English High Court Issues an Order in Favour of Judgment Creditor Forcing British Government to Disclose Foreign Government Assets Frozen under Sanctions

Under the various EU and UK sanctions regimes, financial institutions are required to disclose to the relevant authority in their member state the details of the assets in the jurisdiction that are owned or controlled by persons designated under the sanctions. According to the latest annual report of the UK's Office of Financial Sanctions Implementation nearly £12 billion in disclosed funds are currently frozen in the UK.[1]

Combined with this wide-scale disclosure of assets to member state governments, the EU and UK sanctions regulations contain an exception to the asset freeze that, in certain circumstances, allows frozen funds to be released to pay arbitral awards or legal judgments.

Against these combined contexts, on 12 August 2020, the English High Court (Administrative Division) in *R (on the application of Certain Underwriters at Lloyds London & Ors) v. HM Treasury*[2] issued an order requiring the British government to disclose to judgment creditors details of frozen assets of the Syrian government.

Background of the Dispute

In 1985, an Egyptian aircraft was hijacked and destroyed in a terrorist attack by the Abu Nidal Organization terrorist group, causing many casualties. The reinsurers of the aircraft (the claimants) obtained a judgment in the U.S. District Court for the District of Columbia for approximately U.S. $51.5 million against the Syrian Government, its Air Force Intelligence Agency, and the head of the Agency, as State sponsors for the attack on the aircraft.[3] In 2018, the claimants successfully registered the U.S. judgment and obtained an order from the High Court in London for its enforcement in England.[4]

---

[1] *Available at*: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/838178/Annual_Review_2018-19_FINAL.pdf.

[2] [2020] EWHC 2189 (Admin), *available at* http://www.bailii.org/ew/cases/EWHC/Admin/2020/2189.html.

[3] *Certain Underwriters at Lloyd's, London, et al. v. Great Socialist People's Libyan Arab Jamahiriya, et al., Civil Action* No. 06-cv-731 (JMF) (D.D.C. 2011), *Certain Underwriters at Lloyd's v. Socialist People's Libyan Arab Jamahiriya, et al,* No. 06-cv-731 (JMF), 08-cv-504, 2011 U.S. Dist. LEXIS 98913, (D.D.C. 09/02/2011)

[4] [2018] EWHC 385 (Comm).

Facts under Dispute

In an effort to identify assets upon which to execute, the judgment creditors approached Her Majesty's Treasury (HM Treasury), seeking information about Syrian government assets frozen under the regulation that governs the EU's Syrian sanctions ("EU Regulation").[5] The claimants requested details of any bank accounts including: the name of the bank and branch; the account number; the last known balance, and; information regarding historic use of funds in the accounts and the sources of that information.

HM Treasury declined to provide the information, saying the disclosure would contravene Article 29 of the EU Regulation. Article 29(1) requires financial institutions to provide asset disclosure "which would facilitate compliance" with the Regulation. Article 29(2) limits the use of the information to "the purposes for which it was provided or received". HM Treasury did not believe the information could be used in relation to a request for authorization to allow frozen funds to be released for the benefit of a judgment creditor.

The Judgment

The judgment creditors sought judicial review of HM Treasury's decision. The High Court (Mr Justice Kerr) agreed with the claimants and determined that HM Treasury has the power to provide the information the claimants seek, and is not prevented from doing so by Article 29 of the EU Regulation. The court reasoned that if granting an application for release of funds is an act done in compliance with the Regulation, then providing information to the claimants to enable them to identify the funds eligible for release *facilitates* compliance with the EU Regulation.

The court considered HM Treasury's interpretation of Article 29 as too strained in light of its context and the purposes of the Regulation as a whole. Although the court acknowledged that the information to be provided by a financial institution regarding frozen assets is, by its very nature, sensitive and confidential, the court determined that it is for the financial institution and the competent authorities to engage in discussions and negotiations as to which categories of information need to be disclosed in order to facilitate compliance.

The court also determined that the disclosure was proportionate, as the information sought is not destined to be released into the public domain, but is instead meant to facilitate the Article 18(1) exemption on release of frozen funds to satisfy a judgment or

[5] 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, OJ L 16, 19.1.2012, p. 1–32.

arbitral award. The court refused to grant any additional confidentiality protections to targeted persons and entities, finding they were adequately safeguarded under the restrictive measures and exceptions provided under existing laws.

The court quashed HM Treasury's decision to not disclose the financial information, and remanded to HM Treasury for renewed consideration.

Discussion

As yet, it is unclear whether HM Treasury will seek leave to appeal the High Court's decision. As the law stands, however, claimants seeking to enforce judgments and arbitral awards against those designated under EU and UK sanctions have been granted a powerful new weapon. The precise scope and force of that weapon will remain to be worked out by the courts over time.

In part, this is because there are a number of issues with which the judgment does not deal. Most notably, even though the defendants in the case included the Syrian Republic and a branch of the Syrian armed forces, there was no discussion of sovereign immunity. Under English law, certain categories of assets are not subject to execution unless the state has waived its immunity from execution. This raises the question as to whether the same answer on the "proportionality" of disclosure would be reached where the assets in question were both sovereign and immune. Further, on what basis could HM Treasury be expected to know, or ascertain, whether or not certain assets of a foreign sovereign benefit from sovereign immunity? In addition, the request for disclosure of the historic use of particular bank accounts is clearly designed to gather evidence in order for the claimant to argue that particular accounts were used for commercial purposes and therefore not immune from execution. This disclosure would have the effect of circumventing or overcoming various procedural and evidentiary protections given to foreign sovereigns under the *State Immunity Act 1978*.

In this context, it is worth noting that the defendants to the underlying judgment in this case chose not to participate in this proceeding. There may be circumstances under which a foreign sovereign would be better served by participating and asserting its sovereign rights against disclosure of its assets.

About Curtis

Curtis, Mallet-Prevost, Colt & Mosle LLP is a leading international law firm. Headquartered in New York, Curtis has 17 offices in the United States, Latin America, Europe, the Middle East and Asia. Curtis represents a wide range of clients, including multinational corporations and financial institutions, governments and state-owned companies, money managers, sovereign wealth funds, family-owned businesses, individuals and entrepreneurs. The firm is particularly active on behalf of clients

operating in the energy and renewable energy, commodities, telecommunications, manufacturing, transportation and technology industries.

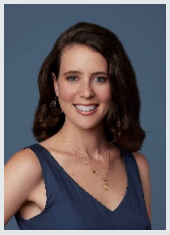
For more information about Curtis, please visit www.curtis.com.

Attorney advertising. The material contained in this Client Alert is only a general review of the subjects covered and does not constitute legal advice. No legal or business decision should be based on its contents.

Please feel free to contact any of the persons listed below if you have any questions on this important development:

Jacques Semmelman
Partner
Litigation
jsemmelman@curtis.com
New York: +1 212 696 6067

Mark Handley
Partner
Litigation
mhandley@curtis.com
London: +44 20 7710 9821



Ana Amador
International Associate
International Trade
aamador@curtis.com
Washington: +1 202 452 7366

Hyuna Yong
Associate
Litigation
hyong@curtis.com
New York: +1 212 696 6123