HARBOUR
LITIGATION FUNDING

The Enforcement & Asset Recovery Landscape in 2020

A note from Harbour

On 4 December 2019 Harbour hosted a gathering of industry experts to preview what the enforcement and asset recovery landscape might look like in 2020. Five principal themes emerged from the wide-ranging discussion, and in our view these represent some of the key topics practitioners may need to consider over the next twelve months. We hope the following pages may prove to be a useful resource for those helping clients to recover damages following success in litigation or arbitration.

Harbour is hugely grateful to our panellists, who generously shared their insights and experience. Should you think they may be able to assist you or your clients they will be pleased to hear from you. And, needless to say, Harbour is always happy to hear from anyone wishing to know more about how litigation funding can be used to support a dispute.

Ellora MacPherson
Chief Investment Officer

Key themes

01

Early strategy planning generates maximum success

A clear message coming from our delegates was that the creative use of court orders and insolvency powers can save considerable time and cost, and short-cut the route to recovery. Examples were given of cases where success had been achieved on liability and quantum, but because insufficient advance thought had been given to an enforcement strategy and budget, defendants were able to dissipate assets, or insufficient funds were available to pursue recoveries. Considering both a litigation and enforcement strategy together pays dividends.

In any piece of litigation or arbitration, it is wise to assume that every defendant is a prospectively defaulting debtor. And in cases which allege dishonesty, one can almost be guaranteed that a losing defendant will not pay up willingly. It is salutary for claimants and their lawyers to think carefully about the strategy and (frequently large) budget which will be required to enforce a decision in their favour, even before proceedings are issued.

A unified strategy, considering liability and enforcement together, can leverage the power of pre-trial action (e.g. freezing orders, disclosure orders, receiverships, etc) and short-cut your way to judgment.

What early advice should we give claimants about how they can ensure the best prospects of collecting?

- A judgment or award in your favour is not enough – you must be satisfied the proposed defendant(s) actually has assets against which you can enforce. That should be considered right from the outset of a case and not just at the enforcement stage, but bear in mind there will be a limit to what can be identified at the pre-action stage.

- A good financial investigator can provide an asset analysis. Different investigators have different skills, and price can vary significantly; a big-name investigator is not necessarily what is required, so think about the particular requirements of your case. An asset analysis can date very quickly, so clients with old reports should be encouraged to have them refreshed. Litigation funders will certainly want to see such a report to assess the prospects of enforcement.

- Consider obtaining a freezing order if possible (especially important in cases alleging fraud), and issue proceedings at the same time. Some disclosure of assets should result from the freezing order, but a fraudulent defendant may only disclose those assets they think you'll find out about anyway.

- Throughout the proceedings, consider what additional orders might be sought, for example against third parties such as email providers.

Case Study: BTA v Ablyazov

Think creatively about where court orders can have maximum practical benefit

Claimant (C) discovered defendant (D) and his associates were communicating through anonymous Yahoo email accounts; C had snippets of emails, and the legal team were able to get an order against Yahoo to deliver up the contents of a number of accounts. This showed the email addresses were involved in the fraud, and the contents of the disclosed messages revealed extensive discussion of moving assets around in breach of a freezing order.

Yahoo is partially based in the UK so the court was content to grant the order; though overseas providers (such as Google) may represent a greater challenge.

The information obtained gave almost real-time information on the movement of assets, and revealed D, his family, and associates were involved in dishonesty (e.g. backdating trustee documents, and concealing the true ownership of assets). The legal team were also able to return to court several times to get further disclosure on an ex parte basis, with gagging provisions.

Richard Lewis, Hogan Lovells

02

Crypto-currencies and technological advances

As technology advances, the creativity of fraudsters and cyber-criminals also flourishes. However, technological advancement also creates new tools for those seeking to mitigate the effects of such behaviour. It seems though that lawyers may not be embracing such tools at a pace which matches the development of new technology.

