

# FOREIGN JUDGMENTS : ATTACHMENT OF ASSETS IN ENGLAND

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Dispute Resolution

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## FOREIGN JUDGMENTS : ATTACHMENT OF ASSETS IN ENGLAND

### 1. What is the general nature and effect of judicial measures available for plaintiffs to obtain provisional relief affecting property of debtors to obtain security for judgments to be obtained (“attachments”)? Freezing property in place? Placing it in the custody of a third party, such as a court official, sheriff or marshal?

Until the coming into force of the Civil Jurisdiction and Judgments Act 1982 in January 1987, the courts of England and Wales had previously been reluctant to grant interim or provisional relief where the substantive proceedings were not or were not about to be instituted in England and Wales. Whilst the courts have always allowed in appropriate cases a foreign judgment creditor to have the benefit of the full extent of the attachment (or execution) processes available in England, a distinction was formerly made in respect of interim relief.

Section 25 of the 1982 Act empowers English courts to grant interim relief in aid of foreign proceedings provided (i) proceedings have been or are about to be commenced in a Brussels, Lugano or Regulation state and (ii) the subject matter is within the scope of the Brussels I Regulation (“Regulation”).<sup>1</sup> This power was extended in respect of non-contracting states and matters not within the scope of the Regulation by the Civil Jurisdiction and Judgments Act 1982 (Interim Relief) Order 1997.<sup>2</sup> The courts in England have a wide range of interim remedies primarily listed under Part 25 of the Civil Procedural Rules (CPR). These powers include:

1. An interim injunction.
2. An interim declaration.
3. An Order (known as a "freezing injunction") which restrains a party from removing assets from the jurisdiction of restraining a party dealing with any assets whether located in the jurisdiction or not (i.e., a Mareva type injunction).
4. An Order (known as a "search order") requiring a party to admit another party to premises for the purpose of preserving evidence (i.e. an Anton Piller type order).
5. An Order:
  - (a) For the detention, custody or preservation of relevant property.
  - (b) For the inspection of relevant property.
  - (c) For the taking of a sample of relevant property.
  - (d) For the carrying out of an experiment on or with relevant property.
  - (e) For the sale of relevant property which is perishable, or where there is good reason to sell quickly.
  - (f) For the payment of income from relevant property.
  - (g) Authorising any person to enter any land or building in order to execute a court order.
  - (h) Under Section 4 of the Torts (Interference with Goods) Act 1977 to deliver up goods.
  - (i) Directing a party to provide information about the location of relevant property or assets or to provide information about the relevant property or assets which are, or may be, the subject of a freezing injunction.
  - (j) For pre-action disclosure of documents or inspection of property.
  - (k) For disclosure (in certain circumstances) or inspection of property against a non-party.

<sup>1</sup> EC Council Regulation 44/2001 Articles 1 and 31 and Regulation 1015/2007. The Brussels Convention of 1968 and The Lugano Convention of 1988 (as amended) have limited scope, (see further at Question 21 below)

<sup>2</sup> SI 1997/302, SI 2001/3929, SI 2009/3131

- (l) For a specified sum to be paid into court, or otherwise secured, where there is a dispute over a party's right to the fund.
  - (m) That a party pay money into court when a party is claiming an order for the delivery up of personal property pending the outcome of proceedings and directing that the property be given up to him, if payment is made
  - (n) Directing a party to prepare and file accounts relating to the dispute.
  - (o) For the lodging of guarantees in intellectual property proceedings as a condition to the continuation of an alleged infringement.
4. An interim payment.

The court may grant an interim remedy whether or not there is a claim for a final remedy of that kind.

In respect of interim relief which may be granted in support of foreign proceedings, Section 25(7) excludes relief relating to the gathering of evidence. Article 31 of the Regulation is unclear as to what constitutes "interim relief." There is, as yet, no authority as to whether the courts will grant a search order. The main form of interim relief in aid of foreign proceedings is accordingly the interim injunction, principally the freezing injunction. These orders are "*in personam*" by nature and temporarily restrain or direct the defendant or its agents. Under the freezing injunction the defendant's property is restrained but remains in its possession and control. This chapter covers primarily the issue of freezing injunctions.<sup>3</sup>

**2. What is the form of the attachment? Injunction? Other kind of judicial order? Specify.**

The attachment is made by way of an injunction and/or judicial order directed to the defendant or its agent or trustee which will ordinarily contain a Penal Notice disobedience of which will render the defendant or third party liable to contempt of court punishable by imprisonment, a fine or seizure of assets by the court.

