

**JUDICIAL ASSISTANCE IN SUPPORT OF
RUSSIAN AND CIS PROCEEDINGS –
THE PERSPECTIVE FROM ENGLAND & WALES**

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Introduction

1. These notes will consider the support to Russian and CIS litigation and arbitration proceedings that the courts in England & Wales¹ can provide in the following areas:

- (1) service of proceedings;
- (2) interim remedies;
- (3) obtaining evidence;
- (4) enforcement of court judgments; and
- (5) enforcement of arbitral awards.

¹ For the sake of brevity only further references below will be to “the English courts”

The procedure in each case is governed by **The Civil Procedure Rules** (“CPR”), the procedural code that governs civil litigation in the English civil courts.

(1) Service of Russian/CIS proceedings in England

2. The United Kingdom² is a party to **The Hague Service Convention on the Service Abroad of Judicial and Extra-Judicial Documents in Civil and Commercial Matters 1965**. The designated Central Authority in the UK is the Senior Master of the Supreme Court, Queen’s Bench Division, Foreign Process Office, Room E10, Royal Courts of Justice, Strand, London, WC2A 2LL.

3. The process for the service through the Senior Master is governed by CPR rr.6.50-6.51. The Senior Master will serve a document upon receipt of:
 - (1) a written request for service from a consular or other authority of [Belarus, the Russian Federation or Ukraine];

 - (2) a translation of that request into English;

 - (3) two copies of the document to be served; and

 - (4) unless the [Belarusian, Russian or Ukrainian] court or tribunal certifies that the person to be served understands the language of the document, two copies of a translation of it into English.

² Along with the Belarus, Russian Federation and Ukraine

Service through the Senior Master can be effected either by a judicial officer or other competent person in Belarus, Russia or Ukraine or directly by any interested person³. The Senior Master will determine the method of service⁴.

4. Alternatively, the service of the judicial documents may (and more usually is) effected by sending them by post either directly to the defendant in England or by instructing an English Solicitor to do so⁵.

(2) Interim remedies available in England in support of Russian/CIS proceedings

Litigation

5. The jurisdiction of the English High Court to grant interim relief in support of foreign proceedings stems from **s.25(1) of the Civil Jurisdiction and Judgments Act 1982**⁶, which confers on it the power to grant interim relief in aid of any proceedings commenced or to be commenced in any foreign jurisdiction. However, it may refuse to do so if the fact that it has no jurisdiction makes it *inexpedient* for the court to grant the relief sought⁷.

6. The jurisdiction under s.25 applies both *before and after* judgment has been granted in the relevant foreign proceedings.

³ Articles 10(b) and 10(c) of the Service Convention.

⁴ CPR r.6.51

⁵ Articles 10(a) and 10(c) of the Service Convention.

⁶ As extended by the Civil Jurisdiction and Judgments Act 1982 (Interim Relief) Order 1997 (SI 1997/302)

⁷ s.25(2)

7. A two stage test applies to an application under s.25, namely:

(1) would the relief sought be granted if the claim was proceeding in England⁸? and
(if the answer to this question is yes)

(2) does the fact that the English court does not have substantive jurisdiction over the claim make it *inexpedient* for the interim relief sought to be granted⁹?

Expediency

8. The court will be cautious about exercising this power (particularly in relation to a freezing order). However, having regard to the principle of international comity and the need to prevent international fraud, it is not timid about granting such relief if satisfied that good grounds exist to do so¹⁰. In deciding whether it is expedient to grant relief, it will consider the following:

(1) Does the relief sought have a real connecting link with England? In particular:

(i) Is the defendant domiciled in England?

(ii) Does the defendant have assets in England?

(iii) Is there some other factor that connects the interim relief sought with the jurisdiction?

⁸ As to which see paragraphs 11-14 below

⁹ *Refco v Eastern Trading Co* [1999] 1 Lloyd's Rep 159

¹⁰ *Ryan v Friction Dynamics Ltd & ors* [2001] C.P.Rep 75

It will rarely be appropriate or expedient to grant interim relief if the defendant has no connection with the jurisdiction and the relevant assets are not located in England¹¹. However, an example where this occurred is *Republic of Haiti v Duvalier*¹². Proceedings had been issued in France, where the defendants resided, to recover sums said to have been embezzled by them from the claimant. The claimant did not know where the defendants' assets were and (in particular) whether any of them were located in England. Indeed, one of the principal purposes of the freezing injunction sought was to identify the whereabouts of these assets through a disclosure order. T & Co. was a firm of English solicitors retained by the defendants that had been involved in moving their assets and a disclosure order would require the defendants through those solicitors to reveal the whereabouts of those assets. That fact alone made it expedient for the freezing injunction to be granted.

