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International Enforcement Strategy – An Overview

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Introduction

International enforcement is a highly complicated area of practice which involves the interplay of different legal systems and national laws amidst a range of bilateral and multilateral international conventions and treaties. Although it involves numerous technicalities, it is more of an art than a science because of the numerous uncertainties that exist. There are many books which focus on the applicable principles under different national laws, but often what is lacking is an overview of how the overall process works. A clear strategy is essential, but strategy can rarely be fixed at the outset and it will usually be iterative, adapting to developments that take place in the proceedings. Strategy must take into account the intricacies of the applicable legal principles whilst at the same time taking into account the practical and commercial factors which are fundamental to any enforcement strategy. Experience is therefore essential.

The three main elements to an effective enforcement strategy will tend to be: (i) information gathering; (ii) preservation of assets; and (iii) execution/enforcement against assets. In some cases, further steps will have to be taken to unwind transfers/disposals of assets by the debtor and/or to enforce against assets held in the names of connected persons. The importance of each of these stages will depend on the facts of the case. In many situations, if success is achieved in the information gathering and preservation of assets stages, formal execution/enforcement against assets will not be necessary. If a debtor gets to a point where successful enforcement appears inevitable, it will very often pay up. However, in more difficult cases where assets are no longer owned by the debtor, proceedings may end up involving a web of third parties who are said to hold assets beneficially owned by the debtor, or who are said to have received the debtor's assets other than on commercial terms.

A debtor seeking to avoid enforcement will typically rely on a combination of technical arguments against recognition of a foreign judgment, and the use and abuse of procedural mechanisms to delay matters. Some debtors will go further by dissipating their assets and asserting that supposedly innocent third parties have prior rights over the debtor's property.

When considering enforcement strategy, the question of where particular steps should be taken will be an important and potentially complex question, and there may be several options. The most obvious option is not always the best option.

This overview chapter addresses the three principal issues of: (i) information gathering; (ii) preservation of assets; (iii) execution/enforcement against assets; as well as the important matters of (iv) sovereign immunity; and (v) limitation periods. However, an effective enforcement strategy should really be planned from before the commencement of the original proceedings, since decisions such as those relating to the choice of defendants, the choice of jurisdiction, the choice of cause of action and methods of service can all impact on the issue of enforcement.

(i) Information Gathering

Gathering information about a debtor's assets can be crucial to successful enforcement. However, the most successful means of gathering information will depend on the circumstances of any particular case. Information gathering will involve the review of publicly accessible resources and the compulsion of companies and individuals to provide information about assets pursuant to orders of the court.

Gathering information from publicly accessible sources is a process which may be undertaken by lawyers but may also be undertaken by specialist investigation practices. Sometimes the investigations will require manual checks of public registers in remote jurisdictions, or the surveillance of properties; but much can also be done by searching the internet and electronic resources with the assistance of sophisticated software that enables a broad range of information to be gathered quickly and efficiently. Increasingly, individual debtors and their families have a significant footprint on social media, which can assist in identifying assets and tracking extravagant lifestyles.

However, in many cases, it is essential to obtain orders from a court compelling the provision of information by debtors and/or third parties who have information about the assets of the debtor. Information can be obtained both at a pre-judgment stage and at a post-judgment stage, although unsurprisingly, it is generally easier to obtain orders requiring the provision of information about assets at a post-judgment stage.

There is no single answer as to which courts one should go to in order to obtain information about the assets of the debtor. In general, in common law systems, the court that is determining the substance of the dispute will consider itself to have personal jurisdiction over the debtor such that it can compel the debtor to provide information about its worldwide assets both before and after judgment.

In addition, in many legal systems (and under the EU jurisdiction and enforcement regime), provisional and protective measures can be granted by the courts of a state other than the state that is determining the substance of the dispute, where there is a sufficient connection between the protective measure sought and that other state. On this basis, it may well be possible to obtain an order requiring the provision of information about assets in the courts of the place of the assets or the debtor's domicile, as well as in the court determining the substance of the dispute.

