Forcing the issue

Michael Redman on the challenges of enforcing judgments

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Which dispute resolution centre is the best in the world? That is a question that is often raised among those in the legal profession – and the usual suspects of London, New York, Singapore and Hong Kong are often mentioned, both in litigation and arbitration circles.

Whatever the answer is, there is one clear, yet often unspoken problem which is faced by an unquantified number of litigants or arbitration parties in all jurisdictions – judgment enforcement.

Any lawyer will tell you that there is an inherent risk involved in litigation. The risk they are referring to is, of course, that you will lose your case; a witness's evidence may not stack up under scrutiny, or the judge may simply not go your way. The risk that is almost never addressed or much spoken of is that you will win your case, but the other side simply refuses to comply.

In such cases, claimants are left only with the 'legal paper' of the judgment itself, perhaps the moral high ground, and inevitably the cost of bringing the claim in the first place, which they are now unable to recover. It is a headache for lawyers – and the businesses or individuals they represent – alike.

A CASE IN POINT

One recent case at London's High Court brings this problem into sharp focus. In *ADM Rice Inc. v Corporacion Comercializadora De Granos Basicos SA* [2015] EWHC B1 (Admlty), the claimant commodities giant Archer Daniels Midland had to resort to extreme measures to try and enforce six GAFTA arbitration awards against its determined counterparty – which had already failed to comply not only with the arbitral awards, but with a worldwide freezing order and connected penal notice.

In light of the defendants' prior behaviour, the court took the unusual step of permitting service of the freezing order by email, and of the committal proceedings by courier. Two of the directors of the defendant company, a Nicaraguan grains business, were sentenced by Mr Justice Phillips to 18 months' imprisonment for contempt of court.

The case centred on the failure to pay millions of dollars owed to commodities house ADM (Archer Daniels Midland) for rice imports. More than 6,500 metric tonnes of US-origin rice was shipped to the importer, Corcosa – Corporacion Comercializadora de Granos Basicos, in 2011 and 2012, under six sale contracts in dispute.

In some quarters, the tough stance of the High Court has been heralded as an underlining of London's excellence as a dispute resolution centre in international cases where jurisdictional links can be found. And why shouldn't it? Respected news agency Reuters reported on the case, and said lawyers were increasingly chasing worldwide freezing orders in London in order to seek justice.

But the flip side of the argument is that it merely reinforces the problem of judgment enforcement. Despite this and the court's obvious willingness to assist in the enforcement proceedings, the result remains only punitive rather than compensatory – what good does it do the successful claimant? Perhaps worse, the net effect of the proceedings appears to be unknown given that the defendants are based in Central America and are, particularly now, likely to remain there.

It was reported that ADM is studying options for executing the arrest warrants in Britain, the US or other countries, and for seizing assets

belonging to Corcosa or directors.

In scenarios where the defendant refuses to abide by a final court ruling to pay damages, and asset recovery is an avenue to pursue, the average claimant's position very quickly becomes one stifled by the cliched but understandable fear of throwing good money after bad.

Unsatisfied judgments are, after all, perceived very often as a debt compounded by time, legal costs and an unquantifiable element of bad corporate behaviour, if not outright fraud.

There are often good reasons for a judgment creditor's pessimism. While legal decisions may be final and have full effect domestically, there are often significant and costly barriers to enforcement in cross-border scenarios. Beyond the legal and evidential nuances that pervade each system, jurisdictional imbalances may include the obligation of personal service, the posting of significant bonds and the shifting of costs when seeking to freeze or restrain assets.

Very often attachments are made in the dark, with very little clarity on whether your court order has 'bitten', and if so on what. Finding out can be a process several years in the making.

The imbalance is arguably even starker as between the judgment creditor and the determined recalcitrant defendant. While it can take many months and hundreds of thousands of pounds to identify and evidence a bank account and its control by a judgment debtor, new companies and related accounts can be formed in a matter of hours, and for hundreds of pounds. Facilitating this is an international market specialising in asset protection schemes, only some of which are legitimate in purpose and method.

EXTENT OF THE PROBLEM

Often when one thinks of unsatisfied judgments, the image that comes to mind is the classically impecunious and inexperienced litigant who has been frustrated in their first, and perhaps only, foray into the world of legal disputes. The reality is often much different. Given their global commercial presence and frequent interactions with the legal system as a cost of doing business, some of the largest volume holders of unsatisfied judgment debt are international commodities traders, extractives companies and financial institutions.

The ubiquitous recourse to arbitration in these types of disputes, means the sheer volume of unenforced legal paper in these sectors – the market if you will – is unknown and likely unknowable. But an educated guess would tell us unenforced judgments run into billions globally.

Currently, this is impacted by the fact that the value of commercial arbitration cases, adding to those in the litigation space, has gone up. Figures show that in 2005 there were 71 commercial arbitrations with amounts in dispute exceeding $300m; in 2013 there were 109 cases exceeding $500m.

In order to overcome the judgment creditor's paralysis on being presented with judgment debtor, one of two things is typically necessary; either immediate monetisation in lieu of actual legal recovery, or finding someone who is willing and able to share the pain of recovery and not incur additional costs unless and until they achieve the very specific goal of enforcement, ie a contingency agreement. Either solution requires a shift in perception, to seeing the judgment as an asset and not just a bad debt. It has been reported in the US media that hedge funds in New York are now seeking to buy court judgments in large-scale disputes, but speaking from experience, it is an arena in which litigation finance is already playing a global role which, spurred by litigation financiers' legal knowledge, is increasing all the time.

For a provider of litigation finance, which can also buy judgments to pursue themselves, or fund and then execute the pursuit for a cash-strapped and frustrated claimant, this shift in perception brings with it a different challenge. Namely, valuation and risk management.

After all, prior to a judgment being handed down, a litigation financier can largely assess the legal merits of the case in the same way that counsel would; by analogy to a body of case law and with reference to the evidence that is likely to be made available. By contrast, in a post-judgment environment, the merits have already been decided. What lies beyond that is often a factual gulf, frequently characterised more by the unknowns than the knowns: where are the defendants' assets, who owns them, how will they respond to enforcement proceedings, what is their bottom line?

Again, from personal experience, this bottom line could be the defendants' luxury villa in the south of France, or even dividend from company stock. It is often something quite personal to them, something that mixes wealth and status but goes beyond just money. In the past, my team has also seized web domains and polo ponies.

Many of the challenges can be overcome through in-depth factual, forensic and legal investigation, to understand the footing of the judgment and disposition – broadly understood – of the judgment debtor. This front-loaded process is often interdisciplinary in nature, and defined as often by the commercial, political and personal context of the dispute itself as it is by the details set out in the underlying decision. It is also painstaking, cross border and nowhere near as glamorous as the image may conjure to the uninitiated.

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Where questions remain, and they often do, the litigation financier is left with experience as the primary guidance to assessment, and the onerous task of assigning a quantitative value to the often significant risks that remain.

But while litigation finance is providing assistance, it is a problem for legal centres to answer.

One possible solution is for jurisdictions to join forces and collectively come down much harder on the experts who help rogue defendants hide assets and escape justice. The dispute resolution centre which forms the best answer to tackle the problem may then truly take the crown as the world's best and most efficient.

For while the development in *ADM Rice Inc. v Corporacion Comercializadora De Granos Basicos* is a positive move, it is one drop in an ever swelling sea of unenforced judgments.

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