

LECTURE SEVEN

The Nature and Scope of the Conflict of Laws

Aim:

To provide an overview of the nature and scope of the Conflict of Laws.

Objectives:

After carefully studying the following notes, and other prescribed readings for this lecture, you will be able to:

1. Explain how an English court may acquire jurisdiction in a Conflict of Laws case;
2. Explain the stages in the choice of law process and outline what is meant by categorization; characterization (or classification); substance and procedure; an incidental question; a connecting factor; and renvoi;
3. Provide an outline account of the process by which the recognition and enforcement of foreign judgments is made.

Introduction

The Conflict of Laws concerns what has been described as “*disputes about disputes*” or “*disputes within disputes*” or “*disputes about how and where the actual substantive dispute is to be settled.*” It is procedural in nature. “*Conflicts of Law*” is an integral part of English private law in which, by definition, the subject matter always contains a ‘*foreign element.*’

In a simple example, the foreign element differs from (i.e., it potentially ‘*conflicts*’ with) the English rule on the same point. Resolution of the problem - i.e., resolution of the conflicting assertions of jurisdiction and governing law - is by way of determining which of the courts of two or more countries have jurisdiction to hear the case and which system of law (internal procedural and substantive) they would apply. The following examples illustrate the distinction between uncomplicated, domestic cases and those requiring further analysis because of the inclusion of the foreign element.

Examples

- a) George, an autonomous individual who has always lived in England, contracts in London with Arthur, another autonomous individual who, also, has always lived in England, for the purchase of Arthur's vintage car. If, subsequently, Arthur should breach the terms of the contract, then it would appear to be a relatively straightforward matter for an English court to deal with if litigation should ensue: the parties to the contract are English, the place of contracting is England and so, in the absence of evidence to the contrary, the contract will be governed by English law. There is no ‘*foreign element*’ in that there is no connection with a legal system other than the English Legal System.
- b) Application of essentially the same legal points to natural persons in another country might illustrate that Stefan, who has the capacity to make a binding contract and who has always lived in Sweden, has contracted, in Stockholm, with Anders, for the purchase of Anders' vintage car. Anders has the capacity to make a binding contract and he has always lived in Sweden. If, subsequently, Anders should renege on the contract, it would appear to be a relatively straightforward matter for a Swedish court to deal with if litigation should ensue. For a Swedish court there is no ‘*foreign element*’ in this case: it is purely a matter for Swedish domestic law.
- c) However, if George, the Englishman, should contract with Anders, the Swede, in (say) New York, USA, for the purchase of Anders' vintage car, it is not immediately obvious as to which legal system will have jurisdiction to hear a claim which may result from an action for an alleged breach of contract. But irrespective of where the dispute is heard, the courts in that particular *country*, or *law district*, will have to decide a case which contains a foreign element.

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If George attempted to initiate an action in England it would be for the court to determine, first of all, whether it had *jurisdiction* to hear the case. As a starting point, the *general rule* is that if the defendant is domiciled in the EC he should be sued in the courts of his domicile¹. The English courts may claim jurisdiction when the defendant is not domiciled in the EC and if it does, then it does so by virtue of the EC Regulation² permitting the application of the 'traditional rules' of English law. Should that be the case, jurisdiction is claimed only if it is in the interests of both parties and the ends of justice to do so.

However, any declaration of itself, that the English courts have jurisdiction, does not necessarily mean that it is appropriate for resolution of this problem for *English law* to be applied. Consequently, it is a function of the court in a Conflict of Laws case to determine not only the question of *Jurisdiction* but also what *system or choice of law* to apply. If the deemed choice of law is other than English law, New York law, for example, then its relevant provisions have to be proved in the same manner as other evidence, i.e. as a matter of fact.³ Thus, the plaintiff who aims to rely on the foreign law will try to prove it by relying on an *expert witness* to testify as to the law of the country in question. If, for some reason, the plaintiff does not discharge his burden of proof, then an English court will presume that English law is to be applied. Equally, English law could be applied and the foreign law be excluded if application of the latter was offensive to English justice or against public policy.

- d) Furthermore, had George succeeded in having judgment made in his favour in an action for breach of a contract unrelated to the one noted above, and which was brought before a court in a different country (New Zealand, for example), but then finds that the defendant and all his assets have arrived in England without the judgment having been satisfied, then George, no doubt, will hope that he can pursue the matter through an English court, not by having to prove his case again, but by persuading the court to *recognise and enforce the foreign judgment*.

Essential Elements of the Conflict of Laws as Developed from the Examples

The foregoing examples are merely indications that matters relating to *Jurisdiction* and *Choice of Law*, in cases involving a foreign element, and *the Recognition and Enforcement of Foreign Judgments* form the basis of, or the essential elements of, the Conflict of Laws. Moreover, the determination of jurisdiction and the choice of law are as important for arbitration matters as for any other 'conventional' litigation issues in the Conflict of Laws

Summary of the Nature of the Conflict of Laws

The Conflict of Laws is part of the *private law* of a country dealing with a foreign element. It is a function of the court to apply rules to the facts before it in order to select the *appropriate legal system* (jurisdiction) under which the problem may be resolved. In this respect it is unique: all other legal subjects apply rules to facts in order to resolve problems. In contrast, in the Conflict of Laws, resolution of the problem in question is possible only after selection of the appropriate legal system, i.e. once it has been established that a court has the jurisdiction to hear and decide a case, the next step is to determine the appropriate choice of law. If an English court rules that it doesn't have jurisdiction over the case, then all other matters are for a foreign court to decide.

Whereas the Conflict of Laws is as much a part of English Law as is (say) Labour Law, Contract, Tort or Family Law, it differs from other English legal subjects in that:

1. its subject matter always includes a foreign element;
2. one of its prime objectives is the pursuit and application of the appropriate legal system (expressed as: the *forum conveniens*); and
3. jurists have been more influential in this branch of the law than is typical with other legal subjects.