In common law systems, in a post-judgment context where a judgment has not been satisfied, obtaining orders requiring the debtor to disclose all its assets is a relatively straightforward process. Debtors can be required to attend court for the examination of their assets, and/or they can be required to provide a sworn affidavit detailing their assets. Failures to comply with such orders, and the concealment of assets, is likely to constitute a contempt of court punishable by imprisonment or a fine.

In common law systems, *Norwich Pharmacal* orders can often be used to obtain information from third parties about a debtor's assets. There are a number of subtleties about which courts can compel third parties such as banks to provide information and concerns about breaching foreign laws are an important consideration. In general, when seeking information from banks, one has to go to the courts of the country where the bank account is held. In other cases, the courts of the domicile of the third party used to be the most common option, but changes to the English procedural rules mean that the court now has jurisdiction to grant orders requiring foreign third parties to provide information where it relates to the identity of a potential defendant and/or what has happened to property belonging to the claimant.

In very general terms, obtaining detailed information about assets in civil proceedings tends to be more difficult in civil law systems. However, the counterbalance to this is that often, in civil law systems, information can be obtained through criminal proceedings.

In the international context, the discovery procedures in the United States under section 1782 of the United States Code are of particular note. Whilst there are conflicting decisions as to the precise scope of documents that can be obtained under this procedure, in general terms, it enables a claimant to obtain information from third parties in the US in a very wide range of circumstances where the provision of information is in support of foreign proceedings. Interestingly, in some cases, banks operating in the US have been required to provide information about accounts outside the US under this procedure.

It is worth noting that the sort of information that can be obtained can include information about the operation of an asset that produces a revenue stream for the debtor, and not only straightforward information about the ownership of bank accounts, etc.

As well as obtaining orders specifically requiring the provision of information surrounding assets, another route to obtaining information can be through the appointment of a court-appointed receiver. In most common law systems, a receiver can be appointed to manage and collect in certain specific assets or classes of assets. The powers that are granted to the receiver can include the power to require the provision of information. It has been clear since a landmark judgment in 2008 (*Masri v Consolidated Contractors (No.2)* [2008] EWCA Civ 303) that worldwide receivership orders can be granted by the English court, and other common law courts have followed suit.

(ii) Preservation of Assets

The preservation of assets may well be the most important step in the overall enforcement process. If assets can be effectively secured through the application of interim measures such as freezing injunctions, often the formal process of execution against the assets will not become necessary.

However, that is by no means always the case. In particular:

- Assets may be frozen where they are held by a third party. In this situation, the court will not have determined that the assets can definitely be enforced against by the creditor; the court will most likely only have determined that there is a good argument or a realistic prospect of the creditor being able to establish that it can enforce against the assets. In this context, the debtor may well continue to dispute that it has the requisite interests in or rights over the assets held by the third party.
- In other situations, it may be asserted that the assets frozen by the creditor are the subject of third-party security interests which take precedence over the creditor's interests. Whilst in some cases, there may be genuine third-party security interests held by independent third parties, in other cases, the security interests may be held by parties which the creditor believes are connected to the debtor and there may be concerns that they are a device to evade enforcement.

The preservation of assets can either take the form of a "provisional attachment" in respect of the relevant property, or an *in personam* order which prohibits persons subject to the jurisdiction of the relevant court from disposing of the asset (referred to as "freezing orders"). In general terms, the former approach of provisional attachment orders is used in civil law jurisdictions and the latter approach of freezing orders is used in common law jurisdictions.

The different nature of these orders impacts which courts will consider themselves to have jurisdiction to grant such orders. Because the provisional attachment order operates over the specific property to which it relates, such orders will normally only be granted by the courts of the place of the relevant assets. This means that the courts of civil law jurisdictions will not grant provisional attachment orders over worldwide assets.

In contrast, the personal nature of the freezing order means that common law courts will grant so-called "worldwide" freezing orders. It is important to note that the freezing order does not give the claimant any security interest in the relevant property and/or any priority over other creditors. What it does is order the named individuals (who are subject to the jurisdiction of the court) not to dispose of the relevant assets, wherever they may be located. If a party to litigation breaches a freezing order or other injunction, it will be in contempt of court and may be imprisoned or fined. Furthermore, non-parties to the litigation who are subject to the jurisdiction of the court and who are notified of the order will also be in contempt of court if they assist in any breach of the injunction.