Conversely, some success has been had in the field of crypto-assets, which will be a big theme for 2020. England and Wales courts are increasingly issuing orders and injunctions over crypto-assets, and the High Court (AA v Persons Unknown v Ors [2019] EWHC 3556 (Comm)) has now endorsed the view that crypto-assets are indeed capable of being treated as property in law, as expressed in the Legal Statement on Crypto-Assets and Smart Contracts published by the LawTech Delivery Panel. However, even though a court order may assist, converting a crypto-asset into cash for a claimant remains challenging.

Can crypto-currencies be the subject of effective freezing relief and enforcement?

- This will certainly be a big issue in 2020, and is a rapidly developing area. Orders can be sought against crypto-assets, but the enforcement picture is challenging as the anonymous and non-centralised nature of crypto-currency is a gift to those seeking to protect or conceal assets. Further, most claimants will want to identify a way to convert the crypto-asset into *fiat* ("hard") currency, which is not always straight-forward.

- If you are able to get disclosure of a defendant's crypto-currency holdings, and the wallet number in which they are held, it is very easy to set up alerts and monitor their transactions. This reveals information on when a defendant may be dealing in breach of a freezing order, which can then provide grounds for contempt applications.

- Much more difficult is to freeze the assets effectively – there is no equivalent of a centralised bank, to which you can present a court order preventing it from transferring money in and out of accounts. In extremis, it may be possible to obtain an order that a defendant transfer his digital assets to an account held by an escrow agent until trial, but strong evidence of dissipation would be required.

- Another consideration in cases where a freezing order is sought is undertakings in damages. The value of crypto-currencies is very volatile, so even short delays of a few hours could prevent defendants making significant money from trades, and so the risk posed to a claimant's undertaking in damages is very high. So if a freezing order is sought over crypto-assets, then a process also needs to be put in place to very quickly allow the defendant to deal with them.

- The ideal strategy in such cases will involve identifying a place to put crypto-assets pre-judgment that makes it possible to recover against them post-judgment. And getting a pre-judgment order (e.g. that the defendant transfer to an escrow account) also sets the ground for an application for default judgment if they fail to comply. Otherwise the only realistic way is to have access to the defendant's private key, which will be very difficult to obtain. Seizure and disposal orders may be sought against portable devices with keys or wallets on them, but courts will apply a high threshold. We are already seeing effective seizure and disposal of crypto-assets in criminal proceedings.

- Cases have been known where skilled investigators have been able to identify holdings, and attribute them to defendants, then obtain access to the electronic wallet / device holding the wallet, making realisation of the crypto-asset straightforward. However, it is important to ensure any such strategy is conducted entirely in accordance with the law, and the product of such an investigation meets a court's evidential standards. Seizure and disposal orders can be sought from the court.

- Even if a defendant's disclosure doesn't reveal the existence of crypto-assets, then remember every asset leaves a trail, which may be revealed consequent to third-party disclosure orders – so subsequent disclosure of emails, for example, may indicate there are crypto-assets (or indeed other assets) which can be pursued.

From L-R: Louisa Watt, Andrew Stafford QC, Wayne Barnes, Victoria Mackay, Richard Lewis and J-P Pitt

03

Alternative funding options

Our delegates spoke of the developing secondary market in the trading of judgments and awards. Private equity firms and other investors – including litigation funders - are increasingly buying the entitlement to judgments and awards, which may represent an option for claimants who seek some kind of recovery more quickly than the usual pace of enforcement proceedings might allow.

Lawyers speak of the value which litigation funders can add to the client relationship; as funders are generally only paid when recoveries are achieved, they can help focus a client's mind on the practicalities (and realities) of enforcement proceedings, and their "stress-testing" of a case can be a valuable benefit for legal teams. And as litigation funders are increasingly involved in supporting enforcement and asset recovery proceedings, so too their processes have adapted to the need for swift decision making, and the need for swift access to capital.

What if a claimant has a judgment or an award in their favour, but doesn't have the funds or the appetite to pursue funding? Have they got any options open to them?

- Distressed investment funds have increasingly become interested in trading judgments or awards as assets in their own right. It can be an attractive option for some claimants, and purchasers are out there. Litigation funders are also purchasing the entitlement to judgments or arbitral awards and pursuing enforcement themselves, though usually only when a final and non-appealable decision has been reached on liability.