(2) Will the order interfere with the management of the case in the primary court?

It will weigh heavily (and probably conclusively) against the granting of relief if to do so would obstruct the management of the case by the primary court or give rise to conflicting, inconsistent or overlapping orders¹³. However, an overlapping freezing order may be granted if there is cogent reason for doing so (e.g. the defendant is resident in England (which could justify a worldwide order) or if some of the assets are located there)¹⁴.

(3) Will the order give rise to disharmony?

¹¹ *Belletti v Morici* [2009] EWHC 2316 (Comm); [2010] 1 All E.R. (Comm) 412

¹² [1990] 1QB 212

¹³ *Credit Suisse Fides Trust SA v Cuoghi* [1998] QB 818 at 831; and *Motorola Credit Corporation v Uzan (No.2)* [2004] 1WLR 113, 147 [115]

¹⁴ In such cases the English court will normally indicate which court is to have the principal responsibility for enforcing the overlapping jurisdiction (usually the primary court) and any order made by the English court should (as far as possible) track the terms of the foreign order.

Where a similar order has been applied for and refused by the primary court an English court would also generally refuse relief (unless the reason for the primary court's refusal was that the defendant was resident in England¹⁵). The English court will always pay careful regard to the likely reaction of the primary court to the grant of interim relief. If the primary court is likely to welcome such a step as being of assistance to the case it is trying, the English court is likely to look favourably on the application. However, if the primary court is likely to regard such a step as an interference with its own jurisdiction, the English court is most unlikely to accede.

(4) Is there a potential conflict on jurisdiction?

Such a conflict may make it inexpedient to grant relief.

(5) Will the order be enforceable by the English court?

This will usually require the defendant to be resident, or some of his assets to be located, in the jurisdiction.

Range of available relief

9. The interim relief that an English court can grant under s.25 includes:
 - (1) a freezing injunction (including a disclosure order);
 - (2) a search and seizure order;
 - (3) the delivery, detention and preservation of property;

¹⁵ *Credit Suisse* at 829; *Motorola Credit* 147 [115]

- (4) the inspection of property;
- (5) the taking of a sample of property;
- (6) the carrying out of an experiment on property; and
- (7) the payment of income from property.

The court's power under s.25 is not limited to the relief that could be granted by its primary counterpart¹⁶. So, for example, it is able to grant a worldwide injunction in support of Russian proceedings even if the Russian Arbitrazh Court or Court of General Jurisdiction with jurisdiction over the substantive dispute to freeze assets considers itself unable to do so.

General principles applicable to the grant of injunctions

10. As stated in paragraph 7 above, any application under s.25 will first require consideration of whether an injunction would be granted if the English courts had jurisdiction over the substantive claim. It is therefore worth summarising the principles applicable to the grant of injunctions under English law. Ultimately, an injunction will only be granted if the court considers it 'just and convenient' to do so¹⁷. However, well established guidelines have been developed to assist the court in making this assessment.

Normal injunctions

¹⁶ *Credit Suisse* at 829 per Millett LJ

¹⁷ s.37(1) of the Senior Courts Act 1981

11. A claimant seeking a “normal” injunction¹⁸ will generally be expected to:
- (1) establish that there is a serious issue to be tried between himself and the defendant;
 - (2) satisfy the court that the balance of convenience is in favour of granting the injunction¹⁹; and
 - (3) provide an undertaking in damages²⁰ (supported by evidence that he has sufficient assets to discharge the undertaking if required)²¹.

Freezing injunctions²²

12. In the case of a freezing injunction, the burden will be on the claimant to:
- (1) establish a good arguable case that he will succeed at trial;
 - (2) demonstrate a real risk that the defendant will dissipate his assets to avoid enforcement of a judgment against him once he has notice of the claim; and
 - (3) provide an undertaking in damages²³.
13. A standard (and important) component of a freezing injunction is an order requiring the defendant to provide information (in a sworn affidavit) of the extent and whereabouts of his assets (wherever located) above a limited sum (often £1,000). Assets subject to disclosure include details of all bank accounts (and the balances on the same), monies held on trust, real property, shares, vehicles, jewellery etc. Once a freezing order is served on third parties in possession or control of the defendant’s

¹⁸ ie. injunctions other than freezing and search and seizure orders

¹⁹ which will generally mean that an injunction will be refused if the claimant would (if successful) be adequately compensated at the end of the case by an award of compensation for the loss suffered as a result of the defendant’s wrongful actions.