**3. What is the jurisdictional basis for an attachment? Is the presence of the debtor's property a sufficient basis for an attachment to be obtained, assuming other requirements are satisfied? To what extent may attachments be used as a basis for obtaining personal jurisdiction over a debtor? To what extent are attachments or similar orders intended to have extraterritorial effect?**

The courts normally require the presence of the defendant itself or its property within the jurisdiction before granting an interim remedy. As detailed under Question 1 above, such remedies give rise to the courts exercising personal jurisdiction over the defendant. English courts are willing, in appropriate cases, to grant an interim injunction having extra-territorial effect, i.e., a world-wide freezing injunction though this does not apply to Regulation cases.<sup>4</sup>

**4. May an attachment be obtained in support of a proceeding on the merits in another country? If so, may the other proceeding be in court, arbitration or in another type of forum? Are attachments used as a mechanism in enforcing judgments or arbitral awards?**

A freezing injunction may be obtained on the merits in support of proceedings which are taking place, or will take place, outside the jurisdiction. There is furthermore no case authority yet

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<sup>3</sup> A person seeking an Order for production of evidence for use in proceedings abroad may wish to utilise the Evidence (Proceedings in other Jurisdictions) Act 1975. The English courts will not grant an anti-suit injunction in non-Regulation state cases where it considers that it does not itself have jurisdiction to determine the substantive issues. *Airbus Industries v Patel* [1998] 2 ALL ER 257 (HL)

<sup>4</sup> *Republic of Haiti v Duvalier* [1989] 1 ALL ER 456 CA. See also *Derby & Co Ltd v Weldon* [1989] 1 ALL ER 469 CA and *Mobil Cerro Negro Ltd v Petroleode Venezuela SA* [2008] EWHC 532: see Articles 27 and 31 with regard to Regulation cases *Van Uden v Deco Line* [1998] ECR I-7091

upon what constitutes "proceedings" in a foreign jurisdiction for the purposes of Section 25 of the 1982 Act in non-Regulation cases. Interim relief is not available in respect of foreign arbitral proceedings.<sup>5</sup>

**5. What are the requirements for obtaining an attachment of property in your country? In support of a proceeding in another country, if different?**

Domestic Freezing Injunction

There are three main requirements for obtaining a freezing injunction. The claimant (the term now used in England in place of the "plaintiff") must show that:

- (i) it has a good arguable case
- (ii) a real risk that the defendant may dissipate or conceal its assets such as to render any judgment of little value and,
- (iii) the "balance of convenience" favours the grant of an injunction.

Freezing Injunctions Pursuant to Section 25

The same three requirements as stated above must be satisfied. In addition, the courts will have regard to the enforceability of its order, particularly with regard to world-wide freezing injunctions in non-Regulation cases.<sup>6</sup>

**6. May an attachment be obtained without notice to the debtor? If so, what are the requirements for notifying the debtor and what procedure is available to the debtor to challenge the *ex parte* attachment obtained? If not, what are the procedural requirements for obtaining an attachment on notice to the defendant?**

Applications for interim remedies are often, due to their very nature, made and granted without notice to the defendant. The court must be persuaded that there were good reasons for not giving notice. If an interim remedy is granted without notice then, and in any event, such order or injunction will only have effect once it has been notified to the defendant. Any such order or injunction will normally require a copy to be served personally upon the defendant and/or any relevant third party who will be notified of the date of the hearing when the defendant may seek to have the court order set aside or where the court may make any further order it deems fit. In the meantime, a defendant may make an application on notice to the claimant for any order to be set aside if there are good reasons for urgency.

In non-regulation cases, the defendant can argue that the claimant has not satisfied the requirements to obtain an injunction (see Question 5 above) or that the Foreign court has no jurisdiction (according to English Forum Conveniens or otherwise) or that its judgment is not enforceable in England for other reasons. The English courts have a wide discretion. In Regulation cases, whilst the ambit of the relief that may be granted in terms of extra-territorial orders is restricted, the ability of a defendant to resist an order under the 1982 Act is limited e.g. the defendant might argue that the nature and extent of the Order in favour of the claimant contravenes Articles 31 and 47 of the Regulation.

