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The Impact of Sanctions on the Enforcement of Foreign Judgments


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Introduction

In recent decades, governments have increasingly leveraged economic sanctions to pursue foreign policy objectives, including sanctions imposed on a multilateral basis (such as through U.N. Security Council Resolutions) and by individual countries or regional international arrangements (e.g., the European Union). The growing popularity of economic sanctions as a foreign policy tool is matched by the ever-increasing significance of sanctions for lawyers who advise on contentious and non-contentious matters involving jurisdictions and parties that are the target of economic sanctions. The imposition of new rounds of sanctions by various nations against Russia, in the aftermath of Russia's full-scale invasion of Ukraine (beginning in February 2022) and associated war crimes, has given new urgency and importance to the work being done by lawyers on sanctions issues. As of February 2023, 1,551 individuals and 181 entities had been made subject to UK sanctions alone pursuant to the relevant UK-Russia sanctions regulations, freezing more than £18 billion worth of Russian assets.[1] It is therefore an opportune moment to reflect on how sanctions issues can arise, and how they have been considered by the Courts, in the context of the process for the enforcement of foreign judgments.

(i) Identifying Relevant Sanctions

This chapter proceeds from an English law perspective. It is nonetheless a characteristic feature of sanctions regimes that, wherever they may be based, persons and businesses engaged in activities in relation to sanctioned jurisdictions and/or parties must consider carefully the interaction of different measures from multiple jurisdictions, many of which have extra-territorial application.

Whether issued by the UK, EU, US or other jurisdictions, sanctions will typically comprise a combination of measures targeting individual sanctioned persons or entities, as well as broader sanctions that restrict certain types of transactions with *any* person or entity in, or from, a given sanctioned jurisdiction.

The UK, EU and US sanctions regimes carry a notably broad extra-territorial scope – they can apply to the activities of UK, EU or US citizens and businesses regardless of where they are located at any given time. Moreover, aspects of the US sanctions – known conventionally as the US "secondary" sanctions – can apply to anyone, anywhere in the world, that engages in certain transactions involving parties or jurisdictions that are targeted for US secondary sanctions measures. Further, while sanctions regimes focus primarily on business activities that have some nexus to the jurisdiction that is the target of sanctions, they can in practice apply to transactions that are far removed from any sanctioned jurisdiction. For example, the US, EU, and UK sanctions include measures blocking the property of designated sanctioned persons/entities, and prohibiting transactions relating to those parties. Those sanctions can also extend to transactions involving businesses that are, directly or indirectly, owned or controlled by designated parties, including businesses that are established in countries that are not themselves the target of sanctions.

While the recent response to Russian military action in Ukraine has led to increased coordination between different regimes imposing sanctions against Russia, there are nonetheless wide-ranging differences in the ways in which (even theoretically similar) restrictions imposed under different sanctions regimes operate, as well as differences between the core features of different sets of sanctions rules. In some respects, sanctions regimes can even conflict with one another – for instance, under so-called "blocking" legislation implemented by the EU and UK, persons subject to EU or UK jurisdiction are restricted, in certain circumstances, from complying with aspects of the US sanctions in relation to Cuba and Iran.

(ii) Disputes about Sanctions

The likelihood of encountering sanctions issues in enforcement proceedings can be exacerbated by the fact that, in addition to their potential impact on the enforcement process itself, sanctions can be the engines that generate disputes and drive the parties to Court in the first place.

Typically, this can arise when the effect of sanctions is understood by one party as preventing it from discharging its contractual obligations, but this is disputed by its contractual counterparty. Under English law, there is ample scope for disputes on these kinds of issues. Sanctions clauses in contracts, prescribing specifically how contractual obligations should operate (or not) in those circumstances, have only started to become more common in recent years, and there remains little commercial consensus over how those clauses should be drafted. In the absence of such a clause, the outcome of a dispute can depend on a range of different legal theories, such as *force majeure*, supervening illegality and frustration. How those will apply on the facts of a particular case will not always be obvious, even in scenarios that can arise quite frequently.

