

KEY POINTS

- The English courts have long held the power to grant a worldwide freezing order ('WFO') in aid of substantive non-English proceedings. The *Dadourian* Court of Appeal decision sets out eight guidelines that the courts should apply in considering whether to permit a party to enforce a WFO outside England.
- Historically the US courts have been hostile to the kind of relief obtainable in the English courts.
- This seems to be changing with the recent *Koehler* decision which represents a key jurisprudential development in the New York state court.

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International asset freezing: the US and UK perspectives

OBTAINING A WFO

The English courts can grant a worldwide freezing order ('WFO') to a US entity where the fraud or unlawful conduct is committed against that entity. Typically, this would be when the misappropriated funds flow out of the US and into/through England and the defendant has assets in other jurisdictions.

A WFO is an injunction prohibiting the defendant from dissipating assets up to a certain value, preventing the defendant from becoming judgment-proof before any trial or enforcement of a judgment (although it is also available post-judgment). Breach of a WFO is a contempt of court with potential consequences of imprisonment, fine or asset seizure and is therefore taken very seriously by even the most evasive of defendants.

There will usually be a carve-out for living expenses, legal costs and payment of bona fide creditors. It is described as 'ancillary relief' as it does not exist for its own purposes; it must be sought in aid of an existing or proposed cause of action, even though it can be (and often is) sought before proceedings are issued in England without giving notice of the application to the respondent. It is granted at the court's discretion and as an *in personam* remedy against the defendant, does not give any proprietary rights over the defendant's assets.

Notwithstanding that the WFO is an *in personam* remedy, if the applicant is aware that the respondent has funds held in banks, the WFO will also usually be served on those banks, which must not act in a way (such as paying away frozen funds) that would defeat the purpose of the WFO – otherwise they might also be in contempt of court. A key point is that WFOs can be granted against a third party, extending the court's jurisdiction even when there is no direct cause of action

This article examines the remedies available from the US and UK courts to prevent the dissipation of funds pending the prosecution of a fraud or other unlawful conduct. It is instructive to consider this from the perspective of a US domiciled company (or government agency) although these remedies are available to non-US based entities, in appropriate circumstances.

against the third party (see *HM Revenue & Customs v Clayton Egleton, Trade Eazy Limited, Shabeed Vali, Frakhameed Raman* [2006] EWHC 2313).

The English court also has the power (under the Civil Jurisdiction and Judgments Act 1982 [Interim Relief] Order 1997) to grant a WFO in aid of substantive non-English proceedings. This power has been described as the 'nuclear weapon' of English litigation and, understandably, is exercised with more caution than if the substantive proceedings were brought in England. It is this aspect which provides the most interesting comparison with developing US jurisprudence, and this is addressed below.

The English court's jurisdiction to grant WFOs is derived from s 37(1) of the Senior Courts Act 1981. The applicant must show:

- a good arguable case;
- a real risk of dissipation of assets (easily satisfied in a fraud/unlawful conduct case); and
- that the order is just and convenient in all the circumstances.

If the WFO is sought in aid of non-English proceedings, the applicant must also show a real and connecting link between the defendant's assets and England.

Given the risk of dissipation that a WFO is designed to prevent, the applicant will often apply without giving notice to the respondent and is therefore under a duty to give 'full and frank' disclosure to the court. This means articulating all the facts

and legal arguments, including what the respondent may argue by way of a defence (see *Brinks MAT v Elcombe* [1988] 1 WLR 1350). It is not enough to expect the court to be aware of an important issue, if it is buried deep within a witness statement or exhibited document – it must be drawn to the court's attention at the hearing. A finding of material non-disclosure by the applicant could well lead to the WFO being discharged on the application of the respondent. The applicant will also usually need to provide a cross-undertaking in damages to compensate the respondent in the event that it is later shown that the freezing order was not justified.

At the same time that it applies for a WFO, the US entity in our scenario would usually seek a disclosure order, directing the respondent to provide a sworn affidavit containing information about the location and value of any relevant assets anywhere in the world. This can be an extremely useful tool in building up a picture of what assets are available against which a subsequent judgment can be enforced, and assisting the US company to trace the proceeds of the fraud/unlawful conduct.

ENFORCEMENT OF A WFO: THE DADOURIAN CASE

Generally, the successful applicant for a WFO will be required to give an undertaking not to enforce it in another jurisdiction without the English court's permission, so as to avoid the defendant

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facing a multiplicity of actions. It may of course be necessary (or indeed preferable) for the US entity in our scenario to protect itself by taking such enforcement proceedings in the local court of the country in which the defendant's assets have been frozen. The Court of Appeal decision of *Dadourian Group Int. Inc v Simms & Others* [2006] EWCA (Civ) 399 sets out the guidelines which will be applied if enforcement of the WFO abroad is sought.

