FREEZING INJUNCTIONS

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Introduction

1. The term "freezing injunction", or order, is used below to mean an injunction freezing the defendant's assets, whether all of his assets or only up to a specified limit [as per the standard forms of order found at the Annex to CPR PD 25A and Appendix 5 of the Commercial Court Guide]. The role of a freezing injunction, in such limited sense, is to prevent a defendant to a monetary claim from frustrating such claim, or a judgment already obtained, by dissipating his assets.

2. A not uncommon misconception is that a freezing injunction provides security over the defendant's assets for a possible judgment, or secures a judgment already obtained. This is not the case. Per Lord Donaldson MR in ***Polly Peck International plc v Nadir (No 2)*** [1992] 4 All ER 769, 785g-786a:

> "I therefore turn to the principles underlying the jurisdiction. (1) So far as it lies in their power, the courts will not permit the course of justice to be frustrated by a defendant taking action, the purpose of which is to render nugatory or less effective any judgment or order which the plaintiff may thereafter obtain. (2) It is not the purpose of a Mareva injunction to prevent a defendant acting as he would have acted in the absence of a claim against him. Whilst a defendant who is a natural person can and should be enjoined from indulging in a spending spree undertaken with the intention of dissipating or reducing his assets before the day of judgment, he cannot be required to reduce his ordinary standard of living with a view to putting by sums to satisfy a judgment which may or may not be given in the future. Equally no defendant, whether a natural or a juridical person, can be enjoined in terms which will prevent him from carrying on his business in the ordinary way or from meeting his debts or other obligations as they come due prior to judgment being given in the action. (3) Justice requires that defendants be free to incur and discharge obligations in respect of professional advice and assistance in resisting the plaintiff's claims. (4) It is not the purpose of a Mareva injunction to render the plaintiff a secured creditor, although this may be the result if the defendant offers a third party guarantee or bond in order to avoid such an injunction being imposed."

3. More pithily Lord Bingham put it as follows in ***Fourie v La Roux*** [2007] UKHL 1, [2]:

> "Mareva (or freezing) injunctions were from the beginning, and continue to be, granted for an important but limited purpose: to prevent a defendant dissipating his assets with the intention or effect of frustrating enforcement of a prospective judgment. They are not a proprietary remedy. They are not granted to give a claimant advance security for his claim, although they may have that effect. They are not an end in themselves. They are a supplementary remedy, granted to protect the efficacy of court proceedings, domestic or foreign …"

<u>The applicable test</u>

4. An applicant for a freezing injunction must establish the following [this has recently been examined in considerable detail by HHJ Richard Seymour QC in ***Irish Response Ltd v Direct Beauty Products Ltd*** [2011] EWHC 37 (QB), paragraphs 25-41]:

   4.1. a good, or properly, arguable case; and

   4.2. a risk, or a real risk, of dissipation or hiding of assets.

5. Risk of dissipation is usually the most important factor [see below]. If the applicant can satisfy the test, it is then for the court to decide whether it is just and convenient to grant the injunction (*i.e.* it is a discretionary remedy).

6. However, it is clear that the court should go beyond those two requirements. In ***Finurba Corporate Finance Ltd v Sipp SA*** [2011] EWCA Civ 465 Lord Neuberger MR (as he was) said the following [at paragraph 31]:

> "In the light of the increasing sophistication of fraudsters, and their extensive use of companies and other entities to mask their activities and assets, the

courts should adopt a robust and realistic approach to technical points of substantive law or evidence raised against the grant of a freezing order, in cases where there is good reason to believe that fraud has occurred. Having said that, a freezing order can have very serious adverse effect often over a long period, sometimes even financial ruin, for the individual or company against whom it is made. The court should be satisfied not only that there is a properly arguable case against the defendant and a risk of dissipation or hiding of assets, but also as to the proportionality of the order, and it should be especially concerned about making the order when there seems to be little real value in the cross-undertaking."

7. Accordingly the court should also consider:

   7.1. the proportionality of the freezing injunction (arguably part of the just and equitable assessment); and

   7.2. the value of the cross-undertaking in damages [see further below].

8. Finally the court will need to be persuaded that the defendant has assets that will be caught by the injunction: see for instance ***Commissioners for HM Revenue & Customs v Cozens*** [2011] EWHC 2782 (Ch), [72].

<u>Good, or properly, arguable case</u>

9. This is a very low threshold. Per Mustill J in ***The Niedersachsen*** [1983] 2 LLR 600, at 605:

   "... I consider that the right course is to adopt the test of a good arguable case, in the sense of a case which is more than barely capable of serious argument, and yet not necessarily one which the Judge believes to have a better than 50 per cent chance of success."

10. There may also be questions as to whether the applicant has a sufficient immediate and present interest to support the granting of a freezing injunction [see for instance ***Commissioners for HM Revenue & Customs v Ali*** [2011] EWHC 880 (Ch)], or whether the claim is justiciable in England [***VTB Capital plc v Nutritek International Corp*** [2013] UKSC 5].

The cross-undertaking in damages

11. CPR PD 25A, para 5.1(1) states that any order for an injunction, unless the court orders otherwise, must contain an undertaking by the applicant to the court to pay any damages which the court considers the applicant should pay. Such an undertaking will almost always be required from an applicant for a freezing injunction. The standard order includes an undertaking as follows [Schedule B, paragraph 1]:

> "If the court later finds that this order has caused loss to the Respondent, and decides that the Respondent should be compensated for that loss, the Applicant will comply with any order the court may make"

12. Per Floyd J in ***Re Bloomsbury International Ltd*** [2010] EWHC 1150 (Ch), [12], the rationale for requiring a cross-undertaking is:

> "The court makes the litigant give a cross undertaking in damages against the possibility that it may turn out at trial that the order should not have been made. In a case where it does turn out that an order should not have been made, the party restrained may have suffered harm at the behest of the litigant which would result in injustice if there existed no means for it to be redressed. Absent a cross undertaking, the law does not provide any automatic means of redress for a party who is harmed by litigation wrongly brought against him in good faith. The cross undertaking is the means by which the court ensures that it is in a position to do justice at the end of the case."

13. If the applicant ultimately loses the case, or the defendant succeeds in an application to discharge the injunction, the applicant could face a large damages claim. In any subsequent inquiry as to damages, the defendant must prove that the losses he alleges would not have occurred but for the injunction, but not that the injunction was the sole cause of the loss: ***Soutzos v Asombang*** [2011] EWHC 1582 (Ch), [53]. In that case, the applicant was not ordered to pay compensation to either of the defendants.

