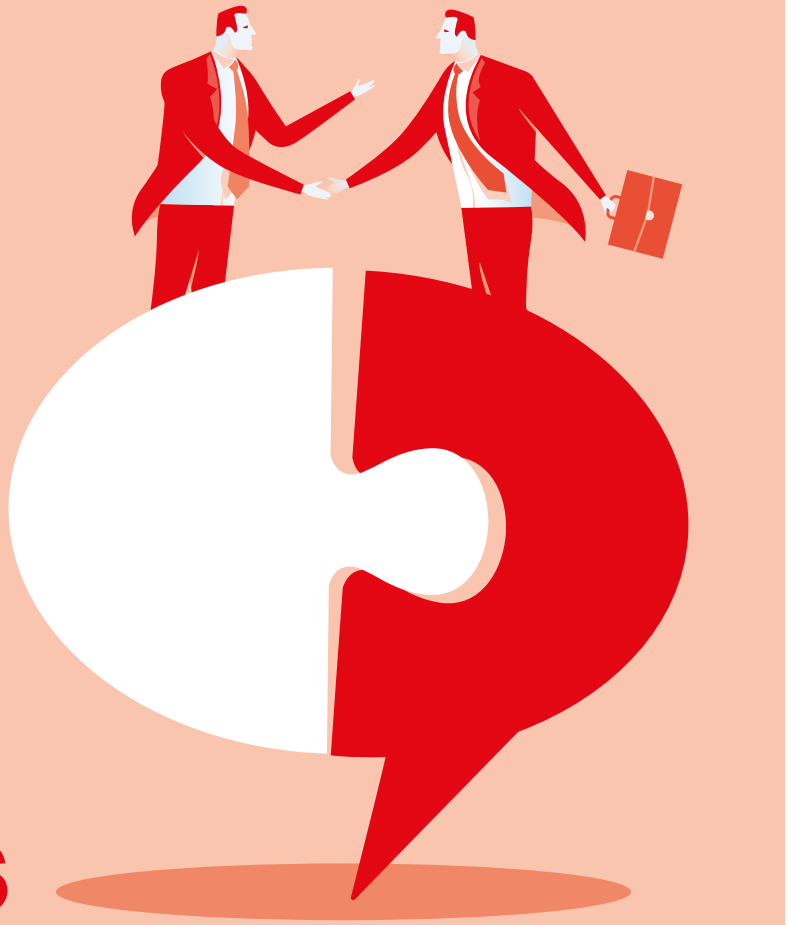
DUOMATIC PRINCIPLE:

THE LIMITS OF DIRECTORS TO BIND COMPANIES



Authored by: David Harby (Partner) and Anneka Williams (Paralegal) - Collas Crill BVI

It has long been the position in the BVI[1] that directors of a company can rely on the Duomatic principle which recognises that a company's shareholders can informally give approval through unanimous consent which legally binds the company without the need of any formal shareholder resolution.

This principle was confirmed in Ciban Management Corporation v Citco (BVI) Ltd ("Ciban")[2]. In that case, the ultimate beneficial owner of the company, Mr B, authorised Mr Costa to give instructions to the company's Registered Agent, Citco[3] and director, TCCL[4]. Over the years, with Mr B's consent, several powers of attorneys ("POA") had been executed by TCCL on Mr Costa's instructions. When Mr B and Mr Costa's relationship deteriorated, Mr Costa instructed TCCL to execute a fifth POA for a contract for the sale of the company's asset.

Having previously relied on Mr Costa's instructions to issue POAs, TCCL and Citco approved the fifth POA and thereby allowed the sale of the asset. Mr B became aware of the transaction and sued TCCL and Citco alleging breach of their fiduciary duties in granting the POA claiming that the transaction was not formally approved by him as the ultimate beneficial owner and shareholder of the company[5].

The BVI Commercial Court held that the Duomatic principle applied. As such, the company was bound by the informal consent of Mr B as the ultimate beneficial owner to the representation that Mr Costa had authority to instruct TCCL and Citco to issue the fifth POA. The court further found that Mr B, having set up a mode of operation on which TCCL and Citco relied, Mr Costa had authority to instruct them to issue previous POAs, Mr B was estopped from denying that he consented to giving Mr Costa authority.

From that decision, the following key principles can be levied for the purposes of BVI law:

i. the Duomatic principle applies to apparent authority;

ii. consent may be by way of conduct; and

iii. consent of both the ultimate beneficial owner and registered shareholder can bind the company.

The case of Ciban illustrates that the Duomatic principle, therefore, provides some comfort to directors who honestly act on any apparent authority given by shareholders to their agents, provided that there is a mode of operation or conduct which the directors have become accustomed to relying on.

1 In Re Duomatic Ltd [1969] 2 Ch 365

2 [2020] UKPC 21.

3 Citco (BVI) Limited

4 Tortola Corporation Company Ltd

5 This was required for disposal of over 50% of the Company's assets Mr. B also claimed a breach of section 80 of the International Business Companies Act (now section 175 of the Business Companies Act,2004)

The Limits of the Duomatic Principle

However, the limits of such protection are evident from the recent decision of Green Elite[6] where a director was unable to rely on a shareholder's informal agreement. The court clarified that the principle, although characterised by its informality, must be underpinned by a degree of certainty. Namely, it must be possible to identify that an agreement was intended to have legal effect and that such was on terms which were certain. Most importantly, the shareholders must have been aware that their consent to such conduct was being sought.

In Green Elite, the issue was whether the directors of a company had lawfully paid the proceeds of the sale of the company's sole asset to three employees (the "Three Employees").

The director sought to justify the payments by reference to the Duomatic principle, alleging that there had been an informal "understanding" between the shareholders in 2008 that the funds would be used to pay employees at some point in the future for their service in respect of an initial public offering.

Incorporated in 2010 as a joint venture ("JV") equally between Mr Fang and Delco, Green Elite's sole purpose was effecting an employee share benefit for the listing of JV's business. After the sale of Green Elite's asset, the proceeds were paid into a bank account of Mr Fang who caused the funds to be paid in three instalments to the Three Employees. Delco was not told of this disposition nor was there any directors' meeting held or any formal shareholder resolution passed to approve the payment.

In upholding the first instance decision, the Court of Appeal found that there was no Duomatic assent as the shareholders were not aware and could not have been aware that their consent was being sought for the sale of the shares and thus could not have applied their minds to the issue of assent as the discussions surrounding the sale took place in 2008 before the incorporation of Green Elite in 2010.

On this basis, the court found that the directors could not rely on the informal discussions of the shareholders as there could not have been any certainty as to the terms relating to the sale to legally bind the company given that such understanding between Mr Fang and the shareholders took place before the incorporation of Green Elite. Thus, the shareholders could not have expected that at the time of discussions, and in fact before the incorporation of Green Elite, that they were intending for the discussions to create legal relations.

Another decision that further limits the Duomatic principle is Arrowcrest[7] (also decided in 2023). In that case, Mr Taruta owned 100% of the shares in Arrowcrest, which in turn owned 100% of the shares in Enard. VTB Bank applied to the BVI Court for recognition of a Russian judgment which VTB Bank had obtained against Mr Taruta and to enforce that judgment by way of a receivership order over the shares in Enard.

It was found that as the sole shareholder of Arrowcrest, Mr Taruta exercised Duomatic control over Arrowcrest to direct how the shares in Enard could be voted upon and, therefore, the appointment of the receivers was an appointment over the power held by Mr Taruta under the Duomatic principle.

On appeal, the Court found that while a shareholder of a company may have power to direct the way the shares in that company are voted on, the Duomatic principle does not give the shareholder the power or control to deal with or dispose of the company's assets[8]. Accordingly, the court found that the Duomatic principle was irrelevant, thus the first instant judge had no jurisdiction to make the receivership order.

Key takeaways

The case of Ciban illustrates that while directors can rely on informal shareholder assent to bind the company, Green Elite confirms that directors may be limited in relying on informal discussions with shareholders if there were no certain terms which could lead to an intention to legally bind the company. Further, Arrowcrest illustrates that shareholders cannot give themselves freestanding power or control over a company's assets by relying on the Duomatic principle.

Therefore, it is important that directors of BVI companies ensure that (i) shareholders have full knowledge of all matters that may bind the company; (ii) an actual assent can be objectively ascertained; and (iii) where assent has been given by way of agreement, the agreement is unqualified and does not lack any critical detail.

6 BVIHCMAP2022/0013 (1) Fang Ankong and (2) HWH Holdings Limited v Green Elite Limited (in Liquidation)

7 Arrowcrest Ltd v JSC VTB Bank BVIHCMAP 2021/0043

8 for any purpose other than the furtherance of the objective of the company

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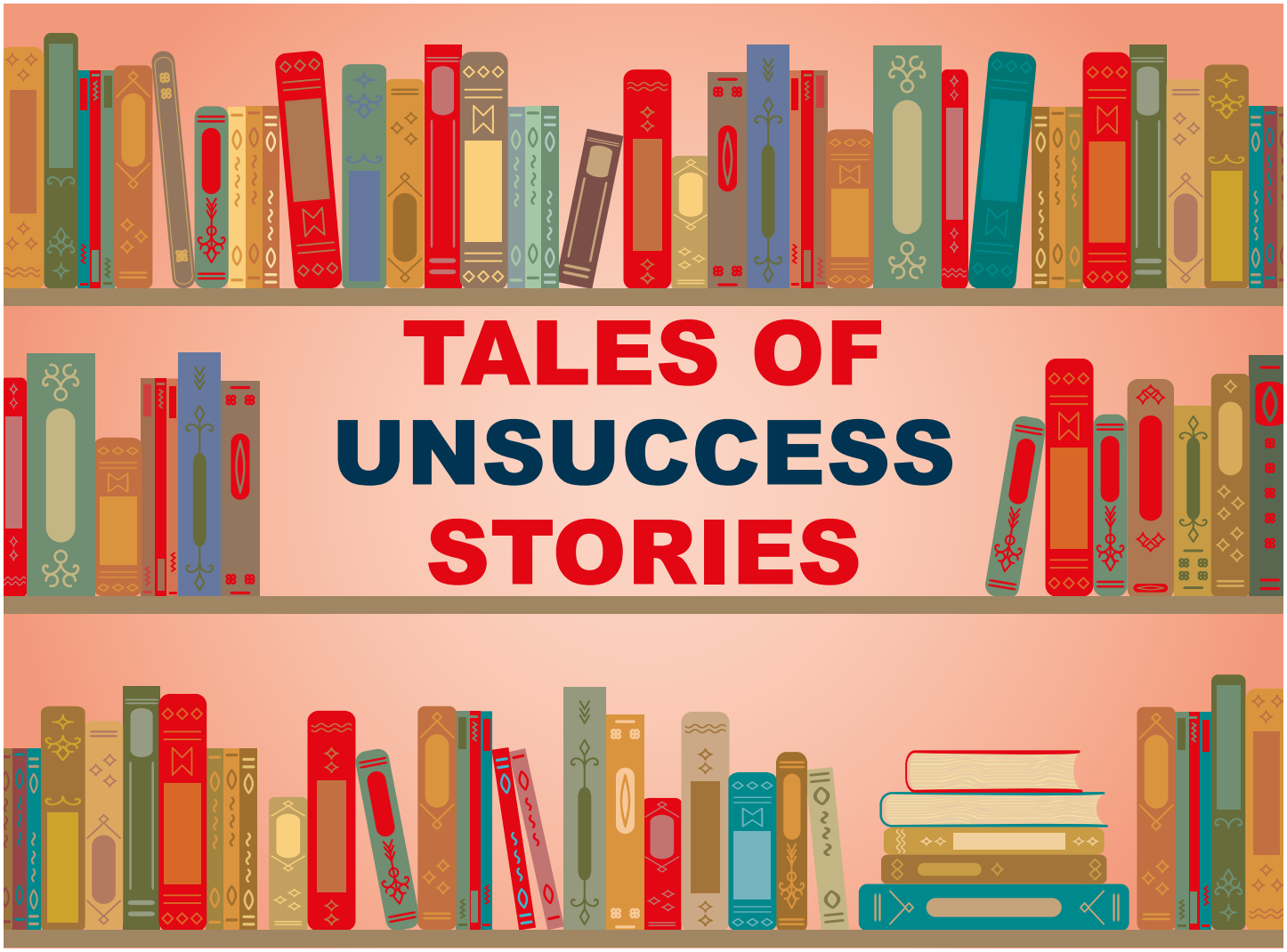

TALES OF UNSUCCESS STORIES

Authored by: Yannick Poivey (Partner) - Swiss Forensic & Compliance Sàrl

You have probably read many success stories in the area of asset tracing investigations, whether perfectly true or slightly altered to look nicer. Of course, a number of these operations are actually successful, and allow the creditors to identify and attach substantial assets. But creditors should be aware that whatever the financial and other efforts engaged into well-executed asset tracing investigations, success in recovery is far from guaranteed due to multiple factors. Let us consider a number of "unsuccess stories" that illustrate the point.

First, some current debtors used to be prosperous business people, and may be wrongly still considered as such.

A creditor might believe that the debtor's failure to repay debts is explained by dishonesty and bad faith, and will be convinced that the debtor in question

hides some wealth somewhere. However, evidence gathered during the investigation may uncover a much less favourable situation. This is illustrated by the case of this debtor from Central Asia, who used to hold stakes in large mining operations and travel aboard his own private jet. All evidence of substantial wealth found during the investigation pointed towards a successful period about a decade ago, while the recent years had been characterized by financial losses and sales of assets. These findings obviously came as a disappointment to the client, whose hopes were strong at the beginning of the research. In addition, such cases always leave an impression of unfinished business, as it is impossible to bring absolute proof that the debtor's substantial assets have all been dissipated: the hypothesis that some assets have been discreetly concealed from view, somewhere in a friendly jurisdiction, can never be ruled out. In a minority of cases, evidence of the debtor's shrinking wealth may in fact be indicative of a sophisticated scheme to evade creditors.

Second, the investigation may be successful in identifying relevant and substantial assets. However, significant difficulties may emerge in the course of the recovery process.

An illustration is the case of this senior executive who had embezzled several millions from his employer. Research showed that a substantial part of this amount had been invested in real estate properties in the UAE. However, these properties were registered in the name of a relative. As a result of various legal hurdles, as well as the fact that it was quite impossible to demonstrate that the debtor was the actual beneficial owner of the properties, the client abandoned all proceedings in the UAE and recovered only small amounts in a EU jurisdiction. Creditors' frustration may also arise from the use of the identified assets, which may prevent recovery. For instance, research in France had identified a luxury apartment that was owned by an African State, subject of the investigation. Although there was evidence that the apartment was used for private purposes by individuals close to the ruling family, the African State successfully contended that the apartment was dedicated to consular activities. As a result, the client did not manage to attach this property.

Third, a gap may appear between the clients' initial beliefs, and the situation depicted by the research.

This will of course generate some disappointment amongst the creditors, in spite of - or due to - the thoroughness of the investigation. For instance, a creditor was initially convinced that the debtor company owned assets in Singapore, in the form of affiliates,

participations, or storage assets. Research showed with certainty that this was not the case. Along the same lines, a client had instructed us to identify the villa in Spain of an individual debtor. The investigation brought proof that the debtor did not own any property in the whole of Spain; however, a villa was identified that was rented by the individual every Summer.

Fourth, asset tracing investigations may result in very solid assumptions about the ownership of some assets, while the absolute evidence will be missing, thus compromising the asset recovery action.

Let us consider the example of this villa in the South of France, which was occupied by a Russian individual owing a few millions to our client. The villa was owned through a French special purpose real estate company, which was itself controlled by a holding company in a Southern EU country. Research in that jurisdiction showed that some of the corporate filings were missing at the corporate registry, and that the UBO declaration had never been filed. There was evidence that the individual debtor had been a Director of the holding company in the past, but proving that he was its current beneficial owner was impossible. In another case, a local news article reported that the subject of our research had co-invested in a company in St-Moritz (Switzerland) that owned a restaurant. However, research in corporate filings did not identify any trace of this investor, which was not surprising since limited companies are under no obligation to declare their shareholders.

Finally, research might unveil strong evidence that the subject debtors have gone broke.

While this is in principle a source of disappointment to the creditors, this conclusion may help make the decision to close a case, and avoid further costs in terms of legal fees as well as case management. For instance, an individual debtor in France owed various small amounts to both the tax authorities, and the real estate company that managed the building in which he owned an apartment. If this debtor had hidden substantial wealth from his creditor through a sophisticated arrangement, why would he have incurred small additional debts that

would reduce his creditworthiness and damage his reputation? Along the same lines, a Swiss company indebted to our client had several liens recorded against itself. As counterparties in Switzerland regularly check these liens before committing to a business relationship, it was obvious that the debts displayed by the subject company were indicative of true financial difficulties.

As shown by the few examples above, an asset tracing investigation is no miracle weapon but rather a tool that will unveil the reality of the debtor's asset and wealth position. This reality might be as diverse as anything else in life, and be favourable, or not, to the creditor. In addition, the gap may never close between the successful identification of substantial assets, and the actual recovery.

A true success story requires an alignment of factors that combine into seamless recovery proceedings. An asset tracing investigation is only one of these factors, whatever its quality of execution.