²⁰ ie. a promise that he will compensate the defendant for any loss incurred as a result of the injunction in the event that it emerges at the end of the proceedings that the injunction should not have been granted (which will usually arise if the claimant’s claim does not succeed).

²¹ *American Cyanamid Co v Ethicon Ltd* [1975] AC 396

²² injunctions which prevent the defendant from dealing with his assets (save for the purpose of meeting regular personal and business expenses) pending judgment and/or satisfaction of the same.

²³ *Nimena Maritime Corporation v Trave Schiffahrtsgesellschaft mbH und Co KG* [1983] 1WLR 1412

assets (most commonly banks), they are obliged to prevent any dealings with those assets. A freezing injunction (known as a worldwide freezing injunction) may be granted in respect of assets located outside England.

Search & Seizure Injunctions

14. A claimant seeking a search and seizure order²⁴ will be expected to:
- (1) demonstrate a strong prima facie case against the defendant;
 - (2) establish a serious risk that damage will be caused to the claimant's interests if the injunction is not granted;
 - (3) provide clear evidence that the defendant has incriminating evidence in his possession which there is a serious possibility he will destroy if he becomes aware of the claimant's claim; and
 - (4) provide an undertaking in damages²⁵.

Contempt of court sanctions

15. An important aspect of any injunction granted by an English court is the robust contempt of court sanctions that are available to anyone who breached (*or knowingly facilitates a breach of* (ie. therefore third parties)) its terms. This includes a term of imprisonment of up to 2 years²⁶ and an unlimited fine.

²⁴ an that order allows a designated agent of the claimant to enter premises in the jurisdiction and carry out searches make inspections, take copies photographs and samples and retain for safekeeping property identified in the order. Such orders are most commonly made in cases involving breaches of intellectual property rights.

²⁵ see *Anton Piller KG v Manufacturing Processes Ltd* [1976] Ch 55; and s.7 of the Civil Procedure Act 1997

²⁶ s.14 of the Contempt of Court Act 1981

Arbitration

16. The English court has a similar power to grant interim relief in support of any tribunal proceedings (including foreign proceedings) under **S.44 of the Arbitration Act 1996** (“AA”), which provides that:

“(1) Unless otherwise agreed by the parties, the court has for the purposes of and in relation to arbitral proceedings the same power of making orders about the matters listed below as it has for the purposes of and in relation to legal proceedings.

(2) Those matters are—

...(b) the preservation of evidence;

(c) making orders relating to property which is the subject of the proceedings or as to which any question arises in the proceedings: (i) for the inspection, photographing, preservation, custody or detention of the property, or (ii) ordering that samples be taken from, or any observation be made of or experiment conducted upon, the property; and for that purpose authorising any person to enter any premises in the possession or control of a party to the arbitration;

(d) the sale of any goods the subject of the proceedings;

(e) the granting of an interim injunction or the appointment of a receiver.”

17. In urgent cases such an order may be made prior to the initiation of arbitral proceedings²⁷.

18. However, the court will only order interim relief to the extent that the arbitral tribunal itself does not have the power or is unable to act effectively²⁸ and (if the matter is not urgent) with the permission of the tribunal or the agreement of the parties in writing²⁹.

19. Further restrictions on the court’s power under s.44(2) are: (i) any agreement by the parties that the English court should not be entitled to exercise that power³⁰; and (ii) if

²⁷ s.44(3)

²⁸ s.44(5)

²⁹ s.44(4)

³⁰ s.44(1)

the court considers that the fact that the seat of the arbitration is outside the jurisdiction makes it inappropriate to exercise that power³¹.

3. Obtaining evidence through the English courts in support of Russian/CIS proceedings

20. The United Kingdom is a signatory to **The Hague Convention on the Taking Evidence Abroad in Civil or Commercial Matters 1970**. The terms of the Convention are incorporated into English law by **the Evidence (Proceedings in Other Jurisdictions) Act 1975** (“the 75 Act”). The procedure for obtaining such evidence is set out in CPR rr.34.9, 34.10 and 34.16-34.21.

General principles

21. In summary, the English High Court has the power to assist a foreign (and therefore a Russian/CIS) court to obtain evidence in support of civil proceedings, which have either been instituted before that court or tribunal or whose institution is contemplated, if it is requested by the latter to do so.
22. The specific evidential assistance that it is able to provide includes: (i) the examination of witnesses; and (ii) the production of documents for the purpose of enabling a party to ascertain whether evidence exists to support his own case or contradicts the opposing party’s case³².