Both forms of orders have their strengths and limitations, and deciding what is the most appropriate means of preserving assets will depend on a careful assessment of the circumstances of the case, combined with a pragmatic approach as to what can be achieved in different jurisdictions within the specified time period.

In a post-judgment context, in some civil law jurisdictions, obtaining a provisional attachment over bank accounts, for example, can be a very straightforward process which is less costly and complex than seeking a freezing injunction in a common law jurisdiction. However, the provisional attachment is a less flexible remedy in a number of ways.

Over the last 10 years, receivership orders have become a more widely used tool in common law jurisdictions for the preservation of assets. The decision in *Masri v Consolidated Contractors* (as mentioned above) was soon followed by similar decisions in various other common law jurisdictions. In this context, a "receivership order" (or "order for the appointment of a receiver") does not derive from insolvency laws. It is the process whereby the court appoints an individual to act as a receiver to stand in the shoes of the respondent in respect of the management of specified assets. Receivership orders can be

granted in both a pre-judgment and a post-judgment context, but they are more common in a post-judgment context. The receiver is an officer of the court and owes duties to the court, but plainly their role is to preserve the relevant assets – a task which is in the creditor's interests. As for freezing orders, the receivership order does not grant any proprietary right or interest over the relevant assets. Its effectiveness relies on either the respondent or relevant third parties complying with the order and recognising the receiver.

Post-judgment receivership orders often fill a useful purpose in assisting enforcement where legal execution against assets would be impossible because of jurisdictional issues or a lack of certainty or specificity as to the whereabouts of assets. For example, receivership orders might be used to collect a future revenue stream which will become payable to the judgment debtor over time. As well as being used to enforce contractual rights, receivership orders may also be used to exercise powers under a trust or rights as a shareholder. Naturally, the rights exercised by the receiver can never be greater than the rights of the debtor itself, and so due regard must be paid to the interests of third-party security interests. Of course, determining what is a *bona fide* third-party security interest and what is not can be difficult.

Variations between jurisdictions in the requirements for the grant interim relief

The requirements for the grant of provisional attachments and/or freezing orders vary between jurisdictions.

- A claimant will have to show that it has a claim against the defendant, otherwise there could be no justification for interim relief. However, whether or not the claim must already have been commenced, and/or whether the court will consider the strength of the claim in any way, varies between legal systems.
- In many jurisdictions, assets will only be frozen or subject to a provisional attachment if the claimant can show that there is a risk that the defendant's assets will be dissipated, or that the defendant will evade payment of any judgment. However, this is not always the case; and in some jurisdictions, there is no such requirement.
- Requirements for the applicant to provide undertakings or security in respect of the potential harm that might unfairly be caused to the defendant by the order vary significantly across jurisdictions. However, these requirements can be important practical points when applying for relief.
- The duty of full and frank disclosure that arises in common law systems (when an application is made without notice) is another important strategic issue. In general terms, this duty does not apply in civil law systems.

Granting relief in support of foreign proceedings

In most legal systems, the courts will grant some form of provisional/interim relief in support of claims that are ongoing before those courts. However, should they grant interim relief in support of foreign proceedings? As trade and litigation have become more international in their nature, many legal systems have adapted to meet this challenge.

Within the European jurisdictional regime, the Recast Brussels Regulation (Regulation (EU) 1215/2012) specifically provides separate rules as to which courts have jurisdiction to grant provisional or protective measures as against the courts which have jurisdiction to determine the substance of the dispute. These rules contemplate that provisional measures may be granted either by the court determining the substance of the dispute or by the courts of another EU Member State where there is sufficient connection between the relief sought and the state concerned – the prime example being the obtaining of a provisional attachment order in the courts of the place where the asset is located. Furthermore, an unusual feature of the EU regime is that orders for provisional/interim relief granted by the courts of one Member State are enforceable in other EU Member States.

In many common law regimes, specific statutory measures have been put in place to enable freestanding proceedings to be commenced for the purpose of obtaining interim relief in support of foreign proceedings. However, in the absence of such provisions, it may be the case that a claimant can only make an application for provisional/interim relief if it has also commenced substantive proceedings to recognise and enforce a foreign judgment in the relevant jurisdiction.