Since the subject is *part of English Law*, then the application of foreign law (if deemed appropriate by the court) is *not* a derogation of sovereignty. Given that *Austin* had said that law was a '*command of a Sovereign backed by a sanction*', this statement might imply that if foreign law is applied by an English court then the

¹ *EC Regulation 44/2001, Article 2.*

² *EC Regulation 44/2001, Article 4*

³ Note that this is not necessarily the case in other jurisdictions. Whilst English Law treats foreign law as fact, some jurisdictions treat it as law. This is a practicable approach in Civil Law Legal Systems – but is problematic under the common law because of the concept of binding legal precedent. Clearly an English court cannot shape the law of other countries or bind its courts. A further consequence of this distinction is that as a determination of fact, it is not amenable to appeal under English Law.

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foreign law has a position of relative supremacy over English law and that is why it prevails. However, the application of foreign law is made under the authority of *English law* and it is applied by the courts in the interests of justice for all the parties concerned. If, in any way, the application of foreign law would be offensive to English public policy, however, then the general rule is that the courts would not enforce it: English law would be substituted instead.

Note that *EC Law* prevails over conflicting English law on the same point is a matter that has been decided by the *Court of Justice of the European Communities (ECJ)* in 1964 in *Case 6/64, Costa v. ENEL* and affirmed in the *Factortame case (Case C-213/89)* in which an English Act of Parliament breached the 'non-discrimination' and 'rights of establishment' provisions of the Treaty of Rome (as amended) - an international Treaty to which the UK had voluntarily acceded and to which it had voluntarily ceded its sovereignty over specific issues. Given that *Art.249EC* provides that *Regulations* are generally applicable, binding in their entirety and directly applicable, it is readily understood why *Regulation 44/2001/EC* is the current 'starting point' for the determination of jurisdiction. This has been the case since 1st March 2002. See also: *Arts.293* and *65EC*; and *s.2(1) European Communities Act 1972*. *Regulation 44/2001* does *not* apply in Denmark).

An Outline of the Elements of the Conflict of Laws

1. Jurisdiction

In the English Conflict of Laws the principal concern relating to jurisdiction is that of jurisdiction *in personam*, i.e. jurisdiction over a particular person (natural or legal) as opposed to jurisdiction *in rem* which involves a particular thing - such as a ship in an Admiralty action in rem.

(i) **The basic common law rule** – applicable if the defendant is *not* domiciled within the EC - is that a court may only exercise its jurisdiction *in personam* if the defendant personally has been served with a claim form [formerly a writ of summons] in England or Wales. It is *not* a prerequisite that the matter being litigated has a connection with the English legal system nor is it necessary for the defendant to be in England for a specified minimum period before a writ may be served. Thus, in *Maharanees of Baroda v. Wildenstein* [1972],⁴ the defendant, who was resident in France, was served with a writ when he was in England merely for a day at Ascot racecourse. That was held to be sufficient to give the English High Court jurisdiction. Mere presence in England would, of course, no longer be sufficient for the English court to claim jurisdiction when a person served with a claim form is domiciled within the EC.

A defect of the common law, however, was that if the defendant was not present in England, or if he had neither expressly or impliedly submitted (i.e. agreed) to the jurisdiction of the English court, then the court did not have jurisdiction over him. To remedy this defect, the *Common Law Procedure Act 1852* was enacted. This introduced the principle of an 'assumed' or 'extended' or 'exorbitant' jurisdiction, i.e. this gave the court a *discretionary power* to summon before it defendants (irrespective of nationality) who were not domiciled or resident or present in England, by having them served with the writ or notice of the writ (now referred to as a claim form).

The present rules relating to the serving of a claim form on a defendant, who is not present in England (i.e., those in force since May 2000) or domiciled in another EC Member State, are contained in the Civil Procedure Rules Part 6.⁵ The discretion to serve a claim outside England will not be exercised, however, unless the court believes that England is the appropriate forum in which the dispute should be resolved i.e. England must be regarded as the *forum conveniens*.⁶ A significant feature of an English court having jurisdiction over a case is that in many instances, e.g. in proceedings for separation, divorce, maintenance of wives and children, it has applied English domestic law. Conversely, as the late *Dr. Morris* notes,

*"There are many situations in which, if a foreign court has jurisdiction according to English rules of the conflict of laws, its judgment or decree will be recognised or enforced in England, regardless of the grounds on which it was based or the choice of law rule which it applied."*⁷

4 *Maharanees of Baroda v. Wildenstein* [1972] 2 QB 283,

5 Previously Rules of the Supreme Court Order 11. r.1(1) (RSC Ord.11).

6 *CPR 6.37(3)* The court will not give permission unless satisfied that England and Wales is the proper place in which to bring the claim.

7 NB.: Note the qualification '*many situations*'. As previously noted, supra, if the enforcement of a foreign judgement would be contrary to English public policy then the English court will apply the appropriate rule of English law instead

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- (ii) When a defendant is domiciled within a Member State of the EC, the general rule is that he shall be sued in the courts of the country of his domicile: *Art 2(2) Council Regulation (EC) No 44/2001* and *Art.2 of the 1968 Brussels Convention* with regard to Denmark. However, there are notable exceptions to this as provided for in *Arts.5; 16 and 17* of the Regulation (*and semble Brussels Convention.*⁸)