³¹ s.2(3)

³² See also para.24 below

23. Before rendering such assistance, the High Court will wish to satisfy itself that:
- (1) The application for such assistance is made pursuant to a request issued by or on behalf of a court or tribunal exercising jurisdiction in a foreign country³³.
 - (2) The proceedings in relation to which it has been requested concern civil or commercial proceedings (as defined both under English law³⁴ and the law of the requesting state³⁵) that have either been instituted before the requesting court or whose institution is contemplated³⁶. In the absence of evidence to the contrary the High Court will accept its requesting counterpart's statement as to the nature of the proceedings in relation to which the request is made.³⁷
 - (3) The evidence in relation to which assistance is sought is admissible evidence for the purpose of the anticipated trial before the requesting court. Statements in the letter of request that the evidence is sought for use at trial are relevant but not conclusive. The English Court will make its own assessment in this regard, although the benefit of any doubt will be given to the applicant relying on the request³⁸.
 - (4) The steps that it has been requested to take are ones that could be required in civil proceedings in the English court³⁹.

³³ s.1(a) of the 75 Act

³⁴ which classifies "civil proceedings" as all proceedings other than criminal proceedings (and includes commercial proceedings)

³⁵ in this case reference is made to the law and practice of the country of the requesting court or tribunal having regard to the manner in which classification is ordinarily made in that country (see *State of Norway's Application (Nos.1 and 2)* [1990] 1AC 723

³⁶ s.1(b) of the 75 Act

³⁷ see *Re Westinghouse Uranium Contract Litigation MDL Docket No. 235* [1978] AC 547, at p.634

³⁸ *State of Minnesota v Philip Morris Inc* [1998] I.L.Pr. 170 (CA)

³⁹ s.2(3) of the 75 Act

Specific powers

24. The High Court has wide powers to ensure that it can provide the assistance requested. In particular, it may:

(1) Arrange for the examination of witnesses orally or in writing.

(2) Order the production of specifically identified documents (including from a third party).

(3) Order the inspection, photographing, preservation, custody or detention of specifically identified property.

(4) Order the taking of samples of any property and the carrying out of any experiment on or with specifically identified property.

An examination

25. It is normal practice for the court to appoint a practising lawyer to conduct an examination but, exceptionally, it may order that it be conducted by English counsel before a High Court judge. The examination will usually be conducted in the same way as if the witness were giving evidence at trial⁴⁰. The examiner must ensure that the evidence given by the witness is recorded in full⁴¹ (usually in the form of a verbatim transcript of questions and answers recorded by a shorthand writer and by audio or video recording⁴²). Following the conclusion of the examination the examiner will send the written deposition of the witness to the Senior Master who will provide a certificate sealed with a seal of the Senior Courts and send that, along with

⁴⁰ CPR rr.34.9 and 34.18(2)(a)

⁴¹ CPR r.34.9(4)

⁴² CPR 34.9 APD para.4.3

the request, the order of the High Court for the examination and the deposition, to the party who submitted the request for transmission to the requesting court or tribunal⁴³.

26. If a person served with an order to attend before an examiner fails to attend or refuses to be sworn for the purpose of the examination or to answer any lawful question or produce any document at the examination, the party who applied for the examination may apply to the court for a witness summons requiring that person to attend, or to be sworn or to answer any question or produce any document⁴⁴. Failure to comply amounts to a contempt of court.
27. A party to foreign arbitral proceedings may (with the permission of the tribunal or the agreement of the other parties) also apply to the English court for a witness summons requiring a witness to attend before a tribunal to give oral testimony or to produce documents or other material evidence⁴⁵.

(4) Enforcement of a Russian/CIS court judgment in England

General Principles

28. There are no bilateral or multilateral treaties of which the United Kingdom and the Russian Federation (or any other CIS country) are parties that recognise and facilitate the enforcement of judgments of each other's courts. However, the English court

⁴³ CPR r.34.19

⁴⁴ CPR rr.34.10 and 34.18(2)(b)

⁴⁵ ss.2(3) and 43 of the AA

nevertheless has a common law jurisdiction to recognise and enforce any foreign court judgment (and in particular (for these purposes) that of a Russian/CIS court) if the judgment is *final and conclusive, on the merits* and relates to the *payment of money*. Such a judgment can also be relied on in court proceedings in England to support a defence by way of a set-off⁴⁶ to a claim.