- A purchaser's principal concerns will be time frame to recovery, and likelihood of successful enforcement.

- A vendor will almost always need to accept a discount on the face value of the judgment or award, as money must still be spent (e.g. on lawyers, investigators, etc) to recover the investment, which comes with risk. Enforcement usually also becomes more difficult as time elapses.

- Investors will usually want to keep the existing legal team for continuity, rather than pay a new team to get up to speed on what can be many years of proceedings, though they may wish to add their own lawyers to the team.

- In many jurisdictions it is the claimant who must enforce in their own name. Additionally some investors may not wish to appear adverse to a particular defendant. Claimants should be prepared to remain involved in a case for at least some time, no matter how strong their desire to exit, not least because evidence of fact will be required for the enforcement stage, just as much as it was for the liability stage.

How are such deals commonly structured?

Common structures to compensate a claimant's ongoing involvement might involve a partial upfront payment plus some consideration deferred until there has been some recovery, or an uplift payment if the claimant remains involved and recovery meets a pre-agreed hurdle. Care should be taken that by purchasing a claim there is no negative impact on the right to pursue against the defendant. Legal title in the claim should remain with the original claimant until a non-appealable and final judgment outcome to the litigation or arbitration.

Louisa Watt, Brown Rudnick

Are there specific advantages to using funders in the context of enforcement proceedings?

A third-party voice in conversations with the client can be helpful. Claimants are understandably indignant, and focussed on liability and quantum. But it is crucial their attention is drawn to the practicalities involved in ensuring they recover from the defendant. The fact Harbour is only paid when the client recovers damages means the conversation quickly becomes helpfully practical.

The involvement of Harbour is also helpful in stress-testing a case strategy. The Harbour team, and the senior QCs, finance professionals and others on their investment committee, all add very experienced eyes. The questions arising from their analysis are well-aimed, and their shared experience really helps us refine the enforcement strategy for success.

Andrew Stafford QC, Kobre & Kim

04

The impact of politics and economics on enforcement

The prospects of success in enforcement and asset recovery proceedings can be significantly impacted by politics and economics. Whilst static or negative global economic growth might give rise to an increase in fraud (and an associated increase in work for lawyers), politics continues to challenge. The potential threat posed to Brussels (Recast) by Brexit means UK claimants may be on the verge of losing a hugely valuable reciprocal enforcement arrangement. Uncertainty exists over how regulators and law enforcement bodies will work together in future, and how easy (or not) it will be for UK claimants to obtain information from overseas, and get their judgments recognised to facilitate enforcement.

Globally, enforcement against Sovereign states remains challenging when compared to enforcing against commercial entities, but examples exist where creative lawyering and a carefully considered strategy has reaped rewards. We also heard about how a good political risk assessment can open up new routes to recovery. Many States, previously considered no-go areas for enforcement, are now seeking to underline a commitment to the Rule of Law, and with it they are recognising overseas judgments, and honouring their own liabilities, so as to attract new inward investment.

How does enforcement against sovereign States differ from enforcement against commercial entities?

- A State defendant has much more power to destabilise a claimant than a commercial defendant. So in planning enforcement against a State the strategy must consider whether collection prospects remain possible if the State counter-attacks using its unique powers.
- A State's toolkit in arbitration or litigation is very different. In commercial cases one might consider an enforcement strategy which involved insolvency action, or piercing corporate veils or other opaque structures, with a view to taking control of companies. That's not a possibility against a State.
- States who are regular defendants are becoming enforcement-savvy, and are making full use of their own toolkit of sovereign and central bank immunity. By way of example:
    - Bond repayments might be intercepted, but certain States are writing their Bond prospectuses in a way that makes them enforcement-proof.
    - States institute investigations within their own borders, accusing predecessor governments of entering into contracts fraudulently or illegally.

- Sovereign immunity need not be a total barrier to enforcement, as assets can sometimes be identified over which immunity does not apply. Identifying such "pressure points" can precipitate an offer of settlement.

