



## SECTION 44, FREEZING INJUNCTIONS AND FOREIGN ARBITRATIONS: LIMITATIONS ON JURISDICTION

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In the course of 2008, two high-profile cases arose involving the making of freezing injunctions by the High Court in London in relation to arbitration matters with a seat outside England and Wales. Both cases concerned actions (and assets) with a South American flavour, one in relation to a private commercial dispute and the other in relation to a claim against a government pursuant to a bilateral investment treaty (BIT), and they afforded the High Court the opportunity to consider and comment upon the English court's jurisdiction to make orders in such matters, in a way which should prove instructive to claimants and their legal teams in future similar matters.

Both applications ultimately failed before the English court, for different reasons. Given the recent activities of the European Court of Justice in restricting the English courts' ability to act extra-territorially where cases concern European parties (including in particular the *West Tankers*<sup>1</sup> case and the subsequent English cases which appear to cast doubt on the Courts' ability to intervene on an even broader basis than that imposed by the European Court), on the face of it the failure of both applications might seem to suggest an unwillingness on the part of the High Court to become enmeshed in disputes over which the High Court does not otherwise have jurisdiction. As becomes clear from an analysis of the decisions, however, the two cases do not represent a policy shift but an appropriate treatment of the applicable tests by the Court in each case.

In this article, I examine the statutory basis for the grant of freezing injunctions by the English court in support of or connection with foreign arbitration proceedings, review the judgments in the two cases (*Mobil Cerro Negro Ltd v Petroleos De Venezuela SA*<sup>2</sup> and *ETI Euro Telecom International NV v Bolivia*<sup>3</sup>) and try to establish whether any general themes emerge from the thoughtful and considered judgments given in both cases with

respect to this highly controversial aspect of English court jurisdiction.

### Statutory provisions

The Court's discretionary power to grant such relief derives from a number of statutory sources, each of which was examined in one or other of the 2008 cases:

- Section 44 of the Arbitration Act 1996 (the 1996 Act) which so far as relevant for these purposes provides:
  - “(1) Unless otherwise agreed by the parties, the court has for the purposes of and in relation to arbitral proceedings the same power of making orders about the matters listed below as it has for the purposes of and in relation to legal proceedings.
  - (2) Those matters are:
    - ...
    - (e) the granting of an interim injunction or the appointment of a receiver.
  - (3) If the case is one of urgency, the court may, on the application of a party or proposed party to the arbitral proceedings, make such orders as it thinks necessary for the purpose of preserving evidence or assets.
  - (4) If the case is not one of urgency, the court shall act only on the application of a party to the arbitral proceedings (upon notice to the other parties and to the tribunal) made with the permission of the tribunal or the agreement in writing of the other parties.
  - (5) In any case the court shall act only if or to the extent that the arbitral tribunal, and any arbitral or other institution or person vested by the parties with power in that regard, has no power or is unable for the time being to act effectively.”
- Section 2 of the 1996 Act, which at subs.3 provides:
 

“The powers conferred by the following sections apply even if the seat of the arbitration is outside England and Wales or Northern

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1. *Reunione Adriatica di Sicurta SpA RAS v West Tankers Inc* C-185/07

2. *Mobil Cerro Negro Ltd v Petroleos De Venezuela SA* [2008] EWHC 532; [2008] 1 Lloyd's Rep. 684.

3. *ETI Euro Telecom International NV v Bolivia* [2008] EWHC 1689 (Comm); [2008] All E.R. (D) 358.

Ireland or no seat has been designated or determined—

...

(b) section 44 (court powers exercisable in support of arbitral proceedings);

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

- Section 37 of the Supreme Court Act 1981 (the SCA) which provides at subs.(1) that:

“The High Court may by order (whether interlocutory or final) grant an injunction or appoint a receiver in all cases in which it appears to the court to be just and convenient to do so.”

