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The Mareva Injunction and its Story of Expanding Horizons

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A Mareva injunction or a freezing injunction is a form of *ad personam* interim relief, which is usually sought during the pendency of court or arbitration proceedings or once the proceedings are completed and a verdict is rendered, but before the judgement/award is enforced and executed. This form of injunction is essentially sought by a claimant or judgement/award creditor against a respondent or judgement/award debtor, to prevent the latter from dispersing his assets otherwise than in the ordinary course of business, so as to ensure that the enforcement of a judgement or arbitral award is not defeated. Unlike a regular injunction, a freezing injunction covers even those assets which are not necessarily a part of the subject-matter in dispute or those in which the claimant does not claim any direct right.

Though originally conceived as an aid to commercial litigation, English Courts have been quite liberal in granting freezing orders to aid enforcement of arbitral awards, especially arbitral awards arising out of international commercial arbitration. Since ease of enforcing awards and effectiveness of interim reliefs lend strength to the arbitral award and also play a crucial role in influencing the decision of parties when choosing a seat, it is important to understand the entire legal framework governing the grant of freezing injunctions in England, should a party opt for England as the seat. The purpose of this article is to provide the reader with an overview of the applicable legal provisions, the criteria expounded by the judiciary for the grant of such injunctions; explain the effect, if any, of the choice of seat by the parties on the power of the English Courts to grant freezing orders and the scope of such orders; and examine whether freezing injunctions can be granted against a non-party to the arbitration agreement and proceedings.

Section 44 of the 1996 English Arbitration Act prescribes the ambit of the interim reliefs which can be granted by the Courts to preserve assets. Certain conditions have been prescribed which must be taken into consideration by the Courts in deciding whether a particular case, with its unique facts and circumstances, merits the grant of freezing orders. The primary diktat of Section 44 is that the Court can grant the requisite interim relief only when the Arbitral Tribunal is unable to do so effectively. Thus, the Court's power to grant freezing injunctions may be affected in certain cases by the agreement of the parties concerning the powers of the Arbitral Tribunal or the provisions of the relevant institutional rules. This is in keeping with the principle of judicial non-intervention in arbitral proceedings unless absolutely necessary.

An Arbitral Tribunal by itself can grant freezing injunctions, if empowered to do so by the agreement of the parties. In such cases, the Tribunal would be the primary forum from which the injunction is to be sought. However, there is a bit of a controversy on the scope of the powers of

the Tribunal, whether its powers are equivalent to that of the Court and whether it can grant such a remedy without the prior agreement of the parties. While an argument can be advanced that an Arbitral Tribunal should ideally be empowered to grant a freezing injunction just like the Courts and without the prior agreement of the parties; it is to be noted that a freezing injunction is a remedy which would require, at times, extra-territorial enforcement or adjudication of rights of third parties. Therefore, at least in international arbitrations, the Court would be a better forum to grant such remedy than the Tribunal, as both adjudication and enforcement would be easier.

The Judiciary has formulated three tests which are to be applied in deciding whether a Mareva injunction should be granted- the 'good arguable case' test, the 'real risk of dissipation' test and the 'just and convenient' test. Of these, the requirements of good arguable case and real risk of dissipation are subject to the 'just and convenient' test, so as to ensure that the legitimate business interests of the losing party are not compromised. The choice of seat as England or otherwise does not affect the grant of freezing injunctions by the English Courts, provided that there is a 'sufficient connection' of the assets or either party to England, thereby enabling the English Courts to exercise jurisdiction. English Courts can also exercise concurrent and simultaneous jurisdiction with the Courts of foreign countries, when granting freezing orders to enforce awards of arbitrations seated in England and Wales or Northern Ireland. World-wide freezing orders can also be granted. Guidelines have been issued for the enforcement abroad of a world-wide freezing order granted by an English Court. Prior approval of the English Court is necessary in such cases.

Freezing of assets of third parties who are non-parties to the arbitration agreement and proceedings, is generally not permissible, in line with the principle of 'privity of contract'. An exception has been carved out for cases where the respondent or the award debtor is de facto beneficial owner of the assets held by the third party or has some other sufficient interest or control over the third-party assets. This sort of relief constitutes a special category termed as "Chabra relief". However, the recent case of *Cruz City Mauritius Holdings v. Unitech Ltd. et al. ([2014] E.W.H.C. 3704 (Comm.))* has held that for Chabra jurisdiction to be exercised, the primary dispute should also be adjudicated before the Court, thereby creating uncertainty whether Chabra relief can in fact be granted in support of arbitration proceedings, since the primary adjudication in such cases is done by the Arbitral Tribunal. A mere application for interim relief before the Courts does not entail any substantive adjudication.

Considering the evolution of the Mareva injunction as an interim remedy over the years, it can be seen that most of the evolution has happened at the hands of the judiciary. This is a prime example of going beyond what is provided in the black and white letter of the legislation and evolving remedies which are better suited to provide justice, as per the exigencies of the situation. The way in which the scope of the remedy has been interpreted and expanded shows tremendous application of judicial mind and attention to detail. An exhaustive study of the jurisprudence relating to the freezing injunction would make it obvious that while the English Courts have always tried to adapt the remedy to suit the circumstances, they have never deviated from the general, internationally-accepted principles in relation to interim injunctions and arbitration. For example, the tests of 'good arguable case', 'real risk of dissipation' and 'just and convenient' are all adaptations of the principles applicable to regular interim injunctions i.e. a prima facie case, balance of convenience and risk of irreparable loss or injury. Similarly, general principles of arbitration dictate that any interim or final relief granted should not affect the rights of third parties who are unrelated to the arbitration and cannot appear before the Tribunal or the Court. Hence, some criteria have been laid down which are required to be fulfilled before assets of third parties can be frozen. Thus, when in doubt, parties simply have to go back to the basics to understand and build their case.

Mareva injunction can thus be considered an excellent outcome of the judicial creative process and is a very potent weapon in disputes where there are huge monetary stakes or questions of fraud involved. The Courts, in expanding and refining the Mareva injunction, have recognized the truly commercial nature of majority of the disputes which are arbitrated. Yet, because of the largely liberal scope of this interim relief and the draconian effect which it has on the rights of the party against whom it is imposed, the grant of the injunction is also to be strictly regulated. English jurisprudence has furnished a rich body of cases which have dealt with, explained and expanded the ambit of freezing injunctions, while at the same time prescribing copious safeguards and limitations. England is a very mature jurisdiction in relation to freezing injunctions in the sense that it has furnished jurisprudence dealing with almost every question of law which could come up in proceedings involving this injunction, and exhaustive guidelines have been provided on every aspect and facet of the remedy, thereby providing abundant guidance to parties. England is also the country which gave birth to the Mareva injunction and the common law jurisprudence with regard to the same makes for an excellent study on the art of balancing commercial interests, jurisdictional limitations and practical considerations. A prudent, progressive remedy is all that any commercial litigant can ask for, and the Mareva injunction of the common law system certainly fits the bill.

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