International litigation: protective measures

Latest Update

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The use of protective or injunctive measures in civil litigation has long been of interest to litigants and practitioners alike. They can often make the difference between court proceedings with a useful, tangible outcome on the one hand, and pyrrhic victories on the other. Obtaining - and holding onto - pre-trial remedies can also be a legitimate way of applying great pressure on an opponent and thereby bringing a dispute to an early conclusion.

For several decades now the courts in England and Wales have recognised the benefits of such orders - in particular freezing injunctions and search and seizure orders - in the context of domestic litigation. They preserve assets or information which could subsequently be lost, dissipated or destroyed with the result that the purpose of the litigation is defeated. Parliament subsequently legislated to permit English, Welsh and Northern Irish courts also grant such orders in support of litigation (and arbitration) proceeding overseas. This is a long-arm jurisdiction which makes the UK an attractive forum for overseas litigants seeking protective relief. More recently we have also seen the increasing use of anti-suit injunctions to block the commencement of litigation overseas.

This article will provide a summary of the principles applicable to freezing injunctions, search and seizure orders and also anti-suit injunctions in the context of cross-border disputes.

Overview of Topic

1. The principles relating to the granting of freezing orders, search and seizure orders and anti-suit injunctions - being the three most important and draconian types of protective measures that the English Courts will grant - will be dealt with in turn below. The requirements and tests explained apply both to orders sought in the context of English proceedings, as well as those sought in support of proceedings on foot, or about to be commenced, abroad.

2. Before that it is important to consider the basis upon which an English (and also Welsh and Northern Irish) Court can make such orders in support of foreign litigation at all.

3. **UK Courts: Long-arm Jurisdiction to Grant Protective Measures:** Section 25 of the Civil Jurisdiction and Judgments Act 1982 (as amended) confers jurisdiction on the High Court of England, Wales and Northern Ireland to grant interim relief in support of civil litigation being conducted overseas. An equivalent power is conferred by s.44 of the Arbitration Act 1996, read together with s.2(3)(b) of that Act, where overseas arbitrations are concerned (although this can be contracted out of). Notably, the kind of protective measures contemplated here can be ordered whether or not the respondent is domiciled, present or resident within the High Court's jurisdiction (s.37(1) of the Senior Courts Act 1981). If the respondent is based outside of England/Wales/Northern Ireland, permission to serve out of

the jurisdiction will need to be obtained when the originating claim or application is made, in the ordinary way.

4. The types of relief available will include asset freezing orders and search and seizure orders, as well as other injunctive relief such as disclosure orders under the Norwich Pharmacal jurisdiction. The overriding purpose is to ensure that practical justice is achieved through international judicial co-operation.

5. In addition to the legal tests applicable to each specific remedy sought (see below), before making an Order in support of international litigation the Court will want to be satisfied that:

   a. the substantive proceedings (for instance for breach of contract, or misuse of confidential information, or misappropriating company monies) have been or are about to be commenced; and

   b. the fact that the English Court does not have jurisdiction over the substantive proceedings does not make it "inexpedient" for the Court to grant the ancillary order sought (or "inappropriate" in the case of a foreign arbitration).

6. The "inexpedient" or "inappropriate" tests are intended to address the risk that any order the English Court might make could hinder, cut across or otherwise be inconsistent with any order made (or refused) by the home court or arbitral tribunal. The legislation itself provides no guidance on how the Court should approach these tests. The case law has filled this gap: see in particular Haiti v Duvalier (Mareva Injunction) (No.2) [1990] 1 Q.B. 202, Credit Suisse Fides Trust SA v Cuoghi [1998] Q.B. 818, Refco Inc v Eastern Trading Co [1999] 1 Lloyd's Rep. 159, Motorola Credit Corp v Uzan (No.6) [2003] EWCA Civ 752; [2004] 1 W.L.R. 113 and (where arbitrations are concerned) Mobil Cerro Negro Ltd v Petroleos de Venezuela SA [2008] EWHC 532 (Comm); [2008] 2 All E.R. (Comm) 1034.