14. As pointed about above, the Court of Appeal have given guidance that the value of a cross-undertaking should be considered by the court before it grants a freezing injunction. Previously, at least, this was a factor which tended to be raised by a defendant on the return date asking for the cross-undertaking to be fortified, for instance by personal guarantees from the shareholders of a company, failing which the injunction should be discharged.

15. In deciding whether to require the cross-undertaking to be fortified the court will seek to adopt the course which will involve the least risk of ultimate injustice. In assessing such issue the courts have tended to consider [see for instance the summary in ***Re Bloomsbury International Ltd*** [2010] EWHC 1150 (Ch)]:

    15.1. whether the cross-undertaking which has been given, or which is being offered, is inadequate. This will require the court to make a realistic estimate of the potential loss which might be suffered by the defendant <u>as a result of the grant of the injunction</u> and to consider the nature of the cross-undertaking given/on offer and the financial position of the party who has given/is offering it; and

    15.2. whether to require fortification of the cross-undertaking would stifle the action.

16. A cross-undertaking may not be required when the applicant is the Crown or a law enforcement body. A law enforcement or regulatory body, acting in pursuance of such function, will not be required to give a cross-undertaking in damages, whether to the defendant or third parties, unless there are circumstances which justify a different position: ***FSA v Sinaloa Gold plc*** [2013] UKSC 11. Such "dispensation principle" is of broad application, for instance the Secretary of State does not give a cross-undertaking in damages when seeking the appointment of a provisional liquidator post the presentation of a public interest winding up petition. It should, however, be noted that the absence of a cross-undertaking will be considered by the court when deciding whether it is just and equitable to grant an injunction.

17. By contrast if the body in question is asserting a proprietary claim of the Crown, or acting in its own interest, a cross-undertaking will usually be required: see the summary in ***Customs and Excise Commissioners v Anchor Foods Ltd*** [1999] 1 WLR 1139. Despite the observation of Neuberger J (as he was) that "it would ordinarily not be right to require a cross-undertaking in damages from Customs", HMRC often do offer a cross-undertaking when seeking a freezing injunction.

Full and frank disclosure

18. If the application is made without notice, or on short notice [see ***CEF Holdings Ltd v Mundey*** [2012] EWHC 1524 (QB)], the applicant must disclose to the court all matters relevant to the application. Such obligation is very important and in practice it can be a significant burden on both Counsel and solicitors. Per Mummery LJ in ***Memory Corporation plc v Sidhu (No 2)*** [2000] 1 WLR 1443, 1459H-1460B [approved in ***Fourie v La Roux*** [2007] UKHL 1, [34]], and for a recent detailed discussion of the duty see ***Irish Response Ltd v Direct Beauty Products Ltd*** [2011] EWHC 37 (QB), [35]-[41]]:

"It cannot be emphasised too strongly that at an urgent without notice hearing

for a freezing order, as well as for a search order or any other form of interim injunction, there is a high duty to make full, fair and accurate disclosure of material information to the court and to draw the court's attention to significant factual, legal and procedural aspects of the case. It is the particular duty of the advocate to see that the correct legal procedures and forms are used; that a written skeleton argument and a properly drafted order are prepared by him personally and lodged with the court before the oral hearing; and that at the hearing the court's attention is drawn by him to unusual features of the evidence adduced, to the applicable law and to the formalities and procedure to be observed."

19. The extent of the obligation was set out vividly by Hughes LJ in the context of a without notice application for a restraint order under POCA in ***Re Stanford International Bank Ltd*** [2011] Ch 33, [191]:

> "… it is essential that the duty of candour laid upon any applicant for an order without notice is fully understood and complied with. It is not limited to an obligation not to misrepresent. It consists in a duty to consider what any other interested person would, if present, wish to adduce by way of fact, or to say in answer to the application, and to place that material before the judge. That duty applies to an applicant for a restraint order under POCA in exactly the same way as to any other applicant for an order without notice. Even in relatively small value cases, the potential of a restraint order to disrupt other commercial or personal dealings is considerable. The prosecutor may believe that the defendant is a criminal, and he may turn out to be right, but that has yet to be proved. An application for a restraint order is emphatically not a routine matter of form, with the expectation that it will routinely be granted. The fact that the initial application is likely to be forced into a busy list, with very limited time for the judge to deal with it, is a yet further reason for the obligation of disclosure to be taken very seriously. In effect a prosecutor seeking an ex parte order must put on his defence hat and ask himself what, if he were representing the defendant or a third party with a relevant interest, he would be saying to the judge, and, having answered that question, that is what he must tell the judge."

20. In assessing the materiality of non-disclosure, the test is not whether, if informed of that which he or she was not told, the judge would have made a different order from that in fact made [Per Woolf LJ in ***Behbehani v Salem*** [1989] 1 WLR 723, 729D-F]:

> "In deciding in a case where there has undoubtedly been non-disclosure whether or not there should be a discharge of an existing injunction and a re-grant of fresh injunctions, it is most important that the court assesses the degree and extent of the culpability with regard to the non-disclosure, and the importance and significance of the outcome of the application for an injunction of the matters which were not disclosed to the court.
>
> "In this connection Mr. Brodie at one stage of his argument submitted that the acid test was whether or not the original judge who granted the injunction ex parte would have been likely to have arrived at a different decision if the material matters had been before him. I do not regard that as being the acid test. Indeed, although I regard it as a relevant matter when considering the question of discharge and re-grant of injunctions, I do not regard it as a matter of great significance unless the facts which were not disclosed would have resulted in the refusal of an injunction."

21. If such duty is breached the court may, notwithstanding that the case is otherwise one which is appropriate for relief, discharge the freezing injunction and decline to re-grant a fresh one: ***Arena Corp Ltd v Schroeder*** [2003] EWHC 1089.

Practical considerations

22. The first consideration for any applicant should often be whether he actually wants a freezing order. He should consider:

    22.1. the time, expense and commitment involved;

    22.2. the potential liability pursuant to the cross-undertaking in damages; and

    22.3. what benefits will actually accrue as a result of obtaining a freezing injunction.

23. The ***Finurba*** case is an example of how, after having obtained a freezing injunction at the *ex parte* stage, it can all go wrong for the applicant. Lord Neuberger concluded as follows [at para 32]:

> "In the present instance, it seems to me that, although his reasoning was somewhat more limited in nature (because Finurba apparently did not base its claim on piercing the corporate veil, as it does now), the Judge was right to conclude that the freezing order made against the Companies should be discharged. While I accept that it is conceivable that Finurba may have a claim to some, or even all, of the assets of the Companies, it may well not do so. Finurba has had plenty of time to formulate and plead a proper claim, if there is one, as it is now nearly a year since the Portuguese judgment was made available, but it still has not done so. Further, as the Judge concluded, the risk of the Companies dissipating or concealing assets appears slight at least for the time being. Additionally, I am concerned about the apparent valuelessness of Finurba's proposed cross-undertaking, and at the absence of any specific proposal for underpinning it. While only a preliminary view, it does also look as if there were infringements of the rules at the ex parte stage."