- Section 25 of the Civil Jurisdiction and Judgments Act 1982 (the CJA) which provides as follows:

“(1) The High Court in England and Wales or Northern Ireland shall have power to grant interim relief where—

- proceedings have been or are to be commenced in a [Regulation 44/2001] state<sup>4</sup> other than the United Kingdom or in a part of the United Kingdom other than that in which the High Court in question exercises jurisdiction; and
  - they are or will be proceedings whose subject-matter is within the scope of the Regulation as determined by Article 1 of the Regulation (whether or not the Regulation has effect in relation to the proceedings).
- (2) On an application for any interim relief under subsection (1) the court may refuse to grant that relief if, in the opinion of the court, the fact that the court has no jurisdiction apart from this section in relation to the subject-matter of the proceedings in question makes it inexpedient for the court to grant it.
- (3) Her Majesty may by Order in Council extend the power to grant interim relief conferred by subsection (1) so as to make it exercisable in relation to proceedings of any of the following descriptions, namely:
- proceedings commenced or to be commenced otherwise than in a Regulation state;
  - proceedings whose subject-matter is not within the scope of the Regulation

4. i.e. a country which is a member of the EU and which has adopted the provisions of Regulation 44/2001 on jurisdiction and the recognition and enforcement of judgments [2001] OJ L12/1.

as determined by Article 1 of the Regulation.”

The existence of the discretionary power of the court to grant freezing orders, and the historic development of the freezing order into a world-wide freezing order or “WWFO” is a matter more or less unique to English Court jurisdiction, deriving as it does from the ever-purposive approach of Lord Denning in *The Mareva*<sup>5</sup> to the inequity which could be caused to a righteous claimant in circumstances where the defendant would and could conceal its assets from the reach of a judgment unless restrained to a global extent from so doing.

The description of a WWFO as the “nuclear weapon” of the litigation world therefore imports the notion that it should only be used sparingly and in fear of the consequences which may flow from a wrongful grant of such relief. The exercise of long-arm jurisdiction poses obvious risks to comity and the treatment of those risks in the judgments given in the 2008 cases is instructive.

The use of such remedies by parties (particularly on a without notice basis) can raise strong emotions. Indeed the *MOBIL/PDVSA*<sup>6</sup> case incorporated allegations by the Venezuelan Minister of Petroleum that the grant of such relief by the judge who heard the without notice application was an act of “judicial terrorism”: PDVSA’s counsel went further in the course of the 6-day hearing on the continuation of the WWFO to describe Mobil as the “al-Qaeda of the oil world” engaged in a form of “legal terrorism” by seeking to freeze PDVSA’s assets up to the level of \$12 billion to cover its claim.

## Mobil v PDVSA

This case arose out of a series of agreements entered into in relation to the exploration and exploitation of Venezuela’s oil reserves. As part of the relevant series of agreements there was an agreement under Venezuelan law between Mobil (a Bahamian company) and PDVSA (a Venezuelan state-owned company); which provided that PDVSA would guarantee certain obligations of one of its subsidiaries with respect to the exploration and exploitation arrangements which Mobil had in place with that subsidiary for the purposes of participation in the exploitation and upgrade of extra-heavy oil from the Cerro Negro region of Venezuela. The guarantee further provided for disputes which arose under it to be referred to ICC arbitration in New York. These agreements were entered into in 1997.

Mobil claimed that a payment under the guarantee had been triggered as a result of the Venezuelan Government’s nationalisation programme with respect to oil exploration/exploitation, legislation in respect of which came into force in Venezuela in June 2007.

5. *Mareva Compania Naviera SA v International Bulk Carriers SA (The Mareva)* [1980] 1 All E.R. 213; [1975] 2 Lloyd’s Rep. 509.

