"Frozen 2": An Update on Commercial Injunctions and Associated Jurisdictional Issues

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Introduction

1. We are now less than two months away from the 50th anniversary of the grant of the first freezing order, previously known as the "*Mareva*" injunction. If you heard or read Foxton J's excellent talk to this forum on 30 October 2024[1], you will recall that the first such order was granted in late May 1975, not in the *Mareva* case itself[2] but in *Nippon Yusen Kaisha v Karageorgis*[3]. It may seem remarkable that, so many years later, the courts are still debating questions about the scope of the court's jurisdiction to grant such relief, the tests to be applied, and even the appropriate costs orders. However, that may well be a testament to both (a) the prevalence of such orders, which have become part of the regular stock in trade of commercial practitioners and courts and (b) the never-ending permutations of complex circumstances in which freezing orders and other injunctions are sought.

2. This talk is intended as a practical update, pausing to focus on some particular points that appeared to be of interest (at least to me), but also including a particular focus on the court's jurisdiction to grant both freezing orders and other commercial injunctions. There are two reasons for that focus. First, from the court's point of view, making the wrong order is bad enough, but it is if anything even worse to make (or purport to make) an order which one lacked the power to make at all. Secondly, several recent international injunction cases concern the court's jurisdiction: for example the *UniCredit*[4], *Deutsche Bank*[5], *Investcom*[6] and *Mex Group Worldwide*[7] cases to which I shall return.

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[1] *"The Big Freeze: The Rise and Rise of the Mareva Injunction"*, A Talk to the Manchester Business & Property Courts Forum by David Foxton on 30 October 2024.
[2] *Mareva Company Naviera SA v International Bulk Carriers SA* [1975] 2 Lloyd's Rep 509
[3] *Nippon Yusen Kaisha v Karageorgis and Another* [1975] 1 WLR 1093.
[4] *UniCredit Bank v RusChemAlliance* [2024] UKSC 30
[5] *Deutsche Bank v RusChemAlliance* [2023] EWCA Civ 1144
[6] *Investcom Global v PLC Investments* [2024] EWHC 2505 (Comm)
[7] *Mex Group Worldwide v Ford* [2024] EWCA Civ 959

Jurisdiction to grant injunctions

3. I shall focus on the grounds of jurisdiction that arise most often in commercial injunction cases, passing fairly quickly over the more straightforward ones.

4. Beginning with the basics, the court will of course have power over a defendant who can be served in England & Wales because he/she/it is present there. Service can then be effected personally, or at one of the places listed in CPR 6.9(2) (e.g. the usual or last known residence of an individual, the principal office of a company, or a company's place of business having a real connection with the claim). There may be a contractually agreed place of service in England & Wales (CPR 6.11); or it may be possible to serve on an overseas defendant's agent in England & Wales where the contract was made in England & Wales with or through the agent (CPR 6.12). As a reminder, the rules in CPR 6.15 (alternative service), 6.16 (dispensing with service of claim form) and 6.37(5)(b) (directions regarding method of service abroad) cannot be used to give the court jurisdiction it would not otherwise have.[8]

5. Probably more often in commercial injunction cases, jurisdiction may be founded against an overseas defendant based on a jurisdiction clause or an arbitration agreement (usually the agreement contained in an arbitration clause in a contract) that covers the claim.

6. In the Civil Procedure Rule service provisions, rule 6.33(2B)(a), reflecting the 2005 Hague Convention on Choice of Court Agreements, will apply where there is an exclusive English jurisdiction clause in a written, or otherwise permanently recorded, agreement binding on defendant. Note that the parties need not be domiciled in a Contracting State. Jurisdiction under any other English jurisdiction agreement, such as a non-exclusive one, will arise under rule 6.33(2B)(b). There is also a third limb, sub-rule (c), which applies where the claim is "*in respect of*" a contract within limb (b). This new limb was introduced on 1 October 2022 to fill a potential lacuna in cases where the claimant disputes that it (or the defendant) is party to the relevant contract, but contends that if the defendant wishes to bring a claim under the contract, then it must do so in England: an example being a claimant who wants to hold the defendant to a jurisdiction clause in the putative contract.[9] Under all of these three instances, the claimant can serve claim form abroad without needing the court's permission.

7. Turning to cases where there is an arbitration clause, the English court will have jurisdiction where the seat of arbitration "*is or will be*" in England & Wales

[8] See e.g. *In Plantation Holdings (FZ) LLC v. Dubai Islamic Bank PJSC and others* [2013] EWCA Civ. 1229 at [39], followed in *Marashen v Kenvett* [2017] EWHC 1706 (Comm) at [19].
[9] See the explanation provided in *QBE Europe SA/NV v Generali Espana de Seguros y Reaseguros* [2022] EWHC 2062 (Comm), [2022] 2 Lloyd's Rep. 481.

(CPR 62.5(1)(c) and (2A)), a very simple example being a clause providing that "*all disputes under this contract shall be resolved by arbitration in London"*. Note that a defendant who is a party to the arbitration agreement can be served abroad without the court's permission (sub-rule (2A)). A recent example where the seat requirement was ultimately not satisfied was *Investcom Global v PLC Investments*.[10] The contract provided for ICC arbitration without specifying the seat. The claimant commenced an arbitration and proposed that it be seated in London. Some defendants agreed to a London seat, others did not respond. The claimant obtained interim anti-suit injunctions to stop certain proceedings that had commenced abroad. However, as not all defendants had responded as to the seat location, the ICC Court had the power under the ICC rules to select the seat. It choose Toronto, with the result that the English court's jurisdiction fell way (no other jurisdictional 'gateway' applying).