24. As regards the potential benefits, an applicant may wish to consider:

24.1. the mini(?) victory of obtaining, and more importantly keeping, a freezing injunction;

24.2. whether the defendant will in fact be prevented from dealing with his assets as a result of obtaining the injunction, for instance by registering a restriction against a property, or properties, or notifying a bank;

24.3. if the defendant will not in fact be prevented from dealing with the assets, for instance if the applicant does not know what they are or where they are, is the fact of the injunction likely to stop the defendant from dissipating assets; and

24.4. is the applicant willing to pursue/enforce the injunction if necessary with applications for disclosure, cross-examination, appointment of a receiver, Norwich Pharmacal orders and/or proceedings for contempt [as an illustration of the many applications which can be made in support of a freezing injunction see the litigation brought by JSC BTA Bank].

25. The first consideration for a defendant will often be whether he can live with the injunction, or the injunction in a modified form. Alternatively, can he give sufficient security or undertakings to secure the discharge of the injunction.

26. If the defendant wants to seek the discharge of the injunction, the most likely grounds will usually be that there is no risk of dissipation [see below] and/or that there was material non-disclosure at the ex parte hearing [see above]. Given the low merits threshold, it will usually be difficult to establish that there is no good arguable case.

27. Both parties will need to appreciate that a fully contested application will be remarkably expensive and time consuming.

28. If an applicant decides to proceed he will need to be alert to the following:

28.1. the requirements of CPR 25, PD 25A and in the Chancery Division, Chapter 5 of the Chancery Guide [in particular note that an application for a freezing injunction must be supported by affidavit evidence – PD 25A, para 3.1];

28.2. the applicant will be required to take a note of any without notice hearing and such note must be served on the defendant and if requested on third parties who have been served with the order [CPR PD 25A, para 9];

28.3. if the order sought departs from the standard order [see the Annex to CPR PD 25A and, in the commercial court, Appendix 5 of the Commercial Court

Guide] such departures must be brought to the court's attention and the fact of such matters having been brought to the court's attention should be recorded in the note of the hearing. If that is not done, the applicant will be at risk of the injunction being discharged at a subsequent hearing: ***Finurba Corporate Finance Ltd v Sipp SA*** [2011] EWCA Civ 465, [30].

29. As regards specific practice in the Chancery Division:

29.1. it is generally possible to get applications listed at very short notice to the court and Counsel's clerk can often arrange this;

29.2. in the first instance the hearing will usually be in the interim applications court, although you may be sent to another Judge if available. If possible, bundles and a skeleton argument, complete with reading and hearing time estimates, should be filed at court by 10am on the day before the hearing. The skeleton argument should be filed by e-mail, the advantage being that the Judge has direct access to the inbox and is not reliant on his/her clerk. If it is not possible to file the bundle etc by 10am on the day before the hearing, it is usually a good idea to contact the Judge's clerk to make them aware that an application is being prepared and to give an indication of when the papers may be available;

29.3. the court will usually sit in private and the application will be listed simply as an application without notice;

29.4. after the hearing everything that was before the court [including the skeleton argument], a note of the hearing and a sealed order should be served on the defendant. In the first instance personal service will be required and an order for service by alternative means can be sought on a return date is necessary; and

29.5. you may need to issue a new application for each return date of the application to ensure that it is re-listed before the interim applications Judge.

Alternative orders

30. It is always worth considering the alternative orders that could be sought. They include:

30.1. an order preserving property [CPR 25.1(1)(c)] or securing a specified fund [CPR 25.1(1)(l)];

30.2. a proprietary injunction;

30.3. the appointment of a receiver to hold assets of the defendant;

30.4. the appointment of a provisional liquidator; and

30.5. possibly in the future, European Account Preservation Orders.

31. Orders preserving property or securing a specified fund can be made where there is a dispute as to a party's entitlement to the property or fund in question. The American Cyanamid test applies to such an application: (i) there is a serious issue to be tried, and (ii) the balance of convenience favours making such an order [***Sports Network Ltd v Calzaghe*** [2008] EWHC 2566]. Although such test is different to that for a freezing injunction, in particular there is no requirement to show a real risk of dissipation, the balance of convenience will often be swayed by demonstrating that there is in fact such a risk.

32. If the applicant considers that he can rely on the cooperation of the party currently holding the fund he can simply apply for an order, as opposed to an injunction,

relating to the fund. Such an application is probably the cheapest and most low-key alternative to a freezing injunction and the order can be granted by the Master or in the county court. It must, however, be noted that it does not give the applicant the same level of protection as an injunction carrying a penal notice.

33. If the protection of an injunction is desired a proprietary injunction can be sought [*i.e.* an injunction freezing a specific asset, or assets, rather than the defendant's assets in general]. These are often described as freezing injunctions; however, that is not correct. The court's jurisdiction to grant a proprietary injunction is different, for instance they can be granted by the county court, and the test is different. The court considered proprietary and freezing injunctions separately, applying the different tests, in ***Madoff Securities International Ltd v Raven*** [2011] EWHC 3102 (Comm) and in ***Polly Peck International plc v Nadir (No 2)*** [1992] 4 All ER 769 the Court of Appeal discharged a freezing injunction but granted a proprietary injunction relating to a specific fund [a similar conclusion was recently reached Mann J in ***Gorunova v Berezovsky*** [2013] EWHC 76 (Ch)].

34. The test for a proprietary injunction is still the American Cyanamid test so there is no strict requirement to show a real risk of dissipation of assets. Further, as the underlying claim involves an assertion that the asset belongs in equity to the applicant, the court will be less willing to allow the defendant to have access to such funds for living expenses and legal fees etc: see the summary in ***United Mizrahi Bank Ltd v Doherty*** [1998] 1 WLR 435.

35. Therefore if the claim is purely proprietary [*i.e.* there is no monetary claim] the applicant should be seeking a proprietary injunction, as opposed to a general freezing injunction, and the court is likely to refuse an application for the latter. Such cases would include claims seeking to preserve a deceased's or a bankrupt's estate.

36. In commercial fraud cases in particular, proprietary injunctions will often be sought alongside a general freezing injunction. In such a case the applicant may be asserting proprietary claims in relation to identifiable assets, as a result of tracing or following such assets into the hands of the defendant, and personal claims against such defendant. In such a case the applicant will often seek to restrain the defendant from dealing in any way with the assets which are the subject of the proprietary claim, including using such assets to pay his legal costs, whilst restraining him from dissipating the remainder of his assets, or the remainder up to a specified value, by way of a standard freezing injunction.