(iii) Execution/Enforcement Against Assets

The process of enforcement of a judgment in another jurisdiction really consists of two separate stages. First is the process of obtaining an order of the foreign court which either recognises the foreign judgment as being enforceable, or itself replicates the provisions of the foreign order (the "recognition phase"). Second is the process of enforcing the order obtained in the recognition phase against assets in the relevant jurisdiction (the "enforcement phase").

In most cases, only judgments for the payment of a specified sum of money can be enforced in a foreign jurisdiction. However, as mentioned above, the European regime does allow for the recognition of all types of orders and judgments, including orders for the granting of interim relief.

The recognition phase

The approach to recognition depends on the legal system of the jurisdiction concerned and whether there are any applicable treaties or conventions governing the process of recognition. One important point to note is that the lack of an applicable treaty or convention does not mean that recognition of a judgment is not possible. Most national laws will have a system for the recognition and enforcement of foreign judgments, although the ease of enforcement can vary significantly. Equally, the applicability of an international treaty or convention does not itself necessarily mean that enforcement will be straightforward and speedy.

In general terms, the main approaches to enforcement can be categorised as follows:

- Enforcement of judgments of EU and EEA Member States in other EU or EEA Member States:
  - The Recast Brussels Regulation provides a system for the automatic enforcement of judgments between EU Member States.
  - The Lugano Convention 2007 provides a relatively straightforward system for the enforcement of judgments between EU Member States and Iceland, Switzerland and Norway.
- Enforcement of judgments where a bilateral or international treaty of convention applies:
  - There are a number of applicable bilateral treaties between different countries and checks should always be made in respect of the relevant countries.

- International conventions include the Riyadh Convention and the GCC Convention involving a range of Arab states, as well as the Hague Conventions.
- The 2005 Hague Choice of Court Convention provides a simplified procedure for the enforcement of judgments granted by courts which were the subject of an exclusive jurisdiction clause, and 40 states (including the European Union states) have now ratified it; interestingly, both China and the USA have signed the convention, although neither has ratified it.
- The 2019 Hague Judgments Convention was finalised in July 2019 and will apply to a wider range of judgments where there is no exclusive jurisdiction clause. Following the accession of the European Union (excluding Denmark) and the ratification by Ukraine on 29 August 2022, this Convention entered into force in those states on 1 September 2023. The UK signed this Convention on 12 January 2024, and it will enter into force in the UK on 1 July 2025.
- Typically, under these sorts of conventions or treaties, the recognition and enforcement of judgments is governed by a straightforward code which provides only very limited grounds for refusing to enforce a judgment of the other state.

- Enforcement of judgments between specified commonwealth countries:
  - Specific reciprocal statutory provisions create a straightforward process for the registration of foreign judgments between the relevant commonwealth countries. This process, unlike the normal common law process for enforcement, recognises the foreign judgment rather than granting a new judgment based on the debt arising from the foreign judgment.
- Enforcement where no international treaty or convention applies:
  - In civil law jurisdictions, foreign judgments tend to be recognised by the process of "*exequatur*", by which the court formally recognises that a foreign judgment should have effect in the relevant legal system as if it were a national court judgment.
  - In common law jurisdictions, there is not a process of *exequatur* or recognition as such. Instead, the claimant commences proceedings seeking an order for the payment of the debt created by the foreign judgment. Whilst the procedure is conceptually different from the civil law procedure, the same practical effect is achieved by the process and the court will not reconsider the merits of the underlying judgment.

Irrespective of the strict legal position, the practicalities of the recognition phase can be fundamental to any enforcement strategy. Typical battlegrounds include:

- whether a judgment complies with public policy (and Sharia law) when enforcement is in the Middle East;
- whether or not there is "reciprocity" of enforcement of judgments when enforcing in a civil law jurisdiction – arguments are commonly made that because of the different nature of enforcement in common law jurisdictions (as explained above) as compared with the civil law *exequatur* procedure, there is no reciprocity;
- whether or not the original court had jurisdiction to grant the judgment, applying the test set by the law of the place of enforcement; and
- whether or not the proceedings were properly served.

