

**INVESTIGATING AND RESPONDING TO  
INTERNATIONAL MARITIME FRAUD**

**THE UK COURTS AND  
WORLDWIDE ASSET TRACING**

**Maritime Law Association of the United States,  
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**By Paolo Ghirardani,  
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## **Investigating and Responding to International Maritime Fraud**

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#### **A. INTRODUCTION**

I am an English Solicitor with a somewhat unusual practice. I specialise in investigating frauds on insurers, shipowners and the occasional bank. I frequently conduct the investigation and evidence gathering myself and in recent years have had the pleasure of visiting Sierra Leone about 15 times, Nigeria some 7 times and so it goes on.

What I am talking about is a totally false claim against a shipowner or an insurer for a whole or partial shortage of cargo on delivery at the discharge port. 120 bales of textiles missing from 220.

The typical elements of a fraudulent claim are:

- (i) Refusal to accept a Club Letter of Undertaking.
- (ii) Prolonged arrest to force payment.
- (iii) Insistence of having the claim dealt with in the local court, where they are close to the Judge and can expect the right result.
- (iv) One off big claim against a bulk operator or a series of claims against a liner operator.

When the investigation is complete, or as soon as is reasonably practical, we move to bring a counter attack. This can involve tracing and recovering our clients own money, or identifying and freezing the assets of the fraudster as security for a legal claim.

The English Courts are extremely user friendly for a bona fide Claimant who has been wronged and has good reason to find and freeze assets in possession of the wrongdoer/Defendant. There is

an array of powerful remedies in the English lawyers' arsenal, which I will take you through today.

## **B. [CASE STUDY]**

1. Container Fraud.
2. "DUBAI VALOUR"

## **C. JURISDICTION**

The first decision is in which Court are you able to start proceedings to get your money back? If you can found jurisdiction in that Court, are you able to use those proceedings as a platform for freezing orders in other countries? As I have said, the English High Court is generally regarded as one of the better jurisdictions for such an action. However, the true first question is whether you can bring an action in the High Court?

The English courts will only be able to decide the merits of your claim if they have jurisdiction to do so. The mere presence of assets in England is not normally enough.

The rules for deciding whether the criteria for jurisdiction are satisfied are complicated, but they fall broadly into two categories:

### **Defendants domiciled in an EU or EFTA Member State**

The EU and EFTA member states have signed conventions on civil jurisdiction – known as the Brussels and Lugano Conventions. The terms of these conventions are almost identical, and they set out the rules for deciding whether a particular national court has jurisdiction.

The basis of the rules is that a defendant should be sued in the country where he is domiciled. However, there are a number of exceptions, for example in relation to:

- Jurisdiction clauses meeting certain requirements

- Contractual obligations (where the courts of the place of performance of the obligation in question have jurisdiction)
- Tort claims (where the courts of the place where the harmful event occurred have jurisdiction)
- Specialist areas of law such as consumer, insurance and shipping, which have rules of their own.

Some areas, including arbitration, are excluded altogether from the scope of the conventions.

### **Defendants domiciled in other Countries**

For defendants domiciled outside the EU / EFTA countries, different rules apply. For the court to hear the merits in such cases, the claimant must show that:

- (a) One of a list of grounds for jurisdiction are met. These include, for example, claims
  - in respect of contracts made in England or subject to English law / jurisdiction
  - tort claims resulting from an act committed in England or where loss has been suffered in England
  - claims for an injunction requiring or preventing the defendant from doing an act in England
- (b) The claim has a reasonable prospect of success
- (c) England is a 'proper place' to bring the claim. This has been the subject of many reported cases over the years, but the essence is that the interests of justice and convenience of the parties should not make some other country a more suitable place for the dispute to be resolved.

Where a defendant is not domiciled in an EU or EFTA state, it is a matter for the English court's discretion as to whether it takes jurisdiction; if either of the conventions apply, the court either

does or does not have jurisdiction, but there is not room for the exercise of its discretion in reaching the decision.

#### **D. COMMENCEMENT OF PROCEEDINGS**

The evidence needs to be gathered as quickly as possible and the legal case put together. This is presented to the Court in the Claim Form – which used to be called a Writ. If you are intending to make “ex parte” or without notice applications to the Court for injunctions, it is wise not to issue the Claim Form yet as a wary Defendant may have someone checking the Court Register of new cases once a day, or a journalist from the Times may see that X Bank is about to sue Prince Y for the return of US\$20m and put it on their front page. The Court will grant injunctions if a Claimant undertakes to issue the Claim Form as soon as possible thereafter.