7. The position in simple terms is that (subject to the other substantive tests being satisfied, as to which see further below) the Court will presume that it is expedient to grant relief if the respondent is located in England (or Wales or Northern Ireland, depending on which Court is being asked to make the order), and likewise if the assets to be frozen, or property to be searched (etc.) are within the jurisdiction. If that is not the case, satisfying the Court that it is "expedient" or "appropriate" to make the order sought will be more difficult, although not impossible (especially in a compelling fraud case).

8. The High Court will also consider the home court's view(s) on these matters, if any, and will have regard to principles of comity generally. It will also be reluctant to make orders it cannot enforce, so it will be important to have in mind how the Court would police the order you are asking it to make, for instance by sequestrating assets, imposing fines or in serious cases committing non-compliant individuals to prison.

9. **Freezing Orders:** A freezing order is an injunction designed to prevent the dissipation of assets pending judgment. It does not preserve specific assets (and is therefore not proprietary in its effect) but operates in personam against named respondents, restraining them from dealing with assets up to a certain value (which would typically be the value of the underlying claim). It is therefore different in kind from most forms of pre-judgment "attachments" that one encounters in foreign courts (especially in the United States).

10. A freezing order granted by a UK Court is typically coupled with an order requiring disclosure by the respondent of all of his assets up to the value of the amount frozen (including all legally and/or beneficially owned assets). Plainly, this can yield extremely

valuable information.

11. As will be clear from this description, a freezing injunction is a very powerful and invasive measure and has been described by English Judges as a "nuclear weapon" in civil litigation (Bank Mellat v Nikpour [1982] Com. L.R. 158). It was first approved by the English Court of Appeal in 1975, in Nippon Yusen Kaisha v Karageorgis [1975] 1 W.L.R. 1093, and subsequently in the better known case of Mareva Compania Naviera SA v International Bulk Carriers SA (The Mareva) [1980] 1 All E.R. 213. In England it is now enshrined in the English Court rules at CPR 25.1(f) and (g).

12. Notably, the order can extend to assets outside of England - this is the so-called "Worldwide Freezing Order". There is no absolute requirement to prove that there are any relevant assets within England at all (which again tends to differ from the orders, e.g. New York or Swiss courts tend to be willing to make). This emphasises again the generosity of the English Court, where protective measures are concerned, when compared with many other jurisdictions.

13. In the same vein, the English Courts have made it clear that the relief they are prepared to grant will be flexible where appropriate, in particular where this is necessary to deal with cunning respondents or sophisticated scenarios. That being said, once freezing orders have been made they will be construed narrowly, bearing in mind the penal consequences of breaching them (see generally JSC BTA Bank v Ablyazov [2015] UKSC 64; [2015] 1 W.L.R. 4754).

14. In addition, that being said, the relevant criteria for obtaining a freezing injunction are robust. An overriding "just and convenient" test applies (s.37 of the Senior Courts Act 1981 and the case of American Cyanamid Co v Ethicon Ltd (No.1) [1975] A.C. 396). In addition, two specific criteria must be met:

    a. a good arguable case on the merits (of the underlying case) must be established; and

    b. the applicant must also be able to prove a real risk of dissipation of assets by the respondent, other than in the ordinary course of business.

15. As to practicalities, the application is usually made without notice and heard ex parte in the first instance. If the freezing injunction is ordered, a return or discharge hearing on notice to the respondent will follow some time later, at which time the respondent will have an opportunity to argue that the injunction should be discharged (for example, because on a balanced analysis the criteria have not been met).

16. Importantly, when making the initial application "full and frank" disclosure must be given by the applicant - this obligation is taken very seriously by the Court, especially given the ex parte nature of the original application. Effectively, the applicant must draw to the Court's attention any possible shortcomings in its application, for instance that there are possible defences to the underlying claim. The applicant will also be required to give a cross-undertaking in damages, in case the injunction should prove wrongly granted (save where the applicant is a public body). This acts as a guarantee to the respondent, in case the injunction causes it to suffer loss and is subsequently discharged. Whilst this may seem a technical requirement, it is important not to overlook it since it can sometimes represent a stumbling block for commercial entities unfamiliar or uncomfortable with undertakings of this kind.