The way in which English law is continuing to evolve to address the specific sanctions issues is well illustrated by the very different approaches taken last year, at first instance and then on appeal, in the case of *MUR Shipping BV v RTI Limited*.[2] This case turned on whether a party could rely on a *force majeure* provision as a basis for non-performance of contractual obligations, and specifically what the impact was on that analysis of a reasonable endeavours *proviso* to overcome *force majeure* events – a common qualification for *force majeure* provisions in contracts.

On the facts, which concerned payments under a charterparty, MUR asserted that the effect of US sanctions was to create a *force majeure* event that "*cannot be overcome by reasonable endeavours from the party affected*", because one effect of US sanctions was to prevent RTI from making prompt payment in US dollars, as it had agreed to do under the terms of the contract. RTI disputed that analysis, arguing that it could still make payment to MUR in Euros, and would indemnify MUR for any shortfall arising as a result.

The High Court sided with MUR, on the grounds that the charterparty required payment in dollars, and English law does not require a party to accept non-contractual performance of obligations (i.e. in this case, payment other than in dollars).[3] But the Court of Appeal disagreed, ruling at the end of 2022 that even though the contract anticipated payment in one currency, the question of whether the *force majeure* event could be overcome through reasonable endeavours was different and more narrow, and on the facts, accepting payment in Euros constituted such a measure.[4] While the clarification provided by the Court of Appeal to this issue is helpful, the need for it at all is a telling illustration of the scope for disputes between parties grappling with sanctions issues in what is still a comparatively new area of English law.[5]

(iii) Common Prohibitions Impacting Enforcement Proceedings

For parties that do find themselves in, or contemplating, enforcement proceedings at a time when sanctions apply to one or other party or to a given aspect of performance of a contract, sanctions compliance considerations could impact significantly on those enforcement proceedings.

By way of example, sanctions restrictions could apply where a sanctioned party is being pursued for payment of a judgment debt. Depending on the nature and scope of the underlying sanctions restrictions, the means of enforcement by which the judgment debtor wishes to pursue the sanctioned party could be prohibited by those sanctions. For instance, enforcing a judgment against the property of a party subject to asset-freezing sanctions, such as through execution against judgment assets, garnishment of income streams, or registration of security interests over judgment assets could fall within the scope of sanctions prohibitions such an action could be viewed, in particular, as a restricted "dealing" in an asset that is held or controlled by a sanctioned party.[6] Asset-freezing sanctions typically do not include broad exemptions for payments of judgment debts of sanctioned parties.

Since the satisfaction of the judgment debt is, usually, the fundamental aim of enforcement proceedings, this will generally give rise to a need for a licence permitting the judgment debtor to conduct activities that could otherwise contravene sanctions measures, if the debt involves interests of a sanctioned party. For UK economic sanctions, the relevant licensing body is HM Treasury's Office of Financial Sanctions Implementation ("**OFSI**"). The need to obtain a specific licence can be avoided where OFSI has issued a "general licence" allowing multiple parties to undertake specified activities that would otherwise be prohibited by sanctions legislation. It is seldom the case, however, that general licences are available in relation to dealings with persons or entities subject to UK asset-freezing sanctions.

Where there is no applicable general licence, a specific licence will be required before any transaction involving sanctioned debts can proceed. Whether such a licence will be granted is ultimately matter for the discretion of the sanctions licensing authority (the discretion of which may be limited by the sanctions regulations themselves, which in some jurisdictions impose limits on the circumstances in which regulators may issue sanctions licences). In circumstances where funds are owed *from* a sanctioned person, sanctions policy may favour the granting of licencing, particularly if the funds are owed pursuant to a contractual obligation that existed before the debtor became subject to sanctions. If funds are owed pursuant to an obligation *post-dating* sanctions, or if funds are owed *to* a sanctioned person, the willingness or ability of sanctions regulators to issue licences may be less clear.