#### **E. FREEZING INJUNCTION/MAREVA INJUNCTION**

##### **1. When are they Available.**

##### **(a) Action before the English Court**

The basic jurisdiction for the English Courts to grant freezing injunctions is founded on section 37(1) of the Supreme Court Act 1981 which enables interlocutory relief to be granted in an English action in which substantive relief is claimed based on a cause of action.

##### **(b) Arbitration**

The Arbitration Act 1996 applies to arbitral proceedings commenced on or after 31 January 1997 which are governed by English law. Pursuant to section 44 of the Arbitration Act 1996, unless the parties have agreed otherwise, the English Court will have power to grant a freezing injunction. This is regardless of whether the seat of the arbitration is in England and Wales. Therefore, a freezing injunction from the Courts for English Arbitrations may also be available in foreign arbitrations, but only when they are subject to English law. Section 2(3) provides that the Court may refuse such relief if the fact that that the seat of the arbitration is outside of England and Wales or Northern Ireland makes it inappropriate to grant relief.

**(c) English judgment/award or foreign judgment/award enforceable in England**

Certain foreign judgments and awards are registrable in England pursuant to various reciprocal enforcement procedures. Other foreign judgments and awards (such as those obtained in the US) must be enforced by way of commencing an action in England and suing on the judgment or award. In both cases, freezing injunctions are available in support of the enforcement proceedings.

**2. Requirements which must be satisfied to obtain a freezing injunction**

**(a) Underlying actual or potential action**

The authorities show that there is a rule that freezing injunctions will only be granted in support of an existing cause of action. (*Siskina v Distos SA* [1979] AC 210; *Veracruz Transportation Inc. v VC Shipping Co Inc.* [1992] 1 Lloyd's Rep 353.) If it is feared that a party will not perform its contract, the Court will not grant freezing injunctions in an action for specific performance until the contractual time for performance. However, as a matter of principle the Court can grant freezing injunctions *quia timet* if there is " ... a sufficiently clear right to an indemnity ... together with a clear indication that the indemnifier is going to ignore his obligations" [*Rowland v Gulpac Ltd* commercial Court (24 July 1995) Rix J.]. The purpose of granting this form of relief is to prevent the occurrence of an infringement of the Claimant's existing right to an indemnity.

**(b) Good arguable case**

The claimant must show that he/she has a "good arguable case" on the merits. The Court must not try to resolve conflicts of evidence on affidavit, or to decide difficult questions of law which call for detailed argument and mature consideration [*Derby & Co Ltd v Weldon* [1990] Ch 48 at 57-9; *American Cyanamid* [1975] AC at 407-8]. A good arguable case has been described as "*one which is more than barely capable of serious argument, but not necessarily one which the judge considers would have a better than 50 per cent chance of success*" [*The Niedersachsen* [1983] 2 Lloyd's Rep 600 at 605].

Beyond the threshold of a good arguable case, the merits of the Claimant's case will be taken into account by the judge in his discretion to grant a freezing injunction where it is just and convenient to do so.

**(c) A real risk that judgment or award may go unsatisfied**

In *The Niedersachsen*, the Court of Appeal laid down the applicable test as: "*whether ... the court concludes, on the whole of the evidence then before it, that the refusal of a Mareva Injunction would involve a real risk that a judgment or award in favour of the plaintiffs would remain unsatisfied.*" ([1983] 1 WLR 412).

This requirement is generally referred to as "a real risk of dissipation of assets". The court is interested in seeing evidence supporting the risk of dissipation, and does not require direct evidence of the defendant's motives. Evidence of a risk of dissipation can relate to, or even be inferred from, the nature of the claims against the defendant (e.g. fraud), the nature of the assets (e.g. funds in bank accounts as opposed to real estate) and the nature of the defendant (e.g. part of a complex web of companies with a presence in many different jurisdictions, especially off-shore jurisdictions).

The Court is only concerned to prevent unjustifiable disposals of assets. A corporate defendant is entitled to go on paying ordinary business expenses, and an individual is entitled to pay ordinary living expenses. Indeed provision is made for both these forms of expenditure in a Freezing Injunction order.