Note that when enforcing under some regimes, judgments obtained by default rather than following participation by the defendant in the proceedings can be more difficult to enforce.

In some jurisdictions, it is very easy for a judgment creditor to become embroiled in a litany of seemingly never-ending court hearings and submissions. Genuine experience of the potential pitfalls and ways of avoiding them is therefore invaluable, combined with reliable local law advice.

Following "Brexit", the UK is no longer an EU Member State. However, where proceedings in the UK or another EU Member State were commenced prior to 31 December 2020, any judgment subsequently granted in those proceedings will be enforceable under the provisions of the Recast Brussels Regulation (as mentioned above). In other cases, the enforcement of judgments between EU Member States and the UK will be governed by the 2005 Hague Convention (where there is an exclusive jurisdiction clause), under applicable national laws, or under some remaining bilateral treaties between the UK and individual EU Member States. The UK signed the 2019 Hague Judgments Convention on 12 January 2024, and it will come into force on 1 July 2025. Once this enters into force in the UK, its provisions will also apply to the UK/EU enforcement of judgments.

The enforcement phase

The enforcement phase involves the process of enforcing against specific assets of the debtor. This is often referred to as "execution". Those assets might include tangible property such as interests in land, movable property or cash, and intangible property such as shares, intellectual property rights or debts.

The legal procedures that can be used will depend solely on the national law of the country concerned, and will be confined by jurisdictional and territoriality principles.

Most legal systems will have systems for the enforcement of judgments on land, shares, debts and bank accounts, but some will require very specific identification of the assets in advance by the creditor, which can create a significant practical bar to enforcement. In particular, banking secrecy laws can result in practical difficulties in enforcing against bank accounts where the contents of the account are not known.

As mentioned above, the interests of third-party creditors can also pose significant problems in terms of enforcement.

Unsurprisingly, the timescale of proceedings can also vary hugely between jurisdictions, particularly when issues of service are taken into account.

(iv) Sovereign Immunity

When considering the issue of international enforcement, reference must be made to the issue of sovereign immunity. Sovereign immunity can severely restrict the normal principles of enforcement of judgments.

Sovereign immunity can arise at two stages. First, there is immunity against adjudication, and second, there is immunity against enforcement against the sovereign's assets. One must look to the relevant national laws on sovereign immunity in order to determine whether it applies. However, one may well have to apply different national laws on sovereign immunity in respect of immunity against adjudication and immunity against enforcement.

Accordingly, whenever the defendant and/or the assets against which a claimant wishes to enforce has/have close connections with a state, careful consideration should be given to issues of sovereign immunity.

(v) Limitation Periods in Respect of the Enforcement of Judgments

The fact that one has obtained a judgment does not mean that there are no further considerations in relation to the limitation periods. Many jurisdictions will have limitation periods in respect of the period within which a judgment must be enforced. As a general principle, one should assume that if a judgment is no longer enforceable in the jurisdiction in which it is granted, it is likely that it will no longer be enforceable in another jurisdiction (although this is not always the position). However, the applicable rules of the enforcing state may also impose limitation periods for enforcement, and so these must be checked as well.

Andrew Bartlett is a Partner in Osborne Clarke's International Disputes team in London. He is a highly experienced litigator with market-leading experience in complex cross-border disputes and a particular focus on international enforcement and asset tracing. Andrew has many years of experience in handling large-scale international disputes, directing and coordinating proceedings in numerous countries working for both corporates and high-net-worth individuals. He has been involved in numerous appellate judgments on issues of jurisdiction, injunctive relief, enforcement and asset tracing, including advising the judgment creditor in the *Masri v Consolidated Contractors* litigation, which involved 12 different countries and over 40 law firms worldwide. Andrew's innovative approach on past cases has been recognised in the *Financial Times* Innovative Lawyers Awards and *The Lawyer* Awards, and he is recognised as a "Leading Lawyer" by *The Legal 500*. Andrew's primary focus is on devising effective litigation and enforcement strategies that yield results for clients, using his experience of complexity to deliver simplicity.

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