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RECOVERY OF DEFAULT INTEREST ON A FOREIGN JUDGMENT

Authored by: Nick Ractliff (Partner) and Cath Eason (Senior Associate) - PCB Byrne

In this article Nick Ractliff and Cath Eason of PCB Byrne LLP consider the recovery of default interest on a foreign judgment in a common law debt enforcement claim in the English Court and the scope of section 5 of the Protection of Trading Interests Act 1980.

In a recent decision on summary judgment in the case of Hangzhou Jiudang Asset Management Co Ltd & Anr v Kei Kin Hung,[1] Christopher Hancock KC (sitting as a Judge of the High Court) considered and clarified the scope of section 5 of the Protection of Trading Interests Act 1980 ("PTIA"). This applies a restriction on the enforcement of foreign judgments where it is a judgment for multiple damages, meaning "a judgment for an amount arrived at by doubling, trebling or otherwise by the person in whose favour the judgment is given.".

Background

PCB Byrne acts for the claimants in the case. They had entered into loan agreements which were guaranteed by the defendant, Mr Kei who is the founder of the Sparkle Roll Group of companies, a leading distribution agency for luxury brands such as Rolls Royce and Bentley in the People's Republic of China ("PRC"). The loans were not repaid. Both claimants obtained judgments in their favour for the principal amounts, contractual interest, and legal fees in the Courts of the PRC against Mr Kei as the guarantor (the judgments together referred to as the "PRC Judgments").

The PRC Judgments included default interest, providing that in the event of non-payment of the sums due "the interest on the debt during the delayed period shall be doubled in accordance with the provisions of Article 253 of the Civil Procedure Law of the People's Republic of China" ("Default Interest Provision").

The rate of default interest to be applied according to Article 253 of the Civil Procedure Law of the PRC is 0.0175% per day, the equivalent of an annual rate of 6.39%.

Despite attempts to enforce in the PRC, the PRC Judgments remain outstanding in full. Having identified the existence of assets of significant value in the jurisdiction, the claimants therefore commenced proceedings for the recognition and enforcement of the PCR Judgments as a common law debt claim in England.[2]

The claimants successfully obtained a freezing order against the assets identified in the jurisdiction and subsequently applied for summary judgment.

1 [2022] EWHC 3265 (Comm).

2 There is no reciprocal enforcement treaty between the UK and the PRC

Application for Summary Judgment and the arguments on multiple damages

The summary judgment application was heard on 5 December 2022. Mr Kei's main defence was that the PRC Judgments (or certain portions of them) should not be recognised or enforced in England because the Default Interest Provision constitutes either a penalty and/or multiple damages under section 5 of the PTIA. Mr Kei contended that this applies not only to judgments which double or treble a sum assessed as compensation, but which "otherwise multiply" a sum assessed as compensation. His submission was that the Default Interest Provision is not compensatory but penal, accrues in addition to the contractual rate of interest, and accordingly falls within the prohibition of s5 of the PTIA.

The Claimants' argued that a proper and reasonable construction of section 5 of the PTIA does not prevent the enforcement of a judgment in debt or for breach of a loan agreement, to which a right to additional interest imposed by the local court accrues in the event of non-payment within a specified time limit.

On the claimants' case, looking at the context and purpose of the PTIA, it is clear that it was enacted to "counteract what was perceived by the United Kingdom to be an excessive exercise of jurisdiction by United States courts in anti-trust actions."[3] The PRC Judgments were for principal sums due in debt under a loan (or as contractual damages) which were not multiplied as awarded. If section 5 were to apply in this instance, it would mean that any judgment of a foreign court which provides for interest (irrespective of the amount) to be added in default of payment within the required period, would be unenforceable in England. Indeed, arguably it would apply to any foreign judgment which incorporates liability for further interest.

That is an extraordinary and absurd result, and it cannot be what Parliament intended, particularly given the proper historical context of the PTIA.

The claimants also argued that the reference to "doubled" in the PRC Judgments was, in any event, a translation issue and a misnomer, and that it was doubtful as a matter of English that the word "multiple" was also accurate. "To a greater extent" may be more appropriate, however irrespective of the correct translation, this was an issue of substance over form. Clearly, the interest being applied is further interest in default of payment over time. In addition, the rate of interest being applied was not manifestly excessive or punitive in effect.

The decision

Christopher Hancock KC accepted that the background to the PTIA was the antipathy of the UK to perceived excesses of jurisdiction on the part of the US in relation to anti-trust matters, and the award of triple damages by US Courts in sum case. However, he accepted that the PTIA is not limited to antitrust cases, and extends to all cases in which compensatory amounts are multiplied by a foreign court.

In this case, however, the relevant provisions of the PRC Judgments sought to be enforced are not multiples of compensation awarded within the meaning of s 5 of the PTIA. At paragraph 46(iv) of his judgment, Christopher Hancock KC provided that:

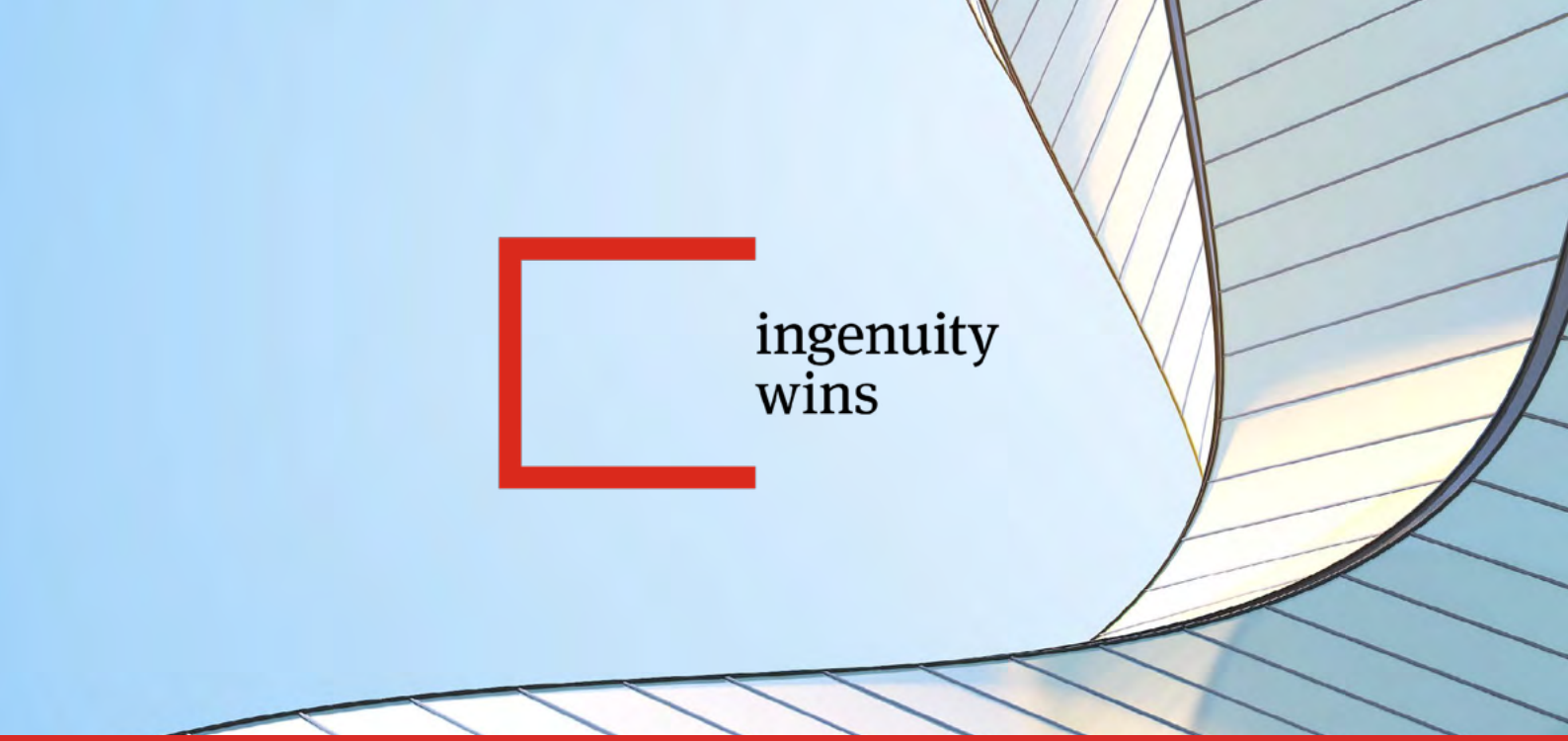
> "I do not regard this as properly described as a multiplier of the compensation awarded at all. It is a sum awarded by virtue of an entirely separate breach, due to a decision of the court and the Chinese legislature to impose a requirement designed to incentivise compliance with Court orders. The fact that the amount of the interest payment is calculated as a percentage of the principal amount awarded does not, in my judgment, make it a multiplier of the compensation within the meaning of Section 5 of the PTIA. Indeed, if it did, then it is difficult to see why any judgment carrying interest would not fall foul of the PTIA, which I regard as a wholly unreasonable result."

When considering the defendant's argument that the Default Interest Provision is unenforceable as a penalty, Christopher Hancock KC found that although it may offend English public policy where a rate of interest applied is penal (and therefore render that interest as not enforceable), if that provision pursues a legitimate policy of deterrence, then it may be justified. In this instance the Default Interest Provision pursued a legitimate policy aim, i.e. deterrence of non-payment and the English court would not interfere negatively with such an aim.

Conclusion

Essentially the decision confirms that any claim for default interest calculated as a percentage of the principal amount of the debt included in a foreign judgment does not necessarily make it a multiplier of the compensation and prevent it from enforcement by section 5 of the PTIA provided the rate of interest is not excessive or punitive in effect.

3 Dicey at 14-220. A similar statement appears in Briggs: Civil Jurisdiction and Judgments (7th Ed) at 34.38



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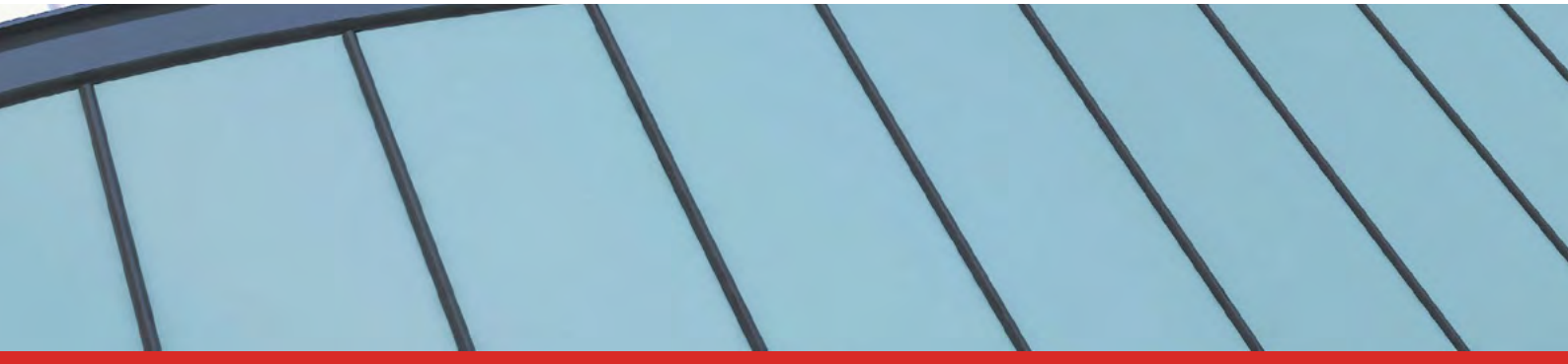

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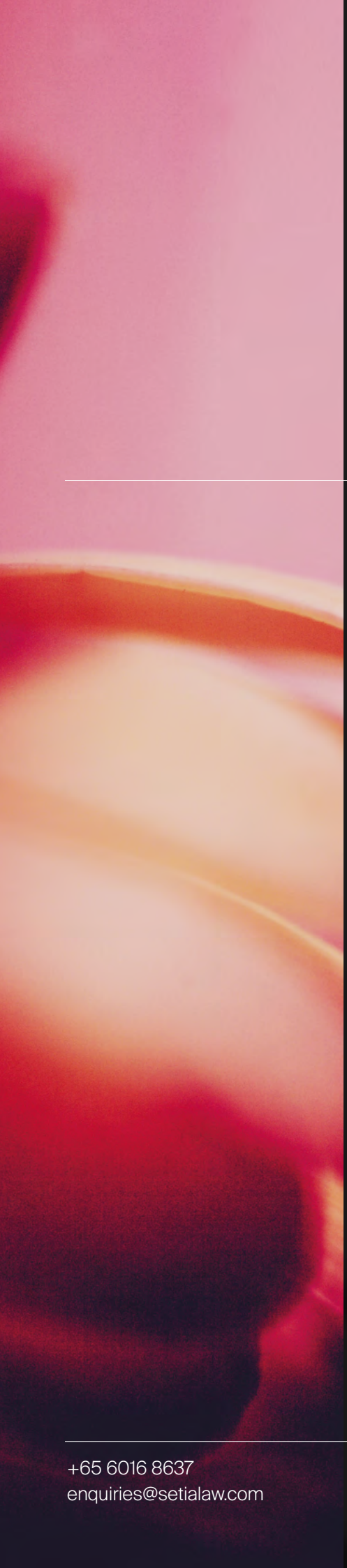

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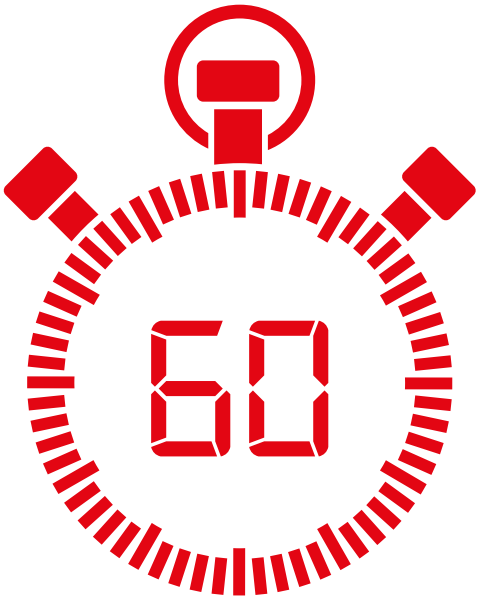

Q **Imagine you no longer have to work. How would you spend your weekdays?**

A Sipping a pina colada in the sun on a tropical beach, making the most of being able to spend quality time with my family.

Q **What do you see as the most important thing about your job?**

A Team work! I am lucky enough to be part of an amazing team of talented people. The job is often stressful, so its vital to be working in an environment where everyone feels supported and valued.

Q **What motivates you most about your work?**

A My work often involves the recovery assets for the victims of fraud, so ensuring as much as possible is taken back from the perpetrators is very motivating to me. Why should they enjoy the benefits of their wrongdoing?

Q **What is one work related goal you would like to achieve in the next five years?**

A Concluding a very complicated, multi-jurisdiction bankruptcy with a very significant return to creditors.

Q **What has been the best piece of advice you have been given in your career?**

A Inertia is the death of asset recovery. It is often better to make decisions quickly and follow your instincts than delay until the complete picture is known.

Q **What is the most significant trend in your practice today?**

A The international aspects of cases. It is very rare to have a matter which only focuses on one jurisdiction. In particular, we have seen a large number of matters which have a UAE/India nexus.

Q **Who has been your biggest role model in the industry?**

A I've been lucky enough to work with lots of role models, so it's not possible to narrow it down to just one!

Q **What is one important skill that you think everyone should have?**

A To quote the old sporting adage; hard work beats talent when talent doesn't work. I believe the right attitude is vitally important and with that, anything is possible!

Q **What cause are you passionate about?**

A Social mobility is very important to me. The more barriers that can be removed to enter the profession, the better it will be for everyone.

Q **Where has been your favourite holiday destination and why?**

A I have been fortunate enough to safari in Kenya and I found the whole experience mind blowing. I'd highly recommend it to anyone that is considering it for their next break.

Q **Dead or alive, which famous person would you most like to have dinner with, and why?**

A I think it would have to be Mandela, the very embodiment of magnanimity and reconciliation. It would be incredible to hear his life lessons in person over a glass or two of wine!

Q **What aspect of FIRE International are you most looking forward to as an attendee/speaker?**

A This is an easy one! Catching up with contacts and friends in the sunshine, with a cold drink in hand!

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RE SOVA CAPITAL – COURT APPROVES AN UNSECURED CREDIT BID FOR THE FIRST TIME

Authored by: Charlotte Cooke (Barrister) - South Square

In Re Sova Capital Limited (in special administration) [2023] EWHC 452 (Ch) the High Court approved the sale of a portfolio of securities held by a company in administration to an unsecured creditor in exchange for the waiver of the creditor's claim. In his judgment Miles J emphasised that the case raised "novel issues" which had not previously been decided by the courts (at [193]). Although he did not in his judgment use the term, this was the first time the Court has approved an unsecured "credit bid" for the assets of a company in administration.

Sova Capital Limited ("Sova") went into special administration under the Investment Bank Special Administration Regulations 2011 on 3 March 2022. Around 87% of its assets comprised Russian securities which, as a result of various sanctions regimes, would be difficult to realise.

