

# Insight: Arbitration

23 May 2013

## English court supports enforcement of arbitral award, granting worldwide injunction requiring disclosure of assets

This morning, Mr Justice Field handed down his decision in the case of *Cruz City 1 Mauritius Holdings v Unitech Limited and others [2013] EWHC 1323 (Comm)*, confirming the jurisdiction of the English courts to order a free-standing, worldwide disclosure injunction under section 37(1) of the Senior Courts Act 1981, to aid enforcement of an arbitration award against a recalcitrant defendant.

Helpfully, the High Court also ruled that service of an application made as an arbitration claim will “invariably” be permitted on a party’s English solicitors who acted in the arbitration if: (i) it would be quicker than other means; and (ii) the solicitors do not appear to have been disinstructed.

### Background

In July 2012, following three London-seated LCIA arbitrations concerning a dispute under a shareholders’ agreement and related keepwell agreement, Cruz City obtained a partial final award and a final award (the “Awards”) against its joint venture partners, Unitech Ltd and two affiliated companies (the “Unitech Parties”). The Unitech Parties were ordered to pay US\$ 298 million in return for Cruz City’s shares in the joint venture company, as well as Cruz City’s legal and arbitration costs.

In January 2013, Cruz City obtained orders from the High Court permitting it to enforce the Awards in the same manner as judgments or orders of the court, pursuant to section 66(1) of the Arbitration Act 1996.

The Awards remained unsatisfied and, unable to verify the extent and nature of the Unitech Parties’ assets through publicly available documents, Cruz City brought an application under section 37(1) of the Senior Courts Act 1981 (the “1981 Act”) for an order compelling the Unitech Parties to disclose their assets worldwide (verified by an affidavit of a proper officer) to aid execution of the Awards.



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## Worldwide disclosure order

Cruz City argued that the English courts have jurisdiction under section 37(1) to make the order sought and to compel disclosure of the Unitech Parties' assets worldwide, independently of whether a freezing order was also being sought, provided it appeared just and convenient to do so. Cruz City relied in particular upon the Court of Appeal's decision in *Maclaine Watson & Co v International Tin Council (No. 2)* [1989] 1 Ch 286 and on Colman J's judgment in *The Naftilos* [1995] 1 WLR 299.

The Unitech Parties contended that the decision in *Masri v Consolidated Contractors International (UK) Ltd and others (No 4)*<sup>1</sup>, which concerned applications under CPR Part 71 for examination of judgment debtors, and in which the court held that Part 71 does not apply to directors outside of the jurisdiction, meant that an order could not be made post judgment or award for the disclosure of assets by a judgment or award debtor outside of the jurisdiction. They argued that the decisions of *Maclaine Watson* and *The Naftilos* were no longer good law because Part 71 was the settled means for a judgment creditor to apply for an order to obtain information and, if those means were unavailable because the officer of the debtor was outside of the jurisdiction, as decided in *Masri (No 4)*, then that could not be circumvented by an application for relief under section 37(1) of the 1981 Act.

Relying upon the Court's policy that arbitral awards should be enforced, Field J held that the High Court had jurisdiction to

order an injunction to make disclosure of assets outside of the jurisdiction in aid of execution of an arbitration award. *Masri (No 4)* did not prevent it from granting the injunction sought, given that it was not addressed to a non-party outside of the jurisdiction but was made against the Unitech Parties, who were subject to the jurisdiction of the English courts by virtue of their agreement to arbitrate in London.

In considering whether it was just and convenient to make the order sought, Field J considered a number of factors, including that Cruz City had been granted permission to enforce the Awards as judgments, two of the Unitech Parties were SPVs and that, as Cruz City was not aware of the nature, the extent or the manner in which the Unitech Parties' assets were held, the order sought had the potential for materially assisting Cruz City to enforce the Awards.

## Service on English solicitors

Having obtained an order under Practice Direction 62.4 for "substituted service," Cruz City had served its application on the English solicitors who had represented the Unitech Parties in the arbitrations and in their challenges to the Awards. In their challenge to service, the Unitech Parties maintained that the disclosure application was not an "arbitration claim" within the meaning of CPR 62.2, and that, in any event, service on the solicitors who acted in the arbitration should only be permitted in limited circumstances.

Field J held that service was valid – the "invariable" practice of permitting service on English solicitors applied since the seat of the arbitrations was London, the English solicitors had acted for the Unitech Parties in the arbitrations and in jurisdictional challenges before the High Court and did not appear to have been disinstructed.

## Comment

Today's decision affirms the pro-arbitration stance of the English courts and demonstrates the willingness of the English courts to take steps to support the arbitral process to its finality. All too often, where an award creditor is unwilling to satisfy an award, the enforcement stage becomes a slow, expensive and challenging process for the award creditor to navigate. However, coupled with a penal notice, a disclosure order under section 37(1) may serve as a useful tool to enable award creditors to target their enforcement efforts where they know the debtors' assets are located.

Field J's approach to the issue of substituted service also shows a welcome practical and flexible approach to aid award creditors seeking to move quickly to enforce their award against award debtors outside of the jurisdiction.

Permission to appeal was refused.

Cruz City is represented by White & Case LLP and was represented at the hearing by David Wolfson QC and Nehali Shah of One Essex Court.

<sup>1</sup> [2008] ULHL 43; [2010] AC 90