29. A judgment will be *final and conclusive* if it is final and unalterable in the relevant Russian/CIS court (ie. it is not provisional).⁴⁷ A judgment is final and conclusive even if it is the subject of an appeal or if the period for appealing it has not expired.

30. A judgment will be *on the merits* if it establishes that certain facts were proved or not disputed, states relevant principles of law, and pronounces the effect of applying those principles to the established facts⁴⁸. This includes a judgment in default and a claim that is dismissed on limitation grounds⁴⁹.

31. The judgment must be for a definite sum of money⁵⁰ and must not relate to the payment of taxes, fines or penalties (which an English court will not assist in the enforcement as a matter of public policy).

Procedure

⁴⁶ the English law principle whereby the sums owed by party A to party B in relation to one cause of action are discharged in part or entirely by the sums owed by party B to party A in respect of a second cause of action

⁴⁷ *Nouvion v Freeman* (1889) LR 15 App Case 1

⁴⁸ *The Sennar (No 2)* [1985] 1WLR 490

⁴⁹ The Foreign Limitation Periods Act 1984, s.3

⁵⁰ so, for example, a judgment that grants a final injunction is not capable of enforcement at common law

32. Common law enforcement of a Russian/CIS court judgment will require the commencement of fresh proceedings in England seeking payment of the sum of money due under the judgment. It is usually possible to obtain permission of the English court to serve such proceedings abroad on the defendant/judgment debtor, if that is necessary.⁵¹ In straight forward cases it will be possible for the claimant/judgment creditor to invoke the summary judgment procedure in English civil proceedings recognised under CPR Part 24, by which judgment prior to a trial may be granted to a claimant who is able to establish (on the basis of documentary evidence and witness statements alone) that the defendant has no real prospects of successfully defending the claim.⁵² The fact of the Russian/CIS judgment will be sufficient to meet this threshold (subjected to the defences referred to below). However, if the judgment debtor has a real prospect of success, the court will allow the matter to proceed to trial.

Defences

33. The following defences will be available to a claim for enforcement of a Russian/CIS judgment:

- (1) The relevant Russian/CIS court acted without jurisdiction.
- (2) The process by which the judgment was obtained involved a breach of the principles of natural justice.
- (3) The judgment was procured by fraud.
- (4) Enforcement of the judgment would involve a breach of public policy.
- (5) An irreconcilable previous judgment exists.

⁵¹ CPR PD 6B, para 3.1(10)

⁵² CPR r.24.2(a)(ii)

(6) S.32 of the Civil Jurisdiction and Judgments Act 1982 (“CJJA”) applies.

(1) *Jurisdiction*

34. The question of whether the Russian/CIS court had jurisdiction will be judged according to English law principles. These will require that the court had *territorial* or *consensual* jurisdiction over the claim in relation to which it gave judgment.
35. *Territorial jurisdiction* will arise if the defendant was present (even temporarily) in Russia/the relevant CIS country when the proceedings there were instituted⁵³. If the defendant is a company, it will be present in the country if it had an established place of business and was carrying on business there or if a representative of the company was carrying on the business of that company from a fixed place of business there⁵⁴.
36. Consensual jurisdiction exists if the defendant voluntarily appeared in the Russian/CIS proceedings without protest or took some substantive step in those proceedings which constitute a submission to the jurisdiction of the Russian/CIS court or if he expressly consented (for example by contract before the commencement of proceedings) to the jurisdiction of that court⁵⁵.

⁵³ More precisely, on the date that they were served

⁵⁴ *Adams v Cape Industries Plc* [1990] Ch 433, CA

⁵⁵ *Adams v Cape Industries*

(2) Natural Justice

37. A breach of natural justice will occur if the procedures in the proceedings that gave rise to the Russian/CIS judgment were contrary to English principles of substantial justice. This will arise if the defendant did not receive due notice of the proceedings or was not afforded a proper opportunity to present his case (also to be established by reference to English principles on those issues).⁵⁶

(3) Fraud

38. Fraud in this context has been described as “every variety of mala fides whereby one party misleads and deceives the judicial tribunal”.⁵⁷ In particular, it includes:
- (1) perjured evidence given during the course of the trial;
 - (2) the use of forged documents; and
 - (3) threats or bribes to prevent witnesses from giving evidence.

However, if the allegation of fraud was brought before, considered and rejected by the relevant Russian/CIS court, the defendant may be prevented from raising that argument again in English proceedings on the basis of the principles of estoppel or abuse of process⁵⁸.