Moreover, in the UK OFSI typically requires a significant timeframe – measured in months – to review licence requests and determine whether or not to grant licensing (similar timeframes exist in other jurisdictions, including the United States and EU Member States). OFSI has encountered a substantial influx of licence requests since the Russian further invasion of Ukraine in 2022, which has placed administrative pressure on OFSI (despite plans on the part of HM Treasury to augment OFSI staffing). Indeed, in September 2022, the Director of OFSI suggested that it would be "*misleading*" to give a timeline for any particular case.[7]

For the UK-Russian sanctions,[8] the provision of legal services to sanctioned persons is not subject to general restrictions. However, payment for those services has required licensing from OFSI. Due to the range of designations made under the UK-Russian sanctions, and the number of applications for licences being made, OFSI has now issued General Licence INT/2022/2252300[9] permitting law firms and barristers to continue to receive payment for legal services provided to designated persons without the need to obtain an independent licence (subject to reporting requirements that require OFSI to be notified and provided with certain documents each time the General Licence is relied upon).[10]

The General Licence also regulates the terms on which remuneration can be received, e.g. by capping the total remuneration that can be received from designated persons under the General Licence and by placing limits on hourly rates that can be charged for relevant legal services under the General Licence. Those terms may not always provide sufficient authorisation for clients to pay their lawyers' fees in full. Licensing issues concerning legal fees payable by designated persons cannot simply be postponed through a decision by the lawyers involved to defer fees until a later date, even if they would otherwise be willing to do so since extending credit might be considered a form of making funds available to a sanctioned person, which is prohibited. Given that position, it should come as no surprise that the English Courts have recognised that, despite the existence of the General Licence, the challenges in securing remuneration presented by the UK-Russian sanctions can justify lawyers ceasing to act to represent their clients, even when the effect is that trial dates then have to be abandoned.[11]

(iv) Delayed Recovery of Funds

Restrictions on the transfer of assets belonging to sanctioned persons mean that counterparties, including judgment debtors, can experience sanctions-related obstacles in recovering sums owed to them. A concern arising in that context, one which has recently been considered by the English Courts, is who bears the additional losses caused by delays in recovering funds caused by the application of sanctions.

This has recently been considered in England by the Court of Appeal in the *Ministry of Defence and Support for Armed Forces of the Islamic Republic of Iran* [*"**MOSDAF**"*] *v International Military Services Limited* [*"**IMS**"*] case.[12] The case concerned the liability of IMS for interest on a historic arbitration award given in favour of MOSDAF. In the past, IMS had agreed to supply MOSDAF with military vehicles; however; those contracts were terminated

following the Iranian Revolution of 1979 and disputes then arose as to the balance of accounts between the parties. In 2006 MOSDAF obtained an ICC arbitration award in its favour against IMS for over £120 million.

Before the award was paid or enforced, MOSDAF was made subject to EU sanctions, via the EU-Iran Sanctions Regulation.[13] Those sanctions included a "no claims" provision which provided that no claims could be satisfied "*in connection with any contract or transaction the performance of which has been affected, directly or indirectly, in whole or in part, by measure imposed under this regulation*".[14] It was not in dispute that this provision prohibited IMS from paying the award to MOSDAF while MOSDAF remained designated by those sanctions.[15] However, MOSDAF claimed that it should be entitled to interest accruing on the award for the period during which it has been subject to EU sanctions. MOSDAF argued that any other interpretation of the EU sanctions would be disproportionate to the aims of sanctions, which were to freeze and not to confiscate assets or punish designated persons, and would also be a disproportionate interference with its fundamental right to property.

That argument was rejected in both the High Court and in the Court of Appeal, which held that where a debtor is unable to satisfy a debt, including a judgment debt, because of a "no claims" provision of the kind appearing in the EU-Iran Sanctions Regulation, interest does not accrue on that sum while the entity to whom that debt is owed remains subject to sanctions. As Lord Justice Newey clarified in the Court of Appeal judgment, the fact the EU-Iran sanctions were not intended to be confiscatory or punitive did not mean that sanctioned parties should be entitled to interest on payments for delayed payments; rather, the "no claims" provision ensured that, where an additional loss of this sort arises that must be borne by one side or the other, "*the burden was borne by the designated persons rather than the counterparties*".[16]

The judgment was based on the specific wording of the EU-Iran Sanctions Regulation under consideration, and the result could be different under other sanctions regimes. Nonetheless, the approach of the English Court to the issue of who must be the "*ultimate losers*"[17] under sanctions instruments provides reasons for optimism for judgment debtors who might face similar future claims.