37. Another alternative, which can also be sought in support of a freezing injunction, is to seek the appointment a receiver, pursuant to section 37 of the Senior Courts Act 1981, to hold assets of the defendant. A receiver will only be appointed in support of a freezing injunction where the injunction is insufficient on its own and where there is a measurable risk that a defendant will act in breach of the injunction: ***JSC BTA Bank v Ablyazov*** [2010] EWCA Civ 1141.

38. The most dramatic, and probably the most unusual, option is to seek the appointment of a provisional liquidator under section 135 of the Insolvency Act 1986. Such an application is very serious as the appointment of a provisional liquidator is likely to have a terminal effect on the company's trading life. In the case of a creditor's petition, as opposed to a public interest petition under section 124A of the insolvency Act 1986, the applicant must demonstrate [***Commissioners for HM Revenue & Customs v Rochdale Drinks Distributors Ltd*** [2011] EWCA Civ 1116]:

    38.1. he is <u>likely</u> to obtain a winding-up order on the hearing of the petition; and

    38.2. in all the circumstances, it is right that a provisional liquidator be appointed.

39. As regards the latter requirement, Rimer LJ stated the following in ***Rochdale Drinks***, [99]-[100]:

> "The usual basis on which such an appointment is sought is because of a risk of jeopardy to the company's assets, namely the risk of their dissipation before the winding up order is made, with the consequence that their collection and rateable distribution between the company's creditors will be frustrated. Such risk does not refer to (or only to) 'dissipation' in the sense in which that word is ordinarily used in the context of freezing orders, that is a deliberate making away with the assets so as to frustrate the enforcement of a future judgment; it includes any serious risk that the assets may not continue to be available to the company (see Re a company (No 003102 of 1991), ex parte Nyckeln Finance Co Ltd [1991] 1 BCLC 539, at 542, per Harman J). I consider that Harman J probably had in mind the type of case in which, despite the presentation of a petition, an apparently insolvent and loss-making company simply continues to trade without obtaining an order under section 127 of the Insolvency Act 1986.
>
> "The circumstances justifying the appointment of a provisional liquidator are not, however, confined to jeopardy of this particular nature. In cases in which there are real questions as to the integrity of the company's management and as to the quality of its accounting and record-keeping function, it will be an important part of a liquidator's function to ensure that he obtains control of its books and records so that he can engage in all necessary investigations of its transactions. These will or may include investigations of those who have been managing the company with a view to considering the bringing of claims against them; and the consideration of whether any of the company's directors ought to be the subject of a report to the Secretary of State to the effect that it appears to the liquidator that they were unfit to be concerned in the management of a company. Such a report might then lead to an application to the court for their disqualification. If there is any risk that, pending the hearing of the petition, records may be lost or destroyed, that will also found the basis for the appointment of a provisional liquidator, who will be able immediately to secure them and commence his own inquiries into the affairs of the company and the conduct of its management."

40. The procedural requirements are largely the same as those for a freezing injunction, although it must be noted that a winding-up petition must have been

presented before a provisional liquidator can be appointed: section 135(1) of the Insolvency Act 1986.

41. Finally, there are on-going negotiations regarding a proposed EU Regulation to establish European Account Preservation Orders ('EAPO'). At present the UK has not opted in to the adoption and application of the proposal; however, the Government's stated aim is to "participate fully in the negotiations with the hope that sufficient changes will be made to enable a post-adoption opt in".

42. The original proposal was as follows:

    42.1. before judgment, or post-judgment but before it is directly enforceable, a claimant would need to demonstrate that his claim is well founded and that future enforcement is likely to be impeded or made substantially more difficult without such an order [this includes, but is not limited to, a real risk that the defendant might remove, dispose of or conceal assets in the bank account(s) to be preserved]. However, all such applications would be ex parte unless the claimant requests otherwise and would initially at least be made and considered on paper, the claimant would not necessarily be required to provide a security deposit or cross-undertaking and the proposal did not set out any obligation to give full and frank disclosure;

    42.2. post-judgment a claimant would simply be able to obtain an order once his judgement was directly enforceable, whether by operation of law or declaration, in the Member State of enforcement; and

    42.3. the draft Regulation also made provision for a mechanism whereby details as to the defendant's bank accounts could be sought from a competent authority of the Member State of enforcement.

43. Essentially the intention behind the proposal is to make cross-border enforcement easier by allowing a claimant, in a claim having cross-border implications, to apply in one member state to freeze all bank accounts held by a defendant throughout the EU. The proposal has, not unsurprisingly, been criticised on the basis EAPOs will be too easy to obtain given the draconian nature of the remedy, hence the UK's decision not to opt in at this stage and the continued negotiations.

Showing risk of dissipation – cases and reality

44. In ***Congentra AG v Sixteen Thirteen Marine SA***[1] Flaux J said (at [49]) that there is a sufficient risk of dissipation if it can be shown that:

> "(i) there is a real risk that a judgment or award will go unsatisfied, in the sense of a real risk that, unless restrained by injunction, the defendant will dissipate or dispose of his assets other than in the ordinary course of business: *The Niedersachsen* [1983] 1 WLR 1412 per Mustill J as interpreted by Christopher Clarke J in *TTMI v ASM Shipping* [2006] 1 Ll Rep 401 at 406 (paragraphs 24–27); or
>
> (ii) that unless the defendant is restrained by injunction, assets are likely to be dealt with in such a way as to make enforcement of any award or judgment more difficult[2], unless those dealings can be justified for normal and proper business purposes: *Stronghold Insurance v Overseas Union* [1995] CLC 1268 at 1273 per Potter J and *Motorola Credit Corp v Uzan (No. 2)* [2003] 2 CLC 1026 at para. 142–146 where the Court of Appeal was applying the same principle in the context of disclosure of assets by the defendant."

45. The important difference between these alternative requirements is on the one hand between

    - a judgment or award going unsatisfied because of dissipation

    and

[1] [2008] EWHC 1615 (Comm); [2009] 1 All ER (Comm) 479; [2008] 2 Lloyd's Rep 602; [2008] 2 CLC 51.
[2] See also ***Mobil Cerro Negro Ltd v Petroleus de Venezuela SA*** [2008] EWHC 532 (Comm), [2008] 1 Lloyd's Rep 684.

- enforcement becoming more difficult because of likely dealings

in either case otherwise than in the normal course of business. [3]

46. That reference to the "course of business" is an important reminder of the limited purpose of a freezing injunction. Where it is relevant to do so *ie* the respondent carries on a business, the example form of freezing injunction under CPR Part 25 must normally provide that:

> "This order does not prohibit the Respondent from dealing with or disposing of any of his assets in the ordinary and proper course of business."