Of the offers that were received, Sova's special administrators (the "Special Administrators") considered an offer for the bulk of the Russian securities by one of Sova's largest unsecured creditors ("Dominanta") to be the most advantageous. Notably, in consideration for those securities, Dominanta would waive its £233 million claim in Sova's special administration (the "Transaction").

By their application to the court, the Special Administrators sought the Court's approval of the Transaction. Another of Sova's unsecured creditors ("BZ"), who had also made a bid for the assets, opposed the Special Administrators' application for approval.

BZ's position was, in short, that the Transaction amounted to a distribution in specie to Dominanta and, as such, would be contrary to the pari passu principle. The pari passu principle is, of course, a fundamental principle of insolvency law and requires the equal distribution among unsecured creditors of available assets. On BZ's behalf it was submitted that, as a consequence of the Transaction, Dominanta would end up with Russian securities which could be worth more to it than the predicted dividends payable to Sova's other unsecured creditors and therefore that the pari passu principle was infringed.

In order for the pari passu principle to be engaged, however, the Transaction would need to be a distribution. The pari passu principle does not apply in the context of a sale.

Crucially Miles J took the view that it did not amount to a distribution, but was properly characterised as a sale.

Characterisation of the Transaction required a focus on substance over form. Moreover, insofar as assessing substance is concerned, it is legal rather than economic substance that matters.

Looking at the terms of the Transaction, the Court concluded that it was a sale of certain assets in return for the waiver of Dominanta's claim in Sova's administration. In this regard Miles J noted, in particular, the fact that the value put on Dominanta's offer for the purpose of the Transaction was not its full value, but rather the value of the dividend which it would have received in the event the Transaction did not go ahead.

In contrast, to characterise the Transaction as BZ had done – focusing on the possibility that Dominanta would end up with Russian securities which could be worth more to it than the predicted dividends payable to Sova's other unsecured creditors – was to place too much emphasis on the economic outcome of the Transaction. It was the legal steps by which that economic outcome would be brought about that mattered for the purpose of characterisation. Looking at those steps, the Transaction was properly characterised as a sale, not a distribution and, as such, did not contravene the pari passu principle.

The Transaction, characterised as a sale of assets in consideration for the waiver of Dominanta's claim in the special administration, the Transaction can therefore be seen as an unsecured "credit bid". Whilst the concept of a credit bid is familiar in the context of bids for assets by secured creditors (i.e. where a secured creditor bids the value of its secured debt in order to acquire the asset in respect of which it holds security), in the context of unsecured creditors this was unprecedented.

The opportunity for use of this novel mechanism arose in this case because of the difficulties faced by the Special Administrators in realising the Russian securities because of the impact of sanctions (which the court ultimately concluded the Transaction would not breach). The Transaction provided a way for the Special Administrators to unlock the value of the Russian securities.

The concept of an unsecured bid may, however, be utilised in other cases in the future (provided of course that it represents the best price for the assets reasonably obtainable). Should other opportunities for the use of the unsecured credit bid mechanism arise, this case provides helpful guidance as to the appropriate methodology for valuing such a bid.

Crucially, the valuation is to be based on the dividend that the buyer would have received in the administration in the event that the proposed transaction does not take place. The value of the bid is not the full value of the buyer's claim.

[Mark Phillips KC, William Willson and Riz Mokal acted for the Special Administrators. Stephen Robins KC and Charlotte Cooke acted for BZ, the opposing creditor]

This article first appeared in the April 2023 edition of the South Square Digest.

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CONSUMER PROTECTION THROUGH THE REGULATION OF THE PROMOTION OF CRYPTOASSETS

Authored by: Elizabeth Meade (Senior Associate) and Anna-Rose Davies (Associate) - Cooke, Young & Keidan LLP

In the UK, plans have been in motion to bring cryptoassets within existing financial services frameworks since at least 2020. In the interim however, high public interest - coupled with a lack of regulation on promotions - has left room in the market for scammers, Ponzi and pump-and-dump schemes, and other market manipulators to target potential investors. Even putting aside blatantly fraudulent activity in the market, there are concerns that consumers may suffer substantial losses after being attracted by volatile prices, but without being aware of the associated risks. Within the last year, the industry has also experienced a series of high profile collapses, and those which have been accompanied by serious allegations of fraud and mismanagement of consumer funds have brought a certain urgency to the task of regulating the crypto industry.

Against this background, the UK Government announced its intention to legislate to bring promotions of certain cryptoassets within the FCA's remit,[1] and just over a year later on 1 February 2023, HM Treasury published a policy statement on the intended approach to the financial promotions regulation.[2] On 27 March 2023, HM Treasury published a draft of The Financial Services and Markets Act 2000 ("FSMA") (Financial Promotion) (Amendment) Order 2023, along with a draft explanatory memorandum.

This new regime is aimed at improving consumer understanding of the risks associated with investing in cryptoassets, and ensuring that cryptoasset promotions are subject to the same standards as for broader financial services.[3]

It is the first measure expected to come into force, which will eventually be accompanied by a wider regulatory regime for cryptoassets generally. The focus on consumer promotions is unsurprising, given that the FCA has repeatedly warned that consumers

1 HM Treasury, "Cryptoasset promotions Consultation", January 2022. "See: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/902891/Cryptoasset_promotions_consultation.pdf

2 HM Treasury, "Consultation Outcome: Government approach to cryptoasset financial promotions regulation policy statement", updated 27 March 2023. See: https://www.gov.uk/government/consultations/cryptoasset-promotions/government-approach-to-cryptoasset-financial-promotions-regulation-policy-statement

3 https://www.legislation.gov.uk/ukdsi/2023/9780348246490/pdfs/ukdsiem_9780348246490_en.pdf

should be prepared to lose all their money if they invest, with cryptoassets currently being excluded from protection or compensation under the Financial Services Compensation Scheme.[4]

It is an area that has also received significant attention in the US, with the Securities and Exchange Commission having recently imposed hefty fines on celebrities including Lindsay Lohan, Akon and Kim Kardashian for the promotion of cryptoassets without disclosing that they were paid to do so.

The new promotions regime

The new regime will come into being by way of an expansion to the scope of the financial promotions restriction in section 21 of FSMA by amending the FSMA (Financial Promotion) Order 2005. Section 21 provides that a person, in the course of business, must not communicate an invitation or inducement to engage in investment activity. In practice, the scope of what constitutes a promotion can be wide, including traditional advertisements in person, advertisements online, e-mails, and social media marketing.

It will only apply to "qualifying cryptoassets". As some cryptoassets are already regulated by the FCA (e.g. controlled investments such as those classified as security tokens), the purpose of the regime is to bring those which currently sit outside the FCA's regulatory remit into the scope of the financial promotions regime. This includes tokens such as BTC and ETH. Notably, NFTs are excluded, with a cryptoasset needing to be both fungible and transferable in order to pass the first hurdle of being considered as "qualifying".

Who will the new regime apply to?

The new regime will apply to firms making promotions to cryptoassets to UK consumers regardless of whether the firm is based overseas or what technology is used to make the promotion, as it will cover promotions that originate outside the UK, but are "capable of having an effect in the UK".[5]

Subject to UK Parliamentary approval, there will be four routes to promote cryptoassets to UK consumers:

1. The promotion is communicated by an FCA authorised person.
2. The promotion is made by an unauthorised person but approved by an FCA authorised person.
3. The promotion is communicated by a cryptoasset business registered under the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 with the FCA (the "MLRs").
4. The promotion otherwise complies with the conditions of an exemption in the Financial Promotion Order.

Making promotions outside of one of these routes carries a risk of serious consequences. Under section 25 FSMA, a person commits a criminal offence if they carry on activities in breach of section 21 and can be subject to a maximum of two years imprisonment, a fine, or both.

The FCA also expects that the new regime will take a consistent approach to that taken for other high-risk investments.[6] This means that crypto businesses will likely be required to use risk warnings and provide 24-hour cooling-off periods, and overall, promotions are required to be clear, fair, and not misleading.

What will it mean in practice?

The new regime will significantly curtail the ability of crypto businesses to promote "qualifying" cryptoassets to UK consumers, unless they are prepared.

The FCA has published a letter it sent to a number of international businesses on 5 April 2023, calling on them to consider which of the four routes they intend to use to communicate financial promotions to UK customers once the new regime comes into force. They

4 We note that HM Treasury's February 2023 Consultation Response Document stated that the availability of FSCS pretension for claims against failed cryptoasset custodians was under consideration and was to be determined by the FCA, but also noted that it was not the Government's intention for FSCS protection to apply to investor losses arising from cryptoasset exposures more generally.

5 Financial Services and Markets Act 2000, s 21(3).

6 https://www.fca.org.uk/news/statements/cryptoasset-firms-marketing-uk-consumers-must-get-ready-financial-promotions-regime

have pointed firms specifically to the process for seeking regulation under the MLRs.

This particular route was introduced following industry feedback which will allow those businesses already registered under the MLRs, but are not otherwise authorised persons, to communicate their own financial promotions. This was required as the original proposals meant firms needed to be FCA authorised to communicate or approve qualifying cryptoasset promotions. Given that most crypto businesses in the UK are not FCA authorised (as they do not deal in controlled investments), it would have amounted to an effective ban on promotions. The temporary exemption will ostensibly incentivise cryptoasset businesses both to be based in the UK and to be compliant with the MLRs.

However, it remains to be seen whether this exemption will open up the scope much further.

Since January 2020, the FCA notes that it has received 300 applications from cryptoasset businesses and has determined 260 applications as of January 2023.[7] Of those, the FCA approved and registered 41 cryptoasset businesses (15%). 195 applications (74%) were either refused or withdrew the application, and the FCA rejected 29 (11%) submissions.

This would suggest that in practice, the exemption will not apply to many firms. It is, in any event, only intended to be temporary and will be reviewed by the Government "alongside the future regulatory approach to cryptoassets".[8]

It was also originally planned for there to be a six-month implementation period. However, this period has now been decreased to four months – highlighting the fact that these measures are seen by the Government as being urgently required in order to protect consumers from harm.

Whether the new regime will in fact dampen enthusiasm from investors will remain to be seen.

Despite recent turmoil in the crypto market, recent surveys show that 5-10% of UK adults now own cryptoassets, an increase of more than 100% over the past 1-2 years.[9]

Research by JP Morgan in the US has also shown that most crypto users make their first transactions during spikes in prices.[10]

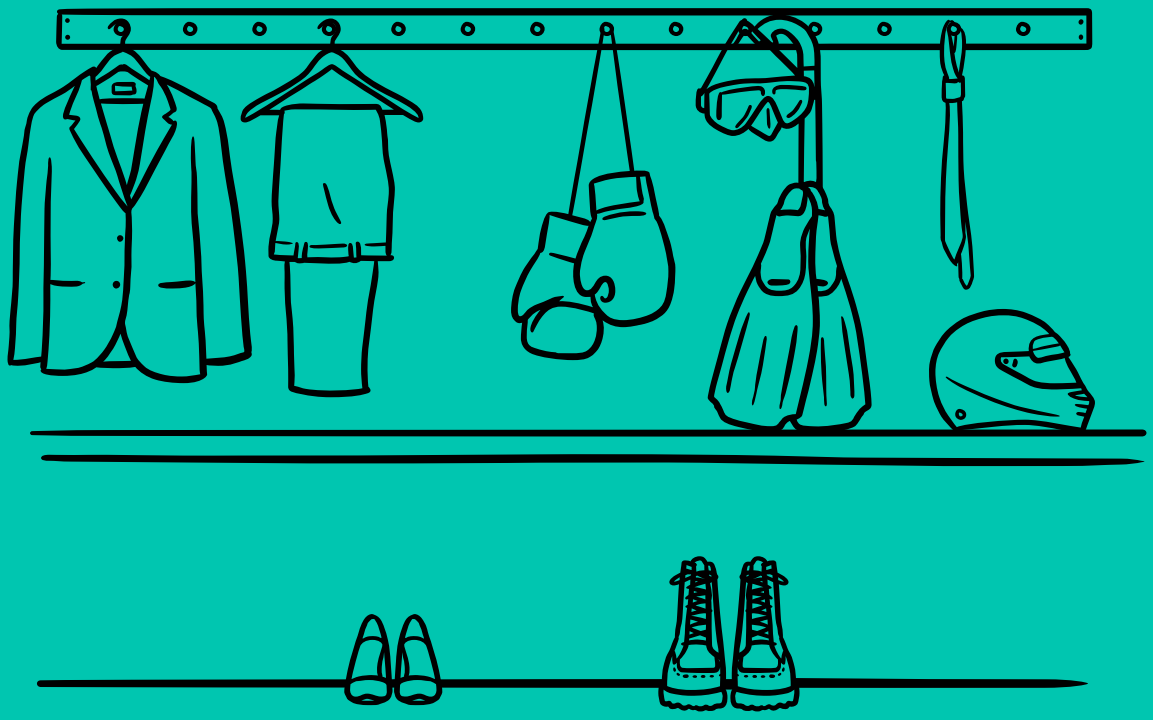
While overall timing for the regime remains unclear, what is certain is that firms who wish to continue marketing to UK consumers, wherever they may be based, should be considering which of the four routes is best suited to them to ensure they are prepared.

7 https://www.fca.org.uk/firms/cryptoassets-aml-ctf-regime/cryptoasset-aml-ctf-regime-feedback-good-and-poor-quality-applications.

8 https://www.legislation.gov.uk/ukdsi/2023/9780348246490/pdfs/ukdsiem_9780348246490_en.pdf

9 https://www.gov.uk/government/publications/individuals-holding-cryptoassets-uptake-and-understanding

10 https://www.jpmorganchase.com/institute/research/financial-markets/dynamics-demographics-us-household-crypto-asset-cryptocurrency-use#finding-1



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ENFORCEMENT OF ARBITRAL AWARDS IN THE BRITISH VIRGIN ISLANDS

Authored by: Andrew Thorp (Partner) and Olga Osadchaya (Counsel) - Harneys

Introduction

BVI has taken significant steps in the last decade to develop and promote its role in international arbitration. The BVI Arbitration Act (the Act), which is modelled on the UNCITRAL Model Law, came into force on 1 October 2014. In November 2016, the BVI International Arbitration Centre opened its doors with its rules based on 2010 UNCITRAL Arbitration Rules. It is a modern and technologically effective framework that was well prepared for the remote hearing requirements necessitated by the Covid-19 pandemic. Most commercial court hearings continue to be conducted remotely, although a return to in-person hearings is currently being contemplated (at least for trials).

Aside from attracting parties to arbitrate in the BVI, the framework also ensures that foreign arbitral awards are recognised and enforced effectively in the jurisdiction.

BVI acceded to the 1958 New York Convention on 25 May 2014 and the Act together with the Eastern Caribbean Supreme Court Civil Procedure Rules 2000 (the EC CPR) ensure a smooth process for getting awards recognised and enforced in the territory.

The distinction between recognition and enforcement is worth highlighting. Recognition under Rule 43.10 of EC CPR ensures that a foreign arbitral award is registered so that it may be enforced as if it were an order of the BVI Court. While recognition is a pre-requisite to enforcement, a successfully registered award does not necessarily need to be enforced. Recognition in itself can be used as a defence in the same or connected matter, for example, to establish res judicata or set off. Enforcement, on the other hand, entails an active step being taken by the judgment creditor to execute the judgment against the debtor.

This article sets out the procedural requirements for getting different types of arbitral awards recognised

and enforced in the jurisdiction and highlights some common issues that arise in the process.

New York Convention awards

Convention awards can be recognised and enforced in the BVI either by:

(1) commencing an action in the BVI Court suing on the arbitral award; or

(2) commencing an action seeking recognition and leave to enforce the award. Such action may be pursued on an ex parte basis, but must be supported by affidavit evidence:

a. exhibiting the duly authenticated original or a certified copy of the original award (or a certified translation thereof if the award is not in English);

b. exhibiting the original or a duly certified copy of the arbitration agreement;

c. giving an address for service on the person against whom the applicant seeks to enforce the award; and

d. if the award is for payment of money, certifying the amount remaining due to the applicant.

Prior to any enforcement action being taken, the resulting order must be served on the party against whom enforcement is sought. The service requirements will differ depending on whether service needs to be affected inside or outside the jurisdiction, and in the latter case an application to serve out of the jurisdiction should be made at the same time as the recognition/ enforcement action.

Grounds for refusing recognition/enforcement

The scope for challenging a Convention award is narrower than for challenging enforcement of a non-Convention award (see for example, PT Ventures SGPS SA v Vidatel Limited). The Court may only refuse to enforce a Convention award on specific grounds:

a. incapacity of a party to the arbitration agreement;

b. invalidity of the arbitration agreement;

c. lack of proper notice of the arbitration or appointment of the arbitrator, or where a party was unable to present their case;

d. the award deals with matters that do not fall properly within the scope of the arbitration;

e. the composition of the arbitral tribunal or the procedure employed was not in accordance with the agreement of the parties or the law of the country where the arbitration took place;

f. where the award is not yet binding on the parties, or it has been set aside or suspended in the jurisdiction in which it was made.

Enforcement may also be refused if the Court finds that the subject matter of the award is not capable of settlement by arbitration under BVI law or if the award contravenes the public policy of the BVI.

The burden of proof is on the party against whom the award has been made to show that one or more of the above grounds applies.

Non-Convention awards

When seeking to enforce a non-Convention award, a party does not have the option, unlike when seeking to enforce Convention awards, to commence an action in the BVI High Court suing on the award. In order to enforce a non-Convention award, a party must apply for recognition and leave to enforce the award.