CPR, PART 11 DISPUTING THE COURT'S JURISDICTION

- 11 Procedure for disputing the court's jurisdiction
- (1) A defendant who wishes to –
 - (a) dispute the court's jurisdiction to try the claim; or
 - (b) argue that the court should not exercise its jurisdictionmay apply to the court for an order declaring that it has no such jurisdiction or should not exercise any jurisdiction which it may have.
 - (2) A defendant who wishes to make such an application must first file an acknowledgment of service in accordance with Part 10.
 - (3) A defendant who files an acknowledgment of service does not, by doing so, lose any right that he may have to dispute the court's jurisdiction.
 - (4) An application under this rule must –
 - (a) be made within 14 days after filing an acknowledgment of service; and
 - (b) be supported by evidence.
 - (5) If the defendant –
 - (a) files an acknowledgment of service; and
 - (b) does not make such an application within the period specified in paragraph (4),he is to be treated as having accepted that the court has jurisdiction to try the claim.
 - (6) An order containing a declaration that the court has no jurisdiction or will not exercise its jurisdiction may also make further provision including –
 - (a) setting aside the claim form;
 - (b) setting aside service of the claim form;
 - (c) discharging any order made before the claim was commenced or before the claim form was served; and
 - (d) staying the proceedings.
 - (7) If on an application under this rule the court does not make a declaration –
 - (a) the acknowledgment of service shall cease to have effect;
 - (b) the defendant may file a further acknowledgment of service within 14 days or such other period as the court may direct; and
 - (c) the court shall give directions as to the filing and service of the defence in a claim under Part 7 or the filing of evidence in a claim under Part 8 in the event that a further acknowledgment of service is filed.
 - (8) If the defendant files a further acknowledgment of service in accordance with paragraph (7)(b) he shall be treated as having accepted that the court has jurisdiction to try the claim.
 - (9) If a defendant makes an application under this rule, he must file and serve his written evidence in support with the application notice, but he need not before the hearing of the application file –
 - (a) in a Part 7 claim, a defence; or
 - (b) in a Part 8 claim, any other written evidence.

2. Choice of Law Rules

*North & Fawcett*⁹ point out that: "If the English court decides that it possesses jurisdiction, then a further question, as to the choice of law, must be considered; i.e. which system of law, English or foreign, must govern the case?" The general rule is that, whatever the case relates to - for example, contract, tort or property - the answer to this question can be expressed in the same straightforward manner. This is illustrated by the evolution of common law rules which include, *inter alia*:

1. Succession to immovables [a category of property which, essentially, corresponds with the English notion of '*real property*' or '*land*', is governed by the *lex situs* [i.e. law of the place where the land is situated (*situs*)].

⁸ N.B. 1. The '*Brussels Convention*' is a Convention which has resulted from agreements that Member States were required to enter into under *Art.293EC* ('old' *Art.220*); and 2..

⁹ Cheshire & North's Private International Law, 12/e, 1992

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2. Succession to movable property [*personalty*] is governed by the law of the last domicile of the deceased: *lex ultimi domicilii*.
3. The formal validity of a marriage is governed by the law of the place of celebration: the *lex loci celebrationis*.

Clearly, each rule consists of two parts:

- (i) a category such as succession to immovables or movables; or the formal validity of a marriage; which is governed by:
- (ii) a factor, known as a connecting factor, since it connects, or links, the category with what is deemed to be the applicable law.

Thus, *the basic analysis of choice of law rules reduces to:* (1): a '*category*' is governed by (2): a '*connecting factor*.'

The *category* determines what type of case is to be resolved and the *connecting factor* indicates the appropriate legal system that is applicable. The connecting factor can only be *indicative* and not determinative of the applicable law since, for example, reasons of public policy may exist for excluding the application of foreign law. When the connecting factor links the category with the law of the Country (or *forum*) in which the Court decides the dispute, the applicable law (especially the English procedural law in the English Conflict of Law rules) is referred to as the *lex fori*. The *substantive law* that is applied (may be English law or a foreign law) is usually described as the *lex causae*.

Connecting Factor.

There are relatively few connecting factors linking legal categories to the applicable law. As already noted *supra* examples of connecting factors include:

- lex situs* (in relation to succession to immovables);
- lex loci celebrationis* (the law of the place where a marriage was celebrated);
- lex domicilii* (domicile) - a very important connecting factor linking a person to a system of law and used in relation to; inter alia, succession to movables and capacity to marry.

The influence of English law on the determination and meaning of connecting factors is clearly expressed by *Collier* who says: "*Since the conflict of laws forms part of English law, English law alone can determine when a foreign law is to be applied. It follows from this that English law must not only select the connecting factor, it must also say what it means. This is clear, though it is only in respect to two connecting factors, domicile and, for jurisdictional purposes, the place of contracting, that authority exists.*"

The authority cited by Collier in relation to domicile is *Re Annesley* (1926).¹⁰ Both English and French law use *domicile* as a connecting factor. However, whereas, according to English law, Mrs A died domiciled in France, this did not accord with French law. **HELD:** English law prevailed; Mrs A died domiciled in France.¹¹

In practice, however, an attempt to compartmentalise the choice of law rules into two 'clear cut' components is often met with difficulties and further analysis is required before the applicable law can be determined. This analysis may introduce considerations of: characterisation; renvoi; an incidental question; the time factor; and questions of substance and/or procedure.

Characterisation.

Whereas it has been decided that succession to the movables of an intestate is governed by the law of his domicile at the time of his death, (his *lex ultimi domicilii*) it is not at all obvious that, say, a widow who makes a claim against her intestate husband's estate is seeking '*succession to the movables of an intestate*'. For example, as Scots law entitles a widow to a portion of her husband's estate, then it may be that the correct category of claim involves the '*proprietary consequence of the marriage*' and that it is not a matter of succession at all. If this is the case, then it is governed by the husband's domicile at the time of the marriage. Suppose, then, that H was domiciled in Scotland at the time of his marriage but that he died domiciled in France. If :-

- (i), W's claim is categorised as intestate succession, the French law applies. However, if
- (ii), her claim is categorised as a proprietary cause of marriage, then Scots law will apply.

¹⁰ *Re Annesley* [1926] Ch 692

¹¹ Domicile, arguably the most important of connecting factors, is dealt with, as appropriate, in Lecture 2

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Consequently, there has to be a process under which the correct category is determinable. There is such a process and it is known as *characterisation* (sometimes known as classification).¹²

Renvoi

Whereas the process of characterisation is deemed necessary when there is not a uniform approach to the determination of a legal category, another approach, known as *renvoi*, may need to be employed when there is **not a uniform approach to the applicable connecting factor**. Diversity of approach may arise by way of either:

- (a) the *lex fori* and the *lex causae* employing the same connecting factor but meaning different things by it, as in *Re Annesley* (1926); or,
- (b) the *lex fori* and the *lex causae* using different connecting factors in conjunction with the same legal category, e.g. English law using domicile when Italian law uses nationality.