17. As mentioned, the hearing on the return date will provide the respondent with an opportunity

to contest the injunction: arguments available to a respondent will essentially be that one of the criteria has not in fact been satisfied (i.e. no good arguable case, or no real risk of dissipation of assets) or that full and frank disclosure has not in fact been given or potentially that the respondent will not be good for the cross-undertaking in damages. The discharge hearing can be of great strategic importance in the wider litigation, since if the injunction is retained this can severely hamper the respondent in the manner in which it deals with its assets, and may drive them to a negotiated resolution. The Court may also on occasion be driven to express a view on the merits of the claim, which can also be of strategic importance. For completeness it should be noted that a respondent who does not wish to contest the injunction in principle may consider giving undertakings to the applicant and to the Court if he wishes to get the order discharged.

18. **Search and Seizure Orders:** Typical cases where orders for the search of premises and the seizure of documents or data will be sought will involve alleged infringements of intellectual property rights, misuse of confidential information in the context of business competition, or commercial fraud. As with freezing injunctions, they may also be used in matrimonial disputes (on this topic see: Tchenguiz v Imerman [2010] EWCA Civ 908; [2011] Fam. 116 in which the Court of Appeal encouraged the use of such protective measures in divorce proceedings, and firmly discouraged the unauthorised seizure by a litigant of a spouse's personal information e.g. as to assets).

19. The standard order - obtained without notice to avoid tipping off, like freezing orders - will require the respondent to permit the applicant's representative to enter his premises to search for and remove property which is either the subject matter of the action (e.g. counterfeit goods) or documentary evidence pertaining to it (e.g. computer hard disks in a fraud case). The property in question will need to be clearly identified in the application and order.

20. As with freezing orders, this form of pre-emptive remedy was originally deployed by the Courts in the mid-1970s (without any specific statutory basis), and received the approval of the Court of Appeal for the first time in Anton Piller KG v Manufacturing Processes Ltd [1976] Ch. 55. It has since put on a statutory footing, see s.7 of the Civil Procedure Act 1997 and the English Court rules at CPR 25.1(h). In developing the relevant principles, the Courts have been keen to emphasise that the order is not a search "warrant" - it does not permit the applicant to break into the respondent's premises. Rather, it forces the respondent to allow the applicant in, failing which he will be in contempt of court and subject to further sanction (including potentially imprisonment).

21. In theory a search and seizure order will only be made in exceptional cases - although this is not always strictly adhered to in practice. The legal requirements, in summary are (see generally Indichii Salus Ltd (In Receivership) v Chandrasekaran [2006] EWHC 521 (Ch)):

a. strong prima facie case of a civil cause of action (domestic or foreign) must be established;

b. there must a "real possibility" of the destruction of important evidence which is clearly likely to be in the respondent's possession; and

c. the harm likely to be caused to the respondent or his business must not be disproportionate to the aim of the order

22. In many respects this is probably the most draconian order the English Court can make - in practical terms, once done it cannot be undone. Indeed, although technically - as with freezing orders - an on notice return Court date will be ordered when the original order is

made, at which the respondent can contest it and request that the order be discharged, in reality of course the relevant inspection and seizure of property will already have taken place. The order therefore constitutes a significant infringement on personal and business privacy and raises human rights concerns - in particular when making the order the Court will need to be satisfied that the interference sought is necessary for the protection of the rights and freedoms of others, per art.8(2) and Protocol 1, art.1 of the European Convention on Human Rights Ultimately the Court will want to be satisfied that the order is necessary in the interests of justice, and will prefer to order less intrusive relief if this will suffice.

23. As you would expect, the process by which search and seizure orders are sought and obtained contains important safeguards for the benefit of respondents: as with freezing orders, full and frank disclosure and cross-undertakings in damages must be given by the applicant. In addition, the entire process is conducted through and in the presence of an independent "supervising" solicitor, and searches may not be conducted unless the respondent or his representative is present. In addition, the respondent has a (limited) right not to allow inspection or removal of material where doing so would violate his right not to incriminate himself (see generally the English Court rules at CPR 25A PD.7.