The grounds for refusing to enforce Convention awards summarised above, also apply to non-Convention awards. However, the Court is also able to refuse to enforce a non-Convention award if it determines that it would be "just to do so".

This is a wide ground for refusal not available in relation to Convention awards.

Enforcement options

Once an award is recognised and permission to enforce it in the BVI is granted, the award is enforceable in the same manner as a judgment or order of the Court. There are a number of enforcement mechanisms in the BVI where an arbitral award requires the payment of a sum of money including:

- Charging orders
- Liquidation proceedings (non-payment of an award is a ground for insolvency as it relates to an undisputed debt)
- Appointment of a receiver
- Orders for the seizure and sale of goods
- Garnishee orders

Enforcement in the BVI often targets share interests in BVI registered companies. Helpfully, the practice has developed for a provisional charging order over BVI shares to be granted at the same time as recognition/ enforcement. This allows for the applications to be "packaged" into a cost efficient single hearing. Other interim measures such as an injunction can also be bolted on concurrently as well as the application to serve out of the jurisdiction.

Overall, the framework is extremely judgment creditor friendly and assists in ensuring that a debtor who avoids payment does not render himself judgment-proof.

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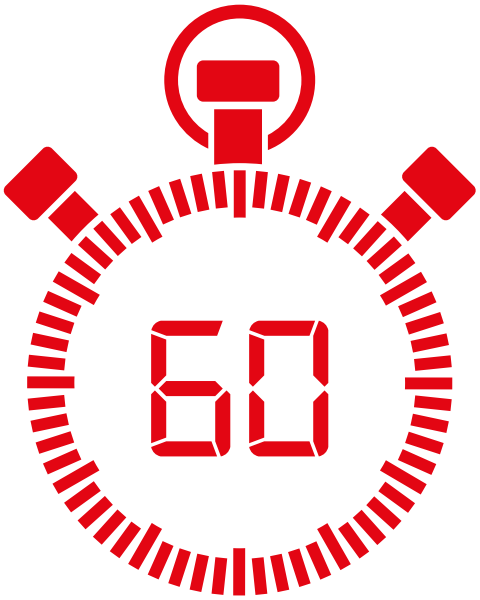

Q **Imagine you no longer have to work. How would you spend your weekdays?**

A I cannot really imagine a time where I will not have to work. It is so much a part of my life. But never say never. So, when such a day arrives, I would want to do all those things which I may have missed doing in the years of working. I would want to spend time more time with my family, get back to drumming, paint professionally, travel, start my own cookery class and just laze around. The list would be never ending.

Q **What do you see as the most important thing about your job?**

A The ability to face and overcome challenges every day is the most important thing about my job. I am a disputes lawyer and the job is extremely client facing, where I am in fire-fighting mode almost every day. There are good days and bad days but, in that journey, what is most important is how I evolve as a lawyer with each matter and take that as an opportunity to learn something new.

Q **What motivates you most about your work?**

A The impact I make on the lives of people who trust me and engage me to represent them in their legal battles and the impact I make on the lives and future of every team member who works with me, is what motivates me the most about my work. My reputation as a lawyer and burning desire to do better in each assignment also motivates me as it defines the lives of people who I work for and who work with me.

Q **What is one work related goal you would like to achieve in the next five years?**

A I would like to see all the young lawyers whom I have mentored succeed in their lives and be equals alongside me.

Q **What has been the best piece of advice you have been given in your career?**

A Disputes practice is dynamic, and we learn something new every day. You are always a student and never a master.

Q **What is the most significant trend in your practice today?**

A When I started my practice, we only knew that there were two kinds of practice for lawyers – litigation (court work) and corporate laws (firm/companies work). Then we saw the emergence of arbitration and a whole new practice opened as an alternate dispute resolution practice. In recent times, it is the contentious insolvency practice which is most trending and rightly so as the world is seeing debt and defaults in unimaginable numbers. Mediation coupled with Arbitration is also on rise and seems to be future of disputes practice.

Q **Who has been your biggest role model in the industry?**

A Everyone around me inspires and motivates me. Young or old, each lawyer has her own story of struggle and success and therefore all of them are my role models. I learn from each one of them.

Q **What is one important skill that you think everyone should have?**

A In the legal profession, it is important to have critical/analytical thinking, deep understanding of domain law and have clear and effective communication. These are the pillars of success in any matter.

Q **What cause are you passionate about?**

A I am passionate about child education and helping indigent people in their legal battles. Every child must have a basic education and there cannot be compromise on that. For me, helping indigent people in their legal battles is a small way of showing gratitude to the life and success I have gained from my profession.

Q **Where has been your favourite holiday destination and why?**

A I live in India. I have travelled the world. It is therefore impossible to choose one favourite holiday destination. Some of the most loved destinations are London, Paris and Darjeeling (in the northeastern part of India). I can never get bored of London and that's the beauty about that city. Paris is full of life, moves at its own pace and has some great food. Darjeeling is simply beautiful and calm with some breathtaking Himalayan views.

Q **Dead or alive, which famous person would you most like to have dinner with, and why?**

A I would have loved to dine with Abraham Lincoln. It would have been the most insightful, engaging, educative and intelligent dinner.

Optional, if relevant:

Q **What aspect of FIRE International are you most looking forward to as an attendee/speaker?**

A I am speaking at FIRE International and this is my second year in a row. I am looking forward to great legal and business minds coming together for some of the most engaging sessions and great networking with people from across the globe!

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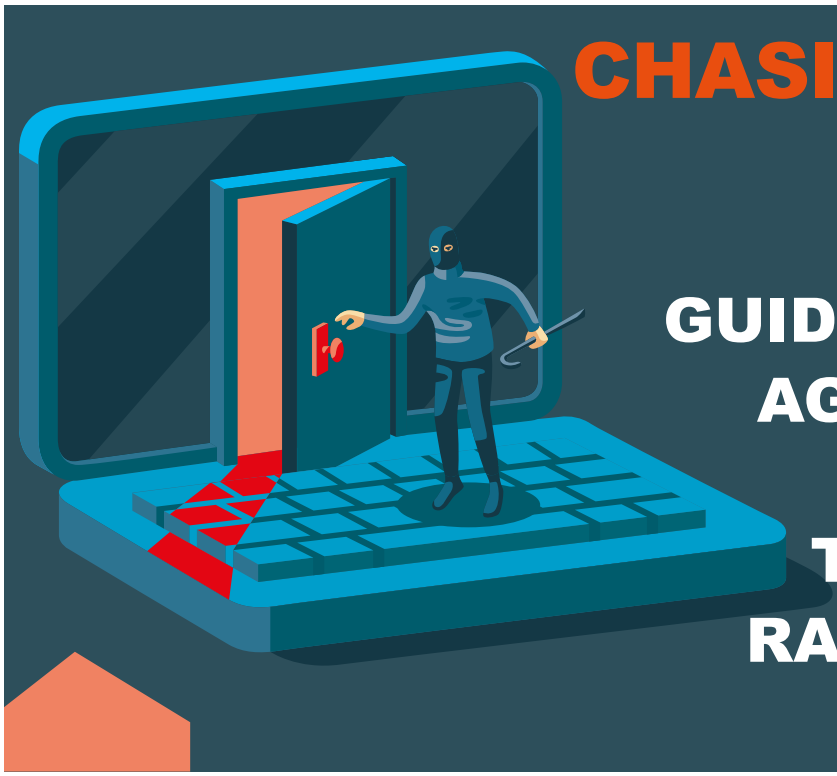


CHASING SHADOWS

A WHISTLESTOP GUIDE TO LITIGATING AGAINST PERSONS UNKNOWN IN THE CONTEXT OF RANSOMWARE AND CYBER FRAUD

Authored by: Maria Kennedy (Barrister) - Twenty Essex

Introduction

This is a whistlestop guide to the various stages of seeking relief against persons unknown in the context of ransomware and cyber fraud. It is intended to give the reader a flavour of the relevant considerations at each step in light of recent legal developments and set out some predictions for the future.

Key takeaways for claimants

- Provide a clear definition of "persons unknown" which is sufficient to identify those who are included and those who are not.
- In addition to relief against the persons unknown, consider what information about the persons unknown and the whereabouts of any stolen property can be sourced from third parties (e.g. banks and cryptocurrency exchanges).
- Consider what other measures are necessary, e.g. a private hearing, protection of court papers and permission to serve out of the jurisdiction and by alternative method. Bear in mind the new gateway at CPR PD 6B, paragraph 3.1(25) which has made serving Norwich Pharmacal and Bankers Trust relief out of the jurisdiction easier.
- Predictions for the future – broadening in scope of parties against whom claimants will typically seek third party disclosure orders and more resistance from e.g. cryptocurrency exchanges who are increasingly becoming respondents to such orders.

Defining 'persons unknown'

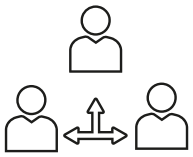
The procedure for commencing a claim against "persons unknown" is the same as against a named defendant, save that the first step will be to define the defendant. In this regard, "the description used must be sufficiently certain as to identify both those who are included and those who are not" (Bloomsbury Publishing Group Limited and JK Rowling v News Group Newspapers Ltd [2003] 1 WLR 1633 at [21]). For a recent example of the jurisdiction being deployed in the context of ransomware, see Ince Group Plc v Person(s) Unknown [2022] EWHC 808 (QB).

Relief against persons unknown

The nature of the relief will typically flow from the type of attack perpetrated. For example:

1. **Ransomware cases:** The claimant will typically seek a prohibitory injunction preventing the publication of data, and a mandatory injunction requiring the defendant to deliver up and/or delete the data and serve evidence detailing their compliance; see e.g. Ward Hadaway v Persons Unknown (Unreported, 11 July 2022). Where a non-publication injunction is sought, the claimant will need to bring the Court's attention to Article 10 of the European Convention on Human Rights (freedom of expression). If this right "might" be affected, the Court will consider whether the test at section 12 of the Human Rights Act 1998 has been satisfied. In practice, this is unlikely to be engaged in ransomware cases; see Ince Group at [8]-[9].

2. **Where property has been stolen:** The claimant's priority will typically be to recover its property (through a proprietary injunction), prevent dissipation (through a worldwide freezing injunction ("WWFO")) and seek ancillary disclosure. When applying for a WWFO, claimants should note that it is "a typical feature of a persons unknown case" that there is unlikely to be much evidence of the defendant's assets, although this should not bar the grant of a WWFO; see Ion Science v Persons Unknown (Unreported, 21 December 2020) at [18].



Relief against third parties

Claimants seeking more information to recover property stolen by persons unknown will typically use the same application to apply for a Norwich Pharmacal order (seeking information about the identity of the defendant) and/or a Bankers Trust order (seeking information about the stolen property) from third parties, e.g. the fraudster's bank or cryptocurrency exchange, who will appear as defendants on the Claim Form.

Practical considerations

1. **Proceeding without notice:** Although the issue is always fact-sensitive, in urgent injunction applications it is generally appropriate to proceed, in the first instance, without notifying the defendant (Ince Group, [4]). In seeking this measure, applicants will need to bring the Court's attention to: (a) the urgency of the application; and (b) the full and frank disclosure (defined at 1356-1357 of Brink's Mat Ltd. v Elcombe [1988] 1 WLR 1350).

2. **Private hearing:** To ensure that the application does not prompt persons unknown to take steps to undermine any relief granted, claimants will typically ask for a private hearing pursuant to the Court's discretion under CPR 39.2; see e.g. Ince Group at [3] and AA v Persons Unknown [2020] 4 WLR 35 at [24].

3. **Treatment of confidential evidence:** CPR PD 25A, paragraph 5.1(2) lists the documents which must be served on the respondent where the injunction has been made without notice. However, where these documents contain confidential information which the defendants are liable to misuse or which highlights the claimant's vulnerabilities, the Court will typically order that it be withheld or served in a redacted form; see e.g. Ward Hadaway at [9] and Ince Group at [14]. In certain cases, the Court will also order that the names of the claimant's solicitors and counsel be redacted; see e.g. 4 New Square v Persons Unknown (Unreported, 28 June 2021) at [8].

4. **Access to the court file by third parties:** As a further precaution, typically in ransomware cases, the court has held it is "strictly necessary" that no copies of the documents on the court file will be provided to any non-parties without further order and that any non-party seeking access to such documents must make an application; see e.g. Ward Hadaway at [8], 4 New Square at [3] and Ince Group at [15].

5. **Anonymity:** Where there is something particular about e.g. the claimant's work which might prompt third parties with malign intent to contact the persons unknown and seek to exploit the claimant's situation, the claimant may also seek an order under CPR 39.2(4) anonymising their identity; see XXX v Persons Unknown [2022] EWHC 1578 (QB). However, the mere fact that a business may suffer negative commercial and reputational consequences if the ransomware attack/cyber fraud becomes public is not automatically a sufficient reason to make an anonymity order (XXX at [25]).

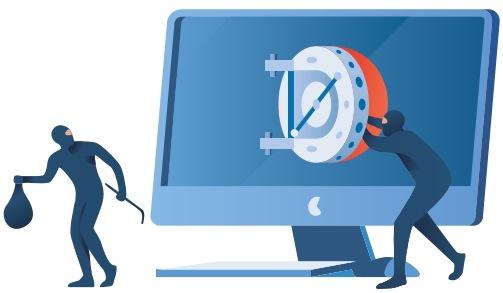
6. **Service:** As the claimant will typically be unable to pinpoint the location of the persons unknown, they should apply for permission to serve out of the jurisdiction and by alternative means. Although previously there was some uncertainty as to when Norwich Pharmacal and Bankers Trust orders could be served on defendants out of the jurisdiction, claimants have recently welcomed the introduction of the new gateway at CPR PD 6B, paragraph 3.1(25), which is specifically directed at service of such orders out of the jurisdiction; see the application of the gateway in LMN v Bitflyer Holdings Inc [2022] EWHC 2954 (Comm).

Long-term considerations

Once the initial relief has been obtained and continued at a return date, the Court will typically question how the claimant plans to 'close out' the proceedings, given that persons unknown are very unlikely ever to participate. In such circumstances, the claimant will need to apply either for default judgment or summary judgment. The decision will depend on the claimant's priorities, with default judgment often being the cheaper option and summary judgment being the option selected by claimants who prioritise enforcement out of the jurisdiction.

Direction of travel

With the increasing provenance of cyber fraud and ransomware attacks, courts are evidently keen to help claimants and deter fraudsters. In this context, we are likely to see an increase in the provenance of third party disclosure orders (e.g. against email providers and social media platforms) and further resistance from cryptocurrency exchanges, who (with the advent of the new gateway) are now more exposed to third party disclosure applications.



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HIGH COURT REJECTS THE FIRST COURT REVIEW OF A UK SANCTIONS DESIGNATION

Authored by: Liam Lane, Associate at Peters & Peters and Joseph Sinclair, Barrister at Mountford Chambers

The Sanctions and Anti-Money Laundering Act 2018 (SAMLA) was enacted post-Brexit to enable the UK's compliance with its international obligations, and to impose financial, trade, immigration and transport sanctions against individuals and entities it suspects are "involved persons". To challenge a designation, a designated person first has to seek a ministerial review under section 23 of SAMLA. If this is unsuccessful, they can bring a claim for judicial review before the courts under section 38.

In March 2023, the first judgment was handed down in respect of a section 38 review, with Mr Justice Jay rejecting the request for de-designation in LLC Synesis v Secretary of State for Foreign, Commonwealth and Development Affairs [2023] EWHC 541 (Admin). The decision clarifies important thresholds for those seeking to challenge their designations and sets out the principles the court will rely on in its approach of section 38 reviews.

UK designation and ministerial review

In December 2020, LLC Synesis was designated by the Secretary of State for Foreign, Commonwealth and Development Affairs (Secretary of State) under the Republic of Belarus (Sanctions) (EU Exit) Regulations 2019 (Belarus Regulations). Synesis was a Belarussian technology company that developed and sold "find and track" surveillance software – Kipod – which could use CCTV to track people and vehicles. It supplied the software to the government of Belarus, which allegedly used it to track dissidents who were subsequently detained and tortured. Synesis was already sanctioned in the EU and the USA.

In January 2022, Synesis applied for ministerial review of its designation under section 23(1) of SAMLA. In its request, it argued that there were no reasonable grounds to suspect that it was an "involved person" for the purposes of the Belarus Regulations, none of the designation criterions contained within regulation 6(2) were satisfied, and the evidence relied on did not refer to Synesis. The Secretary of State upheld Synesis' designation, concluding that Synesis was an "involved person" and had been involved in serious human rights violations or abuse in Belarus, the repression of civil society or democratic opposition, and/or been involved in the supply of technology which could contribute to these activities.

The court challenge

Synesis brought its challenge to the High Court on three grounds. It argued that the Secretary of State had applied the wrong standard of proof, "reasonable grounds to suspect" was an objective question of fact which required more than speculation, and the outcome was irrational.

However, the real question for the court was whether there were reasonable grounds to suspect Synesis was an "involved person" under the Belarus Regulations. The Secretary of State argued that there were reasonable grounds to suspect, and that the other grounds were "largely parasitic" on that central question. Justice Jay agreed.