46.1. Before judgment, there has been no determination of the merits of the claimant's claim (beyond the relatively low test of there being *a good arguable case*). In reality the existence of a freezing injunction will inevitably interfere with the Respondent's (ordinary) conduct of its business but it is not intended to do so and payments made for that purpose are not restrained even if their likely result is that any future judgment will not be met in full or at all. See ***TTMI Ltd of England v ASM Shipping Ltd of India***[4]

[3] The standard form of freezing order restraining a defendant from dealing with his assets does not prevent his increasing his overall indebtedness, for instance by borrowing money or using his credit card - see ***Cantor Index Ltd v Leicester*** (11 November 2001, unreported) and ***Anglo-Eastern Trust Ltd v Kermanshahchi*** [2002] EWHC 1702.

[4] [2005] EWHC 2666 (Comm); [2006] 1 Lloyd's Rep 560. The position is different when it comes to non-trading assets especially when held in the private capacity of an individual – see ***JSC Bank v Abylazov*** [2009] EWCA Civ 1124.

46.2. After judgment the position may be different. ***Soinco SACI v Novokuznetsk Aluminium Plant***[5] concerned the appointment of a receiver by way of equitable execution.[6] Colman J said (at p 421):

> "As to bringing the business of the judgment debtor to a standstill by cutting off payment otherwise available to it, I am not persuaded that this is a relevant consideration in the context of a remedy designed to effect execution and not designed merely to conserve assets pending determination of an unresolved claim. This is not the environment of a *Mareva* injunction prior to trial, but of execution of a pre-existing judgment. Whereas the effect of an injunction on the defendant's ability to conduct his business in the ordinary course may be relevant where his liability is yet to be determined, it cannot possibly be a relevant consideration where his liability has already been determined. Impact on the judgment debtor's business is not a consideration material to the availability of legal process of execution and there is no reason in principle why it should be introduced as material to the availability of equitable execution."

Tomlinson LJ in ***Mobile Telesystems Finance SA v Nomihold Securities Inc***[7] has since said that this dictum of Colman J might be a little too sweeping (or at least not so strongly applicable to freezing relief) given that a post-judgment freezing injunction is granted in aid of execution but is not part of such execution[8]. Tomlinson LJ nonetheless expressed himself to be

> "… satisfied that it will sometimes and perhaps usually be inappropriate to include an ordinary course of business exception in a post-judgment asset freezing order. Of course, its omission would not preclude an application to vary or discharge."

47. The beneficiary of an arbitration award is not for these purposes to be treated as being in the same position as a judgment creditor if the award is not yet

[5] [1998] QB 406.
[6] And which is not of course a formality; rather the Court will need to be satisfied that it is "just and convenient" to make the appointment and which will normally mean that legal execution is insufficient or has proved inadequate.
[7] [2011] EWCA Civ 1040, [2012] 1 All ER (Comm) 223, [2012] Bus LR 1166, [2012] 1 Lloyd's Rep 6.
[8] ***Masri v Consolidated Contractors International Co SAL*** [2008] EWHC 2492 (Comm) at [35].

enforceable because, say, the period prescribed by CPR 62.18(9) has not yet elapsed[9] and the same reasoning would presumably apply where a judgment debt was subject to a stay of execution.

48. As has already been mentioned neither before nor after judgment does a freezing injunction give the claimant any secured interest or priority over other creditors with the consequence (at least before judgment) that the discharge of other (legitimate) debts is permissible. The example form of order provides that

> "(4) The order will cease to have effect if the Respondent—
>
> (a) provides security by paying the sum of £ into court, to be held to the order of the court; or
>
> (b) makes provision for security in that sum by another method agreed with the Applicant's legal representatives."

But despite the use of the term "security" no property interest in necessarily created by these means; it all depends on how the "security" is given.

49. Thus in *Flightline Ltd v Edwards*[10] a freezing injunction was discharged on the respondent's agreement to pay £4,260,747 into a bank account in the joint names of the parties' solicitors. The respondent also undertook not to withdraw or in any way dispose of or deal with or encumber its interest in the money up to a limit of £3,325,000 in that joint account until further order of the court. The respondent subsequently went into insolvent liquidation and it was held by the Court of Appeal (overturning Neuberger J) that no equitable charge (or other proprietary interest) in the fund had been created. This would have been the result had the Respondent agreed to *pay* the debt out of the fund; but the mere restriction on its disposal was insufficient. All that had been achieved by the latter was continuing interim relief of a freezing nature, albeit in a different form.

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[9] ***Mobile Telesystems Finance SA v Nomihold Securities Inc*** [2011] EWCA Civ 1040, [2012] 1 All ER (Comm) 223, [2012] Bus LR 1166, [2012] 1 Lloyd's Rep 6.
[10] [2003] EWCA Civ 63 [2003] 1 WLR 1200.

The Burden on the Claimant

50. The burden on the claimant is to show that there is a real risk of dissipation and it has been said that this too means a "good arguable case".[11] This – as has already been mentioned in the context of the merits of the underlying claim – is

> "a case which is more than barely capable of serious argument, and yet not necessarily one which the judge believes to have a better than 50 per cent chance of success"[12]

This is a more stringent requirement than the "serious issue to be tried" for *American Cyanamid* purposes.[13]

51. The authorities suggest that the following are amongst the relevant factors:

51.1. the nature of the assets – the more liquid and disposable the easier to dissipate;[14]

51.2. the nature and financial standing of the defendant's business including its length of establishment;

51.3. what the defendant has said about dealing with its assets;

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[11] ***Customs & Excise Commisioners v Anchor Foods Ltd*** [1999] 1 WLR 1139

[12] ***Lakatamia Shipping Company Limited v Nobu SU Limited*** [2012] EWCA Civ 1195 , per Longmore LJ at [19] and [25]-[28] citing ***Ninemia Maritime Corporation v Trave Schiffahrtgesellschaft MBH und Co KG (The Niedersachsen)*** [1983] 2 Lloyd's Rep 600 , per Mustill J, at 603, 605; [1983] 2 Lloyd's Rep 600, 613–614.

[13] See ***Fiona Trust Holding Corporation v Privalov*** [2007] EWHC 1217 (Comm). *Cf* ***Attock Cement Co Ltd v Romanian Bank for Foreign Trade*** [1989] 1 All ER 1189 where the "good arguable case" test was said to involve the judge reaching a provisional view on the material before him that the claimant will probably succeed on the matter at issue. The better view is that this (and the cases on service out which rely on this formulation) are applying too stringent a test.

[14] See *eg* ***Dellborg Corix Properties and Blissfield Corporation NV*** (unreported) Court of Appeal, 26th June 1980.