**(d) Assets inside or outside the jurisdiction – the ability to grant orders with world-wide effect**

It is possible for English freezing injunctions to be granted with world-wide effect because they operate *in personam*. It is therefore not necessary for the claimant to bring evidence to show that the defendant has assets within the jurisdiction. Further, it is not necessary for the claimant to produce evidence stating where the defendant's assets are located since it is recognised that the claimant may not know enough about the defendant's financial affairs to supply this information, especially where the relief has been applied for on an urgent basis. However, evidence must be adduced to show that the

defendant does in fact have assets. Without such evidence there would be no purpose for granting an injunction in the first place.

It has been said that world-wide freezing injunctions are exceptional and should only be granted on cogent evidence [*Derby v Weldon* [1990] Ch 48; *Grupo Torras SA v Sheik Fahad Al-Sabah* Court of Appeal (16 February 1994)]. However, there are no firm guidelines as to when world-wide freezing injunctions will be granted. The courts recognise that the granting of such an injunction is more likely to lead to increased costs and protracted interlocutory proceedings as well as the involvement of third parties not subject to the jurisdiction of the English Court. Further, the English courts are concerned that the proceedings should not be more complex and onerous upon the defendant than strictly necessary. Consequently, the English Courts do tend to be more cautious in relation to the granting of world-wide orders.

If the defendant's assets within the jurisdiction appear to be sufficient to satisfy any potential judgment, then the English court will not generally grant a world-wide injunction. Further if the defendant is an international business, the English court will be reluctant to grant a world-wide injunction because the injunction would be likely to be too disruptive of the defendant's business [*ALG Incorporated v Uganda Airlines Corp* (1992) *The Times*, 31 July].

**(e) Justice and convenience**

The freezing injunction remains very much a discretionary remedy to be granted only where it is "just and convenient" to do so. Consequently, a freezing injunction may be refused where it would be unduly harsh on the defendant, e.g. preventing him from finding employment or putting the defendant out of business, or to third parties. It may also be refused where the scale of the claim is too small to warrant such a procedure.

**3. Procedure**

The application for a freezing injunction may be made prior to the commencement of the substantive action (whether in England or abroad) in urgent cases. If the freezing injunction is granted it will be granted on the basis of an undertaking from the claimant to



commence the substantive action within a certain time-span or as soon as reasonably practicable.

In the vast majority of cases it will be necessary to make the application for a freezing injunction without notice to the intended defendants to avoid tipping them off and causing them to carry out the very dissipation of assets that the injunction was intended to prevent. A freezing injunction granted at a without notice hearing will either be granted until a particular date, or until judgment, unless previously discharged or varied. In the former case a further hearing will be fixed for the date specified and in the latter case a hearing will be fixed a short time after the original hearing in order for there to be a full inter-partes hearing of the application. At that hearing, the injunction will either be continued in its original form or varied or discharged.

Where the application is made pursuant to section 25 of the Civil Jurisdiction and Judgments Act 1982 and where the defendant is resident outside England and Wales, permission must be sought from the Court to serve the proceedings out of the jurisdiction.

#### **4. Obligations upon the claimant in an application for a freezing injunction**

##### **(a) Duty of full and frank disclosure**

Since the application for a freezing injunction is in the first instance made on a without notice basis, the Claimant has a duty to make full and frank disclosure to the Court of all facts material to the application. The test of materiality is objective. The duty to disclose includes all facts which the Claimant and his legal advisers should have known had they made all reasonable inquiries. Details of all defences which may have been raised by the defendant or which might reasonably be expected to be raised by the defendant in due course must also be disclosed in the affidavit in support and drawn to the attention of the judge at the hearing.

If the claimant fails to disclose a material fact or makes a material misrepresentation to the Court in the course of the without notice application, the Claimant is at risk of having the freezing injunction set aside in its entirety. The consequences of this could be extremely serious if the defendant is then able to dispose of his assets. Whether the non-disclosure will lead to the discharge of the injunction depends upon its materiality as

assessed by the Court. The fact that the non-disclosure was innocent rather than intentional is relevant but not decisive. Nor is it an answer to say that if the judge had known the full facts he would still have granted the injunction. The Court has a discretion to continue the injunction, or grant a new one on different terms notwithstanding material non-disclosure. However, this discretion is used “sparingly”.