(v) Identification of Assets

There are some circumstances in which the imposition of sanctions can actually improve the prospects of recovery for judgment creditors who are otherwise unable to make progress against recalcitrant debtors. A good illustration of such an approach is provided by *R. (on the application of Certain Underwriters at Lloyds London) v HM Treasury* [2020] EWHC 2189. This case concerned an Egyptian aircraft that was hijacked in 1985 and almost completely destroyed in a terrorist attack that caused many fatalities. The claimants were the reinsurers of the aircraft, who obtained a US judgment against the Syrian state and its agents for the losses caused, and who obtained recognition of that judgment in England in 2018 and pursued steps to identify assets in the jurisdiction, based on the information then known to them, but without success.

By this time, the judgment debtors had also been placed under sanctions pursuant to Consolidated Regulation (EU) No 36/2012 (the "EU-Syria Sanctions Regulation"). One of the measures provided for in the EU-Syria Sanctions Regulation was a requirement on parties holding frozen assets to "*supply immediately any information which would facilitate compliance with this Regulation*" to relevant authorities, including the Treasury. The EU-Syria Sanctions Regulation also provided that the UK government could release funds in order to satisfy a judgment where that judgment was given before the sanctions came into place.[18]

The claimants requested that the Treasury provide them with detailed information about the accounts maintained by the judgment debtors in the UK, including account names and numbers, branch details, last known balances, information regarding the historic use of funds in those accounts and sources of information.[19] After the Treasury refused to provide this information voluntarily, the claimants challenged its decision in the English High Court, successfully.

Mr Justice Kerr ruled that the claimants were entitled to receive the information they were seeking, because the sharing of that information with judgment creditors amounted to facilitating compliance with the Syrian-EU Sanctions Regulation, by providing judgment creditors with the information needed to apply for the release of funds to satisfy sums owed by sanctioned debtors.[20] He noted that that one of the purposes of the EU-Syria Sanctions Regulation was to ensure that innocent third parties did not themselves become victims of the sanctions regime, and determined that judgment creditors could fall within the class of innocent parties just as might persons seeking humanitarian relief, since judgment creditors could be deprived of funds owed to them as a result of the asset freeze imposed by the sanctions. Further, the judge was unpersuaded by concerns that the information being shared would be sensitive and confidential; he found that it was for the banks and other institutions who were supplying the relevant information to determine what information was actually required to be produced under the Syrian-EU Sanctions Regulations, in dialogue with the relevant authorities.[21]

Notably, the sanctions regime introduced by the UK against Russia, under the Russia (Sanctions) (EU Exit) Regulations 2019, contains similar information and records provisions to those considered in *Lloyds*.[22] While the point appears not yet to have been tested in any reported decision, it is possible that a similar approach will be viable under the new UK sanctions regime. That opportunity to leverage the State's information-gathering to locate the assets of a judgment debtor, and to use that to enforce a judgment, is not otherwise available under English law and constitutes a valuable additional mechanism to satisfy judgment debts, including foreign judgment debts.

(vi) Sanctions Litigation Nationalism?

One potential outcome arising from the increased use of sanctions targeting specific States is an increase in jurisdictional disputes, as a result of reactive measures taken by those countries to ameliorate the impact of the sanctions on their nationals. That process has already commenced in Russia, which has passed legislation intended to favour Russian courts in certain contexts in sanctions-related disputes.[23] The Russian courts have begun to make decisions in cases with respect to issues that parties contemplating litigation involving Russian sanctioned entities will need to consider.[24]

Conclusion

Sanctions add complexity to enforcement proceedings, just as they do to a whole host of other activities involving sanctioned persons or jurisdictions. In some cases, that complexity can be useful, for example when providing new mechanisms to pursue or resist enforcement. But it may present obstacles to the enforcing party.