8. Both jurisdiction clauses and arbitration agreements are (at least if governed by English law) interpreted broadly, starting from the presumption that rational businessmen are to be presumed to have intended that all disputes arising from their relationship to be decided by the same tribunal: i.e. applying a *Fiona Trust* approach[11]. However, their scope is not unlimited, especially when aspects of a business relationship are governed by different contracts some of which have different, or no, dispute resolution clauses (see e.g. *UBS v HSH Nordbank*[12]). A recent example of the need to look carefully at the nature of the dispute when deciding which, if any, dispute resolution clause applies to it is *Uconinvest v Jysan Holding*.[13] Fancourt J there held that the issues raised by an unfair prejudice petition fell outside scope of the Sale and Purchase Agreement by which the petitioner acquired its shares, and would mostly also have fallen outside a Shareholders Agreement even if that contract had bound the petitioner.

9. Other familiar gateways through which the court will commonly have jurisdiction in commercial injunction cases require the court's permission to serve out, and are subject to the overriding requirement in CPR 6.37(3) that England & Wales be the proper forum in which to bring the claim. They include defendants domiciled in the jurisdiction (6BPD § 3.1(1)), defendants who are necessary or proper parties to a claim brought against an anchor defendant, where there is a real issue between the claimant and the anchor defendant which it is reasonable for the court to try (§ 3.1(3), contracts made in the jurisdiction or by/through agent trading or residing in the jurisdiction (§ 3.1(6)(a)/(b)), contracts governed by English law (§ 3.1(6)(c)) and breaches of contract committed or likely to be committed in the jurisdiction (§ 3.1(7)). There is also

[10] *Investcom Global v PLC Investments* [2024] EWHC 2505 (Comm)
[11] *Fiona Trust & Holdings Corp v Privalov* [2007] Bus LR 1719 at [13]
[12] *UBS AG v HSH Nordbank AG* [2009] EWCA Civ 585
[13] *Uconinvest v Jysan Holding* [2024] EWHC 1532 (Ch)

the special gateway in § 3.1(5) for claims for an interim remedy under s. 25(1) of the Civil Jurisdiction and Judgments Act 1982: I shall return to that provision.

10. I should also mention the gateway in 6BPD § 3.1(20), which applies to a claim brought "*under an enactment which allows proceedings to be brought*". The Court of Appeal in *Orexim Trading*[14] explained that for this gateway to apply, the enactment under which the claim is made must be an enactment that, as a matter of statutory construction, allows proceedings against persons who are not within the jurisdiction ([33]). The court held, resolving earlier doubts, that a claim to set aside a transaction entered into at an undervalue under section 423 of the Insolvency Act 1986 falls within this category ([47]).

11. More recently, Jacobs J and the Court of Appeal in *Gorbachev v Guriev*[15] held that the power to order disclosure in section 34 of the Senior Courts Act 1981 is a relevant enactment for these purposes, giving the words 'claim' and 'proceedings' a broad interpretation. That gives rise to the intriguing possibility that the general power to grant injunctions, contained in section 37 of the same Act, could also be an enactment falling within the gateway.[16]

12. It would be wrong to express any firm view before that point has been fully argued in any case. One can see the logic of the argument, based on the breadth of the statutory wording and the analogy with *Gorbachev*. Nonetheless, there are counter-arguments worthy of serious consideration if and when the point has to be decided. First, there is a specific gateway for injunctions in 6BPD § 3.1(2), covering claims for an injunction ordering the defendant "*to do or refrain from doing an act within the jurisdiction*". It has been held that, for this gateway to apply, the injunction must be a genuine part of the substantive relief sought and there must be reasonable prospect of it being granted[17]. In a case where that specific gateway does not apply, why should the court be entitled to assume jurisdiction under the 'enactments' gateway instead? True it is that more than gateway can apply in any given case, but this approach would mean that any injunction application fell within the gateway, seemingly making the § 3.1(2) gateway redundant. In addition, consideration would need to be given to whether an application for an interlocutory injunction counts as "*proceedings*" for the purpose of the enactments gateway.[18] More broadly, it might be thought

[14] *Orexim Trading Ltd v Mahavir Port and Terminal Pte Ltd* [2018] EWCA Civ 1660; [2018] 1 W.L.R. 4847, CA
[15] *Gorbachev v Guriev* [2022] EWHC 1907 (Comm) and [2022] EWCA Civ 1270.
[16] See the thought-provoking discussion by Foxton J in *Commercial Bank of Dubai v Al Sari* [2024] EWHC 3304 (Comm).
[17] See White Book note 6HJ.5 and cases cited; reconfirmed by Privy Council in *Broad Idea International v Convoy Collateral* [2023] AC 389 (PC).
[18] Certainly the RSC Order 11 predecessors of the modern gateways were regarded as confined to *"originating documents which set in motion proceedings designed to ascertain substantive rights"*, as distinct from applications for *Mareva* injunctions: *Mercedes-Benz AG v Leiduck* [1996] AC 284, 302 *per* Lord Mustill, delivering the judgment of the majority of the Privy Council.

surprising if the enactments gateway empowered the court to grant an injunction, in relation to anything anywhere, without regard to the otherwise established jurisdictional gateways, the only constraint being the court's application of the 'proper forum' requirement in CPR 6.37(3). The House of Lords held in *Fourie v Le Roux*[19] that the court has power to grant a final or interlocutory injunction under section 37 only if it has *in personam* jurisdiction over the injunction defendant. Would that conclusion have any real meaning if jurisdiction would exist anyway by reason of the 'enactment' gateway read with section 37?