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

Mobil's response to the nationalisation legislation was the issue of proceedings against the Venezuelan Government at ICSID on the basis of an alleged expropriation by the Venezuelan Government. The event was also said by Mobil to amount to an event triggering compensation pursuant to its Association Agreement with PDVSA's subsidiary. Finally, Mobil claimed that the existence of the claim under the Association Agreement entitled it to make demand of PDVSA for payment pursuant to the Guarantee, which demand it issued on October 10, 2007. The claim estimated this payment to be US \$12 billion.

Mobil applied for freezing relief against PDVSA assets in New York to secure payment under the guarantee (in the amount of approximately US \$400 million) and then applied without notice for relief in London in the form of a WWFO against PDVSA's assets.

The matter came before Walker J. in the Commercial Court in late February and early March 2008 and after a six-day hearing, Walker J. handed down a lengthy judgment of 163 paragraphs rejecting Mobil's application.

### The hurdles for the claimant

It was accepted at the hearing that Mobil had to satisfy three hurdles:

- provision of a WWFO must be "just and convenient" in the view of the court to satisfy s.37(1) of the SCA;
- the case must be one of urgency (pursuant to s.44(3) of the 1996 Act) to avoid the restrictions on availability of relief under s.44 which would otherwise apply; and
- despite the fact that the arbitration was to take place in New York and not London, applying s.2 of the 1996 Act, the court had to be satisfied that it was appropriate to make the order.

Walker J. divided his analysis into four stages:

#### *Cause of action*

- Stage 1: existence of an accrued cause of action. Walker J. did not analyse this aspect of the case in any detail (though counsel for PDVSA had made submissions to the effect that the terms of the guarantee upon which Mobil relied in its complaint could be construed such that no obligation on PDVSA would arise unless and until its claim against Venezuela was to succeed) and proceeded on the assumption, for the purposes of the application, that a sufficient cause of action existed in principle as a matter of Venezuelan law, which governed the agreement, to warrant the making of that application. However he expressly stated that that assumption did not also incorporate an assumption that the cause of action was worth the \$12 billion claimed by Mobil.

#### *Real risk of dissipation*

- Stage 2: Dissipation of assets by PDVSA.
- Walker J. here found that Mobil had failed to show that PDVSA had acted unjustifiably with respect to

the treatment of its assets. Mobil had also failed to take steps to try to freeze PDVSA's assets in Venezuela where the bulk of them were located, and beyond hinting in evidence and submissions at the possibility that the local courts in Venezuela would not give effect to the arbitration award which might be obtained were the ICSID claim to succeed, there was no real evidence to show that that was, or was likely to be, the case. The bulk of those assets were in Venezuela, as mentioned, and therefore Mobil's position was that to ensure that assets were not put beyond its reach, it required assistance to overcome the risk that its award would not be enforced in Venezuela, to freeze assets outside Venezuela and prevent PDVSA from repatriating them.

- Mobil had sought to run 13 grounds on which it said the court could make the necessary finding that there was a real risk of dissipation of assets by PDVSA, including amongst others the alleged breach of PDVSA's obligations under the guarantee (which as grounds for a cause of action was permissible but which could not of itself amount to evidence of a risk of dissipation or unjustifiable action on the part of PDVSA); statements made by PDVSA and the Venezuelan Minister of Oil (also PDVSA's president) with respect to PDVSA's position on the payment of damages to oil companies affected by the nationalisation legislation; an alleged policy on the part of PDVSA of disposing of its assets in America and Europe which would frustrate enforcement efforts in those regions; and alleged deterioration in PDVSA's financial position which in Mobil's submission should give rise to cause for concern. Finally, Mobil raised an allegation that PDVSA had specifically taken steps to dissipate assets both in New York and in England following the commencement of the dispute. These allegations were not found by the judge to be sufficient to satisfy the test of a real risk of dissipation based on unjustifiable conduct by the defendant.