- Many Middle East States have a poor reputation for satisfying awards or judgments but the political climate often has a bearing on how willing or not they are to comply.

- Where claimants retain commercial or industrial interests in a country against whom they seek enforcement, those may become in jeopardy of expropriation. Or promises may be made of future financial benefit – e.g. a lucrative new contract in exchange for settling at a low amount. Where such cases are funded by a third party, a conflict very easily arises where the claimant may wish to take the hit, but the investor will want the best possible settlement (though such issues can be addressed through the initial investment agreement).

- The size of awards against sovereigns can be enormous – and whilst there may be little prospect of enforcing the full amount, the skill can often be to manage a dynamic situation to the point where the defendant State seeks to settle. But they will not do so without a fight as there is a political dimension to their decision-making, and unlike enforcement in commercial cases, a good asset report and due diligence will never be enough.

- In terms of selling an award, investors are not entirely put off by a defendant being a State. Clearly they will be interested in which State it is – some pose a higher credit risk than others – but it is also possible (Argentina is one example) where potential awards are swapped for bonds in capital markets, and these sorts of financial solutions can provide an interesting alternative route where one seeks to enforce large claims.

Are there non-legal issues which can make enforcement more difficult in overseas jurisdictions?

- Political risk should be considered, and certain specialist investigators assist lawyers in assessing the ease of enforceability in particular jurisdictions, where barriers may be political as well as legal. Unsurprisingly, the more authoritarian a regime, the more difficult enforcement is likely to be, as it is easier for those holding political power to influence or compromise the independence of the judiciary.

Case Study: The Middle East after the Arab Spring

After the Arab Spring the Middle East saw rapid regime change, typically coupled with a change of civil service, a change in the judiciary, and a lack of centralised authority. For some time it was unclear who controlled central banks and who had legitimacy to make decisions on behalf of the State. As an example, in post-Ghaddafi Libya there were groups in Tripoli and Tobruk both claiming to be the legitimate government. Decisions relating to claims were either not taken for some time, slowing down enforcement processes, or not taken at all.

Whilst many jurisdictions in the Middle East continue to have problems, some like Egypt are keen to attract inward investment, and are seeking to demonstrate a renewed commitment to the Rule of Law. So claimants or funders with higher risk appetites may now be willing to enforce in these sorts of jurisdictions as, over time, these dynamic and changing environments become more stable, and such nations seek to re-join the international community. An up-to-date political risk assessment will always be helpful.

Victoria Mackay, Gryphon Strategies

Case Study: Mittal v Egypt

If the legal process is challenging, a political analysis may help identify another route to enforcement.

An improving political situation in Egypt is leading to a better enforcement landscape. Mittal Steel brought an ICSID claim against Egypt in 2015 which, to the surprise of many, led to a good settlement. But this was more to do with economics and politics, than a legal process. Upon election in 2014, economic imperatives required President Sisi to position Egypt as being at the beginning of a new chapter, and as a good destination for foreign investment, where investor funds were appropriately safeguarded. He also needed to win over the electorate after a low turnout. Public statements were made saying his administration intended to "clean up the mess" of the old regime, and settlements in the Mittal case, and others, were presented as a cheaper way than arbitration to resolve old disputes, and attract new investment.

Victoria Mackay, Gryphon Strategies

Case Study: Investor v Ecuador

Consider when the time is right to deploy your tactical advantage.

Domestic courts may well be hostile to those claiming against the home State, but it is not always necessary to become embroiled in local proceedings. In a case against Ecuador, we leveraged the difference in discovery regimes across US states to obtain discovery orders against banks, property companies and others that held assets of Ecuador. The orders were obtained under seal, so Ecuador did not know this information was being compiled. The information was held until a politically expedient moment for removing the seals. A few days later the President addressed the nation indicating that, although he recognised the people would not thank him for settling the case with the investor, it was the preferable course as the investor had extensive knowledge of the location of State assets. Recovery was achieved at 100 cents in the dollar.