13. A brief word on the topic of the court's jurisdiction in relation to arbitrations seated abroad: for example, an application for freezing order in support of arbitration abroad, or to injunct court proceedings in breach of an agreement to arbitrate abroad. As ever, a jurisdiction 'gateway' will be needed e.g. that the contract is governed by English law (6BPC § 3.1(6)(c)). If the injunction is sought in order to enforce the arbitration agreement itself, such as an anti-suit injunction, then the relevant law is that governing the arbitration agreement, which may or may not be the same as the law governing the contract as a whole (sometimes called the 'matrix' contract) and may or may not be the same as the law of the seat of the arbitration (sometimes called the curial law). As example is *Enka v Chubb* (overall contract governed by Russian law; arbitration agreement governed by English law; seat of arbitration London)[20]. *Enka* held that the law governing the arbitration agreement was to be determined, absent party choice, by a form of closest connection test. There was no jurisdiction problem in *Enka* itself because the arbitration was seated in England & Wales (see § 7 above).

14. The *Enka* closest connection test was then applied in two cases involving foreign-seated arbitrations, *UniCredit v RusChemAlliance*[21] *and Deutsche Bank v RusChemAlliance*[22]. In both cases the overall contract was expressly governed by English law, but the seat of the arbitration was Paris. Applying the closest connection test, the Court of Appeal held that the arbitration agreements were also governed by English law. As a result, the court had jurisdiction to grant an injunction in support of ICC arbitration clause in Paris. The result in a future case on similar facts may not be the same. Section 1 of the Arbitration Act 2025, when in force, will insert a new s.6A into the 1996 Arbitration Act providing that the arbitration agreement will be presumed to be governed by the law of seat of the arbitration unless the parties have expressly agreed otherwise. On the facts of *UniCredit* and *Deutsche Bank*, that would mean the arbitration

[19] *Fourie v Le Roux* [2007] UKHL 1, [2007] 1 WLR 320. See also Raphael, "*The Anti-Suit Injunction",* 2nd ed. (2019) at §3.01, §§3.05-3.06.
[20] *Enka v Chubb* [2020] UKSC 38
[21] *UniCredit Bank v RusChemAlliance* [2024] UKSC 30
[22] *Deutsche Bank v RusChemAlliance* [2023] EWCA Civ 1144

agreements would probably be held to be governed by French law. As a result, unless some other jurisdictional gateway could be found, the English court would lack jurisdiction. In future, therefore, choosing an arbitration seat in England and Wales will be the safer way to be able to avail oneself of our anti-suit jurisdiction should the need arise.

15. CPR 62.5(1)(b) provides another gateway, when claim is for an order under section 44 of the Arbitration Act 1996, hence including the power to grant an interim injunction. It does not apply to anti-suit injunctions (*Ust-Kamenogorsk Hydropower Plant* [2013] UKSC 35). Even where section 44 does apply (e.g., potentially, to an application for an urgent freezing injunction in support of an arbitration claim), section 2(3) of the Act requires the court to consider whether inappropriate to act if the arbitration has a foreign seat, and in practice injunctions in these circumstances are fairly rare. Under section 44, the court can normally act only if the situation is urgent and the arbitral tribunal is unable to grant relief itself. If the situation is not urgent, the court can act only with the consent of the tribunal or of all the parties.[23] As a footnote to this topic, the residual doubt about whether section 44 applies to injunctions against non-parties (*Cruz City1 Mauritius Holdings v Unitech (No 3)* [2014] EWHC 3704 (Comm) and *A v C* [2020] EWCA Civ 409 § 35, 57) will be removed by Arbitration Act 2025 s.9(2) when in force.

16. Finally on the topic of jurisdiction, what happens if there is room for doubt about whether the court has jurisdiction, for example because there is a dispute about where the defendant is resident, or about whether the alleged contract containing a jurisdiction clause was made or not? In these cases we apply the now familiar approach set out in the line of cases culminating in the Court of Appeal's decision in *Kaefer Aislamientos*[24]. Briefly:

    i) The applicant has to show, at the interlocutory stage, a *"good arguable case"* that the court has jurisdiction, meaning in this context, the better of the argument, not necessarily proof on balance of probabilities.

    ii) If there is an issue of fact about the application of the gateway, or some other reason for doubting whether it applies, the court must take a view on the material available if it can reliably do so.

    iii) If nature of the issue and limitations of material available mean no reliable assessment can be made of who has the better argument, then there is nonetheless a good arguable case if there is a plausible (albeit contested) evidential basis for it the gateway applying.