#### *Urgency*

- Stage 3: Was this a matter of urgency, within the meaning of s.44 of the 1996 Act, as required in order for it to be appropriate for the Court to be approached on a "without notice" basis?
- Walker J. found that it was not. The only basis on which this test could have been satisfied by Mobil, given the existence of the ICC proceedings against PDVSA's subsidiary in New York under the Association Agreement, was if the test of a real risk of dissipation could be satisfied. On the finding made by Walker J. at Stage 2, that test had not been satisfied and it therefore followed that the application had not properly been brought pursuant to s.44(3) of the 1996 Act.

#### *Connection with England and Wales*

- Stage 4: whether there was a sufficient connection between the case and England and Wales to bring the matter within the jurisdiction of the court in any event such that it would be appropriate for the



court to exercise its discretion to grant interim relief, on the “just and convenient” analysis required by s.37(1) of the 1981 Act, and on the assumption that the application had properly been made pursuant to s.44(3), considering the application of s.2 of the 1996 Act to that issue of discretion.

- Walker J. concluded, having considered numerous previous cases brought pursuant to the 1982 Act (s.25) that there had to be some sufficient connection between the matter and England and Wales in order for the Court to exercise its powers in respect of a case with the seat outside England and Wales, in the absence of any exceptional features—which really boiled down to evidence of fraud on the part of PDVSA, none of which had been provided. In making this analysis he referred to the *Duvalier* case<sup>7</sup> (involving an action brought in France against the Duvalier family which had ruled Haiti) in which the English court had restrained the Duvalier family (then resident in France) from disposing of assets wherever located and required them to disclose information about their assets. That was a case that involved considerations of fraud affecting the defendants (whereas here there was no question of fraud), and where there was evidence of efforts to conceal assets. It was a case which in PDVSA’s submission stretched the court’s discretion to the limit, and could not be relied upon as a benchmark to support the imposition of a WWFO where no connection to the jurisdiction otherwise existed.
- Mobil had tried to argue that s.44 of the 1996 Act should be construed without reference to considerations of “connection” with England and Wales, on the basis that it had been sufficiently narrowly-drafted not to have to import additional considerations, but Walker J. rejected that submission on the basis that there was nothing in s.44 of the 1996 Act which excluded considerations of comity, and that in exercising a jurisdiction which would risk cutting across the principles of comity the court should be as cautious in the exercise of that jurisdiction with respect to a foreign arbitration as it would be in respect of foreign court proceedings.
- Mobil sought, creatively, to argue that considerations which might force a court not to grant a WWFO because of the risk of competing/inconsistent judgments in another court, should not affect a court hearing an application pursuant to s.44 because where the arbitral tribunal had no authority in any event to make the order sought from the court, no such issues arose. Walker J.’s conclusion was that whilst in particular cases the fact that an arbitral tribunal was involved would lead to fewer practical problems, where a proposed order would tend to run counter to comity in particular because it involved assuming jurisdiction over assets not located in England and Wales, that factor alone did not outweigh the need for caution.
- Further, and most importantly from a practical perspective in considering the question of “connection” was that PDVSA’s evidence demonstrated no business operations, bank accounts, real property or other

assets of any kind in England and Wales. Although Mobil did not accept that evidence, there was nothing before Walker J. which demonstrated that it was designed to mislead or arose from a misunderstanding of the language. Mobil sought to argue that indirect shareholdings or interests of PDVSA in English companies and the assets of those companies could amount to assets of PDVSA within the jurisdiction sufficient to form a connection. Walker J. rejected all of these arguments as there was insufficient evidence to support the contention that PDVSA was the “effective controller” of substantial assets within the jurisdiction.

### *Relevance of the curial law*

One factor which Walker J. did not consider in detail or make a finding on was the question of the choice of New York as the seat of the arbitration in terms of what that indicated the parties’ position had been on the general availability of this type of remedy. PDVSA argued that the parties having chosen New York law as the curial law of their dispute (by virtue of the seat of the arbitration being in New York), the English court should not impose itself or its procedure, particularly because: (a) PDVSA had sovereign immunity under New York law; (b) the New York limitations on the grant of attachment orders were much more restrictive than those available under English law (in part because of the sovereign immunity considerations), since PDVSA had not waived its sovereign immunity in respect of pre-attachment orders; and (c) the New York courts could only grant such interim relief over assets located within their jurisdiction and had no power to issue a WWFO. Therefore, the English court should not be used to overcome the results of the parties’ agreement to arbitrate in New York.