Andrew Stafford QC, Kobre & Kim

05

The enforcement of arbitral awards

The Achmea judgment seems to have almost eliminated, for now at least, the likelihood that an investor can enforce their award against an EU State following arbitration arising under an intra-EU bilateral investment treaty (BIT). All 190 (or so) BITs are likely to be terminated by Member States (see the EU Plurilateral Draft Termination Agreement), though significant concerns arise over the impact on investors' legal rights. More litigation on the issue is likely to be forthcoming, both in domestic courts and ultimately the Court of Justice of the EU.

Are there particular differences between enforcing commercial and investment treaty arbitral awards?

- Foreign arbitral awards are, in general, easier to have recognised and enforced overseas than foreign court judgments. Successful claimants will most likely rely on the New York Convention, under which over 160 States have agreed to recognise arbitral awards made in other signatory States. This allows claimants to enforce their award overseas with the help of local courts, which will not review the merits of the decision, although there are certain grounds on which the award can be challenged. As well as formal enforcement routes, arbitration may also lend itself more to informal enforcement via commercial conversations.

- There is no similar instrument for global reciprocity in relation to enforcing court orders or judgments, although regional instruments do exist, such as the Brussels (Recast) Regulation in the EU. Post-Brexit, there is uncertainty on whether this will remain available to UK claimants, and many commercial contracts involving UK parties are being drafted with arbitration agreements rather than litigation-based dispute resolution provisions.

Case study: ArcelorMittal v Essar Steel Ltd & Ors [2019] EWHC 724 (Comm)

English law may provide assistance to those seeking to enforce arbitral awards. This 2019 case related to an ICC arbitration seated in Minnesota, where the defendants (a Mauritian entity) refused to satisfy the US$1.3 billion award (plus costs and interest) made against them. Enforcement efforts in Minnesota and Mauritius failed, and despite Essar Steel being a foreign company and having no significant assets in England, the High Court took the view that there were people and papers in England which could help identify hidden assets, and so it was "just and convenient" to make a worldwide freezing order, search orders, and third party disclosure orders.

Choosing England and Wales as the seat of arbitration allows claimants to avail themselves of the extensive powers of the English courts. Orders may still be made by English courts relating to foreign seated arbitrations if it's "appropriate in all the circumstances".

- The enforcement of investment treaty arbitration awards can be more challenging, generally, than commercial arbitration awards. In particular, enforcement of arbitral awards under intra-EU bilateral investment treaties (BITs) has been dealt a blow by the Achmea decision of March 2018 (in which the CJEU ruled that an investment arbitration clause in an intra-EU BIT was incompatible with EU law).

- Following that decision, the European Commission has announced (24 Oct 2019) that EU Member States will ratify a plurilateral treaty (the Termination Agreement – TA) terminating all intra-EU BITs, which are estimated to number around 190. A leaked draft of the TA suggests that both BITs and their sunset clauses will be terminated, which could have an immediate negative effect on a claimant's prospects of recovery in ongoing proceedings or pre-action disputes.

- The TA will not be retroactive for arbitrations concluded pre-Achmea, so any ongoing enforcement in such cases should not be affected. However, the position is likely to be different for any arbitrations which were ongoing at the time of the Achmea decision, though some provision is made for investors to settle with States. More worryingly, the leaked draft suggests that any arbitration launched post-Achmea will be null and void, incurring potentially huge wasted costs for investors, and severely limiting their ability to obtain redress.

- There are real concerns over how the EC's action can be compatible with the Rule of Law. A potential area for challenge in 2020 will be for those affected investors to bring claims against States in domestic courts for ratifying the TA, or potentially against the EU itself. But with that comes significant delay in receiving their damages, and substantial additional cost.

- As enforcement risk increases, claimants are seeking to mitigate that with the full or partial involvement of litigation funders. As with any case, funders are keen to see a carefully considered strategy for jurisdiction, liability, quantum, and enforcement, as well as to learn more about the legal team's track record in winning similar cases. Another area of interest will be what gives rise to the claim (the loss of substantial sunk costs *vs* lost opportunity / lost future profits; a direct expropriation rather than "death by a thousand cuts" indirect expropriation or unfair treatment claim). Funders will also be interested to have a sense of what the respondent State's track record is in settling cases or honouring awards against it, and whether the investor claimant has an ongoing commercial relationship with the State.