However, the real problem reduces to this: if the connecting factor indicates that the law of country X is the applicable law, just what is meant by '*the law of X*' [bearing in mind that it is English law that decides what the connecting factor means]? As country X will have its own Conflict of Laws rules does the law of X refer to:

- (i) the domestic or internal law of X, i.e. X minus its conflict rules, as in contract (including arbitral agreement) cases; or, perhaps,
- (ii) the law of X including its conflict rules but minus its conflict rules applying renvoi (if it has any) which may indicate that the appropriate law is either that of the country from which the litigation arose (i.e. the problem is remitted to England) or perhaps the law of some third country, e.g. Utopian law (a case of transmission); or, finally, does it mean
- (iii) the law of X including its conflict rules *and which include renvoi*, if applicable?

If it is the last, then the problem should, in theory, be viewed from the perspective of a judge hearing the case in country (X) first indicated by the forum, with the forum then applying the same law (of England or of X) as determined by the judge in country X.

The process for resolving problems generated by diversity in the application of connecting factors between the *lex fori* and the potential *lex causae* is known as *renvoi*. In the examples above:

- (i) refers to 'no renvoi';
- (ii) refers to single or partial renvoi; and
- (iii) refers to double or total renvoi, or is sometimes known as the foreign court theory.¹³

The Incidental Question.

Pierre, a testator who was domiciled in France, granted movables in England to Claudia, his 'wife'. Now if the legal category is *succession to movables* then it is governed by *the last domicile of the deceased - the lex ultimi domicilii* - so French law applies. However, a subsidiary or *incidental question* may arise: this relates to the validity of Pierre's marriage and it may be dependent on the validity of a previous divorce. In such a case it has to be decided whether this incidental question, of whether Claudia is Pierre's wife, is to be referred to the English or French rules of the conflict of laws which relate to the validity of marriages and recognition of divorces. It would appear from what limited authority there is that the incidental question is *usually* determined by the conflict rule of the law governing the main issue.

The Time Factor.

The time factor refers to the problem to be addressed when changes in the law over time give rise to a change in any of the factors affecting the choice of law process, viz.:

1. the conflict rule of the forum; or
2. the connecting factor; or
3. the *lex causae*.

Morris said: "*Changes in the lex causae present much the most important and difficult problem of time in the conflict of laws, especially when the change purports to have retrospective effect*".

Yet, in principle, the position is straightforward: the *lex causae as amended* should apply. The reasoning behind this principle being that that is the law which would be applicable in an entirely domestic situation

¹² See Lecture 3 for further information

¹³ **N.B.:** 1. Since *Re Annesley* (1926) double renvoi has emerged as the orthodox English approach. 2. Renvoi has no further part to play in this course: it is specifically excluded from having a role to play in the choice of law process by *s.46(2) Arbitration Act 1996*

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and, if the pursuit of uniformity in decision making is a goal of the Conflict of Laws, then that is what should be applied by the forum. There can be derogation from this principle, however, if enforcement of this would be offensive to the public policy of the *lex fori*.¹⁴

Substance and Procedure.

In essence, *substantive* issues are those which concern the existence of a right whereas *procedural* issues are those which relate to the method and means of enforcement of a right. However, the difficulty lies in distinguishing a substantive issue from a procedural issue. Again, this is a problem of characterisation: is a matter categorised as procedural and governed by the *lex fori*; or is it substantive and governed by the *lex causae*? A House of Lords decision, *Boys v Chaplin* (1971),¹⁵ recognised *remoteness of damage* in a tortious claim as substantive and governed by the *lex causae*. On the other hand, an issue of *quantification of damages* is procedural and governed by the *lex fori*.¹⁶

3. The Recognition and Enforcement of Foreign Judgements.

The recognition by an English court of a foreign judgment simply means that the English court has taken notice of the foreign judgment. It is not required to do anything else: it is an essentially passive function. So, for example, the recognition by an English court of the granting of a decree of divorce by a foreign court dissolving the marriage of H & W means that in a case before the English court, H & W will be recognised as not married to each other. In contrast, enforcing a foreign judgment requires the English court to act: P is petitioning the court seeking an order demanding that D must pay him a fixed sum of money - the sum that was awarded by the foreign court.

At common law, the situations under which a court would recognise or enforce a foreign judgment were listed by *Buckley L.J.* in *Emanuel v Symon* (1908).¹⁷ He referred to '... [the] five cases in which the courts of this country will enforce a foreign judgment.' In essence, however, one of the cases (that based on nationality) has been doubted; three of them constitute various aspects of submission to the foreign court's jurisdiction; and the fifth relates to residence within the jurisdiction of the foreign court. Thus, the effect at common law is that for the foreign court to have jurisdiction (or international competence), i.e. for the judgment of the foreign court to be recognised or enforced by the English court, it must have had the authority to decide a case by way of the defendant's *residence* within, or *submission* to, its jurisdiction.

The basic principle, then, is that an English court will usually enforce a judgment of a foreign court provided that the foreign court had jurisdiction to render that judgment. As to whether the foreign court had jurisdiction is a matter of *English law*: and English law has decided that it is irrelevant that the foreign court did not have jurisdiction under its own internal (or domestic) law: *Buchanan v Rucker* (1808).¹⁸ The reason for this is that the enforcement of a foreign judgment by an English court is largely (though not exclusively) dependent on the sufficiency of the link between the defendant and the foreign court. If the strength of this link is established, then lack of jurisdiction by the particular foreign court (by reference to its own internal law), or the making of an error of fact or law by that court will not enable the defendant to invoke either of these '*mistakes*' in order successfully to defend an action for enforcement in an English court.

The common law rules still predominate in situations where enforcement is sought of judgments made outside EC countries. In addition to :-

- (i) the foreign court having to have International competence '*in the eyes of English law*', two other points must be satisfied, viz;
- (ii) the foreign judgment must be for a fixed sum of money; and
- (iii) the judgment must be final and conclusive, i.e. '*final and conclusive*' in the court which rendered the judgment. It does not mean that if it is subject to appeal in a higher court that it is not '*final and conclusive*'.

Apart from enforcement at common law for judgements rendered outside the EC there are situations dealing with *statutory enforcement* of judgments of both non-EC countries and judgements rendered within the EC.