### *Conclusion on Mobil v PDVSA*

On the basis of Walker J.’s judgment it might be said that Mobil’s actions were a very expensive “punt”. The reality, of course, is that Mobil probably did and still does have concerns about its ability to enforce any award ultimately made in its favour on the merits against PDVSA’s assets in Venezuela (though a substantial amount of assets were accepted to be in the United States at least as at the date of the hearing before Walker J.), and also perhaps saw a degree of negotiating pressure being possible as a result of the making of the without notice order granted by Teare J. Ultimately however this was a case which stretched the discretion of the English courts beyond the limits set in the *Duvalier* case.<sup>8</sup> Merely because the English courts have an extensive power does not mean that it will be appropriate to apply them in a case which has no proper connection with England and Wales.

7. *Haiti v Duvalier (Mareva Injunction) (No.2)* [1990] 1 Q.B. 202; [1989] 2 W.L.R. 261.

8. *Haiti v Duvalier* [1990] 1 Q.B. 202.

## ETI v Bolivia<sup>9</sup>

This case arose out of a May 1, 2008 decree by the Bolivian Government of the nationalisation of a shareholding in the Bolivian entity Entel owned by the claimant in this case, ETI, a Dutch company. ETI had in 1995 acquired management control of Entel, together with a 50 per cent shareholding in the company, from the then Bolivian Government and Entel, as part of a privatisation process which resulted in two Bolivian pension funds owning 47.5 per cent of the remaining share capital. Local shareholders and employees of Entel owned the remaining 2.5 per cent. In the course of April 2007, the Bolivian Government had issued two decrees which transferred the pension funds' shareholding back to the Government and which abrogated the decrees which had authorised the privatisation process. The decree of May 1, 2008 was therefore a continuation of that process.

On May 7, 2008: ETI applied to the English court for an unlimited freezing order in respect of its claim for compensation against the Bolivian Government as a result of the issue of the decree.

ICSID arbitration proceedings had already been commenced between ETI and the Government of Bolivia on October 31, 2007 pursuant to a bilateral investment treaty between Bolivia and the Netherlands (though Bolivia had in November 2007 formally issued a denunciation of its accession to the ICSID Convention which would take effect in May 2008), arising out of the activities of the Bolivian Government in 2007 with respect to Entel. Steps had also been taken by ETI in New York to obtain an attachment order in that jurisdiction (on May 5, 2008) in support of the ability to enforce any order that might be made in ETI's favour in the ICSID proceedings.

By contrast with the position in the PDVSA proceedings, in this case there were assets in England on which the freezing order could bite: an account held by Entel with Deutsche Bank in London in an amount of approximately \$50 million. That aspect might have satisfied the "connection" test, but ETI's claim ran into difficulties on the much more fundamental ground of the existence of the English court's jurisdiction to hear an application for freezing order relief where the substance of the proceedings in respect of which the English court was being asked to exercise its jurisdiction was treaty arbitration under the ICSID Rules. Andrew Smith J., who at first instance had granted the freezing order, then discharged it upon Bolivia's application, delivering his judgment on July 11, 2008. Andrew Smith J. found that the application did not come within the ambit of s.25 of the CJA, that it was inexpedient to grant the relief and that Bolivia was entitled to state immunity.

That decision was appealed to the Court of Appeal in remarkably short order: the hearing took place on July 22 and the judgment of the Court of Appeal was handed down on July 28. Lawrence Collins L.J. gave the leading judgment.

9. *ETI Euro Telecom International NV v Bolivia* [2008] EWHC 1689 (Comm).