51.4. domicile/incorporation in a tax haven with slack or opaque company laws;

Mere foreign residence or domicile is not enough but

> "We often see in this court a corporation which is registered in a country where the company law is so loose that nothing is known about it - where it does no work and has no officers and no assets. Nothing can be found out about the membership, or its control, or its assets, or the charges on them. Judgment cannot be enforced against it. There is no reciprocal enforcement of judgments. It is nothing more than a name grasped from the air, as elusive as the Cheshire Cat. In such cases the very fact of incorporation there gives some ground for believing there is a risk that, if judgment or an award is obtained, it may go unsatisfied." *Per* Lord Denning MR in *Third Chandris Shipping Corporation v Unimarine SA* [1979] QB 645 at p 669.

51.5. the enforceability of English judgments in the place where the respondent has substantial assets.[15] If this is the EU then for obvious reasons this is a factor tending against the grant of relief.

51.6. whether the underlying claim involves dishonesty even if fraud is not pleaded.[16] See ***Guinness v Saunders*** (1987), The Independent, 15 April 1987:

> "In my judgment dishonest behaviour is relevant to Mareva relief not by reference to what is pleaded but by reference to the possibility or likelihood of it existing" – *per* Lord Browne-Wilkinson.

51.7. Response to the claimant's claim

51.7.1. evasiveness;[17]

51.7.2. slender or shady defence(s);

51.7.3. silence;

[15] ***Montecchi v Shimco (UK) Ltd*** [1979] 1 WLR 1180.

[17] ***Linsen International Ltd v Humpuss Sea Transport Pte Ltd*** [2010] EWHC 303 (Comm).

51.7.4. perjury.

- An arguable case of perjury was highly significant in ***Congentra AG v Sixteen Thirteen Marine SA***[18].
- But was considered to be insufficient in ***Irish Response Ltd v Direct Beauty Products Ltd***[19]

and which serves to illustrate how *all* of the evidence needs to be considered (and, possibly, the difference between one judge and another as to the weight which it should be given…).

51.8. Evidence of other dishonesty – *ie* beyond the immediate claim;

51.9. Past failure(s) to pay debts or association with companies with such a record.[20]

- But doubts about the defendant's creditworthiness are not enough on their own – *see* ***Mobil Cerro Negro Ltd v Petroleos de Venezuela SA***[21]

51.10. Evidence of actual removal/dissipation of assets.

51.11. Past failures to comply with court orders.[22] Although note that in ***Masri v Consolidated Contractors International Company*** [2008] EWCA Civ 303 Lawrence Collins LJ said (at [131])

> "… it is a necessary condition of a post-judgment freezing order being sought that the judgment will not have been paid. It does not follow from non-payment that a defendant intends to dissipate its assets."

[18] ***Congentra AG v Sixteen Thirteen Marine SA*** [2008] EWHC 1615 (Comm); [2009] 1 All ER (Comm) 479; [2008] 2 Lloyd's Rep 602; [2008] 2 CLC 51.
[19] [2011] EWHC 37 (QB).
[20] ***Third Chandris Shipping Corporation v Unimarine SA*** [1979] QB 645.
[21] [2008] 1 Lloyd's Rep. 684.
[22] ***Great Future International Ltd v Sealand Housing Corpn*** (2002) LTL 16 May 2002.

51.12. Failure to disclose assets.

52. The test is to be satisfied "on the whole of the evidence" before the Court[23] as was illustrated by the judgment of Arnold J in ***UCB Home Loans Corporation Ltd v Grace*** [2011] EWHC 851 (Ch) where the extensive evidence relied upon ranged from declined insurance cover to failure to comply with previous court orders. Even though the Defendants could have but had not previously dissipated assets, the judge said (at [44]) that "overall"

> "I consider there is a real risk of dissipation of assets, because the evidence suggests that, even if they were not positively dishonest, the first and second defendants have behaved in a manner which gives rise to that risk because they have consistently put their own interests before that of the legitimate interests of their creditors and, in particular, the claimant, which is a judgment creditor.

Evidence of dishonesty

53. In ***Thane Investments v Tomlinson***[24] Peter Gibson LJ said:

> 'In my judgment Neuberger J's reasons for finding Judge Thompson's order one which should not be discharged are insufficient to justify the order which he made. First, Neuberger J said that the matters which were relied on for the good and arguable case applied in demonstrating that there was a real danger of the defendants dissipating their assets to defeat the judgment. I regret that I do not see that the judgment does support a conclusion that in the particular circumstances of Mr Tomlinson and Reyall there was a real risk of assets being dissipated. Mr Blackett-Ord submitted that it has now become the practice for parties to bring ex parte applications seeking a freezing order by pointing to some dishonesty, and that, he says, is sufficient to enable this court to make a freezing order. I have to say that, if that has become the practice, then the practice should be reconsidered. It is appropriate in each case for the court to scrutinise with care whether what is alleged to have been the

[23] ***Ninemia Maritime Corporation v Trave Schiffahrtsgesellschaft mbH (The Niedersachsen)*** [1983] 1 WLR 1412 at 1422.
[24] [2003] EWCA Civ 1272.

dishonesty of the person against whom the order is sought in itself really justifies the inference that that person has assets which he is likely to dissipate unless restricted.'

54. *Thane* continues to be cited in support of the proposition that the mere fact of an allegation of fraud in the actual or intended claim is not sufficient without more to justify the grant or maintenance of a freezing injunction but it requires some qualification not least because, as Flaux J identified in ***Madoff Securities International Ltd v Raven***[25], two highly relevant decisions of the Court of Appeal were not cited in *Thane*.

55. The first was ***Norwich Union v Eden***[26] where Phillips LJ said:

> "It seems to me that when the court considers whether there is a good arguable case it is at that stage that it considers whether the likelihood of a judgment in favour of the plaintiff is sufficient to justify the grant of Mareva relief. If it is so satisfied, the question then arises: if such a judgment is given, what is the risk that there will be no assets there to satisfy it? If the judgment in question being considered is a judgment in which allegations of fraud are made, then it seems to me that it is open to the court to conclude from that fact alone that there is sufficient risk of dissipation of assets to justify the grant of relief. For myself it does not seem to me that there would be any prospect of persuading this court that the learned Judge had erred in principle in so concluding."

56. The second was ***Grupo Torras SA v Al-Sabah***[27] where Saville LJ said:

> "Mr Etherton also criticised the judge for failing, as he put it, properly to address himself to the question whether there was a real risk of dissipation of assets, and simply concluded that such a risk existed because this was a fraud case. ...
>
> ...
>
> What is clear from the judgment is that the judge took the view that there was a good arguable case that Mr Dawson was knowingly implicated in the

[25] [2011] EWHC 3102 (Comm).
[26] (25 January 1996, unreported).
[27] (unreported) 21 March 1997.