[23] Section 44(3)-(5) and *VTB Commodities Trading v Antipinsky Refinery* [2020] EWHC 72 (Comm).
[24] *Kaefer Aislamientos v AMS Drilling Mexico* [2019] 1 WLR 3514

17. It is important to note that limb (ii) is intended to involve a pragmatic approach, and, I would suggest, the court should not often find itself resorting to limb (iii). The Court of Appeal in Kaefer explained to limb (ii) as:-

> "… an instruction to the court to seek to overcome evidential difficulties and arrive at a conclusion if it "reliably" can. It recognises that jurisdiction challenges are invariably interim and will be characterised by gaps in the evidence. The Court is not compelled to perform the impossible but, as any Judge will know, not every evidential lacuna or dispute is material or cannot be overcome. Limb (ii) is an instruction to use judicial common sense and pragmatism, not least because the exercise is intended to be one conducted with "due despatch and without hearing oral evidence" …. Where there is a genuine dispute judges are well versed in working around the problem. For instance, it might be possible to decide an evidential dispute in favour of a defendant on an assumed basis and ask whether jurisdiction is nonetheless established. Equally, where there is a dispute between witnesses it might be possible to focus upon the documentary evidence alone and see if that provides a sufficient answer which then obviates the need to grapple with what might otherwise be intractable disputes between witnesses." ([78])

18. Remember that all of the above concerns the standard to which a jurisdictional gateway needs to be shown. Where the court's permission is needed to serve proceedings out the jurisdiction, there is also a merits threshold. The claimant must show that there is a serious issue to be tried on the substantive merits.[25] In this context, the 'serious issue to be tried' test is the same as the 'real prospect of success' test for defeating a summary judgment application[26].

The granting of commercial injunctions

19. As you will all know, the basic power is that in section 37(1) of the Senior Courts Act 1981: "*The High Court may by order (whether interlocutory or final) grant an injunction … in all cases in which it appears to the court to be just and convenient to do so*." The power is exercised, stating it at the broadest level, "*where it is appropriate to avoid injustice*"[27]. In parallel, there is also the power in section 44 of the Arbitration Act 1996 to grant interim injunctions in relation to an arbitration.

20. In the remainder of this talk, I shall focus on the more common types of commercial injunctions: freezing and other orders designed to preserve assets

[25] See , e.g., *Altimo Holdings v Kyrgyz Mobil Tel Ltd* [2011] UKPC 7 [2012] 1 WLR 1804 at [71].
[26] *Altimo* at [71]; *Lungowe v Vedanta Resources plc* [2019] UKSC 20, [2020] AC 1045 at [42]; *Dos Santos v Unitel* [2024] EWCA Civ 1109 at [123].
[27] *Castanho v Brown & Root (UK) Ltd* [1981] A.C. 557, 573.

or evidence, mandatory orders, and orders granted in the context of what might colloquially be called 'jurisdiction battles'.

Freezing orders

21. Starting with freezing orders, the basic requirements will be well known to you: merits, risk of dissipation and the 'just and convenient' test. It has long been said that the applicant must show it has a good arguable case on the merits, meaning more than barely arguable though not necessarily having a greater than 50% chance of success: that is, the *Niedersachsen* test.[28] The Court of Appeal in *Dos Santos v Unitel* said what needs to be shown is in fact a serious issue to be tried, i.e. the *American Cyanamid* test for interim injunctions generally[29]; and that the court can take account of the invasive nature of a freezing order when considering other aspects of the criteria, the exceptions built into the order, and the cross-undertaking in damages.[30] The court also suggested that the two tests are actually the same.

22. Nonetheless, in practice courts would be well advised to be wary of granting a freezing order based on a mere serious issue to be tried (if there is a difference). Freezing orders can blight businesses and careers for many years, if not permanently. As Foxton J pointed out in his previous talk to this Forum:

> "What is unique about search and freezing orders is that the legal right relied upon to obtain the injunction is not a right pre-existing the commencement of legal or arbitral proceedings and arising under general principles of private law, but a right arising from the commitment to commence legal or arbitral proceedings in pursuit of an award of monetary relief, which subsists only for so long as those proceedings are in contemplation or underway, or have succeeded. That might have offered a principled basis for a higher merits test, but that is not the direction the law has ultimately taken."

I would bear in mind those comments about the special nature of freezing orders when exercising the discretion as to whether or not to grant one in borderline cases.

23. The applicant must of course also show sufficient risk of dissipation: solid evidence of a real risk, judged objectively, that without an injunction a future or existing judgment would not be met because of an unjustified dissipation of assets; and the applicant must persuade the court that, in all the circumstances, it is just and convenient to grant the order sought. The applicant must give the

[28] *The Niedersachsen* [1983] 2 Lloyd's Rep. 600, 605.
[29] *Dos Santos v Unitel* [2024] EWCA Civ 1109 at [106], [122], [131].
[30] Ibid. at [130].

court a fair presentation of the matter, including full and frank disclosure of any adverse points.

24. What type of actual or anticipated judgment can be protected by a freezing order? Provided the court has jurisdiction, under the principles I discussed earlier, it can grant a freezing order in support of an arbitration claim. The court can also grant a freezing injunction in support of foreign court proceedings: see section 25 of the Civil Justice and Judgments Act 1982 and *Broad Idea International v Convoy Collateral*[31]. *Broad Idea v Convoy Collateral* confirmed that (even in a BVI case, where section 25 did not apply) a freezing order could under ordinary principles be granted in a case where no substantive relief was claimed in the country whose courts are asked to grant the injunction. The injunction is granted in support of an anticipated judgment, whether of that court or a foreign court. The court granting the injunction must have personal jurisdiction over the respondent, and the ordinary requirements for a freezing order must be made out. However, there is no requirement that proceedings in which the judgment is sought should yet have been commenced nor that a right to bring such proceedings should yet have arisen. It is enough that a right to bring proceedings will arise and that proceedings will be brought. The Privy Council as part of its reasoning discussed the position under section 25, noting that:

> "The power conferred by section 25(1) of the 1982 Act is of enormous breadth. It has even been exercised to grant a worldwide freezing injunction in connection with foreign proceedings against a foreign defendant with no known assets in England and Wales: see *Republic of Haiti v Duvalier* [1990] 1 QB 202 (where the only link with England and Wales was the fact that the defendant had used the services of an English solicitor)." (§ 18)

25. However, that was an exceptional case, and usually a clearer connection with England & Wales is required. This is clear from the recent decision of the Court of Appeal in *Mex Group Worldwide v Ford*[32]. There a worldwide freezing order in support of proceedings in Scotland was set aside, due to lack of territorial connection with England & Wales (among other reasons). The respondents were investment managers with no assets or presence in England & Wales. The Court of Appeal said:

> "… while *Convoy Collateral* has eliminated the need for a freezing order applicant to have a cause of action which can be pursued in the forum state, it has not eliminated the need for a

[31] *Broad Idea International v Convoy Collateral* [2023] AC 389 (PC).
[32] *Mex Group Worldwide v Ford* [2024] EWCA Civ 959

> connecting link with the territorial jurisdiction of the English court" (§ 99)

and concluded that:

> "none of the respondents has any significant or meaningful current connection to the UK or to England, notwithstanding that Mr Gollits [one of the Respondents] has occasionally visited. The judge was therefore right to conclude that it was inexpedient to grant a worldwide freezing order against them pursuant to section 25." (§ 110)

26. Which assets are caught? The Commercial Court's current standard form of freezing order states:

> "[1] Paragraph 5 [i.e. the freezing order] applies to all the Respondent's assets whether or not they are in its, her or his own name, whether they are solely or jointly owned [and whether the Respondent is interested in them legally, beneficially or otherwise].
>
> [2] For the purpose of this order the Respondent's assets include any asset which it, she or he has the power, directly or indirectly, to dispose of or deal with as if it were its, her or his own.
>
> [3] The Respondent is to be regarded as having such power if a third party holds or controls the asset in accordance with its, her or his direct or indirect instructions."
>
> [numbering and paragraph breaks interpolated]

The Court of Appeal in *BTA Bank v Solodchenko*[33] stated that sentence [3] exhaustively states the circumstances in which sentence [2] applies.

27. The court in that case held that this extended wording catches assets in a discretionary trust in which the defendant retains either a beneficial interest or effective control i.e. the power to decide how the asset should be dealt with. In *Mezhdunarodniy Promyshlenniy Bank v Pugachev*[34] the Court of Appeal went further, holding that the words "*or otherwise*" in sentence [1] extended the reach of the order to assets held under the terms of a discretionary trust, where the respondent was one of the potential class of beneficiaries, even if enforcement could not be levied against those assets. The court made clear that the extensions in the bracketed part of sentence [1], and in sentences [2] and [3], cover things that are not the defendant's assets.

[33] *JSC BTA Bank v Solodchenko and others* [2011] 1 WLR 888
[34] *JSC Mezhdunarodniy Promyshlenniy Bank v Pugachev* [2015] EWCA Civ 139

28. Difficulties can arise with assets held by corporate bodies. In *Lakatamia Shipping v Su*[35] the freezing order contained sentences [2] and [3] but not the bracketed part of sentence [1]. The Court of Appeal held that sentence [3] (and hence sentence [2]) covers situations where a trust holds or controls assets in accordance with the defendant's instructions, but does not cover a company's assets just because of the powers a director or shareholder may be able to exercise over them as such.[36] In practice, it said, they are nonetheless indirectly 'covered' by the injunction in the sense that the defendant will be in breach of the order if he procures a disposition reducing the value of the company's assets (as opposed to an ordinary course of business dealing[37]) as that will reduce the value of his shareholding in it and thus his assets.[38]

29. On the other hand, in *JSC BTA Bank v Ablyazov (No 10)*[39] the Supreme Court took quite an expansive approach, holding that the Commercial Court wording extended the reach of a freezing order to a loan facility which the respondent was entitled to draw down from and apply as he wished. The court reiterated that the second and third sentences catch assets that the defendant does not own legally or beneficially.

30. There is a cogent argument that freezing orders should not be extended to cover assets against which the claimants would not be able to enforce, bearing in mind that the proper purpose of a freezing order is to preserve assets against which any substantive judgment may ultimately be enforced, rather than to apply commercial pressure to the defendant. The Supreme Court stated in *Abylazov* that this so-called 'enforcement principle' should be taken into account when interpreting the standard form.[40] At the same time, though, it is arguable that the enforcement principle is satisfied if there is ultimately a route through which the company's assets or their value could be reached in order to satisfy a judgment. For example, if the defendant owns all the company's shares, the judgment in principle could be enforced via a sale of the defendant's shares in the company, or via the appointment of a receiver who could procure the company to declare a dividend or place it into liquidation.[41] Some case law cites the objection that if the defendant causes the company to dispose of his assets, he is thereby acting as the company's agent rather than in his own right. However, that is not necessarily inconsistent with the defendant still being in breach of the injunction by so acting. The extended freezing order wording contemplates that the order may bite on assets legally owned by a third party,

[35] *Lakatamia Shipping v Su* [2014] EWCA Civ 636, [2015] 1 WLR 291 (CA)
[36] Ibid. at 30-31 and 41
[37] Ibid. at [23].
[38] Ibid. at [22], [26], [31].
[39] *JSC BTA Bank v Ablyazov (No 10)* [2015] UKSC 64
[40] See also the informative discussion by Foxton J in *Civiello v Broadahl* [2024] EWHC 707 (Comm)
[41] See the discussion by Steven Gee in (2024) CJQ 184.

which may be either an individual, a trust or a company, and that the defendant may be in breach by procuring or permitting a disposal in any of those situations.