## Relevant legislation

Section 44 of the 1996 Act has not been extended by the Lord Chancellor to cover ICSID arbitrations (though there is a power for that extension to be made) and therefore the 1996 Act did not apply for these purposes—as those representing ETI admitted, as soon as the point was raised by those representing Bolivia (though it had apparently been relied on by those representing ETI at an early stage).

The ETI case therefore proceeded on the basis that this was a case in which the power under s.25 of the CJA should be exercised in its favour in order to grant the relief sought. Both Andrew Smith J. at first instance, and the Court of Appeal, rejected these arguments and the claim for an injunction failed on every basis on which it was presented.

The main findings were:

- that ETI's claim for interim measures in New York was not a proceeding in respect of which s.25 of the CJA could be relied upon: the proceedings in New York which ETI had taken were themselves for "an order for attachment in aid of arbitration" aimed solely at attachment of assets held in New York in support of the ICSID proceedings which were the substantive proceedings between the parties. The proceedings in England aimed at attachment of assets in England were therefore not ancillary to the New York proceedings (since those proceedings were so limited in scope), and therefore were not of a type in respect of which s.25 of the CJA should apply, because this section was aimed at supporting the "substantive" proceedings between the parties;
- that s.25 of the CJA as implemented by the 1997 Order in Council did not extend to making an order in support of ICSID arbitrations. What the 1997 Order had done was specifically to remove the power to extend the scope of s.25 of the CJA to arbitral proceedings, in response to the existence of s.44 of the 1996 Act. Given that the scope of the 1996 Act had not been extended to ICSID proceedings, therefore, that left ETI where it started, without a route to jurisdiction. Interestingly in this section of his judgment Lawrence Collins L.J. considered the meaning of the scope of the exclusion from Regulation 44/2001 of "arbitration" and found, obiter, that it extends not to all arbitration proceedings but to court proceedings relating to arbitration, and applied very similar logic to that used by the European Court of Justice in the *West Tankers* case to give the exclusion a narrow rather than a broad reading in order to find that arbitral proceedings do not fall within the scope of s.25(3) of the CJA as a matter of its construction;
- that the order should not have been made as it was inexpedient to grant the relief sought—though it was not necessary for the Court to form a view on expediency given the conclusion that its jurisdiction to determine the issue did not arise at all, it nevertheless found that in the circumstances it would not have exercised its jurisdiction in favour of the claimant because the agreement to arbitrate under ICSID Rules incorporated an exclusion of assistance from national courts; and

- Bolivia was entitled to state immunity and there was no independent basis for the order against Entel (because Entel was not a party to the agreement to arbitrate and ETI had no separate cause of action against Entel). In that regard, although s.9 of the 1978 State Immunity Act (the SIA) provides that where a state has agreed in writing to submit a dispute to arbitration, the state is not immune as respects proceedings in the courts of the United Kingdom which relate to the arbitration, that is qualified by s.13 of the SIA which provides that the property of a state shall not be subject to any process for the enforcement of a judgment or arbitration award or, in an action in rem, for its arrest, detention or sale.

the English courts, and as a result of these cases the same courts have some careful analysis on which to base the treatment of future similar applications.

In each case, there was probably enough at stake for the claimants to be willing to spend the necessary costs in bringing the matter to court, given the risks that their claims, if successful, might ultimately be worthless in terms of enforcement in the respondents' home courts. Although the English courts have the power to tip the balance in favour of the righteous claimant, what these cases show is that in the absence of a clear picture of malfeasance by the respondent, the court will be reluctant to intervene so powerfully in matters over which it will not ultimately have jurisdiction.

## Conclusions

Both of these claims failed because the circumstances of each case did not fall within the limits of the powers available to the English courts. However had the Bolivian proceedings been pursuant to ICC arbitration or had PDVSA actually had assets in England and Wales, the outcome may have been different. The "nuclear weapon" may not have been detonated on these occasions but the discretion to make such an order has been affirmed by