> fraud; and that the nature of the allegations was such that there was a strong fear of dissipation. Since it is part of Mr Dawson's own case that he was expert in the sort of intricate, sophisticated and international financial transactions which feature in this case, and since the plaintiffs had established a good arguable case that Mr Dawson had used his expertise for dishonest purposes, I am not in the least surprised that the judge reached the conclusion he did. In short I remain wholly unpersuaded that the judge so erred in his assessment of the risk of dissipation that it would be right for this court to interfere."

Both of these cases were referred to with approval by the Court of Appeal in ***VTB Capital Plc v Nutritek International***[28]. (They also illustrate the unwillingness of the Court of Appeal to interfere with the judge's assessment that there is (or is not) a good arguable case unless he is plainly wrong.[29]

57. Although every case must of course be decided on all the evidence, *in practice* it usually is enough to obtain and by and large maintain such an injunction that the underlying claim discloses an arguable case of fraud.

58. More historic or collateral evidence of dishonesty is more difficult but even then, it can frequently do rather more of the work to show a good arguable case of risk of dissipation than many authorities suggest; it all depends on the facts.

<u>Attempts to reverse the burden of proof on dissipation</u>

59. Sometimes applicants for freezing injunctions seek to rely on unanswered or refused requests for undertakings about assets as evidence of the risk of dissipation.

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[28] [2012] EWCA Civ 808 at [176] for the acceptance of this point, albeit *obiter*. See also ***Finurba Corporate Finance Ltd v Sipp SA*** [2011] EWCA Civ 465 at [31]: "the courts should adopt a robust and realistic approach to technical points of substantive law or evidence raised against the grant of a freezing order, in cases where there is good reason to believe that fraud has occurred." *Per* Lord Neuberger MR.

[29] See ***Lakatamia Shipping Company Limited v Nobu SU Limited*** [2012] EWCA Civ 1195 albeit in the context of "good arguable case" on the underlying merits of the claim.

60. This *can* be useful but for obvious reasons it will be a relatively rare case in which that sort of dialogue even takes place before the application is made. Even then, there needs to be *some* evidential basis for making the request in the first place otherwise it is no more than an attempt to reverse the burden of proof. This is to be distinguished from a situation where a sufficient case of risk of dissipation is made out *ex parte* and is not then rebutted on the return date:

> "The worst this amounts to is a prima facie case. That prima facie case could have been destroyed by evidence given on behalf of Corix Properties Ltd. No such evidence has been put before the Court. I have reminded myself that the absence of evidence proves nothing. On the other hand, the fact that there is no evidence from one side makes it easier to draw inferences from the evidence which is already before the Court; and the evidence before the Court as against Corix Properties Ltd. is that there has been a scheme to make access to the profits of this development difficult for the Inland Revenue."
>
> *Per* Lawton LJ in ***Dellborg v Corix Properties and Blissfield Corpn NV*** (Unreported) Court of Appeal, 26 June 1980.

The international dimension

Worldwide freezing injunctions

61. These injunctions apply to assets which are located outside England and Wales and may apply to these foreign assets instead of or in addition to assets within the jurisdiction.[30]

62. They are not generally available where the defendant clearly has sufficient assets within the jurisdiction – although this will sometimes only become apparent from the affidavit disclosing assets in response to the initial grant of a worldwide order.

[30] It is not necessary for the defendant to have *any* assets within this jurisdiction – ***Derby v Weldon (Nos 3 and 4)*** [1990] Ch 65.

63. Even though the English Court is exercising jurisdiction *in personam* the extra-territorial effect of a worldwide order means, officially at least, that they are only granted in exceptional circumstances. As Arden LJ put it in ***Dadourian Group International Inc v Simms*** [2006] EWCA Civ 399, [2006] 1 WLR 2499 (at [24])

> "the making of "the order in respect of foreign assets is a serious step and the risks of refusing this relief must justify it."

64. In reality, they are quite readily granted in cases of large scale fraud, where assets can readily be transferred abroad or where the defendant is able to salt them away so long as it is incorporated/present in this jurisdiction or has sufficient connection to it.

65. In the case of domestic claims and judgments the source of the jurisdiction is s 37 of the Senior Courts Act but worldwide orders may also be granted in support of foreign proceedings:

65.1. then the source of the jurisdiction is s 25 of the Civil Jurisdiction and Judgments Act 1992 – see ***Credit Suisse Fides Trust SA v Cuoghi*** [1998] QB 818 – or

but

65.2. since such an injunction is *ex hypothesi* directed at (or includes) assets outside the jurisdiction

65.2.1. the respondent must have a sufficient connection with this jurisdiction

or

65.2.2. some special circumstance must nevertheless justify the English Court's involvement – see ***Mobil Cerro Negro Ltd v Petroleos de Venezuela SA*** [2008] 1 Lloyd's Rep 684.

66. An order in support of foreign proceedings will be refused if such relief would be inexpedient and this question depends *inter alia* on 5 factors:

66.1. Whether the making of the order would interfere with the management of the case in the primary court;

66.2. Whether it is the policy in the primary jurisdiction not itself to make worldwide freezing (and/or disclosure) orders;

66.3. Whether there is a danger that the orders made would give rise to disharmony or confusion in other jurisdictions;

66.4. Whether there is likely to be a potential conflict as to jurisdiction;

66.5. Whether in a case where disobedience was likely the court would be making an order which it could not enforce.

See ***Motorola Credit Corpn v Uzan (No 2)*** [2003] EWCA Civ 752, [2004] 1 WLR 113

Special provisions in Worldwide Freezing Injunctions

The *Babanaft* proviso

67. This is to the effect that the order will not affect third parties outside the jurisdiction until, and even then only to the extent that, it has been recognised, registered or, as the case may be, enforced by the relevant foreign court – ***Babanaft International Co SA v Bassatne*** [1990] Ch 13.

The *Baltic* proviso

68. This states that third parties served with a copy of the order are free to comply with what they reasonably consider to be their legal obligations (civil and criminal) in the country where the assets are situated – ***Bank of China v NBM LLC*** [2002[1 WLR 844.

Undertaking not to enforce outside the jurisdiction without permission - *Derby & Co Ltd v Weldon* [1990] Ch 48, CA.

69. This is an undertaking not to enforce the order outside the jurisdiction without the permission of the English Court. It has been said that this undertaking operates as an injunction and may indeed be reformulated as such – see ***Gruppo Torras SA v Al Sabah*** [2005] EWCA Civ 1370.