Justice Jay's ruling

Justice Jay held that the standard of review was whether the decision was irrational or otherwise not based on evidence. The former was a flexible standard with a broad margin of appreciation in the sanctions context; the form of decision making involved expert judgement in an area of government policy. The statutory threshold for "reasonable grounds to suspect" required a "state of mind rather than a state of affairs", which varied according to the context and whether human rights were in play. To "suspect" was to assess all the available information, draw inferences, and reach conclusions in a good faith state of mind.

Requiring less than proof (ie., a "state of mind") recognised the public interest of enabling punitive and restrictive measures. This applied even where a civil court would not be satisfied on the same material. Parliament recognised that the civil standard of proof may be difficult against companies outside the UK's jurisdiction, such as Synesis. This approach was also consistent with the UK's international obligations where it may be expected to act with others.

On the Secretary of State's findings, Justice Jay focused on the wording of regulation 6(3)(d) of the Belarus Regulations: the supply to Belarus of technology which "could contribute" to activities such as the repression of civil society. The judge concluded that the Secretary of State had been entitled to conclude that the Kipod system met this criterion.

What comes next for court review challenges?

The conclusions in the decision were unsurprising. It firmly establishes a wide discretion for the Secretary of State to designate individuals or companies, and a high hurdle for those seeking to challenge a designation. However, Synesis' challenge will be the first of many and each will turn on their own facts. Each challenge will have a different factual matrix with much wider considerations, such as human rights. It is possible that the approach of the court will differ accordingly, and Justice Jay seems to leave the door open.

To illustrate, regulation 4 of the Russia (Sanctions) (EU Exit) Regulations 2019 (Russia Regulations) sets out that its purpose is to encourage Russia "to cease actions destabilising Ukraine or undermining or threatening the territorial integrity, sovereignty or independence of Ukraine". By way of contrast, the Belarus Regulations has 12 purposes, including encouraging Russia to cease actions in Ukraine. Similarly, there are 1,700 designations under the Russia Regulations, compared to 120 designations under the Belarus Regulations.

As such, it is important to consider the precise factual matrix of the Synesis case. It is a Belarusian company said to be involved in human rights violations, where the conduct had a demonstrable nexus to the purpose as set out in the Belarus Regulations. This will inevitably be contrasted to persons designated under the Russia Regulations, where the nexus to the purpose may not be as clear. Greater deference may be paid to the detriment to a sanctioned individual with a sufficient UK attachment.

It will be interesting to see if the court engages with human rights and proportionality arguments, if the factual matrix allows for it.

While the judgment in Synesis clarifies the standard of review, it is not necessarily determinative of every court challenge likely to be seen over the coming months - or indeed years.

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NON-DISCHARGE OF FRAUD DEBTS

Authored by: Josh Lewison (Barrister) - Radcliffe Chambers

"And because fraud and deceit abound in these days more than in former times, it was resolved in this case by the whole Court, that all statutes made against fraud should be liberally and beneficially expounded to suppress the fraud."

Per Lord Coke, Twyne's Case (1601) 3 Co. 80

A recent case in the Supreme Court of the United States has thrown a spotlight on fraud debts, which survive discharge from bankruptcy and invites us to consider how similar debts are treated in England and Wales.

In Bartenwerfer v. Buckley (22nd February 2023, not yet reported) the court had to consider whether a bankrupt was discharged from a fraud debt when she had not personally participated in the fraud.

Kate and David Bartenwerfer owned a house in California, which they decided to renovate and sell. They duly did so, and the sale process was handled by David. During the conveyancing, David failed to make all the requisite disclosures and the buyer sued, eventually winning a $200,000 judgment. When Kate and David filed for bankruptcy, the buyer alleged that his judgment was not discharged because it fell within the fraud exception.

11 USC 523 provides for exceptions from discharge. The relevant part of the fraud portion is as follows:

"A discharge … does not discharge an individual debtor from any debt … for money … to the extent obtained by … false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition …"

The Bankruptcy Court agreed with the buyer, not just in respect of David, but Kate as well. Although David was the perpetrator, the Court found that Kate and David had formed a partnership for the project. Just as the debt was attributable to Kate, so too was the fraud. On the way up to the Supreme Court, it was held at one point that Kate should be discharged because she didn't know about the fraud, a view that had found favour in some Courts of Appeals.

The Supreme Court's unanimous opinion was that Kate's state of knowledge did not matter. The essential reasoning was that the text of the statute says nothing about the debtor's knowledge, or even the identity of the fraudster. The references to fraud go to the character of the debt alone. If the debtor is liable for the debt, and the debt is a fraud debt, that is enough to bring it within the exception from discharge.

Could it happen here?

Just as in the United States, England and Wales has legislated for an exception from discharge for fraud debts. The rationale is public policy: allowing debtors to enjoy the fruits of their dishonesty and then escape the consequences through bankruptcy is objectionable in a way that evading the consequences of improvidence or ill-fortune is not. The court in Bacci

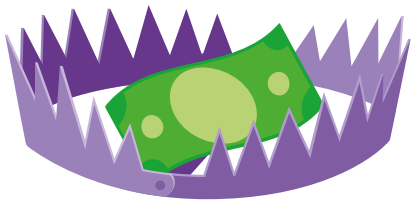
v. Green [2022] EWHC 486 (Ch) summarised it pithily: "Fraudsters should not prosper."

Section 281 of the Insolvency Act 1986 provides, in relation to fraud:

"Discharge does not release the bankrupt from any bankruptcy debt which he incurred in respect of, or forbearance in respect of which was secured by means of, any fraud or fraudulent breach of trust to which he was a party."

The central question likely to confront the court is the interaction between the words "which he incurred in respect of" and "to which he was a party" and whether those twin phrases introduce a distinction between the incurring of the debt and the participation in the fraud. There is a contrast between the English statute and the American one, in that the American text does not refer to the debtor being "party" to the fraud. That may make all the difference.

In England, there are plenty of situations in which one person can become liable for a fraud perpetrated by someone else.



In the partnership context – in which Bartenwerfer was decided – the leading English case is Dubai Aluminium Co. v. Salaam [2003] 2 A.C. 366. Under s. 10 of the Partnership Act 1890, the partners in a firm are liable for the wrongful acts and omission of their fellow partners "acting in the ordinary course of business of the firm". The question in Dubai Aluminium was the extent to which a partner committing a fraud without the authorisation of the other partners could be acting in the ordinary business of the firm. The House of Lords held that liability depended on whether the partner could "properly and fairly" be regarded as engaged in the ordinary course of business, as a matter of fact.

Another obvious situation in which an innocent party might become liable in respect of a fraud debt is under a guarantee. A borrower could obtain a loan by fraudulent misrepresentation, whether about the purpose of the loan, matters going to their creditworthiness or otherwise. Such a debt would be a fraud debt and would survive the debtor's discharge from bankruptcy. But what about a surety who did not know that the borrowing was obtained by misrepresentation and who was not induced to become a surety by misrepresentation?

There may be a distinction between a true guarantor – who incurs a secondary obligation to ensure that the principal complies with their obligations – and someone who gives an indemnity, thus incurring a primary obligation. In the former case, the guarantor's debt was not incurred in respect of a fraud, but was an independent obligation. That would be a harder argument to run where the surety had agreed to be jointly and severally liable with the borrower as a primary obligation, because there they would owe the same obligation.

The possibility that a person might, in the words of the statute, incur a debt in respect of a fraud but not know anything about the fraud throws the importance of the phrase "to which he was a party" into sharp relief. Grammatically, the phrase seems to refer to the fraud or fraudulent breach of trust rather than the incurring of the debt. If it referred only to the debt, then the phrase would be superfluous because the bankrupt would have to have incurred the debt for questions about discharge to arise.

In Templeton Insurance v. Brunswick [2012] EWHC 1522 (Ch), HHJ Simon Barker held: "The epithet 'fraudulent' added to the phrase 'breach of contract' is intended to signify that actual dishonesty on the part of the defendant is a feature of the particular breach of contract alleged." The reference to dishonesty "on the part of the defendant" was not part of the ratio; dishonesty was alleged against Mr Brunswick and it was his own discharge under consideration.

A different section of the Insolvency Act 1986 that deals with being party to fraud is s. 213. Under that section, any persons who were "knowingly parties" to fraudulent trading can be held liable. The Court of Appeal has recently reviewed the law on fraudulent trading in Tradition Financial Services v. Bilta [2023] EWCA Civ 112. The court noted an earlier case in which it was held that "party to" meant no more than "participates in", "takes part in" or "concurs in". Section 213 is not a precise comparison with s. 281, because the latter section does not explicitly mention knowledge.

Even so, I suggest that the words "to which he was party" should be understood as connoting knowing involvement with the fraud.

As discussed above, a person may suffer liability for a fraudulent transaction without knowledge that the transaction is fraudulent. But that is dealt with by "incurred". It is only when the person has knowledge that they become party to the fraud itself, beyond the underlying transaction.

Such an interpretation fits with public policy, too. The insolvency Act seeks to strike a balance between, on the one hand, giving debtors a clean slate through discharge from their debts and, on the other hand, permitting fraudsters to evade the consequences of their actions. If a person has incurred a debt as a result of a fraud, but did not themselves act dishonestly, it is hard to see what public policy purpose would be served by preserving the debt after discharge.

Thus, it can be seen through Bartenwerfer that the United States has adopted a harder line than England and Wales to discharge from bankruptcy. The different approach highlights the English policy choice that has been made to offer more extensive protection to those caught up in frauds, but who are not culpable to the same degree as the real fraudster.

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STANFORD, SEQUANA AND THE SUPREME COURT

Authored by: Abigail Rushton (Senior Associate) - Charles Russell Speechlys

At the end of last year, the Supreme Court handed down its ruling in Stanford International Bank Ltd v HSBC Bank PLC [2022] UKSC 34, examining loss in the context of a Ponzi scheme and insolvency. This was preceded by another notable ruling by the same court, BTI 2014 LLC v Sequana SA [2022] UKSC 25, which considered, amongst other things, when directors should consider the interests of creditors in insolvency. How the two rulings interact in practice is yet to be seen but the Stanford decision raises issues which touch upon the creditor considerations arising from the ruling in Sequana.

The Stanford Ponzi Scheme

Stanford v HSBC stems from a fraud perpetrated by the bank's former chairman, Robert Allen Stanford.

The fraud was uncovered following an investigation by the US Securities and Exchange Commission. It was discovered that Stanford International Bank (SIB), an Antiguan based bank, had been used for years as vehicle for a multi-billion-dollar Ponzi scheme and impacted thousands of investors from multiple jurisdictions.

The fraudulent scheme involved the sale of Certificates of Deposit to investors by SIB. Investors were falsely promised that the Certificates Deposit were high-yielding and would achieve high returns for investors. "Early customers", who withdrew their funds in full before the scheme collapsed, escaped without loss. But, "late customers", who did not withdraw their funds before the scheme collapsed, risked losing almost all their money.

SIB went into insolvent liquidation in April 2009. Following that, in 2012, Mr Stanford was convicted for his role in the fraud and is currently serving a 110-year prison sentence in the US.

SIB's liquidators are currently trying to recover funds for investors and have brought claims in multiple jurisdictions against a range of parties who had dealings with SIB. One such party is HSBC, with whom SIB held accounts and which were operated by HSBC until it froze them in February 2009.

Sib's Claim Against Hsbc

In 2018, SIB's liquidators brought a claim against HSBC in respect of £116 million which had been paid to the "early customers" out of its accounts between August 2008 (when the liquidators considered that the HSBC should have frozen the accounts) and February 2009 (when it did freeze them following the US SEC's action against Mr Stanford).

SIB's liquidators alleged, amongst other things, that HSBC had breached the so-called Quincecare duty. This is the duty that banks have to their customers to refrain from executing an order where the bank has reasonable grounds to believe that the order is an attempt to misappropriate customer's funds, as defined in Barclays Bank Plc v Quincecare Ltd [1992] 4 All E.R. 363.

SIB's liquidators argued that HSBC had breached this duty because it was on notice of the fraud and had not

recognised the signs, when it should have done, that SIB was being used as a vehicle for a Ponzi scheme. Their position was that, if HSBC had recognised those signs earlier, the HSBC accounts would (and, should) have been frozen earlier and money held in those accounts would not have been paid out to the "early customers". In turn, SIB would have held more in its accounts when it went into insolvent liquidation and so would have had more assets available to pay out to investors who had been defrauded.

The Decisions

High Court

HSBC applied to strike out SIB's claim on the basis that SIB had suffered no loss and so had no claim for damages and argued that certain elements of SIB's claim were not sufficiently pleaded. At first instance, the High Court, struck out certain elements of SIB's claim but not the claim for breach of the Quincecare duty. Both sides appealed.

Court of Appeal

The Court of Appeal held that the claim relating to the Quincecare duty should be struck out: where a company was trading, even insolvently, then money paid to a creditor reduced its assets but that was offset by a corresponding reduction to its liabilities, meaning that the payments made by HSBC to "early customers" had caused SIB no loss.

SIB's liquidators appealed, contending that SIB had suffered the loss of a chance. When the payments were made, SIB had been hopelessly insolvent. In those circumstances, had the payments not been made, the relevant debts would still be owed. The "early customers" would, in that case, then have to prove their debts in the liquidation and were likely to receive only a few pence in the pound (rather than the amount that had been paid out to them). SIB, it followed, had lost the chance of discharging those debts for a few pence in the pound.

Supreme Court

The question for the Supreme Court was whether payments made out of HSBC's accounts to "early customers" could be caught by the Quincecare duty. That hinged on whether SIB had suffered loss. (In order to determine the question of loss, it was assumed for the purpose of the hearing that there had been a breach of the duty.)

The Supreme Court dismissed SIB's appeal and upheld the Court of Appeal's decision to strike out the majority of SIB's claim against HSBC in relation to alleged breach of the Quincecare duty.

The Supreme Court held that SIB did not sustain loss where, while it was still trading, HSBC had paid money out of its accounts (in alleged breach of duty) and SIB had later entered an insolvency process. Although SIB argued that it had suffered the loss of a chance in that the payments had discharged certain of its debts in full when they could have been discharged for far less in the liquidation, that chance was matched by the risk of it having to increase the payments in liquidation to other creditors who had not received any payment before liquidation. Thus, SIB had not suffered the loss of a chance that had any pecuniary value to it.

In the Stanford decision, Lord Leggatt and Lord Sale also considered the nature of the fiduciary duty owed by a director to a company when it is about to go into insolvent liquidation. That follows the Supreme Court decision in Sequana which confirmed that once insolvent liquidation becomes inevitable the creditors interests become paramount. In both cases, a change happens to the responsibilities of the company when it is about to go into insolvent liquidation.

In his dissenting judgment, Lord Sales noted that in Sequana "the fiduciary duty owed by directors to the company itself would become a duty to protect the interests of creditors of the company at the point when the company entered into liquidation or was on the verge of doing so".

On the question of loss, Lord Sales found that SIB had suffered loss. This was on the basis that, considering the decision in Sequana, when the "early customers" were paid SIB was hopelessly insolvent and so SIB's interests were equated with those of SIB's creditors (being the "early" and "late customers"). SIB's assets were reduced by paying the "early customers", which Lord Sales thought SIB would not have done but for HSBC's breach. That meant SIB suffered loss of the assets which ought to have been paid out to both the "early" and "late customers" during the insolvency process.

In his concurring judgment, Lord Leggatt noted that had the case been about SIB's directors breaching their fiduciary duties then Sequana would be relevant. But, determining what the director's fiduciary duties were at a given time had no bearing on whether a payment ordered by a director in breach of his duties gave rise to a loss to the company.

Comment

How the Stanford and Sequana decisions interact in practice will be of interest to practitioners going forward. The decisions are important in terms of recoverable loss and when, in the context of insolvency, the interests of creditors should be considered.

On the question of loss, the Stanford decision reconfirms that the recoverable damages for breach of contract or in tort are subject to the net loss rule (meaning that the losses and gains caused by the breach must be netted off and only net loss awarded as damages).

That is a helpful reminder for both banks and claimants in terms of the losses that can be recovered in claims for breach of the Quincecare duty particularly in the context of insolvency.

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FIRST PAST THE POST

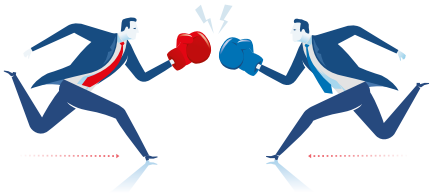
THE ENFORCEMENT RACE

Authored by: Rosanna Foskett (Barrister) - Maitland Chambers

This article is about a recent decision of the King's Bench Division, OOO Nevskoe v UAB Baltijos Šalių Industrinio Perdirbimo Centras and Bilderlings Pay Ltd. It is useful reading for FIRE practitioners in relation to judgment debt/arbitration award enforcement in multi-jurisdictional disputes, particularly where there is a looming spectre of insolvency of the judgment/award debtor.

The decision deals specifically with a third party debt order (TPDO) against an English-incorporated financial institution in relation to a European judgment debtor who owed money pursuant to an arbitral award. It raises some important and interesting points for practitioners to think about and be aware of when advising in these disputes.

As we all know, the race to (usually limited) assets in a jurisdiction where enforcement is not prohibitively difficult or expensive can be an aggressive one and an awareness of this case is important.