The *Dadourian* case arose out of an arbitration to resolve a dispute between the parties concerning an agreement to manufacture hospital beds and related equipment. The arbitrators found in the applicant's favour, and damages were awarded in the sum of \$4.5m. The

and setting out eight guidelines that the court should apply, in its discretion, in considering whether to permit a party to enforce a WFO outside England. A detailed discussion of the guidelines is beyond the scope of this article, but they address matters such as: (a) permission to enforce should be just and convenient for the purpose of ensuring the effectiveness of the WFO, and, in addition, is not oppressive to the parties to the English proceedings or to third parties who may be joined to the foreign proceedings; (b) permission should not normally be given in terms that would enable the applicant to obtain relief in the foreign proceedings which is superior to the relief given by the WFO; and (c) it must be shown that there is a real prospect that assets caught by the WFO are also located

damages was required to be given by the SEC. As well as demonstrating the high level of co-operation on transatlantic financial crime and regulatory enforcement work, Manterfield also demonstrates the effectiveness of the WFO jurisdiction to a foreign (here, US) plaintiff. However, as we will see, recent developments in the US may be broadening the reach of the US courts in international frauds.

THE VIEW FROM THE US: WHEN WILL US COURTS ORDER RELIEF IN SUPPORT OF FOREIGN PROCEEDINGS?

Historically, US courts have been hostile to the kind of relief now obtainable in English courts with a WFO. Whether it reflects a form of American insularity or not, absent explicit statutory authorisation (eg under the US Bankruptcy Code 11 USC §304), US courts are reluctant to issue injunctive orders in support of foreign proceedings. While US courts will, as a matter of course, issue a freezing order in support of a US proceeding, they have repeatedly expressed extreme reluctance to do so in support of a non-US proceeding as a matter of course.

This reluctance was manifested by the Supreme Court case of *Grupo Mexicano de Desarrollo, SA v Alliance Bond Fund, Inc*, 527 US 308 (1990) ('*Grupo Mexicano*'). In *Grupo Mexicano*, certain investment funds became concerned that Grupo Mexicano de Desarrollo ('GMD'), a Mexican holding company, which had missed payments on interest notes held by those funds, was in danger of insolvency. Worried that GMD would improperly pay off its Mexican creditors first, or wrongfully transfer assets to them, thus frustrating any effort by the investment funds to get any judgment satisfied, the funds sought an order in a US court freezing the transfer of any assets. Although the trial and appeal courts issued the injunction, the Supreme Court reversed those orders.

The *Grupo Mexicano* decision held that in an action for money damages, federal courts lacked the equitable authority to enjoin a party from transferring assets

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applicants then applied for and were granted a WFO at first instance against the first four defendants. This initial WFO contained an undertaking by the applicants not to attempt to enforce the order outside of England, Wales or France, without permission of the court. After discovering that some of the defendants held assets in Switzerland, the applicants successfully applied for permission to vary the WFO so that it could be enforced in Switzerland. The variation to the WFO would have allowed the applicants to seek orders in Switzerland, including, crucially, an order that would confer a charge or other security against the respondents or respondents' assets, ie, a higher form of relief than the purely *in personam* relief under the WFO. The defendants appealed the variation, contending that before enforcement of the WFO, the applicant should be required to establish a strong case that the defendants held assets in Switzerland and that there was a real risk of dissipation. The Court of Appeal disagreed, dismissing the appeal,

within the jurisdiction of the foreign court in question and will be dissipated.

A good recent example of the attraction of the WFO powers to US claimants was the case of *SEC v Manterfield* [2008] EWHC 1349(QB). In that case the SEC applied for a WFO in support of its case against Mr Manterfield, a resident of England who held assets in England, who was alleged to have operated a fraudulent investment fund of \$US34m. The SEC had commenced proceedings against Mr Manterfield in the Massachusetts courts in which it sought to recover the 'ill-gotten gains' and also make the defendants pay a civil penalty to the US government. However, the English courts have no jurisdiction to enforce a penal rule of a foreign state and thus, on appeal, the WFO was granted only on the basis that the SEC used the assets in support of the recovery of the ill gotten gains, and not to pay the penalty to the US government. The Court of Appeal also stated that no cross undertaking as to

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located outside the US, even where some interest in that property is claimed by a US resident. The Supreme Court explicitly distinguished (and implicitly criticised) English jurisprudence allowing such injunctive relief, and held that prior to any kind of asset freeze a party must first obtain some prior judgment.