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<sup>5</sup> ETI Euro Telecom Int'l NV v Republic of Bolivia [2008] EWCA Civ 880, but also note Arbitration Act 1996 S44, and CPR 62.20 and 74.9(3)

<sup>6</sup> Dadourian Group International Inc v Simms [2006] EWCA Civ 399. See also Supreme Court Act 1981 s.37.

- 7. What are the elements that must be established to the satisfaction of the court for it to grant an attachment. E.g., likelihood of success on the merits, likelihood that the debtor is removing, or will remove, its assets from the jurisdiction, fraudulent activity by the debtor, need for the attachment as security, for an expected judgment or award?**

Any interim remedy is at the discretion of the court particularly in non-Regulation cases. When considering the "balance of convenience" the court will have regard to the conduct of the defendant. Additionally, the court will consider whether damages would be an adequate remedy (as opposed to an injunction) and will seek to balance the risk of doing an injustice.

- 8. What is the procedure for obtaining an attachment? What is the nature and extent of the evidence that must be presented to the court and how must it be presented?**

An application for an interim remedy can be made before proceedings are started, during proceedings or after final judgment has been given. The procedure for applications is detailed primarily in CPR Part 23 (and its corresponding practice direction), but also CPR Part 25 (and in particular practice direction 25A relating to freezing injunctions and search orders). There is a duty upon a party seeking an injunction, particularly one without notice, to disclose to the court all facts which are material to the application. This obligation may extend to making proper enquiries as to the material facts before making the application. If the court later forms the opinion that there has been some material non-disclosure on the part of the claimant, the usual penalty, whether or not the material non-disclosure was inadvertent, is the discharge of the order, unless the court is satisfied that no injustice has been caused. Unless the court orders otherwise (which is most unusual), the evidence is presented by way of Affidavit in respect of applications for a freezing injunction or search order and usually by way of witness statement for other interim remedies.

- 9. To what extent, and under what circumstances, is an undertaking, in the form of a third party bond or guarantee or a deposit, required in order to obtain an attachment? In what amount, in relation to the amount claimed, is the undertaking required? How are such undertakings generally obtained, as a matter of practice? How much do they cost?**

An undertaking is invariably required from a claimant seeking an interim remedy particularly where the court is concerned that the defendant may suffer damage as a result of the order. The ability of the claimant to persuade the court that it can comply with any such undertaking is often a major factor in the success of any such application. There are no hard and fast rules as to the amount that a court may require to be subject to an undertaking. The amount will depend upon many factors, e.g., the size of the claim, the likely period of the injunction and the likelihood and amount of any possible damage to the defendant. The strength of the claimant's case will also be taken into account. Undertakings are given by the claimant in person by way of evidence submitted to the court or in extreme cases by its legal advisers on its behalf, and are recorded in the appropriate order. On occasions, e.g., where there is doubt whether the claimant can comply with the undertaking, the court can require a bond or payment into court of a suitable sum. If, with regard to domestic injunctions, proceedings have not been issued, then the claimant will normally have to undertake to do so within a short period of time. The same may be the case with regard to applications under Section 25 of the 1982 Act.

A defendant can offer an undertaking in advance or anticipation of an application by the claimant. This can be a useful means by the defendant to place the claimant on risk as to costs if it refuses the offer. The claimant will normally wish any undertaking to be given to the court and embodied in a court order.<sup>7</sup> The model form of freezing injunction can be found appended to Practice Direction 25A to CPR Part 25.

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<sup>7</sup> CPR 5.1, CPR 5.1A

**10. What does the undertaking secure? Damages to the debtor if the attachment is ultimately vacated? Do such damages include interest? Other elements? Legal fees? To what extent? Court costs? To what extent?**

The undertaking is a promise to pay a defendant or any party bound by the terms of the order, damages if the claimant fails to maintain its right to the interim remedy. Undertakings are enforced by an assessment of any loss suffered as a result of the injunction. Such loss normally include interest and legal costs. The undertaking is given to the court which has discretion whether or not to enforce it.<sup>8</sup>

**11. How specific must the application for an attachment be as to the nature, extent and location of the assets sought to be attached? How many potential garnishees may be served with an order of attachment?**

As stated above, there is a duty upon the claimant to make full and frank disclosure of all material facts relating to his application including facts concerning the nature, extent, and location of the assets sought to be attached. The claimant is obliged to give the court as much information reasonably known or available to it with regard to the identity and location of defendant's assets held by a third party and should inform the court of the names of the third parties to whom notice is to be given. Notice may however be given to additional third parties after further enquiry.