**(b) Cross-undertaking in damages**

Almost invariably, the Claimant is required to give the Court an undertaking to abide by any order for damages which may be made if the defendant suffers loss as a result of the injunction being in force and the court is of the opinion that the claimant should compensate him. The court may determine that damages are appropriate if the injunction is discharged for material non-disclosure or if the claimant fails to establish its claim at trial. The court would make an order for there to be an enquiry into the damages suffered by the defendant.

The claimant must inform the court of any reason why it may not be able to satisfy an order for damages made against it pursuant to such an undertaking. If the claimant is impecunious the court may require that the undertaking is guaranteed by someone else or may exceptionally allow the case to proceed without such an undertaking. The undertaking is given to the court, and any breach is a contempt of court.

The Court may often require security from the claimant in support of the undertaking (either in the form of a bank guarantee or payment of a sum of money into an escrow account). The Court is most likely to require this where the claimant does not have assets within the jurisdiction and where the claim is itself of substantial value.

**5. Third parties and Freezing Orders**

Once a third party such as a bank has been notified that a freezing injunction has been made against a defendant, the third party is bound not to take any steps inconsistent with the preservation of assets covered by the injunction. A third party may be in contempt of court if it acts inconsistently with the injunction. Therefore third parties are entitled to apply to the court to vary or discharge the injunction, or for directions as to its effect.

An innocent third party who is notified of an injunction order and has incurred expense in complying with its terms is entitled to recover its expenses which have been reasonably incurred from the Claimant. Such a provision is included within the standard form for a freezing injunction order. The cross-undertaking in damages provided by the Claimant also extends to third parties as well as the defendant.

## **F. ANCILLARY ORDERS**

One of the advantages of obtaining an English freezing injunction is the willingness of the English Courts to grant wide-ranging disclosure and other ancillary orders in aid of freezing injunctions.

### **1. Ancillary orders available against the defendant**

- (a) an order for the disclosure of documents or provision of information regarding the defendant's assets, wherever situated;
- (b) an order restraining the defendant from leaving the jurisdiction and requiring him to deliver up his passport
- (c) an order requiring the defendant to attend court for an immediate cross-examination as to his assets
- (d) an order for delivery up forthwith of certain assets into the custody of the claimant's solicitors;
- (e) an order requiring the defendant to sign a document directing his bank to disclose information to the claimant; and
- (f) a search order enabling the claimant's solicitors to have access to the defendant's premises to search for and seize documents.

### **2. Ancillary orders available against the third parties**

- (a) where a third party has become mixed up in an attempt by the defendant to make himself judgment-proof or defraud his creditors, the court may order a third party

to give full disclosure about certain assets (whether they are held in the defendant's name or the name of the third party) to assist the claimant in the enforcement of its rights [*Bankers' Trust v Shapira* [1980] 1 WLR 1274];

- (b) where a third party (through no fault of its own) becomes mixed up in the tortious acts of others so as to facilitate the wrongdoing, the third party may be ordered by the court to assist the person wronged by giving full information and disclosing the names of the wrongdoers to the Claimant [*Norwich Pharmacal v Customs & Excise Commissioners* [1974] AC 133 at 175]. In relation to tracing claims, this jurisdiction has been extended to making interlocutory orders against third parties requiring them to give disclosure regarding the assets of the wrongdoers;
- (c) Bankers Books Evidence Act (1879) application – can be made for an order that a bank or financial institution should allow the Claimants' solicitors to inspect defined records of the Defendant; and
- (d) gagging orders may be made to prevent third parties disclosing the existence of the proceedings to the defendant and therefore frustrating the purpose of the freezing injunction.

#### **G. APPLICATIONS FOR FREEZING INJUNCTIONS IN OTHER JURISDICTIONS**

Several countries will grant freezing orders over assets in that jurisdiction. It is usual to make these applications simultaneously with the English applications. The timing of the service of orders made in England can be extended to allow for the foreign applications.

#### **H. ANTI-SUIT INJUNCTIONS TO PREVENT THE DEFENDANTS' PROCEEDINGS ABROAD**

This type of injunction restrains the Defendant from starting legal proceedings in other jurisdictions. It is a topic in itself – but you should be aware that it exists.

## **I. THE DEFENDANT'S CONTEMPT OF THE COURT'S ORDERS**

- Cross Examination
- Writ of Sequestration
- Debarring Application
- Committal

## **J. WARNING**

These notes are designed to introduce you to the remedies available from the English Courts. Please do not assume that they are definitive or intended to be used as legal advice. Each case needs to be considered on its own special facts, and considered legal advice taken.

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