¹⁴ The Incidental Question and the Time Factor are considered in more detail in Lecture 7

¹⁵ *Boys v Chaplin*, [1969] 2 All E.R. 1085 (H.L.)

¹⁶ Substance and Procedure is subjected to further analysis in Lecture 7.

¹⁷ *Emanuel v. Symon*, [1908] 1 K.B. 302 (C.A.),

¹⁸ *Buchanan v. Rucker*, 9 East 192, 103 Eng. Rep. 546 (K. B. 1808).

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Foreign Judgments (Reciprocal Enforcement) Act 1933

An Act to make provision for the enforcement in the United Kingdom of judgments given in foreign countries which accord reciprocal treatment to judgments given in the United Kingdom, for facilitating the enforcement in foreign countries of judgments given in the United Kingdom, and for other purposes in connection with the matters aforesaid.

PART I

REGISTRATION OF FOREIGN JUDGMENTS

Power to extend Part I of Act to foreign countries giving reciprocal treatment.

1. (1) If, in the case of any foreign country, Her Majesty is satisfied that, in the event of the benefits conferred by this Part of this Act being extended to, or to any particular class of, judgments given in the courts of that country or in any particular class of those courts, substantial reciprocity of treatment will be assured as regards the enforcement in that country of similar judgments given in similar courts of the United Kingdom, She may by order in Council direct—
 - (a) that this Part of this Act shall extend to that country;
 - (b) that such courts of that country as are specified in the Order shall be recognised courts of that country for the purposes of this Part of this Act; and
 - (c) that judgments of any such recognised court, or such judgments of any class so specified, shall, if within subsection (2) of this section, be judgments to which this Part of this Act applies.
1. (2) Subject to subsection (2A) of this section, a judgment of a recognised court is within this subsection if it satisfies the following conditions, namely—
 - (a) it is either final and conclusive as between the judgment debtor and the judgment creditor or requires the former to make an interim payment to the latter; and
 - (b) there is payable under it a sum of money, not being a sum payable in respect of taxes or other charges of a like nature or in respect of a fine or other penalty; and
 - (c) it is given after the coming into force of the Order in Council which made that court a recognised court.
- 1.(2A) The following judgments of a recognised court are not within subsection (2) of this section—
 - (a) a judgment given by that court on appeal from a court which is not a recognised court;
 - (b) a judgment or other instrument which is regarded for the purposes of its enforcement as a judgment of that court but which was given or made in another country;
 - (c) a judgment given by that court in proceedings founded on a judgment of a court in another country and having as their object the enforcement of that judgment.
- 1.(3) For the purposes of this section, a judgment shall be deemed to be final and conclusive notwithstanding that an appeal may be pending against it, or that it may still be subject to appeal, in the courts of the country of the original court.
- 1.(4) His Majesty may by a subsequent Order in Council vary or revoke any Order previously made under this section.
- 1.(5) Any Order in Council made under this section before its amendment by the Civil Jurisdiction and Judgments Act 1982 which deems any court of a foreign country to be a superior court of that country for the purposes of this Part of this Act shall (without prejudice to subsection (4) of this section) have effect from the time of that amendment as if it provided for that court to be a recognised court of that country for those purposes, and for any final and conclusive judgment of that court, if within subsection (2) of this section, to be a judgment to which this Part of this Act applies.

Application for, and effect of, registration of foreign judgment.

- 2.(1) A person, being a judgment creditor under a judgment to which this Part of this Act applies, may apply to the High Court at any time within six years after the date of the judgment, or, where there have been proceedings by way of appeal against the judgment, after the date of the last judgment given in those proceedings, to have the judgment registered in the High Court, and on any such application the court shall, subject to proof of the prescribed matters and to the other provisions of this Act, order the judgment to be registered:
Provided that a judgment shall not be registered if at the date of the application—
 - (a) it has been wholly satisfied; or
 - (b) it could not be enforced by execution in the country of the original court.

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- 2.(2) Subject to the provisions of this Act with respect to the setting aside of registration—
- (a) a registered judgment shall, for the purposes of execution, be of the same force and effect; and
 - (b) proceedings may be taken on a registered judgment; and
 - (c) the sum for which a judgment is registered shall carry interest; and
 - (d) the registering court shall have the same control over the execution of a registered judgment; as if the judgment had been a judgment originally given in the registering court and entered on the date of registration:
- Provided that execution shall not issue on the judgment so long as, under this Part of this Act and the Rules of Court made thereunder, it is competent for any party to make an application to have the registration of the judgment set aside, or, where such an application is made, until after the application has been finally determined.
- 2.(4) If at the date of the application for registration the judgment of the original court has been partly satisfied, the judgment shall not be registered in respect of the whole sum payable under the judgment of the original court, but only in respect of the balance remaining payable at that date.
- 2.(5) If, on an application for the registration of a judgment, it appears to the registering court that the judgment is in respect of different matters and that some, but not all, of the provisions of the judgment are such that if those provisions had been contained in separate judgments those judgments could properly have been registered, the judgment may be registered in respect of the provisions aforesaid but not in respect of any other provisions contained therein.
- 2.(6) In addition to the sum of money payable under the judgment of the original court, including any interest which by the law of the country of the original court becomes due under the judgment up to the time of registration, the judgment shall be registered for the reasonable costs of and incidental to registration, including the costs of obtaining a certified copy of the judgment from the original court.

Rules of court.

- 3.(1) The power to make rules of court under section 84 of the Supreme Court Act 1981, shall, subject to the provisions of this section, include power to make rules for the following purposes—
- (a) For making provision with respect to the giving of security for costs by persons applying for the registration of judgments;
 - (b) For prescribing the matters to be proved on an application for the registration of a judgment and for regulating the mode of proving those matters;
 - (c) For providing for the service on the judgment debtor of notice of the registration of a judgment;
 - (d) For making provision with respect to the fixing of the period within which an application may be made to have the registration of the judgment set aside and with respect to the extension of the period so fixed;
 - (e) For prescribing the method by which any question arising under this Act whether a foreign judgment can be enforced by execution in the country of the original court, or what interest is payable under a foreign judgment under the law of the original court, is to be determined;
 - (f) For prescribing any matter which under this Part of this Act is to be prescribed.
- 3.(2) Rules made for the purposes of this Part of this Act shall be expressed to have, and shall have, effect subject to any such provisions contained in Orders in Council made under section one of this Act as are declared by the said Orders to be necessary for giving effect to agreements made between His Majesty and foreign countries in relation to matters with respect to which there is power to make rules of court for the purposes of this Part of this Act.