**12. What are the obligations of a third party who is served with an order of attachment to report on the nature and extent of the assets of the debtor in his possession and the extent to which other persons, including the party served itself, have prior or competing liens on the property covered by the attachment order?**

A third party is bound by the terms of any injunction/order immediately it has received notice, even if notice has not yet been given to the defendant. Under the model form of freezing injunction a third party must do what it reasonably can to preserve the defendant's assets. The court has jurisdiction to attach a disclosure order in appropriate circumstances, i.e., to make the injunction more effective. Any disclosure will not normally be wider than the injunction to which it relates. In appropriate cases however a disclosure order may relate to assets outside the jurisdiction but in that event the order itself will normally contain an undertaking by the claimant restricting the use of such disclosure.

Courts will normally wish to ensure that innocent third parties are not oppressed. A party having security or the right of set-off will normally be able to obtain a variation of an injunction to allow it to exercise its rights. A third party may apply to discharge or vary an injunction upon the grounds that it has a claim in priority to that of the claimant and that the injunction interferes with its exercise of its business rights. The courts will not allow the claimant to seek to obtain a form of security in priority to other innocent parties.

**13. To whom are such reports given and what is the form of such reports? To the court? To the attaching plaintiff? What is the form of such reports? In writing? Oral? Informal? Hints?**

The form of order may require the defendant to serve an affidavit of disclosure on the claimant. The court may order cross-examination of the defendant on the contents of any affidavit filed by him pursuant to the order. This right of cross-examination is granted sparingly and the use of the information obtained is severely restricted. Failure to comply with the order may be punished as contempt or by a further order debarring the defendant from defending the action.<sup>9</sup>

<sup>8</sup> Cheltenham and Gloucester Building Society v. Ricketts [1993] 4 ALL ER 276CA.

<sup>9</sup> Canada Trust Co v. Stolzenberg [2002] 1 AC 1

**14. What kind of property of a debtor may be attached? Debts of third parties to the debtor? Claims of the debtor against third parties? Expectancies?**

Any real or personal property can be attached including the defendant's interests in assets owned jointly. In essence, any asset can be restrained by the claimant if those assets are available for attachment by a judgment creditor. The defendant's asset where it is a claim or right must be vested in the defendant and not a conditional or contingent claim or right. The court will normally freeze the defendant's assets up to a sum equivalent to the amount of the claimant's likely judgment. The court may freeze assets held by the defendant to which the claimant has a proprietary claim but exclude them from its computation of the amount of assets to be frozen.

**15. What is the effect of the service of an order of attachment on assets of the debtor that came into possession of the garnishee after the time of the service of the attachment order? Are there any time limits on the effectiveness of the order of attachment? In particular, what is the effect of the service of the order of attachment on a bank that has issued or confirmed a letter of credit of which the debtor is a beneficiary?**

The courts normally require that routine bank transactions should not be stopped, and similarly the defendant is often allowed to make payments in the ordinary course of business.<sup>10</sup>

The nature of interim remedies is that they are ancillary to the claim--they should not be treated as the final relief. If the claimant does not prosecute his claim diligently (whether within the jurisdiction or abroad) the defendant can apply to have the injunction discharged.<sup>11</sup>

**16. Are there certain kinds of assets or property of a debtor that are immune, or in some other way protected from attachment, e.g., pension funds, salaries, wages, diplomatic property, other sovereign property, other property specified under consumer-protection laws?**

Most assets of a defendant are available for attachment. The model form of order does however normally sanction payments in the ordinary course of business, reasonable living expenses and ordinary debts, and legal expenses. However in cases where the claimant maintains a priority claim to the defendant's assets, the courts have exercised a greater degree of restriction in order to avoid dissipation of such assets. A freezing order cannot apply to assets which do not belong to the defendant.<sup>12</sup> Assets held by the defendant in trust can however be attached.<sup>13</sup>