31. Separately, as you will know, the court can sometimes make a freezing order directly against the third party holding the assets, under the so-called *Chabra* jurisdiction. That is, however, beyond the scope of this talk.

32. A brief comment on asset disclosure orders forming part of the typical freezing order. Particularly at the without notice stage, it is important to ensure these are reasonable and do no more than necessary to preserve the position pending the return date. Commercial Court Guide Appendix 11 preamble states:

> "... The draft order presented to the Court should represent a realistic assessment of what is required to meet the purposes of the application, having regard to its without notice context. The draft order should not be presented as an "opening offer", leaving it to the Court to amend it down. The Court has noted an increasingly prevalent practice of draft orders being presented to the Court which include wide definitions of some of the terms which appear in the Commercial Court form, thereby considerably adding to its scope: for example of the terms "assets" or "details". These definitions constitute departures from the standard form, which should not be sought on a routine basis, and the existence and scope of any suggested definitions in those cases where they are sought must be highlighted and justified."

As well as the definitions, care should be taken to ensure that the deadlines for asset disclosure are realistic and fair in the light of the scope of the disclosure required.

33. An updated precedent applicable across KB and Chancery will come into force on 6 April 2025, replacing those in CPR, Comm Ct Guide and Chancery Guide. This can be found at https://www.justice.gov.uk/courts/procedure-rules/civil/forms/model-orders .

34. A word about the costs order made when granting a freezing order. At the without notice stage, the costs are typically reserved to the return date. If the injunction is continued on the return date, costs have traditionally often been reserved to the trial judge, as in *American Cyanamid* injunctions. *Dos Santos* suggests that at a different approach may be appropriate, namely to order costs in favour of the successful applicant. *Dos Santos* § 119 stated that

> "Another important distinction between a freezing injunction and an *American Cyanamid* injunction is that whereas, in the case of the latter, if the relevant right or obligation is not established at trial it can generally be said that the interim injunction should not have been granted, in the case of the former

> even if the claim fails at trial, it does not follow that the freezing order was not correctly granted on the basis that the claimant satisfied the three criteria for the grant of the freezing injunction"

and that it was 'misconceived' to suggest that if the claim failed at trial, the freezing injunction should not have been granted in the same way as in the case of an interim *American Cyanamid* injunction.

35. One might wonder why the two types of injunction should be differentiated in this way. In both cases, an injunction will be granted if certain criteria are satisfied and the court considers it just and convenient to grant the injunction. The judge at first instance in *Dos Santos* made a costs order in the claimant's favour "*because of the circumstances in which this application has come about rather than because of general views about what is appropriate in the general category of freezing orders*" (quoted in the Court of Appeal's decision at [24]). The Court of Appeal said:

> "In so far as there is a general rule as to the costs of contested interlocutory or procedural applications, it is that a party who contests an application and fights it tooth and nail on every point, thereby causing the successful party to incur costs which would not otherwise be incurred, should be ordered to pay the successful party's costs at the conclusion of the application." [116]

The Court of Appeals ultimate decision was that the judge exercised his discretion appropriately ([120]). I would not regard *Dos Santos* as laying down any firm rule that the claimant should necessarily get its costs of a successful freezing order application. It is open to the judge to make whatever costs decision seems appropriate in all the circumstances. If the respondent fights tooth and nail, taking bad points, that is one thing. If, on the other hand, the respondent merely puts in economical evidence or submissions designed to show (for example) that the claimant does not have a good arguable case, the position may be different. Should the defendant's case be vindicated at trial, there may be a good argument that the claimant, not the defendant, should bear the costs of the injunction application. Reserving the application costs to trial may therefore be entirely appropriate in such situations.

36. Turning now to the return date and applications to set aside the freezing order, data referenced in a Fried Frank article in 2023, based on publicly available judgments, recorded that in 2021/22, 23% of applications to discharge injunctions were successful.[42] Careful thought needs to be given to whether to apply to set aside, and if so on what grounds. The Court of Appeal in *Mex*

[42] https://www.monckton.com/wp-content/uploads/2023/01/NO7-Freezing-Orders-Search-and-Imaging-Orders-and-Disclosure-Orders.pdf

Group Worldwide v Ford[43] upheld the judge's decision to set aside and not renew a worldwide freezing order *inter alia* on grounds of material non-disclosure. The respondent made 18 complaints about full and frank disclosure occupying 67 paragraphs of their skeleton argument at the return date, adding another 14 complaints on appeal. Coulson LJ said:

> "127. That is not a sensible or proportionate way in which to address this sort of allegation. It is almost always the position that, no matter how big the case or how complex the underlying issues, a defendant's case that the claimant failed to make full and frank disclosure at the *ex parte* hearing will stand or fall on no more than a handful of alleged failures. That is because, if the 'big ticket' allegations of failure are not established, or are established but found to be immaterial, then the less significant failures will not bridge the gap. It is the law of diminishing returns. In our view, this case is no different to the norm.
>
> 128. Accordingly, those preparing this sort of attack in the future should ensure that they concentrate their efforts on alleged failures of disclosure which are clear-cut and obviously important. Quality not quantity should be the watchword. The failure to follow that course, as happened both before the judge and again on appeal, means that there is a real risk that the best points become buried in an avalanche of trivia."