The facts

The Claimant was a Russian-incorporated agricultural supplier (Nevskoe), which supplied wheat to a Lithuanian-incorporated company (UAB) in late 2020 and early 2021. UAB failed to pay for the wheat and Nevskoe obtained an arbitral award against it in a GAFTA arbitration in Lithuania. The award was for over 5.4 million euros.

During the arbitration, Nevskoe obtained a freezing injunction against UAB under section 44 of the Arbitration Act 1996 in England, granted without notice on 18 June 2021 and continued on notice a week later.

The asset disclosure given by UAB pursuant to the freezing order showed that UAB's only asset was around 627,000 euros in an account held in England with the third party (Bilderlings).

The arbitral award was recognised in England prior to enforcement.

UAB went into an insolvency process in Lithuania on 31 March 2022, following action taken against it by another creditor, and a court-appointed Insolvency Administrator appointed over it.

On 26 August 2022, Nevskoe issued an application for a TPDO in relation to the funds held with Bilderlings and the Master made an interim TPDO on 4 September 2022, with the date for the final TPDO hearing set for 3 November 2022. The interim order was served on UAB on around 27 September 2022.

On 27 October 2022, UAB's Insolvency Administrator applied in England for the Lithuanian insolvency proceedings to be recognised under the Cross-Border Insolvency Regulations 2006 (CBIR) and notified Nevskoe of this on 28 October 2022. The hearing of the recognition application was set for 4 November 2022, the day after the final TPDO hearing.

What was (and was not) in dispute

Neither party thought there was any real likelihood that the recognition proceedings under the CBIR would be refused on 4 November 2022.

It was agreed between the parties that if the interim TPDO was not made final before recognition was granted under the CBIR, there could be no final TPDO because of the stay on proceedings imposed by paragraph 20(1) of Schedule 1 to the CBIR. (Nevskoe would then have simply been another unsecured creditor of UAB and would have had to prove in its insolvency alongside others.)

It was also agreed that in order for a final TPDO to be made:

- There must be a debt due from the third party to the debtor;
- The third party must be within England and Wales;
- The debt must be situated within England and Wales; and
- The Court must consider it right or just to make the order, taking into accont all the circumstances of the case (i.e. the Court has a discretion to exercise).

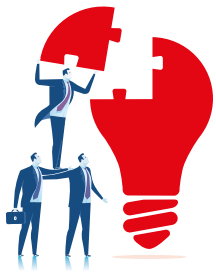
At the final TPDO hearing on 3 November 2022, UAB's Insolvency Administrator objected to the making of the final TPDO, on the basis that the recognition proceedings which had already been issued ought to be allowed to take their usual course (including the inevitable stay on Nevskoe's enforcement action that would be imposed once recognition was granted).

Nevskoe argued in summary that:

- it had acted diligently and should be entitled to the fruits of that diligence, on the basis that where there are no domestic insolvency proceedings opened (such that the distribution policy set out in the insolvency legislation is not yet engaged), the general policy is "first past the post" in a competition between creditors over assets in England and Wales;
- UAB had engaged in "trickery" and delayed both the arbitration and enforcement of the award and this was exacerbated by UAB's director frustrating payment to Nevskoe and then being identified as a preferential creditor in UAB's insolvency to be paid out ahead of Nevskoe;
- UAB's Insolvency Administrator had not acted diligently or expeditiously in obtaining recognition.

What did the Court decide?

The Court made the TPDO final, applying the "first past the post" principle referred to above, given that the recognition order had not yet been made in England in respect of UAB's Lithuanian insolvency. Certain conditions were attached before payment could be made to Nevskoe by Bilderlings (because there was a question raised at the hearing about whether Nevskoe had in fact assigned the debt to someone else).



Some tips for future cases

If you are acting for the judgment/award creditor in England and Wales:

- Keep an eye on all publicly available information in the local jurisdiction of the judgment debtor about possible insolvency
- Assess promptly what possible enforcement applications are open to you: TPDOs, charging orders over property, orders for sale etc.
- If you do not have much information about the debtor's assets, how can you get information? Could you get an asset disclosure order against the debtor or any third parties (such as banks, corporate service providers etc)? Can you get a CPR Part 71 examination order (if there is a director/officer of the judgment debtor within the jurisdiction of England and Wales)?
- Do not delay in issuing the applications that you want to – several can be made on paper and without notice in the first instance.
- Watch out for full and frank disclosure obligations on a without notice application.

If you are acting for the judgment/award debtor's foreign insolvency officer:

- Consider whether you should issue a recognition application in England and Wales. If the answer is "yes", consider under which regime your application should be made.
- Consider whether you should issue recognition proceedings in any other jurisdiction.
- Make recognition applications as quickly as possible and seek to have an expedited hearing to get the recognition order quickly if there is good reason to do so (eg where there is a final TPDO or final charging order hearing listed).
- If you find that the recognition order cannot be granted prior to something like a final TPDO hearing, it would be advisable to file proper evidence to explain why the Court should not exercise its discretion in favour of the creditor by the deadline in the CPR (which was not done by UAB in Nevskoe).
- Consider whether you should apply for any interim orders (eg the interim powers available under the CBIR pending the making of a recognition order).
- Consider whether you should ask for any conditions to be attached to any final order that is made prior to recognition.

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AN UPDATE ON THE NEW JURISDICTIONAL GATEWAY

WHERE ARE WE NOW?

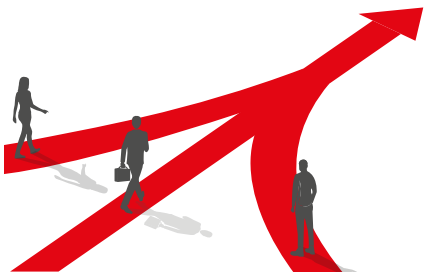
Authored by: Alexandra Algazy (Solicitor) - Pinsent Masons

Introduction

In October 2022, an update to CPR Practice Direction 6B extended the 21 "jurisdictional gateways" through which the English Court could give permission for a claim to be served outside of the jurisdiction.

Under the new gateway 25[1] (the "Gateway"), parties can make an application for disclosure to obtain information needed to identify a defendant or to establish what has become of the property of the claimant so long as the application is made for the purposes of proceedings in England and Wales.

This article looks at how the English courts have approached the Gateway and whether victims of cross-border fraud can rely on using the Gateway in the hope of recovering their assets.



Disclosure Orders

Norwich Pharmacal orders (NPOs) and Bankers Trust orders are two powerful weapons in a civil fraud litigator's armoury to obtain information which might assist their client's case in tracing and recovering assets dissipated as a result of fraud. The information obtained from innocent parties who have been mixed up in the "wrongdoing" pursuant to such orders can reveal the identity of a fraudster or assist in tracing the stolen assets. Financial institutions such as banks and cryptocurrency exchanges are often the respondents to disclosure orders. These types of orders are often the steppingstone for claimants to bring their claim against the fraudster and maximise their chances of recovering the stolen assets.

The introduction of the Gateway for disclosure orders was driven by a willingness to assist victims of complex and cross-border fraud, such as cryptocurrency fraud, where the defendants or assets of the defendants are often located outside of the jurisdiction of the victim. The Gateway has the potential to fast-track parties being able to obtain information from foreign non-parties overseas without the need to go through the lengthy process of making a Hague request to obtain evidence.

LMN v Bitflyer Holdings Inc & Ors [2022] EWHC 2954 (Comm)

In November 2022, Mr Justice Butcher handed down the first judgment to be released concerning the Gateway granting Bankers Trust relief against a handful of overseas cryptocurrency exchanges for service out of the jurisdiction. LMN, a cryptocurrency exchange operating in England was the victim of a hack in 2020, whereby millions of dollars of stolen cryptocurrency were transferred to exchange addresses around the world. Butcher J found that the test to bring the claim within the remit of the new disclosure gateway was satisfied and that LMN had a good claim to Bankers Trust relief.[2]

The Judge did, however, address the argument made by Binance (the second Defendant), registered in the Cayman Islands. Binance argued that making a Bankers Trust order against a foreign defendant is an infringement of the sovereignty of a foreign jurisdiction and should only be made in "exceptional circumstances" on the basis of the reasoning in Mackinnon v Donaldson, Lufkin & Jenrette Corp[3]. On balance the Judge found Mackinnon to be

1 CPR PD6B, para 3.1(25)

2 The requirements for an order permitting service out of the jurisdiction is summarised in Altimo Holdings and Investment Ltd v Kyrgyz Mobil Tel Ltd [2011] UKPC 7

3 Where the respondent to an application is a foreign bank, additional special considerations apply (Hoffman J in Mackinnon v Donaldson, Lufkin & Jenrette Corp [1986] Ch 482) [1986] Ch 482)

inapplicable as it would be impractical and contrary to the interests of justice for the victim to have to make "speculative applications" in multiple jurisdictions to locate the relevant exchange. It would then have had to seek disclosure in aid of foreign proceedings back in England. Butcher J cited the importance of "no further avoidable delay" to the pursuit.

While the orders in Bitflyer were ultimately granted, the judgment issued a word of warning.

Where a party serves disclosure orders outside of the jurisdiction in reliance of the gateway, much will turn on whether the overseas financial institutions consider that English court orders override their own local laws and specifically the duties of confidentiality owed to their customers.

Scenna & Anor v Persons Unknown [2023 EWHC 799 (Ch)

In the latest decision of the High Court on the Gateway, the threat of foreign law obligations prevailed.

In this case, a Canadian resident and his company were the victims of a fraud. The alleged fraudsters persuaded the victims to make payments of US$2.9 million to accounts at banks in Hong Kong and Australia. The Claimant sought Bankers Trust relief against two Australian banks but at a second hearing in January 2023, James Pickering KC discharged those orders for the following reasons:

1. **Compliance with Australian law:** The banks argued that compliance with the disclosure orders would put the banks in breach of Australian law (i) under the implied contractual duty of confidentiality[4] and (ii) by way of a beach of the Privacy Act 1988.[5]
2. **Availability of an alternative procedure:** The Judge reasoned that the Australian courts have powers to grant similar disclosure orders as in England and the Banks had confirmed that if the Claimants were to make an application for such an order to the Australian courts, they would comply.
3. **Hot pursuit:** The case was not a "hot pursuit"[6] but at best a "luke warm" pursuit therefore infringing local laws could not be excused.

On balance, the High Court found no exceptional circumstances to justify the orders originally made. The appropriate course of action was to obtain a disclosure order from the Australian courts.

Will applicants get what they ask for?

The Gateway was a welcome invention that turned the heads of civil fraud practitioners working on multi-jurisdictional fraud cases. However, Scenna v Persons unknown demonstrates that English disclosure orders sought for the purpose of aiding victims of cross-border fraud will not necessarily override the duties that foreign banks owe to their customers under local laws.

What to consider when relying on the gateway

1. **Local laws:** Is it likely that the foreign non-party will be able to comply with an order without breaching its own local laws? It may be worth including a caveat in the order that the respondent will not be required to do anything contrary to local laws to bolster the applicant's position. The applicant may also consider obtaining local foreign law advice before the application is made.
2. **Hot or not?** Is the pursuit of information in the foreign jurisdiction time-sensitive? The Court will be more willing to grant relief if the applicant can show there was no delay between the fraud, the discovery of the fraud and issuing the application. Applicants should demonstrate the need to act quickly to avoid the train of enquiry going cold. "Hot pursuits" will be considered in the overall balancing exercise to show why, exceptionally, an order should be made against a foreign bank.
3. **Equivalent orders in the overseas jurisdiction**: Is it possible to get a similar order for Norwich Pharmacal or Bankers' Trust relief in support of foreign proceedings in the overseas jurisdiction? If the answer is yes, the Court may be in favour of the applicant pursuing relief directly in the overseas jurisdiction to secure the order, particularly if it is known that the information is located in the jurisdiction in question. On the other hand, if the answer is no, will the Court be willing to step into the shoes of the foreign lawmaker and make a disclosure order where local law does not permit one? Unlikely.

So where does this leave us? While the gateway may provide a shortcut to obtaining evidence abroad in exceptional circumstances for the hottest pursuits, the challenges of foreign laws cannot be ignored. When the English courts are next called upon to balance the interests of victims of fraud and foreign law obligations, we can expect the gateway to be further tested.

4 Tournier v National Provincial and Union Bank of England [1924] 1 KB 461

5 The Privacy Act 1988 is an Australian statute which requires certain entities (including banks) not to act or engage in a practice that breaches an "Australian Privacy Principle".

6 The wording "hot pursuit" derives from Hoffman J's dicta in Mackinnon v Donaldson, Lufkin & Jenrette Corp [1986] Ch 482) [1986] Ch 482

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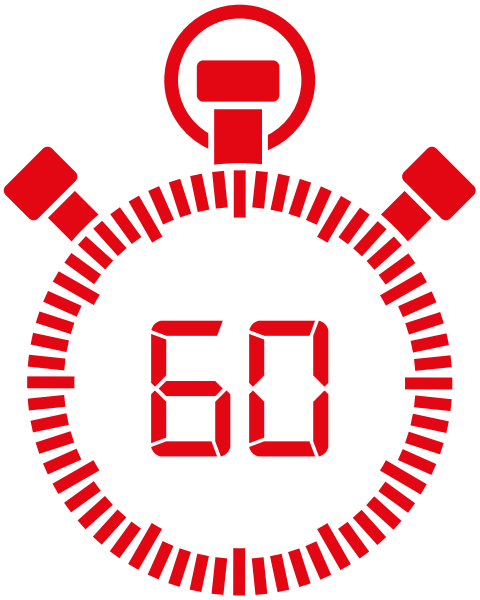

Q **Imagine you no longer have to work. How would you spend your weekdays?**

A I love travelling and learning languages, so could easily spend a few months doing that and exploring the world a bit more. But I think that after some time, I would need to do something a little bit more meaningful with my life. I would look for a role in the non-profit sector, or maybe politics, where I could use my skills to effect social change.

Q **What do you see as the most important thing about your job?**

A Never losing focus on what the client is trying to achieve. A fully-contested trial might be good for the lawyers, but is often financially ruinous for a client, sometimes even if they win. Taking a novel point of law might be a good way to get yourself in front of the Supreme Court, but will often cost the client a fortune they would rather not spend. For most clients in my line of work, the decision whether to pursue or defend a claim is a purely commercial decision; they want to get the best result they reasonably can as quickly as possible, so they can get on with their lives and their business. Very few clients want to win at any cost.

Q **What motivates you most about your work?**

A In an adversarial matter, it's the winning. In a transactional matter, it's getting the deal through, especially one that is going to save jobs and make a real difference to ordinary people. In cases where I'm asked to advise on a difficult legal question, it's that "ahah" moment that comes after hours of research when you finally identify the solution.

Q **What is one work related goal you would like to achieve in the next five years?**

A Now that covid travel restrictions have largely been lifted, I'd like to do more cases offshore again. I had the pleasure of doing a 4-month trial in the Cayman Islands in 2017, and I loved it. I am also admitted in the BVI and the DIFC, but due to covid, all my court hearings in those jurisdictions have been remote since 2020.

Q **What has been the best piece of advice you have been given in your career?**

A Never miss an opportunity to use the toilet. I shan't say which of my brilliant pupil supervisors gave me that nugget of wisdom, but it has got me through countless long trials and arbitrations.

Q **What is the most significant trend in your practice today?**

A We're definitely seeing more insolvency work come through. The covid-era restrictions on winding up petitions and debt recovery have come to an end, and both interest rates and energy bills have risen sharply over the past 12 months. Businesses which were just about getting by a year ago are now finding themselves in real trouble. It is up to insolvency professionals to save those businesses that can be saved, and deal with the fall-out from those that can't.

Q **Who has been your biggest role model in the industry?**

A It is so difficult to pick just one person, but Tom Smith KC (my first pupil supervisor) and Felicity Toube KC (my mentor in my early years of practice) both spring to mind. I'm fortunate to have worked with a number of amazing leaders, all of whom have taught me something different.

Q **What is one important skill that you think everyone should have?**

A Self-awareness. It's obviously important for an advocate to be aware of how they come across to a judge or tribunal. But I think everybody can benefit from understanding their own strengths and weaknesses, and how they fit in to what they ultimately want to achieve.

Q **What cause are you passionate about?**

A Social mobility – I went to a state school myself and was part of the first generation in my family to go to university, and I want other people like me to have the same opportunities I did.

Q **Where has been your favourite holiday destination and why?**

A Mexico. It's got a mix of beautiful beaches, breath-taking mountains, and vibrant, historic cities. Scuba diving in the cenotes just outside Tulum is something I'll never forget.

Q **Dead or alive, which famous person would you most like to have dinner with, and why?**

A Stephen Fry. I've been a fan ever since relying on re-runs of Blackadder to get me through GCSE history.

Q **What aspect of FIRE International are you most looking forward to as an attendee/speaker?**

A I'm looking forward to the Sweet Dreams my FTX event on 27 April. I've been doing a few crypto-related matters lately, and I'm keen to hear what other practitioners make of the latest developments.