24. **Anti-suit Injunctions:** An anti-suit injunction is an injunction granted to restrain the respondent from instituting or continuing proceedings in a foreign court or arbitral process, where it is necessary in the interest of justice to do so.

25. At the outset it is important to understand that as a matter of law, the order is not directed at the "other" court or tribunal - rather, it is addressed to a specific party which is subject to the English Court's jurisdiction, which will then be in contempt of court if it breaches the order (see generally Turner v Grovit (Reference to ECJ) [2001] UKHL 65; [2002] 1 W.L.R. 107).

26. There are two broad categories of case where an anti-suit injunction may be granted (these are explained in more detail below):

a. where the applicant has the benefit of a legal or equitable right not to be sued in the foreign court or tribunal. This will usually consist of a contractual jurisdiction or arbitration clause that the applicant is seeking to protect and insist upon, when faced with a counterparty that is threatening to disobey it; and

b. where there is no such contractual right, but it is nevertheless vexatious and oppressive for the respondent to bring or continue the claim in the other court or tribunal.

27. Jurisprudentially, the making of the injunction does not involve (or require) a denial by the English Court of the foreign court or tribunal's jurisdiction. Whether that foreign court does or does not have jurisdiction remains, technically, a matter for it to determine in accordance with its own laws (see Barclays Bank Plc v Homan [1992] B.C.C. 757). So, the anti-suit injunction does not, in theory, engage the question of whether the foreign court or tribunal has jurisdiction. Indeed, it is typically sought in circumstances where that foreign court is prepared to accept - potentially exorbitant - jurisdiction over the underlying dispute, hence the need for the injunction. Rather, it involves an assessment of the conduct of the respondent in seeking to invoke that foreign jurisdiction.

28. As to the practicalities and requirements relating to anti-suit injunctions, ultimately, the decision for the Court is a discretionary one. In recognition of the importance and potential ramifications of its decision, and the fact that, in practice, it involves interfering with foreign judicial processes, the Court will weigh up all of the circumstances of the dispute in reaching its view (see Donohue v Armco Inc [2001] UKHL 64; [2002] 1 All E.R. 749). For this reason, there is a heavy burden on the applicant to provide the Court with the fullest possible

knowledge and understanding of the case. The applicant must also apply promptly and before the foreign proceedings are too far advanced (REC Wafer Norway AS (formerly REC Scanwafer AS) v Moser Baer Photo Voltaic Ltd [2010] EWHC 2581 (Comm); [2011] 1 Lloyd's Rep. 410). Notice of the application must be given to the respondent, unless there is evidence that to do so might defeat the point of the application, for instance because the respondent might then attempt to obtain a pre-emptive injunction in the other jurisdiction (and if the application is originally made without notice and heard ex parte, then as with the other types of injunctions considered above the Court will order a return hearing, on notice, at which the respondent will have an opportunity to contest the order).

29. To grant the injunction, the English Court will want to be satisfied that it has a sufficient legitimate interest in the foreign proceedings. As mentioned above, typically this will require that the applicant has a contractual right not to be sued in the courts of the foreign country, and the English Court will be satisfied that there is no breach of comity if it is merely enforcing an exclusive jurisdiction or arbitration clause governed by English law, for example (see for instance Deutsche Bank AG v Highland Crusader Offshore Partners LP [2009] EWCA Civ 725; [2010] 1 W.L.R. 1023). Essentially, the English Court will always be keen to enforce compliance by the parties with whatever contractual bargain they have struck - unless the party suing in the different forum can show strong reasons for doing so.

30. The Court will factor in the interests of third parties, as well as the undesirable risk of inconsistent decisions or parallel proceedings, before making a decision (for instance where the foreign dispute involves a number of issues which are suitable for determination together, of which only one is the subject of an exclusive jurisdiction clause that is not in favour of the foreign court concerned - see for example OceanConnect UK Ltd v Angara Maritime Ltd [2010] EWCA Civ 1050; [2011] 1 All E.R. (Comm) 193).