The panellists

We are grateful to our expert panellists for leading the discussion and sharing their insights and experiences at our event. They are all happy to speak informally with anyone seeking specialist assistance with enforcing a judgment or arbitral award.

Wayne Barnes of **Fulcrum Chambers** (our Moderator) is an experienced criminal barrister and trial advocate who has appeared regularly in cases of commercial fraud and money laundering, including confiscation hearings under the Proceeds of Crime Act 2002. He has negotiated settlements with the Serious Fraud office and the World Bank Group, and has conducted complex internal company investigations in Rwanda, Uganda and Zambia as part of an anti-corruption compliance initiative.

Louisa Watt is a partner and Practice Group Leader of **Brown Rudnick's** Special Situations & Distressed Debt team. She represents investment funds and financial institutions in the acquisition and sale of loan portfolios, syndicated bank loans, debt instructments, derivatives, insolvency, and litigation claims throughout Europe, the United States, and Asia. Louisa has extensive experience of secondary loan trading in distressed situations.

Victoria Mackay manages the political risk and global strategic advisory offering at **Gryphon Strategies**. A former British Diplomat, Victoria led the Middle East and North Africa desk of a leading business intelligence and political risk firm whilst working in the region, and has extensive experience consulting on due diligence, political risk, litigation and other complex investigation assignments around the world.

Andrew Stafford QC of **Kobre & Kim** represents corporations, hedge funds and HNWIs in complex, high-value, and multi-jurisdictional cross-border litigation. He has particular experience in international judgment enforcement, developing and executing strategies designed to secure effective collection of awards and judgments, including relating to enforcement against sovereign judgment debtors.

Richard Lewis of **Hogan Lovells** conducts high-value, complex litigation, often originating from former CIS countries. He has experience in fraud & cross-border litigation, including worldwide freezing injunctions and other powerful asset preservation relief. Richard has acted on some of the most high profile disputes to come before the English courts in the past five years.

Helping claimants receive their damages How can Harbour help?

Litigation funders, claimants, and their legal advisers share an interest in seeing not only justice delivered by a successful case, but also the financial recompense which should follow. That, however, is not always easy to achieve, and to bring enforcement and asset recovery proceedings to a successful conclusion one cannot always rely on the law by itself. Highly creative and practical solutions emerge when lawyers, investigators, experts, and funders work together.

Harbour is committed to supporting claimants throughout the lifetime of their case, and our solutions are available at any stage of legal or arbitral proceedings. As well as providing funding to pursue litigation or arbitration, we also help claimants ensure they receive their court or tribunal-awarded damages. In certain circumstances we may also purchase a claimant's entitlement to damages for an immediate cash sum.

Harbour always encourages claimants and their legal advisers to give the earliest possible consideration to an enforcement strategy, especially in cases (e.g. fraud) where it is reasonably foreseeable that recovering assets to enforce a judgment may be difficult. Our approach to analysing cases for investment is entirely designed to support successful recovery of damages for claimants.

Benefits

- We have an extensive track-record of funding cases in which achieving satisfaction of judgments/awards has been challenging. We use our extensive experience to assist claimants and their lawyers to prepare realistically large budgets for the often extensive work required to enforce.

- Our pricing is straightforward and up-front, and in the event of a loss we bear 100% of the cost. Alternative arrangements are also available for claimants or lawyers who seek only partial-funding.

- We firmly believe that the claimant and their lawyers should be in complete control of the litigation, nor do we want a financial conflict of interest to arise between us and those we fund. As a result we always outsource investigations to our network of trusted third parties who can provide cost-effective and swift advice.

- We ring-fence case budgets meaning even very large sums from our £750m of capital under management are reserved for use solely on your case. Working with our experienced case management team, you can be sure funds will always be available throughout the lifetime of your litigation.

Contact us

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