37. Males LJ agreed and went further, saying:

> "In this case we have been prepared to separate the wheat from the chaff, but I would suggest a different approach for the future. In future, if the court is presented with a long shopping list of alleged failures of disclosure, with no attempt made to identify the relatively few points which really matter, it should simply decline to consider the issue at all." ([112])

Flaux CHC agreed with both judgments, so it appears there is at least a majority for the view that the court may simply disregard non-compliant applications to set aside.

Proprietary freezing orders

38. The freezing order may also include special provisions where the claimant claims a proprietary in some or all of the assets to be frozen. As regards those assets, the form of order is slightly different. For example, the court's permission is generally required before those assets can be used for living or legal expenses. The new standard forms include a proprietary form of order.

[43] *Mex Group Worldwide v Ford* [2024] EWCA Civ 959

Search and imaging orders

39. Moving on to other types of order, space does not permit a detailed consideration of search and imaging orders. Briefly, the applicant for these orders must show "*clear and compelling evidence"/"strong prima facie evidence*".[44] Such orders are highly intrusive, and the court should exercise special caution about whether to grant, and their terms (e.g. the length of any temporary deprivation of the respondent's phone). The order should ensure that materials over which the respondent claims legal professional or self-incrimination privilege should not be allowed to be passed from Supervising Solicitor to the claimant without court sanction. The new standard form includes provisions for the respondent to have time to gather privileged materials, the Supervising Solicitors to exclude them from search if he/she considers them privileged, and for the court to rule on disputed claims for privilege before documents are given to the claimant. Particular care is needed with fair presentation when such orders are sought (as usual) without notice: see, e.g., *J&J Snacks Food v Ralph Peters & Sons*[45] where Fancourt J said:

> "119. Anyone applying without notice for a freezing injunction or an access and imaging order, and especially if applying for both together, must understand that there is a very high duty on them to ensure that relief of that nature is not granted without the defendant's case, so far as it can be anticipated, being put squarely before the court, and any weaknesses in the applicant's case being identified. However much a judge may indicate that they see things the applicant's way, the absent respondent's likely case still needs to be articulated and understood before a decision is made."

Mandatory orders

40. Occasionally we are asked to grant mandatory orders. One type we encounter from time to time in the Commercial Court are anti-suit orders requiring the respondent to withdraw overseas proceedings which are brought in breach of contract or are vexatious. Another, in a shipping context, is an order for enforcement of a letter of indemnity provided against discharge of a cargo without production of an original bill of lading. The indemnity can be enforced by ordering the respondent to provide security to obtain release of vessel.[46]

[44] *Rank Film Distributors v Video Information Centre* [1982] AC 380
[45] *J&J Snacks Food v Ralph Peters & Sons* [2025] EWHC 436 (Ch)
[46] See, e.g., see e.g. *Trafigura Maritime Logistics v Clearlake Shipping* [2020] EWHC 726, 805 and 995 (Comm) and *Tenacity Marine v NOC Swiss* [2020] EWHC 2820 (Comm).

41. There is no hard and fast rule about the merits standard where a mandatory injunction is sought. The general principles for an interim mandatory injunction are:[47]

    i) The overriding consideration is which course is likely to involve the least risk of injustice if it turns out to be wrong.

    ii) An order which requires a party to take some positive step at an interlocutory stage, may carry a greater risk of injustice if it turns out to have been wrongly made.

    iii) Where a mandatory injunction is sought, it is legitimate to consider whether the Court feels a high degree of assurance that the claimant will succeed at trial. The greater the degree of assurance, the less the risk of injustice.

    iv) Even where the court is unable to feel any high degree of assurance that the Claimant will succeed, it may still be appropriate to grant a mandatory injunction at an interlocutory stage where the risk of injustice if this injunction is refused outweighs the risk of injustice if it is granted.

42. Similar considerations will apply where an interim injunction is likely to be determinative of the case. Following the *Dos Santos* approach, these considerations, including the relevance of the merits, are likely to form part of the 'just and convenient' analysis rather than the threshold test.

Anti-suit and related orders

43. My final topic is anti-suit injunctions and related orders. These seem to be becoming increasingly common. The basic principles are these.

    i) An applicant applying on a contractual basis – to enforce a legal or equitable right, typically based on exclusive jurisdiction or arbitration clause – must show "*a high degree of probability*" that clause binds respondent, and respondent has breached/likely to breach it by commencing or pursuing the foreign action or arbitration unless stopped.[48]