70. Guidelines on applications for such permission and the considerations which the Court will take into account are to be found in ***Dadourian Group International Inc v Simms*** [2006] EWCA Civ 399, [2006] 1 WLR 2499:

Guideline 1 The principle applying to the grant of permission to enforce a WFO abroad is that the grant of that permission should be just and convenient for the purpose of ensuring the effectiveness of the WFO, and in addition that it is not oppressive to the parties to the English proceedings or to third parties who may be joined to the foreign proceedings.

Guideline 2 All the relevant circumstances and options need to be considered. In particular consideration should be given to granting relief on terms, for example terms as to the extension to third parties of the undertaking to compensate for costs incurred as a result of the WFO and as to the type of proceedings that may be commenced abroad. Consideration should also be given to the proportionality of the steps proposed to be taken abroad, and in addition to the form of any order.

Guideline 3 The interests of the applicant should be balanced against the interests of the other parties to the proceedings and any new party likely to be joined to the foreign proceedings.

Guideline 4 Permission should not normally be given in terms that would enable the applicant to obtain relief in the foreign proceedings which is superior to the relief given by the WFO.

Guideline 5 The evidence in support of the application for permission should contain all the information (so far as it can reasonably be obtained in the time available) necessary to make the judge to reach an informed decision, including evidence as to the applicable law and practice in the foreign court, evidence as to the nature of the proposed proceedings to be commenced and evidence as to the assets believed to be located in the jurisdiction of the foreign court and the names of the parties by whom such assets are held.

Guideline 6 The standard of proof as to the existence of assets that are both within the WFO and within the jurisdiction of the foreign court is a real prospect, that is the applicant must show that there is a real prospect that such assets are located within the jurisdiction of the foreign court in question.

Guideline 7 There must be evidence of a risk of dissipation of the assets in question.

Guideline 8 Normally the application should be made on notice to the respondent, but in cases of urgency, where it is just to do so, the permission may be given without notice to the party against whom relief will be sought in the foreign proceedings but that party should have the earliest practicable opportunity of having the matter reconsidered by the court at a hearing of which he is given notice.

It may also be relevant to consider to what use information obtained as a result of the worldwide order may be put. See

- ***Dadourian Group International Inc v Simms*** [2006] EWCA Civ 1745, [2007] 1 WLR 2967 where the question was whether the claimant should be released from an undertaking not to use in enforcing the order information obtained from a party in associated contempt proceedings;

- ***Bates v Microstar Ltd*** [2003] EWHC (Ch) where the question was whether information obtained under the injunction could be used for another purpose.

Section 44 of the Arbitration Act 1996

71. Section 44 provides (so far as relevant) that

> "44 Court powers exercisable in support of arbitral proceedings.
>
> (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—
>
> …
>
> (e) the granting of an interim injunction or the appointment of a receiver.
>
> (3) If the case is one of urgency, the court may, on the application of a party or proposed party to the arbitral proceedings, make such orders as it thinks necessary for the purpose of preserving evidence or assets.
>
> (4) If the case is not one of urgency, the court shall act only on the application of a party to the arbitral proceedings (upon notice to the other parties and to the tribunal) made with the permission of the tribunal or the agreement in writing of the other parties.
>
> (5) In any case the court shall act only if or to the extent that the arbitral tribunal, and any arbitral or other institution or person vested by the parties with power in that regard, has no power or is unable for the time being to act effectively.
>
> …"

72. Against whom can this power be exercised? Section 2(3) of the 1996 Act provides " as to "Scope of application of provisions" that

> "(3) The powers conferred by the following sections apply even if the seat of the arbitration is outside England and Wales or Northern Ireland or no seat has been designated or determined—
>
> …
>
> (b) section 44 (court powers exercisable in support of arbitral proceedings);

> but the court may refuse to exercise any such power if, in the opinion of the court, the fact that the seat of the arbitration is outside England and Wales or Northern Ireland, or that when designated or determined the seat is likely to be outside England and Wales or Northern Ireland, makes it inappropriate to do so."

73. CPR Rule 62.5 (1) (b) provides that

> "(1) The court may give permission to serve an arbitration claim form out of the jurisdiction if—
>
> … (b) the claim is for an order under section 44 of the 1996 Act;"

74. The jurisdiction of the English Court is of course founded on service and there are complex and detailed rules about when a party domiciled outside the jurisdiction can be served with English process (with permission) – see in particular CPR Part 6.36 onwards and the jurisdictional "gateways" listed in paragraph 3.1 of Practice Direction 6B.

75. But what if none of these jurisdictional gateways can be established and the Court has no *in personam* jurisdiction over the proposed foreign respondent to the application under s 44? Can the Court nonetheless grant permission to serve out of the jurisdiction?

76. The answer to that question appears to be yes. There is a footnote buried in Dicey & Morris to this effect and the decision of the Court of Appeal in ***AES Ust-Kamenogorsk Hydropower Plant LLP v Ust-Kamenogorsk Hydropower Plant JSC*** [2012] 1 WLR appears to proceed on the basis that one of the available jurisdictional gateways against the Kazakhstan respondent was CPR Part 62 r 62.5(1)(b) alone.[31]

[31] There the injunction was an anti-suit injunction. The Supreme Court is due to hear an appeal on the question in *AES* whether the service provision in CPR r 62.5(1)(c) is limited to claims

77. This conclusion has recently been confirmed in one of the writer's own cases where his client successfully challenged the jurisdiction of an English arbitrator in the Commercial Court under s 67 of the Arbitration Act 1996. The applicable clause instead prescribed Swiss law and arbitration and (it was common ground that) the Court had no *in personam* jurisdiction over the Turkish Respondent.

78. In a subsequent (private) hearing the Court nonetheless held that it was entitled to give permission under CPR Part 62 r 62.5(1)(b) to serve on the Respondent an application for (and order granting) an interim injunction in support of the still to be constituted Swiss tribunal, restraining any demand on demand guarantees issued by Standard Chartered Bank (and which were subject to Turkish law and (possibly exclusive) Turkish jurisdiction).

79. This was not a freezing injunction but such relief would seem to fall within s 44 and therefore to be relief for which service out of the jurisdiction could be permitted under CPR Part 62.3(1)(b) subject to the general discretionary question under s 2(3) of the Arbitration Act 1996 whether it is "inappropriate to do so" under section 2(3).[32]

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under the Arbitration Act 1996 or applies to claims in general regarding arbitration including an anti-suit injunction under section 37 of the Senior Courts Act 1981.

[32] See for example ***Commerce and Industry Insurance Co of Canada v Certain Underwriters at Lloyd's*** [2002] 1 WLR 1323; ***Econet Wireless Ltd v VEE Networks Ltd*** [2006] EWHC 1568 (Comm), [2006] 2 Lloyd's Rep 428.