(4) Public Policy

⁵⁶ *Adams v Cape Industries*

⁵⁷ *Jets Holdings Inc v Patel* [1990] 1QB 335, CA

⁵⁸ *House of Spring Gardens v Waite (No 2)* [1991] QB 241, CA

39. This principle is rarely invoked in the context of common law enforcement of a foreign judgment and where it has been the issues involved were of a family law nature.

(5) *Irreconcilable prior judgment*

40. Enforcement will also be refused if there is a prior irreconcilable English or foreign judgment involving the same parties and the same issues.⁵⁹

(6) *s.32 of the CJJA*

41. Finally, s.32 of the CJJA prohibits the enforcement of a judgment which stems from proceedings that were brought in breach of a contractual agreement to refer the dispute to a particular forum. S.32 states that:

“(1) [A foreign] judgment shall not be recognised or enforced .. if

(a) [the foreign proceedings were] *contrary to an agreement under which the dispute ... was to be settled otherwise than by proceedings in [the foreign court];*

(b) [those proceedings] *were not brought by ... or with the agreement of [the judgment debtor]; and*

(c) [the judgment debtor] *did not counterclaim ... or otherwise submit to the jurisdiction ...”*

(5) Enforcement of a Russian/CIS arbitral award in England

The New York Convention

Procedure

42. The United Kingdom and most CIS countries are signatories to **The Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958** (“**New York Convention**”). The enforcement mechanism that the New York Convention⁶⁰ provides is by far the easiest, most effective and most common basis of enforcement of Russian/(relevant) CIS arbitral awards in England. An application for permission to

⁵⁹ *Vervaeke v Smith* [1983] 1 AC 145, HL; *Showlag v Mansour* [1995] 1 AC 431, PC

⁶⁰ which is recognised in English legislation by the AA

enforce an award involves the commencement of fresh proceedings (“an Arbitration Claim”) and is set out in CPR Part 62, specifically:

(1) Issuing an Arbitration Claim Form (which may be served outside the jurisdiction with permission of the court⁶¹).

(2) Filing and serving a witness statement that: (a) exhibits the original or a certified copy of the award; (b) exhibits the original arbitration agreement (or a certified copy of it) (and a translation if it is not in English)⁶²; and (c) provides certain proscribed information (e.g. the address of the claimant and the defendant and confirming that the award has not been complied with (in whole or in part)⁶³.

43. An order granting permission to enforce the award must be drawn up and served by the claimant on the defendant personally or by sending it to his usual or last known residence or place of business⁶⁴. It may be served abroad without the permission of the English court⁶⁵. The defendant may apply to set aside the order within 14 days of service (or any longer period specified by the court if it is served abroad) and the award cannot be enforced until the expiry of that period.⁶⁶

Grounds on which award may be set aside⁶⁷

44. Permission to enforce a New York Convention award may be set aside on the following grounds:

(1) Incapacity on the part of the defendant.

(2) The arbitration agreement was invalid.

⁶¹ r.62.16(2)+(3) and r.62.18(4)

⁶² Article IV, r.62(18)(6)(a) and s.102 of the AA

⁶³ r.62.18(6)(b)+(c)

⁶⁴ r.62.18(7)

⁶⁵ r.62.18(8)

⁶⁶ r.62.18(9)

⁶⁷ Article V of the New York Convention and s.103 of the AA

- (3) The defendant was not given proper notice or was unable to present his case to the tribunal.
- (4) The award exceeded the terms of reference of the tribunal.
- (5) The tribunal was not properly composed.
- (6) The award is not binding or has been set aside or suspended.
- (7) The dispute was not capable of arbitration in England or the award is contrary to public policy.

(1) Incapacity

45. Enforcement of the award will be refused “*if the person against whom it is invoked proves that a party to the arbitration award was (under the law applicable to him) under some incapacity*”⁶⁸.” In the case of a company this may arise if it was not permitted under its own constituent documents or its own law to enter the arbitration agreement. However, the defendant may be precluded from raising this argument in the course of the enforcement proceedings if it was possible for him to raise this in the arbitration and he failed to do so.

(2) Invalidity

46. Enforcement may also be avoided “... *if the arbitration agreement was not valid under the law to which the parties subjected it to or, failing that, under the law of the country where the award was made.*”⁶⁹ The invalidity in question is that of the arbitration agreement, not the underlying contract. The question of invalidity will be judged in accordance with the law to which it was subject or (failing that) the law of the country in which the award was made.