[47] Gee, "*Commercial Injunctions*" (7th ed.) § 2-041, based on the summary provided by Chadwick J in *Nottingham Building Society v Eurodynamics Systems Plc* [1993] FSR 468 at 474.
[48] See, e.g., *Transfield Shipping v Chiping Xinfa Huayu Alumina* [2009] EWHC 3629 (Comm) [51]-[52]

ii) It may be a breach of the jurisdiction/arbitration clause in a contract between C and D contract for D to sue C's affiliates, if in substance D is seeking to litigate its dispute with C (i.e. a form of proxy war).[49]

iii) Conversely, an injunction cannot generally be sought on a contractual basis to prevent a claim by D's affiliates against C: but may be granted on the 'vexatious and oppressive' basis (see below)

iv) A third party to a contract containing an exclusive jurisdiction or arbitration clause may occasionally be entitled to apply for an injunction pursuant to the Contracts (Rights of Third Parties) Act 1999, if the Act has not been contractually excluded, and/or on the vexatious and oppressive basis.[50]

v) An anti-suit injunction can be granted against a non-contracting party where the pursuit of the foreign proceedings or the arbitration is vexatious and oppressive, e.g. as an attempt to outflank the jurisdiction/arbitration clause, and thereby engages the jurisdiction of the English court to prevent the wrong of vexatious, oppressive and unconscionable conduct.[51]

vi) The usual standard for the grant of a non-contractual anti-suit injunction (assuming the court has jurisdiction) is the *American Cyanamid* one: serious issue to be tried and balance of justice

vii) In all cases, the court may decline relief on discretionary grounds, e.g. by reason of delay or on the ground of comity with the relevant foreign court.

44. We have encountered a very recent phenomenon of parties, having obtained an anti-suit injunction, later applying for it to be revoked in the face of threats of penalties from the overseas court. Such a situation came before the Court of Appeal very recently in *Unicredit Bank v RusChemAlliance* [2025] EWCA Civ 99. After hearing from the parties and an *amicus curiae*, the court agreed to approve an order revoking the injunction by consent, though it preserved other parts of the order in which it had declared that the English courts had jurisdiction over the matter.

45. Turning lastly to anti-enforcement injunctions, the same tests apply in principle, but comity and delay mean in practice harder to obtain. I reviewed the cases

[49] See *LLC Eurochem North-West-2 v Tecnimont* [2023] EWCA Civ 688 §§ [62]-[65] and [127]; cf *Renaissance Securities (Cyprus) v Chlodwig Enterprises* [2024] EWHC 2843 (Comm).
[50] *Manta Penyez Shipping* [2025] EWHC 353 (Comm).
[51] See, e.g., *Ingosstrakh Investments v BNP Paribas SA* [2012] EWCA Civ 644 and *Sodzawiczny v. Smith* [2024] EWHC 231 (Comm).

recently in *Google v Tsargrad*.[52] In that case, two Google entities sought anti-enforcement injunctive relief, with ancillary anti-anti-suit injunctive relief, in order to prevent the recognition or enforcement of a series of judgments of the Russian courts in any jurisdiction outside Russia. The Russian proceedings were alleged to have been commenced and pursued in breach of London arbitration or exclusive English jurisdiction agreements. The judgments had led to the seizure in Russia of assets worth more than £50 million belonging to a subsidiary, Google Russia, and the defendants had also embarked on a series of attempts to enforce the Russian judgments in various other jurisdictions around the world. There was an issue about the interpretation of one of the jurisdiction clauses, which I resolved in favour of Google. The main issues of principle revolved around delay and comity, which generally count strongly against the grant of anti-enforcement injunctions, at least where the applicant has not previously sought an anti-suit injunction. After reviewing the authorities, I attempted to summarise out the main principles (at [82]), which in further simplified form are these:

i) In principle, the enforcement of a judgment obtained in breach of an exclusive jurisdiction clause or an arbitration agreement can be restrained by injunction. Like an anti-suit injunction, it is directed to the party, not the foreign court or courts.

ii) Anti-enforcement injunctions are rarely granted, because delay and/or comity considerations usually make it inappropriate to grant such an injunction.

iii) As to comity, an anti-enforcement injunction (like an anti-suit injunction) has the effect of indirectly interfering in the processes of a foreign court, and so is a strong step for which clear justification must be required.

iv) The fact that the foreign proceedings were brought in breach of the respondent's obligations under an exclusive jurisdiction clause or arbitration agreement is capable of amounting to such a justification.

v) It is particularly intrusive and inconsistent with comity to grant an injunction indirectly preventing enforcement by and in the territory of a foreign court which has already proceeded to judgment; and such an injunction would be liable to result in the resources and time of the foreign court, as well as the respondent, having been wasted.

vi) Where an anti-enforcement injunction prevents enforcement in one or more third countries, the general point about indirect interference with a

[52] *Google v Tsargrad* [2025] EWHC 94 (Comm).

foreign court still applies, in relation to both the foreign court which gave judgment and the putative enforcement court. However, if the injunction is sought before or at a very early stage of those enforcement proceedings, concerns about waste of the resources and time of the enforcement court should not arise. Such concerns may still arise in relation to the court which gave judgment and in relation to the respondent, but that will depend on the circumstances.

vii) Where the respondent seeks to enforce in a third country, there is an argument that it should be left to the overseas court to decide whether or not enforce the judgment. However, there are counter-arguments, including a cogent argument that an applicant who has contracted for an exclusive jurisdiction clause or arbitration agreement has a *prima facie* entitlement not to be troubled by either substantive or enforcement proceedings elsewhere, and accordingly to seek to hold the respondent to its contractual promise.

viii) It is relevant to consider whether there is a good reason for the applicant not having applied sooner for injunctive relief (by way of anti-suit injunction or anti-enforcement injunction, or whether the applicant was simply hoping to have two bites at the cherry.

ix) Delay is an important, and sometimes decisive, factor against the grant of an injunction, but it is not necessarily a bar to relief. Its weight will depend on all the circumstances.

46. Applying these criteria, I granted anti-enforcement relief. An application has been made for permission to appeal, so there may in due course be a Court of Appeal decision on the point.

47. I hope this overview has been useful and interesting, and will attempt to answer any questions.