Cases in which registered judgments must, or may, be set aside.

- 4.(1) On an application in that behalf duly made by any party against whom a registered judgment may be enforced, the registration of the judgment—
- (a) shall be set aside if the registering court is satisfied—
 - (i) that the judgment is not a judgment to which this Part of this Act applies or was registered in contravention of the foregoing provisions of this Act; or
 - (ii) that the courts of the country of the original court had no jurisdiction in the circumstances of the case; or
 - (iii) that the judgment debtor, being the defendant in the proceedings in the original court, did not (notwithstanding that process may have been duly served on him in accordance with the law of the country of the original court) receive notice of those proceedings in sufficient time to enable him to defend the proceedings and did not appear; or
 - (iv) that the judgment was obtained by fraud; or
 - (v) that the enforcement of the judgment would be contrary to public policy in the country of the registering court; or

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- (vi) that the rights under the judgment are not vested in the person by whom the application for registration was made;
 - (b) may be set aside if the registering court is satisfied that the matter in dispute in the proceedings in the original court had previously to the date of the judgment in the original court been the subject of a final and conclusive judgment by a court having jurisdiction in the matter.
- 4.(2) For the purposes of this section the courts of the country of the original court shall, subject to the provisions of subsection (3) of this section, be deemed to have had jurisdiction—
- (a) in the case of a judgment given in an action in personam—
 - (i) if the judgment debtor, being a defendant in the original court, submitted to the jurisdiction of that court by voluntarily appearing in the proceedings . . . ; or
 - (ii) if the judgment debtor was plaintiff in, or counter-claimed in, the proceedings in the original court; or
 - (iii) if the judgment debtor, being a defendant in the original court, had before the commencement of the proceedings agreed, in respect of the subject matter of the proceedings, to submit to the jurisdiction of that court or of the courts of the country of that court; or
 - (iv) if the judgment debtor, being a defendant in the original court, was at the time when the proceedings were instituted resident in, or being a body corporate had its principal place of business in, the country of that court; or
 - (v) if the judgment debtor, being a defendant in the original court, had an office or place of business in the country of that court and the proceedings in that court were in respect of a transaction effected through or at that office or place;
 - (b) in the case of a judgment given in an action of which the subject matter was immovable property or in an action in rem of which the subject matter was movable property, if the property in question was at the time of the proceedings in the original court situate in the country of that court;
 - (c) in the case of a judgment given in an action other than any such action as is mentioned in paragraph (a) or paragraph (b) of this subsection, if the jurisdiction of the original court is recognised by the law of the registering court.
- 4.(3) Notwithstanding anything in subsection (2) of this section, the courts of the country of the original court shall not be deemed to have had jurisdiction—
- (a) if the subject matter of the proceedings was immovable property outside the country of the original court; or
 - (c) if the judgment debtor, being a defendant in the original proceedings, was a person who under the rules of public international law was entitled to immunity from the jurisdiction of the courts of the country of the original court and did not submit to the jurisdiction of that court.

Powers of registering court on application to set aside registration.

- 5.(1) If, on an application to set aside the registration of a judgment, the applicant satisfies the registering court either that an appeal is pending, or that he is entitled and intends to appeal, against the judgment, the court, if it thinks fit, may, on such terms as it may think just, either set aside the registration or adjourn the application to set aside the registration until after the expiration of such period as appears to the court to be reasonably sufficient to enable the applicant to take the necessary steps to have the appeal disposed of by the competent tribunal.
- 5.(2) Where the registration of a judgment is set aside under the last foregoing subsection, or solely for the reason that the judgment was not at the date of the application for registration enforceable by execution in the country of the original court, the setting aside of the registration shall not prejudice a further application to register the judgment when the appeal has been disposed of or if and when the judgment becomes enforceable by execution in that country, as the case may be.
- 5.(3) Where the registration of a judgment is set aside solely for the reason that the judgment, notwithstanding that it had at the date of the application for registration been partly satisfied, was registered for the whole sum payable thereunder, the registering court shall, on the application of the judgment creditor, order judgment to be registered for the balance remaining payable at that date.

Foreign judgments which can be registered not to be enforceable otherwise.

6. No proceedings for the recovery of a sum payable under a foreign judgment, being a judgment to which this Part of this Act applies, other than proceedings by way of registration of the judgment, shall be entertained by any court in the United Kingdom.

Power to apply Part I of Act to British dominions, protectorates and mandated territories.

- 7.(1) His Majesty may by Order in Council direct that this Part of this Act shall apply to His Majesty's dominions outside the United Kingdom and to judgments obtained in the courts of the said dominions as it applies to foreign countries and judgments obtained in the courts of foreign countries, and, in the event of His Majesty so directing, this Act shall have effect accordingly and Part II of the ^{M1}Administration of Justice Act 1920, shall cease to have effect except in relation to those parts of the said dominions to which it extends at the date of the Order.
- 7.(2) If at any time after His Majesty has directed as aforesaid an Order in Council is made under section one of this Act extending Part I of this Act to any part of His Majesty's dominions to which the said Part II extends as aforesaid, the said Part II shall cease to have effect in relation to that part of His Majesty's dominions.
- 7.(3) References in this section to His Majesty's dominions outside the United Kingdom shall be construed as including references to any territories which are under His Majesty's protection and to any territories in respect of which a mandate under the League of Nations has been accepted by His Majesty.

PART II

MISCELLANEOUS AND GENERAL

General effect of certain foreign judgments.