(3) Insufficient notice/inability to present his case

⁶⁸ s.103(2)(a) of the AA

⁶⁹ s.103(2)(b) of the AA

47. A further ground for avoiding enforcement is “... *if [the defendant was] not given proper notice of the appointment of the arbitrator or the arbitration proceedings or was otherwise unable to present his case.*”⁷⁰ There is no definition of what constitutes ‘proper notice’. However, the defendant will generally be required to establish that he really did not know of the appointment or hearing (ie. not just that there was a technical failure to comply with a formal requirement of notice). A defendant will be unable to present his case if he was not afforded a proper opportunity to deal properly with the claimant’s case at the arbitration or if the tribunal took into account evidence not available to him⁷¹. Ultimately, the benchmark by which the court will be guided is whether there was a denial of justice as a result of the matters complained of by the defendant. Again, this ground will be judged in accordance with English law principles of natural justice and due process⁷².

(4) Outside the terms of reference

48. In accordance with the provisions of the New York Convention, the English court will also set aside permission to enforce “*if the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration or contains decisions on matters beyond the scope of the submission*”.⁷³ This is akin to challenging the substantive jurisdiction of the tribunal and is essentially a question of fact. If the award can be separated, those parts that fall within the tribunal’s jurisdiction may be enforced.

(5) Improper composition of arbitration tribunal and arbitral procedure

49. Permission will also be revoked “... *if the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or [failing*

⁷⁰ s.103(2)(c) of the AA

⁷¹ see *Irvani v Irvani* [2000] 1 Lloyd’s Rep. 412; and *Kanoria v. Guinness* [2006] EWCA Civ 222

⁷² see *Parsons and Whittemore Overseas Co v Societe Generale de l’Industrie du Papier* (1976) 1 Ybk Comm Arbn 205

⁷³ s.103(2)(d) of the AA

that] *with the law of the country in which the arbitration took place.*"⁷⁴ An example would be if: (i) the tribunal consisted of a sole arbitrator instead of three, as provided for in the arbitration agreement; or (ii) if a different procedure was employed than that stipulated by the agreement (although it must be shown that the departure from the agreement in this sense adversely affected the defendant). However, if the defendant participated in the arbitration without objection he may lose his right to rely later on them as the basis for resisting enforcement notwithstanding these defects.⁷⁵

(6) Award not binding or set aside or suspended

50. An award may also be avoided "... *if [it] has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which it was made.*"⁷⁶ In English law an arbitral award becomes binding when it is made⁷⁷.

Dispute not capable of settlement by arbitration or contrary to public policy

51. Finally, enforcement will be refused "... *if the award is in respect of a matter which is not capable of settlement by arbitration, or if it would be contrary to public policy to recognise or enforce the award.*"⁷⁸ There is no internationally accepted definition of what issues are arbitrable. However, under English law this could, in principle, cover

⁷⁴ s.103(2)(e) of the AA

⁷⁵ *Minmetals Germany v Ferco Steel* [1999] CLC 647

⁷⁶ s.103(2)(f) of the AA

⁷⁷ s.58(1) of the AA

⁷⁸ s.103(3)(f) of the AA

corporate issues governed by statute (particularly if they affect third party rights)⁷⁹, child custody issues and issues which give rise to public policy considerations.

s.66 of the AA

52. Section 66 of the AA provides an alternative summary procedure by which foreign arbitral awards⁸⁰ may be enforced. This procedure is only suitable for straight forward cases not for ones involving complex objections or requiring a full investigation of the background facts⁸¹. The procedure for summary enforcement under s.66 is the same as that applicable to New York Convention awards referred to above (ie. an application without notice for leave to enforce, which may be set aside on an application by the defendant)⁸². If leave is given, judgment may be entered in the terms of the award and that judgment may be enforced in the same way as any domestic judgment.

Grounds for setting aside permission to enforce

53. The grounds on which permission granted under s.66 must or may be set aside are as follows:

⁷⁹ See, for example, *Exeter City AFC Ltd v The Football Conference Ltd* [2004] EWHC 831 (Ch) [2005] 1 BCLC 238; *In A Best Floor Sanding Party Ltd v Skyer Australia Party Ltd* (19 May 1999, unreported); and *ACD Tridon v Tridon Australia* [2002] N.S.W.C. 896

⁸⁰ as well as domestic ones

⁸¹ *Chaim Kohn v Sheva Wagshal* [2006] W.L. 3854048, paras. 13, 14

⁸² the provisions of CPR r.62.18 set above apply

- (1) If the tribunal lacked substantive jurisdiction.⁸³
- (2) If there was a serious irregularity affecting the tribunal.⁸⁴
- (3) If the award related to matters that were not arbitrable.
- (4) If the arbitration was conducted pursuant to an oral agreement to arbitrate.
- (5) On public policy grounds.⁸⁵

(1) Lack of substantive jurisdiction

54. Leave to enforce *must* be set aside where *or to the extent that* the tribunal lacked jurisdiction. This is the only mandatory ground for refusing leave to enforce under s.66. However, the right to rely on this ground may be lost if this argument was not raised forthwith in the arbitral proceedings⁸⁶ or by appealing the award⁸⁷.