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COMBINE FUNDING AND INVESTIGATION EXPERTISE FOR AN EFFECTIVE DISPUTE STRATEGY

Authored by: Michael Redman, Co-Head of EMEA at Burford Capital, and Phoebe Waters, Chair of The Female Fraud Forum

Collection risk is an important factor for companies deciding whether to pursue meritorious litigation or arbitration claims. Legal claims and decisions can represent highly valuable, multi-million-pound business assets, but assets that companies and law firms routinely leave unpursued due to the cost of litigation, arbitration and enforcement. Indeed, in 2022, three out of five in-house lawyers interviewed said their companies neglected to pursue meritorious recoveries in the prior year. A key reason for this reluctance to spend money on disputes is that companies need to be confident before pursuing a claim that payment will be made by the counterparty.

Many companies choose to work with a legal finance provider like Burford Capital to fund the recovery of their legal claims and shift some of the downside risk (including collection risk) while retaining a share in the upside. The legal financier will either pay the legal fees and expenses incrementally as a matter progresses or accelerate a portion of a pending monetary award as cash, with the legal finance provider advancing non-recourse capital that would otherwise be unavailable until that dispute is fully adjudicated and enforced.

While a legal finance provider may use its own in-house team of experts to investigate and locate assets if it has such a resource, it may also engage an external investigator to work alongside them at any stage of the recovery process as a partner to achieve the client's main aim:

To be paid monies owed.

The challenge of enforcement

Identifying enforceable assets is the cornerstone of any effective dispute resolution strategy where the desired outcome is the payment of a monetary sum. The claimant and its funder must be satisfied at an early stage that the defendant is creditworthy, has the means to pay or else has sufficient assets located in favourable

jurisdictions for enforcement. No matter how meritorious the claim, if any resulting judgment or award is unenforceable, a legal finance company would not be able to fund the matter.

An experienced investigator is often an important part of the wider legal team alongside other dispute professionals and the funders financing the claim. Investigators help to identify and find geographically dispersed assets that could be enforced to satisfy damages awarded to the claimant, and gather strategic intelligence that can encourage the defendant to engage and consider payment. In fact, given that compliance with a judgment is essentially voluntary and particularly so when, it is often the threat of pressuring the respondent's vulnerability points that forces them to settle or at least come to the negotiation table.

The process of finding these assets is not straightforward. Respondents (whether sovereign states, companies or individuals) will often obscure assets in deliberately opaque structures and interests, incentivized by domestic tax and other issues. Another significant issue in the tracing of assets is the lack of publicly available corporate information, particularly regarding shareholders and ultimate beneficial owners of companies, in many jurisdictions.

Thus, an effective asset trace must combine forensic financial analysis, detailed public record and corporate investigation, inquiries with sources close to the debtor and its business, and intelligent use of the different legal remedies available across jurisdictions and circumstances.

Collection risk against sovereign states

The problem of finding applicable assets is even more acute in investor treaty arbitration awards against sovereign states. An investigator will not only be needed to help identify assets for enforcement but they will also often need to develop intelligence to support arguments of alter ego in order to pierce the veil of separate corporate identity. It may also be useful to obtain intelligence into the political landscape so that claimants fully understand what they're up against and if there are any special considerations that need to be taken into account before bringing a claim.

The volume and variety of assets owned by a sovereign and a sovereign's lack of transparency create additional challenges to enforcement.

In our experience, states use complex ownership structures, extensive restructuring and ostensible privatisation as tactical manoeuvres to obscure, dissipate or otherwise firewall assets, enabling them to claim that they lack the requisite levels of control over money-making interests.

The sovereign immunity doctrine also poses a significant enforcement hurdle. The claimant's counsel will need to distinguish between acts of a sovereign government and those of a purely commercial nature. The "commercial purpose" test has a high threshold: Using the Bancec guidelines, claimant counsel will need to be able to prove that a state-owned entity is an instrumentality of the state. The investigator's role here is to secure intelligence that unveils a clear underlying commercial purpose to the transaction in dispute.

Considerations when using investigators

Legal finance providers look at pending claims and awards through an economic lens, with predefined budgets in place and set against procedural timetables. However, investigators tend to gradually form an iterative asset profile and develop contextual intelligence in parallel with the legal process, often without set deadlines. Relatedly, more time dedicated to the investigation process does not necessarily mean there will be more assets uncovered. It may also not be possible or even advisable to work with investigators on a contingent fee arrangement to reduce the current cost. Therefore, legal finance partners and clients should be realistic and transparent about setting a timeframe and budget for investigators' work to keep the economics balanced and interests properly aligned.

Ultimately, investigators are a vital part of assessing the viability of a potential litigation or arbitration claim. By including investigators in the process from the early stages of a litigation or arbitration pre-judgment or award, legal finance providers can better assess collection risk. Having a clear enforcement target early on means that the claimants can freeze assets before they can be further dissipated or obfuscated, resulting in better outcomes for clients and law firms.

IS MEDIATION SUITED TO THE RESOLUTION OF INSOLVENCY LITIGATION?

Authored by: Stephen Baister (Barrister), Matthew Marsh (Barrister) and Katherine Hallett (Barrister) - Three Stone

Introduction

The question of the suitability of mediation in insolvency litigation still arises, even though it has established itself for some years now as a tool for the settlement of insolvency cases. Why?

Nature of insolvency proceedings: class proceedings

The first reason is the nature of insolvency proceedings. They differ from much other litigation because insolvency proceedings are often not concerned simply with the interests of two opposing factions. Even when they are, they remain class proceedings, although often below the surface rather than obviously so. The concept of insolvency proceedings as a class remedy is a consequence of the collective nature of the proceedings, although it is not mentioned expressly in the legislation.

In Re a company (No 001573 of 1983) [1983] BCLC 492,Harman J described it like this (at p.495):

> "On a petition in the Companies Court in contrast with an ordinary action there is not a true lis between the petitioner and the company which they can deal with as they will. The true position is that a creditor petitioning the Companies Court is invoking a class right…and his petition must be governed by whether he is truly invoking that right on behalf of himself and all others of his class rateably, or whether he has some private purpose in view."

Whilst a winding up or bankruptcy petition may be the most obvious manifestation of that class principle, it permeates the whole of insolvency. Thus, a person who challenges an office-holder's decision in her capacity as a creditor must act in accordance with the interests of the class, not simply in her own personal interests. In Lock v Stanley and Edengate

Homes (Butley Hall) Ltd [2021] EWHC 2970, when Mrs Lock challenged the liquidator's decision to assign a misfeasance claim brought against her and other connected parties, relief was refused because (para.40): -

"It is obvious from the Application itself and the overall context in which it was made, together with Mrs Lock's two witness statements in support of the Application, that her interests are not aligned with the interests of the creditors as a whole and her real complaint is with the pursuit of the substantive claims in the Main Proceedings against herself and her family rather than the contractual arrangements between the Liquidator and [the assignee]."

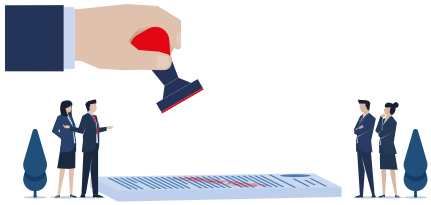
The decision was upheld on appeal at [2022] EWCA Civ 626.

In Re Longmeade Ltd [2016] EWHC 356, Snowden J made the generality of the class proposition clear, in the context of apparently perverse creditor behaviour, as follows (para.52: -

"Liquidation is a class remedy to be conducted in the best interests of the general body of creditors as a whole. If creditors are not promoting a view based upon their capacity as such, but are doing so as the result of extraneous factors which are not shared by, or are even contrary to the interests of the remainder of the class, then such views should be discounted or not given effect."

Office-holder's position as fiduciary

The second reason why some may question whether mediation is suitable in insolvency litigation is that the office-holder (the most common applicant), whilst often bringing proceedings in his own name or as agent of the company in respect of which he has been appointed, does so as a fiduciary i.e. on behalf of the creditors (or members) in whose interests he must act. (For a discussion on the office-holder as fiduciary see Mirror Group Newspapers plc v Maxwell (No 2) [1998] 1 BCLC 638 ('Maxwell'): although the case dealt primarily with office-holders' remuneration, it remains an important statement on the nature of insolvency offices). In this crucial respect, an office-holder is not simply acting in his own commercial interests, as most parties to litigation are entitled to do.



Should these reasons militate against mediation in insolvency proceedings?

These features of insolvency proceedings need not be an obstacle to mediation: indeed, in many circumstances, they will militate in favour of it.

Many other parties bring claims in a fiduciary capacity. Trustees bring a wide variety of claims in the interests of the beneficiaries whose interests they represent. Personal representatives of a deceased do so as well. Provided they bear in mind the capacity in which they are acting and the attendant duties, mediation may be as proper a course to take as full-blown litigation. Ultimately, office-holders are expected to use good judgment and to make commercial decisions. They do this all the time when they deal with assets in a more concrete form than the asset which a cause of action represents. As Ferris J noted in Maxwell (p.648): -

"They are appointed because of their professional skills and experience and they are expected to exercise proper commercial judgment in the carrying out of their duties."

Office-holders are generally entitled to do this without having to look over their shoulders: e.g. Re A Debtor, (No 400 of 1940) ex parte Debtor v Dodwell (Trustee) [1949] Ch 236.

Furthermore, the use of mediation will often be aligned with an office-holder's fiduciary duties and the obligation to exercise commercial judgment. An early return to creditors may be more desirable than a (possible) better return much later, having regard to litigation risk, the legal costs of proceedings (including irrecoverable costs) and, in most cases, the costs of keeping the relevant insolvency open for a number of years in circumstances in which it could otherwise be concluded. Indeed, early mediation before proceedings are issued can avoid the not insubstantial cost of after the event insurance, which any office-holder would be well-advised to obtain to protect against an adverse costs award.

Nor need the class nature of insolvency proceedings be an obstacle to mediating. Many proceedings brought by an office-holder are, in reality, commercial in nature: they are intended to recover assets or money for the benefit of the insolvency estate. Applications for restitution or other relief arising out of director misfeasance, a transaction at an undervalue (s 238 Insolvency Act 1986) or a preference (s 239) (or their bankruptcy equivalents), fraudulent or wrongful trading (ss 213 and 214), or transactions in fraud of creditors (s 423) are all as capable of resolution by mediation as any other essentially commercial claim.

Many winding up and bankruptcy petitions, in spite of their quintessentially class nature, are also capable of mediation: in practice the majority involve only two parties, the petitioner and the company or debtor. Where there are supporting or opposing creditors, they will often be aligned with one of the main parties. Petitions may be less susceptible of settlement where the interests of the parties and the nature of their claims differ substantially, as they occasionally do, although even then multi-party mediation remains a viable possibility.

Potential problems resolved

This is not to say that difficulties of another kind may not arise in insolvency cases. Some of these (as in all litigation) go to the stage at which mediation is desirable and the position of a respondent director as a litigant in person (although litigants in person are now a feature of litigation of many kinds).

It may, for example, be unwise for an office-holder to come to mediation without knowing the figure that has to be reached to enable him to bring the winding up or bankruptcy to a

conclusion. This is likely to be most relevant where a settlement might enable all creditors to be paid, or even give rise to a surplus. This is a rare situation, but it is not unknown. An office-holder may not have wanted to incur the cost of examining the creditors' proofs of debt and adjudicating on them. Many do not do this until they have funds to distribute, but it may be wise to do so in cases where it is likely to affect any negotiations. Directors acting both with and without legal support often want to know what the total claims are. At the very least an estimate from the insolvency practitioner in charge is desirable.

Then there are what one might call psychological factors that are peculiar to insolvency cases. Directors who have "lost everything" often see litigation against them as a form of persecution: liquidation or bankruptcy was supposed to be the end of their problems, not the beginning of even more. That psychological difficulty is compounded where the only asset out of which they can satisfy a claim is their house: having lost their company, they now face losing their home as well.

A particular problem in insolvency cases is the inability of many directors to understand the separate legal personality of what was often a one-man or family company. Many directors have little understanding of their statutory or common law duties, seeing their company as no more than an alter ego. Even those who have some understanding of their duty to shareholders have none of the obligation to creditors when their company is becoming insolvent. An effective mediation may involve explaining this (or indeed the law on misfeasance, transactions at undervalue or preference) simply in an informal setting, with an independent third party assisting.

It can be difficult to persuade a director who is feeling persecuted to go to mediation (and contribute to the costs of doing so). The prospect of early, or any, settlement is not always attractive: keeping one's head firmly in the sand often seems more appealing, at least in the short term. If common sense and an appeal to certainty do not do the trick, it may be legitimate to remind a refusenik of the potential costs consequences of refusing to mediate. Wales (t/a Selective Investment Services) v. CBRE Managed Services Ltd & Anr [2020] EWHC 1050 is just one recent example in which a significant part of a successful defendant's costs was disallowed because it had refused to mediate both at the start of the claim and before trial. His Honour Judge Halliwell (sitting as a High Court judge) noted that even if mediation had not fully succeeded, it would have assisted the parties by clearing up some misapprehensions about the case (para.29): -

> "[A]t the very least it is likely that some of the obscurities and difficulties which have bedevilled the proceedings could have been avoided."

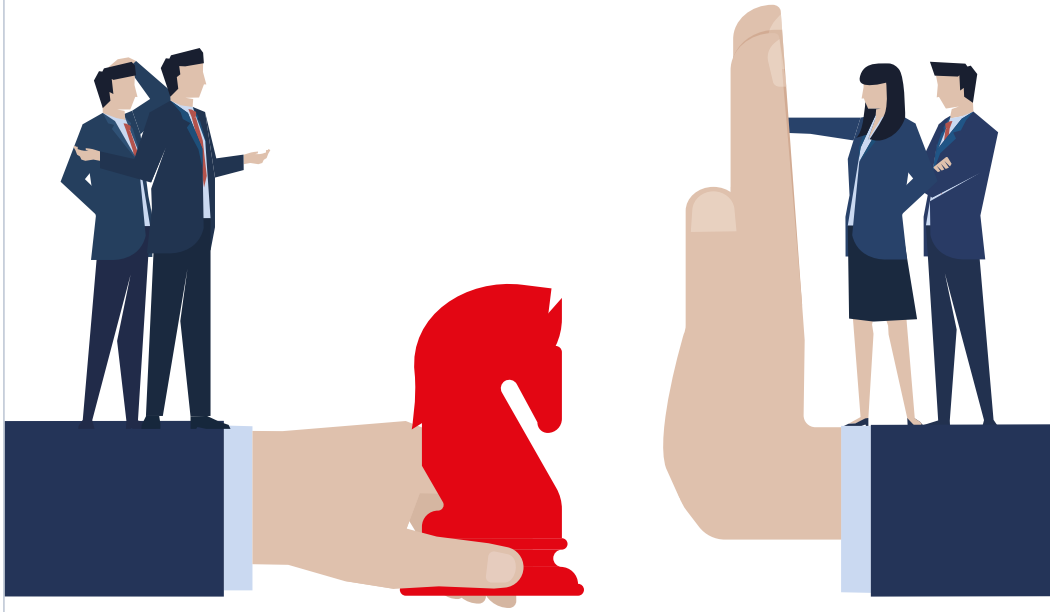
Finally, it should be borne in mind that many cases brought during an insolvency are not insolvency proceedings properly speaking. An office-holder frequently brings proceedings for breach of contract, in debt (for example where a director's loan account is overdrawn), or for anything which the company or individual (where the claim has vested) could have claimed. By their nature, such proceedings are as capable of mediation as they would have been if the company had continued to trade, or the individual had not been adjudicated bankrupt, and had decided to litigate.

Conclusion

Insolvency and insolvency related cases are generally speaking as capable of resolution by mediation as any other kind of case. More and more insolvency practitioners are having recourse to it, frequently with success. The question whether pressure from the courts and the judiciary will increase the likelihood of compulsory mediation remains open. In the meantime, the desirability of early settlement and certainty of outcome remain the main factors in promoting mediation along with the potential costs consequences. As the court said in DSN v Blackpool Football Club Ltd [2020] EWHC 670 per Griffiths J (para.28): -

> "No defence, however strong, by itself justifies a failure to engage in any kind of alternative dispute resolution. Experience has shown that disputes may often be resolved in a way satisfactory to all parties, including parties who find themselves able to resolve claims against them which they consider not to be well founded. Settlement allows solutions which are potentially limitless in their ingenuity and flexibility, and they do not necessarily require any admission of liability, or even a payment of money. Even if they do involve payment of money, the amount may compare favourably (if the settlement is timely) with the irrecoverable costs, in money terms alone, of an action that has been successfully fought. The costs of an action will not always be limited to financial costs, however. A trial is likely to require a significant expenditure of time, including management time, and may take a heavy toll on witnesses even for successful parties which a settlement could spare them."

That must apply equally to a claimant or applicant as it does to a defendant or respondent.



THE ENFORCEABILITY OF SOVEREIGN AWARDS

FROM THE PERSPECTIVE OF AN ASSET TRACER

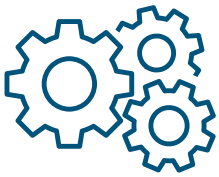
Authored by: Michael Helvert (Associate) - J.S. Held

When award creditors for investor-state arbitrations think of an asset tracer's arsenal of tools for enforcement of their awards, they may immediately think of chasing assets held by the state such as high-value properties, a fleet of state aircraft, or even bank accounts held in enforcement-friendly jurisdictions. However, one less thought of asset relates to the coupon payments made on a state's international debt securities and the different enforcement strategies available to creditors targeting this asset class.