The jurisdiction of the courts to grant freezing orders against the Crown is limited,<sup>14</sup> except in circumstances where the courts are exercising their jurisdiction in judicial review proceedings or in protecting rights directly enforceable under EC law.<sup>15</sup> The courts are not prevented from granting a freezing injunction against the assets of a foreign sovereign state if the claim arises out of a commercial contract where the state waived immunity.<sup>16</sup>

**17. For how long may an order of attachment remain in effect? If the attachment order is in support of a proceeding in another forum, are there any requirements concerning when, in relation to the date of the issuance of the order of attachment, the proceeding in the other forum must be commenced? Completed?**

The interim order takes effect immediately except for any such order to have the added sanction of a penal notice, the order will have to have been served upon the defendant or appropriate third

<sup>10</sup> Polly Peck International Plc v. Nadir (No2) [1992] 4 ALL ER 769 CA; Customs and Excise Commrs v Barclays Bank Plc [2006] UKHL 28

<sup>11</sup> Lloyds Bowmaker Ltd v Britannia Arrow Holdings Plc [1988] 3 ALL ER 178 CA.

<sup>12</sup> SCF Finance Co Ltd v Masri [1985] 2 ALL ER 747 CA.

<sup>13</sup> JSC BTA Bank v Kythreotis [2010] EWCA Civ 1437

<sup>14</sup> Crown Proceedings Act 1947 S21.

<sup>15</sup> Factortame Ltd v Secretary of State for Transport [1989] 2 ALL ER 692 HL.

<sup>16</sup> State Immunity Act 1978 S13.

party. Where an order is made without notice it will normally be ordered to continue in effect until a further hearing of the order, the date for which is normally recited in the order itself. Where such order has been made following a hearing on notice, it is normally the case that the order will provide for it to continue until judgment or further order. Orders can also provide that injunctions will cease to have effect if the claimant fails to provide a guarantee in support of any undertaking should this be required. See also Question 15 above.

In non-Regulation cases an Application may also be made pursuant to the 1982 Act even if final judgment has been obtained in the original court i.e. to obtain a worldwide freezing order, pending enforcement of the original injunction in such other appropriate jurisdiction.<sup>17</sup>

**18. What rights in the plaintiff are created by the service of an order of attachment? Priority over creditors attaching later? Do banks and other garnishees have set-off or other priority rights superior to those of creditors attaching assets of debtors who are also debtors of such garnishees?**

The rights granted to a claimant in freezing injunctions are in personam and not in the assets themselves. A judgment creditor not bound by the terms of the injunction can levy execution in the normal way. As stated above a third party bound by the terms of an injunction, e.g., a bank, can apply to the court for the order to be varied.

**19. How are attachments ultimately enforced as judgments? What is the procedure? What happens if multiple plaintiffs seek judgments against the same property at roughly the same time?**

A freezing injunction is available post-judgment, but generally only for a limited period of time. Usually, once judgment is obtained then the courts expect the judgment creditor to use the normal available methods of execution and enforcement. Where there are competing judgment creditors they take priority according to the time when their execution process is completed.

**20. What is the procedure for challenging or vacating an order of attachment?**

By application to the court on notice or, with leave, by appeal.

**21. If there are any other aspects of attachment of law that have not been addressed in the questions, please discuss them here, or elsewhere, as appropriate.**

The EU member states in addition to the UK are France, Germany, Eire, Italy, Spain, Belgium, The Netherlands, Luxembourg, Sweden, Finland, Austria, Portugal, Greece, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Greek Cyprus, Slovakia, Slovenia, and enforcement is with reference to the Regulation and the 1982 Act. Denmark is also an EU member state but enforcement is with reference to the 1982 Act and the Lugano Convention (as amended) as is also the case with Iceland, Norway, Switzerland, Gibraltar, Northern Ireland and Scotland. Jersey, Guernsey and the Isle of Man are also covered by the 1982 Act, together with The Foreign Judgments (Reciprocal Enforcement) Act 1933.

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<sup>17</sup>Masri v Consolidated Contractors SAL (No 2) [2008] EWCA Civ 303. In Regulation state cases, this would offend Article 47.