(2) Serious irregularity

55. The court has a discretion not to enforce an award under s.66 if a serious irregularity has occurred affecting the tribunal, the proceedings or the award. A serious irregularity includes:

- (1) a failure by the tribunal to comply with its general duty under s.33 of the AA to act fairly and impartially as between the parties (including by giving them a reasonable opportunity to put their cases and deal with their opponent's case);
- (2) the tribunal exceeding its powers (otherwise than by exceeding its substantive jurisdiction);
- (3) a failure by the tribunal to conduct the proceedings in accordance with the procedure agreed by the parties;

⁸³ s.66(3) of the AA

⁸⁴ s.68 of the AA

⁸⁵ s.81(1) of the AA

⁸⁶ s.73 of the AA

⁸⁷ s.70(3) of the AA

- (4) a failure by the tribunal to deal with all the issues that were put to it;
- (5) any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award exceeding its powers;
- (6) uncertainty or ambiguity as to the effect of the award;
- (7) the award being obtained by fraud or the award or the way in which it was procured being contrary to public policy;
- (8) failure to comply with the requirements as to the form of the award; or
- (9) any irregularity in the conduct of the proceedings or in the award which is admitted by the tribunal or by any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award⁸⁸.

(3) *The award relates to non-arbitrable matters*

56. The same principles referred to in paragraph 51 above apply.

(4) *Oral agreement*

57. Part I of the AA (and therefore the procedure under s.66) only apply to written arbitration agreements⁸⁹.

(5) *Public policy grounds*

⁸⁸ s.68(2) of the AA

⁸⁹ s.5(1) of the AA

58. A common example of the public policy ground is an award based on a contract to carry out an illegal act⁹⁰.

Common law action on the award

59. English common law provides an alternative/additional method for the enforcement of an arbitral award rendered in any country, although one that is more cumbersome than the other methods described above. Accordingly, in practice it is only used if those options are not available (for example if the arbitration agreement was made orally).

60. Common law enforcement involves commencing new proceedings in England based on the award (and the implied promise of the parties who entered into the relevant arbitration agreement to perform a valid award⁹¹). The award will (subject to the defences referred to below) be enforceable through a judgment based on its terms if:

(1) the parties had submitted to an arbitration agreement that is valid under the law governing that agreement; and

(2) the award is valid and final under the law that governs the arbitration proceedings.⁹²

61. To succeed in his claim the claimant will be expected to plead and prove:

⁹⁰ see, for example, *Soleimany v Soleimany* [1998] 3WLR 811, CA, where the English court refused to enforce an award on a contract based on an illegal scheme to export Persian rugs out of Iran, even though the contract was governed by Jewish law which recognised the validity of such agreements.

⁹¹ see, for example, *Bremer Oeltransport v Drewry* [1933] 1KB 753 (CA).

⁹² see, for example, *Norske Atlas Insurance Co Ltd v London General Insurance Co Ltd* (1927) 43 TLR 541, 542; and *Dalmia Dairy Industry Ltd v National Bank of Pakistan* [1978] 2 Lloyd's Rep.223 (CA)

- (1) the arbitration agreement in question;
- (2) the dispute(s) falling within that agreement;
- (3) the appointment of a tribunal under it;
- (4) the making of an award pursuant to it; and
- (5) the defendant's failure to perform the award⁹³.

Defences to enforcement

62. The following are defences to a common law claim based on an award:

- (1) the arbitrators had no jurisdiction to make it under the law governing the arbitration agreement; or
- (2) it was obtained by fraud; or
- (3) its enforcement (or recognition) would be contrary to public policy; or
- (4) the proceedings in which it was obtained breached the principles of natural justice.

63. These defences mirror closely those available in respect of the enforcement of foreign judgments. The principles referred to in section 4 above will therefore apply equally here⁹⁴.

⁹³ *The "Santa Anna"*[1983] 1 Lloyd's Rep. 637

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⁹⁴ see *The Conflicts of Law*. Dicey, Morris & Collins (14th Ed), para.16-119.