Whilst the idea of fixed income may not inspire an image as sexy as the seizure of an aircraft, there are four principal factors which make debt securities an attractive enforcement measure for creditors:

1. They frequently carry large principal amounts of up to USD 1 billion and more;
2. They are denominated in currencies such as USD, EUR, and GBP;
3. They maintain paying agents for coupon payment distribution to bondholders in enforcement-friendly jurisdictions such as New York, London, and Luxembourg; and
4. They can put significant pressure on the state and its ability to attract future investments into the country.

This final point is of particular importance and its significance in the context of enforcement action is highlighted by the case of Perenco Ecuador Limited v Republic of Ecuador, discussed below.



The mechanics of enforcement action on coupon payments

Depending on whether an asset tracer is providing a pre-award assessment or a full report of a state's asset profile and the relevant jurisdictions/strategy for enforcement, the asset tracer will ultimately have the fun task of reading through all of the debt securities' bond prospectuses to answer four principal questions:

1. How is the debt security structured (i.e. is there a fiscal agent or are the securities subject to a trust deed);
2. Which bank or professional trust company is acting as the trustee/ fiscal agent for the securities;
3. How frequent and what is the quantum of the coupon payments; and
4. What can trigger an event of default?

This first question is particularly important since it may affect the strategy which a creditor uses in any enforcement action.

There are two options for structuring international sovereign debt securities: a fiscal agency structure or a trustee structure.

In the case of a fiscal agency structure, the issuer of the security (i.e. the state) will appoint a fiscal agent (i.e. a bank or trust company) who is responsible inter alia for facilitating the coupon payments due on these securities to bondholders. The most important aspect of this relationship between the state and fiscal agent is the fact that the fiscal agent is not acting on behalf of the bondholders but rather the state.

In contrast, with a trustee structure the state will choose a professional trust company to act as the trustee for the debt securities. As a result, the trustee has a fiduciary duty to act on behalf of these bondholders. This difference in the role of an agent/trustee may affect legal arguments surrounding the ownership of the coupon payments once they reach the agent/trustee. Indeed in the case of Commisimpex v Republic of Congo,[1] Commisimpex served two restraining notices on the Delaware Trust Company ('DTC'), which was acting as a trustee for one of Congo's Eurobonds, initially freezing the coupon payments due to bondholders. However, when DTC sought to annul these restraining notices acting in its capacity as trustee, it made the argument that the funds transferred by Congo were no longer under state ownership – they had passed to the bondholders as beneficiaries under the trust structure.

1 https://www.reuters.com/article/ozabs-uk-congo-eurobonds-default-idAFKBN1AD2B6-OZABS

If a creditor is therefore seeking to freeze specific coupon payments, a fiscal agency structure is much more favourable than a trustee structure in the eyes of an asset tracer. Whilst the fiscal agency structure is more frequently used in older bond issuances, many states have turned to using the trustee structure for any new bond issuances since it inter alia insulates them from these enforcement actions.

However, even if you are faced with a trustee structure between the bank and the state, all hope is not lost.

The case of Perenco Ecuador Limited v Republic of Ecuador shows that even where a trustee structure exists it is possible for a creditor to obtain a successful outcome.

Perenco Ecuador Limited v Republic of Ecuador

As part of Perenco Ecuador Limited's ('Perenco') efforts to enforce their ICSID award of approximately USD 412 million against Ecuador, they sought to freeze one of the semi-annual coupon payments due on three of Ecuador's debt securities with maturities in 2030, 2035, and 2040. In this case, the Bank of New York Mellon ('BNYM') was acting as the trustee and maintained paying agents through its London and Luxembourg branches. This information guided the enforcement strategy and provided Perenco with jurisdictions where enforcement action would be possible.

Ultimately Luxembourg was selected as the most favourable jurisdiction for enforcement action for two principal reasons. Firstly, following the Luxembourg Court of Appeal's judgment from 11 February 2021 confirming the recognition and enforcement of arbitral awards issued by an ICSID arbitration panel, the process for recognising an ICSID award is more streamlined and faster than recognition in the UK, which aids a creditor's need for speed. Secondly, a creditor can serve a saisie-arrêt[2] on many different banks at the same time, providing an invaluable tool for freezing funds, especially if there is uncertainty surrounding the precise location of the funds.

Following extensive international news coverage of Luxembourg banks being ordered to freeze any assets held by Ecuador in early August 2022,[3] Ecuador responded publicly to these reports by announcing that the freeze had not affected coupon payments to bondholders.[4] However, crucially, because of this press coverage, Ecuador's Ministry of Economy and Finance released a statement on the 30 August 2022 which emphasised Ecuador's capacity and willingness to comply with Perenco's arbitral award.[5] In this statement, the Ministry of Economy and Finance stated that "at no time has there been any intention by the country not to comply with this award which is the result of decisions adopted by Rafael Correa's government." The political landscape of Ecuador here played a key role in the enforcement strategy pursued by Perenco since Guillermo Lasso's centre-right government had promised to incentivise international investment into the country and eliminate Ecuador's fiscal deficit during the 2021 presidential elections.

An asset tracer's knowledge of the political landscape and the thought process of key decision makers is therefore equally important to any enforcement action since certain measures can have an amplified effect when deployed at the suitable time.

In any case, as a result of Perenco's action in Luxembourg, Perenco reached a successful settlement with Ecuador with a payment schedule agreed extending to the end of 2023.[6]

The success of Perenco in this case demonstrates that understanding the political landscape, using available enforcement avenues, and amplifying certain measures with extensive press coverage can be a powerful tool for creditors.

Concluding Remarks

Governments generally want to be viewed as investor-friendly and capable of fulfilling their debt obligations internationally – if they don't, they will struggle to attract future investments into their countries.

Enforcement against a sovereign's international debt securities can offer effective solutions for creditors looking to enforce their awards – be it to actually attach coupon payments through enforcement measures or to exert pressure on the state. There is significant value derived from the multifaceted strategy of sovereign debt disruption. It can expose governments both publicly and internationally for not fulfilling debt obligations; it can lead to successful settlement agreements through negotiation; it can also affect a sovereign's long term credit rating. Equally, it can also offer the creditor the opportunity to recover physical assets through seizure of coupon payments in enforcement-friendly jurisdictions. It is this duality/multiplicity of purpose which makes international debt securities such a powerful tool for creditors in investor-state arbitrations – they are not limited to physical seizure and their value in enforcement actions should not be underestimated.

2 A Saisie-Arrêt is the equivalent of an Attachment Order

3 See for example https://www.reuters.com/markets/europe/exclusive-luxembourg-banks-told-freeze-ecuador-assets-amid-perenco-dispute-2022-08-01/ https://globalarbitrationreview.com/article/perenco-secures-freeze-ecuador-accounts-in-luxembourg

4 https://www.reuters.com/world/americas/ecuadors-debt-payments-not-affected-by-luxembourg-asset-freeze-government-says-2022-08-09/

5 https://www.finanzas.gob.ec/wp-content/uploads/downloads/2022/08/BP.-Perenco.-30.08.2022.-M.pdf

6 https://globalarbitrationreview.com/article/ecuador-pay-perenco-icsid-award-0

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COLLABORATION BETWEEN LAWYERS AND INVESTIGATORS WHEN ACTING FOR ULTRA-HIGH NET WORTH INDIVIDUALS

Authored by: Phoebe Waters, Chair of Female Fraud Forum and Rachael Gregory, Of Counsel at Grosvenor Law

Phoebe Waters, Chair of The Female Fraud Forum is joined by Rachael Gregory, Of Counsel at Grosvenor Law, in a discussion on litigating and conducting investigations (particularly asset traces) when acting for a HNW individual. In this short interview, Phoebe and Rachael touch upon how lawyers and asset tracers alike experience instructions from, and proceedings supporting, HNW clients.

Phoebe: Rach, to kick off our discussion with a broad perspective, could you please elucidate the key distinction for you between representing HNW individuals and other clients?

Rachael: HNW individuals' disputes typically involve complex structures which traverse across the globe, so if things go wrong it takes much more unravelling. Often my clients have factors which may have originally attracted them to a jurisdiction such as anonymity, intricate corporate structures and trusts – these act as challenges and complexities in the event of a dispute.

What else do you think separates a HNW from your other clients, particularly as an investigator?

Phoebe: HNW clients have the means to frontload costs that other clients perhaps don't - at least often not to the same extent or with as rapid turnaround. This translates into them wanting to be fast, aggressive, leaving no stone unturned - because they can afford to. This is, of course, is positive (for both you as the litigator, me as an asset tracer and most significantly the client) because they are likely to engage investigators early on, giving the adverse party less time to dissipate and further obfuscate assets. To bring as much value as possible, I think it is key for investigators to partner with the lawyers from the start - naturally we bring different expertise and ideas to the equation. Together we can create a bespoke team which is highly effective.

Rachael: It is certainly my experience that HNW individuals instruct us to 'get the investigators in' as soon as possible, and much earlier than other clients. Most of the HNW individuals I act for are familiar with the use of investigators and are keen to get them involved from

the outset of an instruction. There can be multiple steps to this instruction. Due to the international flavour of disputes involving HNW individuals, first, we are likely to ask investigators to establish the whereabouts of key players for a) the purpose of jurisdiction, b) strategy as to where a dispute should be brought and c) for service of any proceedings. Even if, for example, we are aware that key players spend a lot of time in London, we need to have evidence that they reside here.

Once location is established, wherever that may be, we then need investigators to identify assets as quickly as possible and confirm ultimate beneficial ownership. We will be acting simultaneously across multiple jurisdictions where HNW individuals are involved (as already mentioned!) and the assistance of investigators is invaluable with this.

P, we are both more than aware that the quantum of the fraud, and therefore monies owed, are high when it comes to disputes involving HNWs. As an investigator, what differences do you see in terms of assets and what do you do differently?

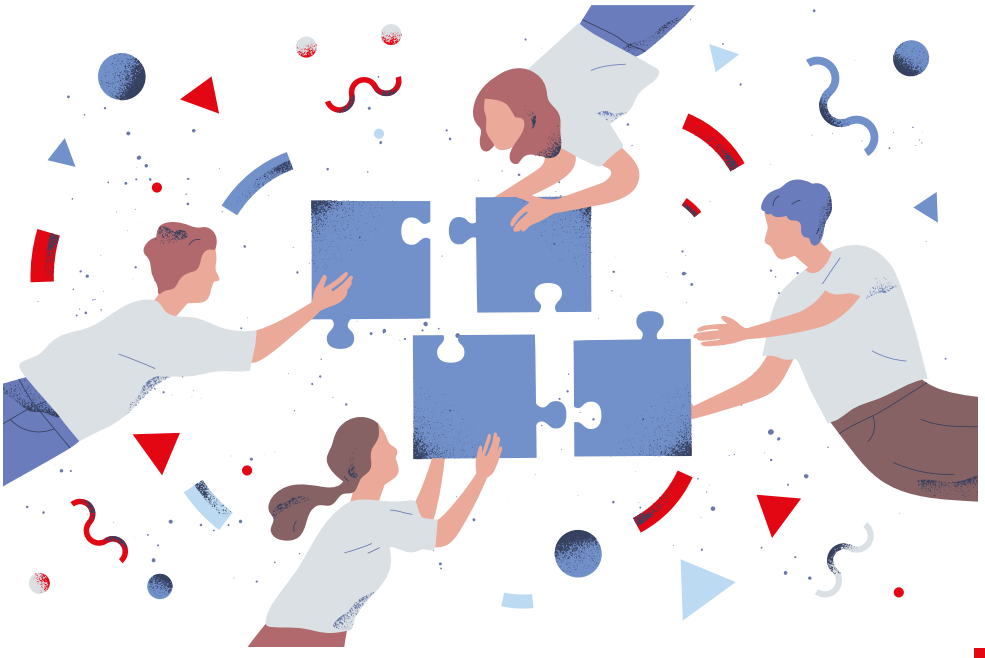
Phoebe: Excellent investigators are creative, curious and persistent (did someone say stubborn?!). We want and need to be like this for every client, and on every matter, but there is something about HNW clients and the disputes in which they are involved that we need to particularly think 'outside of the box' for. This is not only because of the (likely offshore and arguably obtuse) jurisdictions involved, the recalcitrant parties that they are up against, and the complex ownership structures – but the asset classes themselves that often pop up in HNW disputes. We need to be adept at identifying, confirming ownership, and tracking the saucier sources of wealth – from vessels, to aircraft, from sexy cars to polished polo ponies and precious paintings – in addition to the more 'traditional' assets that we know we have to hunt like shareholdings, real estate and so on. Each of these groups requires an asset tracer to use her/his/their special set of skills in a specific way, and each class has a particular niche set of breadcrumbs we can follow. As you mentioned Rach, with HNW disputes often come high quanta, which means we need to be on it with knowing who to reach out to with valuations, such as shipping brokers or art houses. As always for investigators it's crucial to have the right sources in the right places to call on at the right times.

There are many other elements in a HNW dispute of which we are hyper-sensitive, such as reputation, potential political exposure and security. A lot more that we don't have time to cover!

One of the points I am intrigued to know is, as the one directly communicating with the individual who would usually be my ultimate (and not instructing) client, do you find the pressures of working with a HNW any different?

Rachael: In many ways, working with a HNW individual is no different to any other client and there are always the usual challenges of trying to manage expectations. HNW clients often exhibit the strongest desire for comprehensive strategies, based on my experience. Consequently, as you quite rightly said P, it is essential to employ creative problem-solving techniques to identify solutions, even when encountering seemingly insurmountable obstacles.

To this end, many of my HNW individual clients instruct multiple lawyers and potentially multiple investigators in relation to the same dispute. This is a luxury that clients other than HNW individuals cannot generally afford. I am regularly instructed to advise in relation to strategy in relation to proceedings abroad notwithstanding that local lawyers are also instructed in relation to the matter and also to 'quarter back' with other lawyers here. For the client to benefit it requires the entire team to work collaboratively together to maximise the benefits of all the brains in the room.



Rachael is a commercial litigator who specialises in large scale, complex financial disputes and civil fraud claims. Her work usually has an international aspect and often involves working as part of a team of global advisors. Her experience includes asset tracing, forgery and enforcement issues.

Phoebe is Chair of The Female Fraud Forum and a senior investigator. She specialises in disputes and litigation/ arbitration support, including high quantum fraud cases and sovereign state asset recovery exercises.

The Female Fraud Forum, a community partner of TL4 FIRE, is a multi-disciplinary not-for-profit organization comprising a network of professionals (of all genders) in the civil and criminal fraud, asset recovery, and investigations sectors. The FFF's aim is to spearhead the fight for change so that gender equality becomes ingrained in the workplace and secure for future generations.

60-SECONDS WITH:

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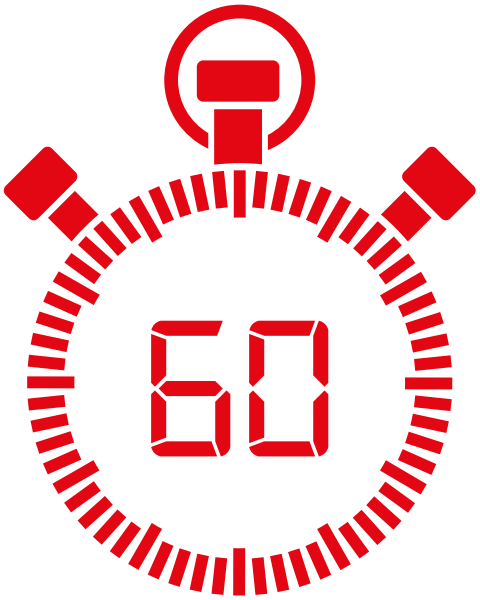
RAJAH & TANN



Q **Imagine you no longer have to work. How would you spend your weekdays?**

A Football! I love watching and playing the game. With more time, I would also like to coach younger children to enjoy the game.

Q **What do you see as the most important thing about your job?**

A Problem solving. As a dispute lawyer, I believe our job is to take on the stress and burden of a client's problem, and to find a solution.

Q **What motivates you most about your work?**

A Being challenged. The more complex the matter, the more interest I have in it. I find it hard to focus on repetitive and mundane tasks.

Q **What is one work related goal you would like to achieve in the next five years?**

A Write a textbook. Problem is, I have not even thought of a topic.

Q **What has been the best piece of advice you have been given in your career?**

A You are never too young to leave an impression. Even as a junior, you have an opportunity in every email, letter, conversation or hearing to leave a good (or bad) impression. Never belittle or undermine the significance of your work product.

Q **What is the most significant trend in your practice today?**

A Technology and digitisation. I believe this would change the nature and way we practice going forward.

Q **Who has been your biggest role model in the industry?**

A My mentor, Adrian Wong, who we call Yoda. He has shaped every aspect of my practice.

Q **What is one important skill that you think everyone should have?**

A Grit.

Q **What cause are you passionate about?**

A Mentoring. I am a firm believer that we each owe a duty to the future generation to mentor and guide them in our profession.

Q **Where has been your favourite holiday destination and why?**

A Maldives. I was there for my honeymoon so it has wonderful significance and memories. Also, the last trip without kids!

Q **Dead or alive, which famous person would you most like to have dinner with, and why?**

A Lee Kuan Yew, the 1st Prime Minister of Singapore. He transformed Singapore through a tough period and was known for his brilliant mind and steely determination. He would offer amazing perspectives and insights.

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