This would seemingly foreclose for good any kind of WFO being granted by a US court in support of a foreign proceeding. However, there are certain exceptions to this general rule, even after *Grupo Mexicano*, based largely on the desire of courts in case-by-case circumstances to do what they perceive as substantive justice. Thus, in several cases US courts have ordered freezes in support of foreign proceedings, as the following sampling demonstrates.

First, a US court will grant an order in support of an English WFO, to the extent that a party has assets subject to that US court's jurisdiction. For example, in *National Union Fire Inc Co v Kozeny*, 115 F.Supp.2d 1243 (D Col 2000), a London court had granted a WFO against the defendant, who allegedly had misappropriated funds belonging to the plaintiff investors and diverted them to improve certain real property within the jurisdiction of the US court. At the prior direction of the London court, the investors filed the US action. The US court then granted a stay of the US proceedings pending the resolution of the UK action, and in the interim entered an order freezing those assets within its jurisdiction. The *Kozeny* court distinguished *Grupo Mexicano* based on the supposed connection between the assets and the cause of action in the case it stayed. The *Kozeny* rule would therefore seem to allow a US action in support of foreign proceedings, but only when those assets were within the US court's jurisdiction, and where there was a cause of action directly related to the assets at issue.

Other courts have carved out an exception based on the language from *Grupo Mexicano* regarding suits for money damages, holding that where plaintiffs seek both equitable and legal relief, a court can order a freeze to preserve the status quo (see, eg, *Wisnatzki &*

Nathel, Inc v HP Island-Wide, Inc, 2000 WL 1610790, at * 1 (SDNY 2000) (citing cases). Note, however that in *Matrix Partners VIII, LLP v Natural Resource*, 2009 WL 175132 (EDTex, 2009) the court strongly disagreed that mere invocation of legal remedies was sufficient to evade *Grupo Mexicano's* limitations.

KOEHLER: A NEW ERA FOR WFOs IN THE US?

However, if the above case law has been prying open the door bit by bit, the door to a more expansive US approach was recently blasted wide open by the decision of New York State's highest court in *Koehler v Bank of Bermuda Ltd*, 12 NY 23d 533, 883 NYS 2d 763 (NY 2009). This decision, in June 2009, saw a US state court providing far more expansive remedies than the US federal courts.

In *Koehler*, which addressed remedies under New York state law, the unfortunate

In a 4-3 decision that has begun to send ripples of shock throughout the banking community, the New York court held that the mere fact that the property was outside its jurisdiction was not controlling. The court continued to rule that, as a matter of law, a non-party to a litigation may be compelled to turn over assets held outside the US, as long as that non-party is subject to the jurisdiction of the New York courts, and even if the actual judgment debtor is not subject to the jurisdiction of the New York courts.

As the very vociferous dissent pointed out, this ruling potentially opens the New York courts to a tidal wave of litigation against banks in New York. Any non-party bank can be ordered to turn over assets in its possession as long as it has a branch located in New York which is subject to the jurisdiction of New York state courts – no matter where in the world the assets or property of a judgment debtor are located.

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Mr Koehler sought to conclude a multi-decade odyssey to recover against his former business partner, a resident of Bermuda. Although he obtained a multi-million dollar default judgment in 1993 in a Maryland federal court, the judgment debtor's assets were in the form of stock in a Bermuda corporation, and were located in Bermuda in the possession of the Bank of Bermuda. After a battle lasting until 2005, the Bank of Bermuda disclosed that it no longer had the stock certificates in its possession, but had given them to another Bermuda entity. The New York federal court dismissed the proceeding on the grounds that the property was no longer within its jurisdiction (compare to *Kozeny*). After several more years of federal litigation, the matter was referred to the New York Court of Appeals for resolution, since it involved matters of state law.

The location of a branch in New York can now serve as a jurisdictional hook to obtain the assets of foreign parties even when those assets are not located in the US.

This decision, the effects of which have not been fully digested, and which is based on state, not federal law, seems to provide a remedy to litigants that goes well beyond what *Grupo Mexicano* authorised. Moreover, unlike the facts before the *Grupo Mexicano* court, which simply concerned the remedies available to the parties, the *Koehler* court provided a worldwide remedy applicable even to complete non-parties to a litigation. It seems to be only a matter of time before an imaginative litigant uses the *Koehler* decision to effectively create a remedy whereby a party can obtain a freezing order over a foreign non-party from a New York court as long as that foreign non-party has an affiliate subject to New York jurisdiction. ■