- 8.(1) Subject to the provisions of this section, a judgment to which Part I of this Act applies or would have applied if a sum of money had been payable thereunder, whether it can be registered or not, and whether, if it can be registered, it is registered or not, shall be recognised in any court in the United Kingdom as conclusive between the parties thereto in all proceedings founded on the same cause of action and may be relied on by way of defence or counter-claim in any such proceedings.
- 8.(2) This section shall not apply in the case of any judgment—
- (a) where the judgment has been registered and the registration thereof has been set aside on some ground other than—
 - (i) that a sum of money was not payable under the judgment; or
 - (ii) that the judgment had been wholly or partly satisfied; or
 - (iii) that at the date of the application the judgment could not be enforced by execution in the country of the original court; or
 - (b) where the judgment has not been registered, it is shown (whether it could have been registered or not) that if it had been registered the registration thereof would have been set aside on an application for that purpose on some ground other than one of the grounds specified in paragraph (a) of this subsection.
- 8.(3) Nothing in this section shall be taken to prevent any court in the United Kingdom recognising any judgment as conclusive of any matter of law or fact decided therein if that judgment would have been so recognised before the passing of this Act.

Power to make foreign judgments unenforceable in United Kingdom if no reciprocity.

- 9.(1) If it appears to His Majesty that the treatment in respect of recognition and enforcement accorded by the courts of any foreign country to judgments given in the courts of the United Kingdom is substantially less favourable than that accorded by the courts of the United Kingdom to judgments of the courts of that country, His Majesty may by Order in Council apply this section to that country.
- 9.(2) Except in so far as His Majesty may by Order in Council under this section otherwise direct, no proceedings shall be entertained in any court in the United Kingdom for the recovery of any sum alleged to be payable under a judgment given in a court of a country to which this section applies.
- 9.(3) His Majesty may by a subsequent Order in Council vary or revoke any Order previously made under this section.

Provision for issue of copies of, and certificates in connection with, U.K. judgments.

- 10.(1) Rules may make provision for enabling any judgment creditor wishing to secure the enforcement in a foreign country to which Part I of this Act extends of a judgment to which this subsection applies, to obtain, subject to any conditions specified in the rules—
- (a) a copy of the judgment; and
 - (b) a certificate giving particulars relating to the judgment and the proceedings in which it was given.
- 10.(2) Subsection (1) applies to any judgment given by a court or tribunal in the United Kingdom under which a sum of money is payable, not being a sum payable in respect of taxes or other charges of a like nature or in respect of a fine or other penalty.

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10.(3) In this section “rules” –

- (a) in relation to judgments given by a court, means rules of court;
- (b) in relation to judgments given by any other tribunal, means rules or regulations made by the authority having power to make rules or regulations regulating the procedure of that tribunal.

Arbitration awards.

10A. The provisions of this Act, except sections 1(5) and 6, shall apply, as they apply to a judgment, in relation to an award in proceedings on an arbitration which has, in pursuance of the law in force in the place where it was made, become enforceable in the same manner as a judgment given by a court in that place.

Interpretation.

11.(1) In this Act, unless the context otherwise requires, the following expressions have the meanings hereby assigned to them respectively, that is to say –

“Appeal” includes any proceeding by way of discharging or setting aside a judgment or an application for a new trial or a stay of execution;

“Country of the original court” means the country in which the original court is situated;

“Court”, except in section 10 of this Act, includes a tribunal;

“Judgment” means a judgment or order given or made by a court in any civil proceedings, or a judgment or order given or made by a court in any criminal proceedings for the payment of a sum of money in respect of compensation or damages to an injured party;

“Judgment creditor” means the person in whose favour the judgment was given and includes any person in whom the rights under the judgment have become vested by succession or assignment or otherwise;

“Judgment debtor” means the person against whom the judgment was given, and includes any person against whom the judgment is enforceable under the law of the original court;

“Original court” in relation to any judgment means the court by which the judgment was given;

“Prescribed” means prescribed by rules of court;

“Registration” means registration under Part I of this Act, and the expressions “register” and “registered” shall be construed accordingly;

“Registering court” in relation to any judgment means the court to which an application to register the judgment is made.

11.(2) For the purposes of this Act, the expression “action in personam” shall not be deemed to include any matrimonial cause or any proceedings in connection with any of the following matters, that is to say, matrimonial matters, administration of the estates of deceased persons, bankruptcy, winding up of companies, lunacy, or guardianship of infants.

Application to Scotland.

12. This Act in its application to Scotland shall have effect subject to the following modifications: –

- (a) For any reference to the High Court there shall be substituted a reference to the Court of Session;
- (b) The Court of Session shall, subject to the provisions of subsection (2) of section three of this Act, have power by Act of Sederunt to make rules for the purposes specified in subsection (1) of the said section;
- (c) Registration under Part I of this Act shall be effected by registering in the Books of Council and Session or in such manner as the Court of Session may by Act of Sederunt prescribe;
- (e) For any reference to the entering of a judgment there shall be substituted a reference to the signing of the interlocutor embodying the judgment.

Application to Northern Ireland.

13. This Act in its application to Northern Ireland shall have effect subject to the following modifications: –

- (a) References to the High Court shall, unless the context otherwise requires, be construed as references to the High Court in Northern Ireland;
- (b) For the references to section ninety-nine of the Supreme Court of Judicature (Consolidation) Act 1925, there shall be substituted, references to sections 55 of the Judicature (Northern Ireland) Act 1978.

Short title.

14. This Act may be cited as the Foreign Judgments (Reciprocal Enforcement) Act 1933.

Black Clawson v Papierwerke [1975] HL.¹⁹ *s8 Foreign Judgments (Reciprocal Enforcement) Act, 1933.*
Statutory interpretation.

¹⁹ *Black Clawson International Ltd v. Papierwerke AG* [1975] UKHL 2 : Before Viscount Dilhorne ; Lords Reid; Wilberforce ; Diplock; Simon. 5th March 1975.

Civil Procedure Rules : General Provisions.