31. Where contractual jurisdiction is not clear cut (for instance there is a non-exclusive jurisdiction clause, or no jurisdiction clause at all) the party seeking the anti-suit injunction must establish that it is vexatious or oppressive for the other party to pursue the claim in the foreign court. The courts have avoided giving a comprehensive definition of vexatious or oppressive litigation, so this is an open-ended category; however, in general terms the doctrine of forum non conveniens will apply, and it will generally be necessary to show:

a. that England is clearly the more appropriate (natural) forum; and

b. that justice requires that the other party should be restrained from proceeding in the alternative forum.

32. In addition, in circumstances where the English Court is not being asked to enforce a jurisdiction clause, in order for it to have a sufficient legitimate interest in the dispute there must be an English claim that the Court is being asked to protect.

33. The Court will also (as always) consider matters of comity. Although case law had previously suggested that, anti-suit injunctions could not be obtained from the English Court in order to prevent a party from commencing or continuing proceedings in another European Union State, even where the other party was doing so deliberately to obstruct the course of justice in England (Turner v Grovit (Reference to ECJ) [2001] UKHL 65; [2002] 1 W.L.R. 107), and even where there they were doing so in breach of an arbitration agreement: Allianz SpA (formerly Riunione Adriatica di Sicurta SpA) v West Tankers Inc (C-185/07) [2008] 2 Lloyd's Rep. 661), in fact recent legislation (Judgments Regulation 1215/2012, amended with effect from 10 January 2015) has softened the position and strengthened the respect for arbitration clauses within the EU.

34. Consistent with this increasing desire to enforce arbitration agreements, the English Court has shown itself willing to grant anti-suit injunctions preventing the pursuit of Court proceedings overseas when the disputed contract contains a London arbitration clause, even where the foreign court has deemed the arbitration clause invalid for violating local public policy and even where arbitral proceedings are not in contemplation (AES Ust-Kamenogorsk Hydropower Plant LLP v Ust-Kamenogorsk Hydropower Plant JSC [2013] UKSC 35; [2013] 1 W.L.R. 1889).

35. **Conclusion:** As will be apparent, the UK Courts have wide-ranging powers to grant protective measures, both in the context of civil litigation within their jurisdiction as well as in support of claims proceeding overseas. They will be ready and willing to step in and make very powerful extra-territorial orders concerning foreign parties and assets where a good case can be made and doing so will not be futile. So long as this remains the case, the UK will remain a popular jurisdiction with international litigants seeking to protect their commercial or financial interests.

Key Acts

Civil Jurisdiction and Judgments Act 1982

Arbitration Act 1996

Senior Courts Act 1981

Civil Procedure Act 1997

Key Subordinate Legislation

Civil Procedure Rules 1998/3132

Key Quasi-legislation

None.

Key European Union Legislation

Regulation 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matter

Key Cases

Haiti v Duvalier (Mareva Injunction) (No.2) [1990] 1 Q.B. 202

Credit Suisse Fides Trust SA v Cuoghi [1998] Q.B. 818

Refco Inc v Eastern Trading Co [1999] 1 Lloyd's Rep. 159

Motorola Credit Corp v Uzan (No.6) [2003] EWCA Civ 752; [2004] 1 W.L.R. 113

Mobil Cerro Negro Ltd v Petroleos de Venezuela SA [2008] EWHC 532 (Comm); [2008] 2 All E.R. (Comm) 1034.

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REC Wafer Norway AS (formerly REC Scanwafer AS) v Moser Baer Photo Voltaic Ltd [2010] EWHC 2581 (Comm); [2011] 1 Lloyd's Rep. 410

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AES Ust-Kamenogorsk Hydropower Plant LLP v Ust-Kamenogorsk Hydropower Plant JSC [2013] UKSC 35; [2013] 1 W.L.R. 1889

Key Texts

None.

Further Reading

None.

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