For judgment creditors, who can choose the time and place for their enforcement activities, waiting out the sanctions issues may, at first, seem a tempting alternative. In reality, that option will often not be realistic, not least because of increasingly long term nature of sanctions (which are indefinite in length, often lasting as long as the geopolitical issue that gave rise to the

sanctions regulations in question). In addition, judgment creditors need to be alert to the heightened vulnerabilities of sanctioned businesses. With sanctions in place, they may well face severe challenges in maintaining their operations in anything like a normal manner. They will also have fewer incentives to build or even maintain their businesses – and thus their asset base – in jurisdictions where sanctions impede their activities.

Judgment creditors who adopt a wait-and-see approach may then find themselves at the back of a growing queue of claimants, competing over a shrinking number of realistically enforceable assets. On the other hand, speedy action against sanctioned persons may offer unique opportunities, allowing a creditor to press its claims when its counterparty may well be unable to focus its energies on a robust defence to the proceedings. For judgment creditors as well as debtors, there are compelling reasons to engage early with the complexity of this evolving area of law.

Endnotes

1. The Russia (Sanctions) (EU Exit) Regulations 2019.
2. [2022] EWCA Civ 1406.
3. [2022] EWHC 467 (Comm).
4. [2022] EWCA Civ 1406.
5. Even more recently, the decision in *PJSC National Bank Trust & anor v Mints & ors* [2023] EWHC 118 (Comm) addressed the fundamental question of whether the English Court could even enter judgment on a claim brought by a person designated under UK sanctions (and confirmed – perhaps unsurprisingly – that it could).
6. E.g. at Section 11 of The Russia (Sanctions) (EU Exit) Regulations 2019, Section 1 of Executive Order 13661, Article 2 of Council Regulation (EU) No 269/2014.
7. UK Finance Sanctions Briefing, "*OFSI's Recent Developments in UK Sanctions*": https://www.europeansanctions.com/wp-content/uploads/2022/09/Russia-Update-OFSI-recent-developments-08.09.pdf.
8. I.e. the Russia (Sanctions) (EU Exit) Regulations 2019 (as amended).
9. OFSI General Licence under the Russia Regulations and the Belarus Regulations (INT/2022/2252300).
10. At the time of this chapter, the General Licence is due to expire on 28 April 2023, although the authors are not aware that OFSI intends to abandon the general licensing model thereafter.
11. See *VTB Commodoties Trading DAC v JSC Antipinsky Refinery & Or* [2022] EWHC 2795 (Comm).
12. [2020] EWCA Civ 145.
13. Council Regulation (EU) No 267/2012 of 23 March 2012 concerning restrictive measures against Iran and repealing Regulation (EU) No 961/2010.
14. *Ibid.*, Article 38.
15. The position may have been different if MOSDAF maintained a bank account in the EU; in those circumstances the EU-Iran Sanctions Regulation would have permitted payment to be made into that account, where the funds would then have been required to be frozen.
16. See [59].
17. *Ibid.*
18. Council Regulation (EU) No 36/2012 of 18 January 2012 concerning restrictive measures in view of the situation in Syria and repealing Regulation (EU) No 442/2011, Article 18.
19. [2020] EWHC 2189, [12].
20. [2020] EWHC 2189, [72] to [76].
21. [2020] EWHC 2189, [82] to [83].
22. See in particular Sections 70–73 of the Russia (Sanctions) (EU Exit) Regulations 2019.
23. See Federal Law No 171-FZ of 8 June 2020, On Amending the Arbitrazh Procedure Code of the Russian Federation in Order to Protect the Rights of Individuals and Legal Entities in Connection with the Restrictive Measures Introduces by a Foreign State, State Association and (or) Union and (or) State (Inter-State) Institution of a Foreign State or State Association and (or) Union.
24. See, e.g., Case No (A60-36897/2020).

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