CPR PART 74

ENFORCEMENT OF JUDGMENTS IN DIFFERENT JURISDICTIONS

74.1 Scope of this Part and interpretation

- (1) Section I of this Part applies to the enforcement in England and Wales of judgments of foreign courts.
- (2) Section II applies to the enforcement in foreign countries of judgments of the High Court and of county courts.
- (3) Section III applies to the enforcement of United Kingdom judgments in other parts of the United Kingdom.
- (4) Section IV applies to the enforcement in England and Wales of European Community judgments and Euratom inspection orders.
- (4A) Section V applies to –
 - (a) the certification of judgments and court settlements in England and Wales as European Enforcement Orders; and
 - (b) the enforcement in England and Wales of judgments, court settlements and authentic instruments certified as European Enforcement Orders by other Member States.
- (5) In this Part –
 - (a) ‘the 1920 Act’ means the Administration of Justice Act 1920;²⁰
 - (b) ‘the 1933 Act’ means the Foreign Judgments (Reciprocal Enforcement) Act 1933;²¹
 - (c) ‘the 1982 Act’ means the Civil Jurisdiction and Judgments Act 1982;²²
 - (d) ‘the Judgments Regulation’ means Council Regulation (EC) No. 44/2001 of 22nd December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, as amended from time to time and as applied by the Agreement made on 19th October 2005 between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters;²³
 - (e) ‘the EEO Regulation’ means Council Regulation (EC) No 805/2004 creating a European Enforcement Order for uncontested claims.²⁴

Civil Procedure Rules : Enforcement of non-EC Judgments

I ENFORCEMENT IN ENGLAND AND WALES OF JUDGMENTS OF FOREIGN COURTS

74.2 Interpretation

- (1) In this Section –
 - (a) ‘Contracting State’ has the meaning given in section 1(3) of the 1982 Act;
 - (b) ‘Regulation State’ means a Member State;
 - (c) ‘judgment’ means, subject to any other enactment, any judgment given by a foreign court or tribunal, whatever the judgment may be called, and includes
 - (i) a decree;
 - (ii) an order;
 - (iii) a decision;
 - (iv) a writ of execution; and
 - (v) the determination of costs by an officer of the court;
 - (d) ‘State of origin’, in relation to any judgment, means the State in which that judgment was given.
- (2) For the purposes of this Section, ‘domicile’ is to be determined –
 - (a) in an application under the 1982 Act, in accordance with sections 41 to 46 that Act;
 - (b) in an application under the Judgments Regulation, in accordance with paragraphs 9 to 12 of Schedule 1 to the Civil Jurisdiction and Judgments Order 2001.²⁵

Carnegie v Giessen [2005] EWCA Civ 191 : Enforcement of a foreign debt - conversion into sterling. CA. before Ward LJ; Dyson LJ; Carnwath LJ. 1st March 2005.

²⁰ 10 & 11 Geo 5 c. 81.

²¹ 23 & 24 Geo 5 c. 13.

²² 1982 c. 27, as amended by the Civil Jurisdiction and Judgments Act 1991 (c. 12) and by S.I. 1989/1346, S.I. 1990/2591, S.I. 1993/603, S.I. 2000/1824 and S.I. 2001/3929.

²³ OJ No. L 299 16.11.2005 at p62.

²⁴ (A copy of the EEO Regulation is annexed to Practice Direction 74B European Enforcement Orders and can be found at http://europa.eu.int/eur-lex/pri/en/oj/dat/2004/l_143/l_14320040430en00150039.pdf)

²⁵ S.I. 2001/3929.

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74.3 Applications for registration

- (1) This Section provides rules about applications under –
 - (a) section 9 of the 1920 Act, in respect of judgments to which Part II of that Act applies;
 - (b) section 2 of the 1933 Act, in respect of judgments to which Part I of that Act applies;
 - (c) section 4 of the 1982 Act; and
 - (d) the Judgments Regulationfor the registration of foreign judgments for enforcement in England and Wales.
- (2) Applications –
 - (a) must be made to the High Court; and
 - (b) may be made without notice.

74.4 Evidence in support

- (1) An application for registration of a judgment under the 1920, 1933 or 1982 Act must be supported by written evidence exhibiting –
 - (a) the judgment or a verified or certified or otherwise authenticated copy of it; and
 - (b) where the judgment is not in English, a translation of it into English –
 - (i) certified by a notary public or other qualified person; or
 - (ii) accompanied by written evidence confirming that the translation is accurate.
- (2) The written evidence in support of the application must state –
 - (a) the name of the judgment creditor and his address for service within the jurisdiction;
 - (b) the name of the judgment debtor and his address or place of business, if known;
 - (c) the grounds on which the judgment creditor is entitled to enforce the judgment;
 - (d) in the case of a money judgment, the amount in respect of which it remains unsatisfied; and
 - (e) where interest is recoverable on the judgment under the law of the State of origin –
 - (i) the amount of interest which has accrued up to the date of the application, or
 - (ii) the rate of interest, the date from which it is recoverable, and the date on which it ceases to accrue.
- (3) Written evidence in support of an application under the 1920 Act must also state that the judgment is not a judgment –
 - (a) which under section 9 of that Act may not be ordered to be registered; or
 - (b) to which section 5 of the Protection of Trading Interests Act 1980 applies.²⁶
- (4) Written evidence in support of an application under the 1933 Act must also –
 - (a) state that the judgment is a money judgment;
 - (b) confirm that it can be enforced by execution in the State of origin;
 - (c) confirm that the registration could not be set aside under section 4 of that Act;
 - (d) confirm that the judgment is not a judgment to which section 5 of the Protection of Trading Interests Act 1980 applies;
 - (e) where the judgment contains different provisions, some but not all of which can be registered for enforcement, set out those provisions in respect of which it is sought to register the judgment; and
 - (f) be accompanied by any further evidence as to –
 - (i) the enforceability of the judgment in the State of origin, and
 - (ii) the law of that State under which any interest has become due under the judgment, which may be required under the relevant Order in Council extending Part I of the 1933 Act to that State.
- (5) Written evidence in support of an application under the 1982 Act must also exhibit –
 - (a) documents which show that, under the law of the State of origin, the judgment is enforceable on the judgment debtor and has been served;
 - (b) in the case of a judgment in default, a document which establishes that the party in default was served with the document instituting the proceedings or with an equivalent document; and
 - (c) where appropriate, a document showing that the judgment creditor is in receipt of legal aid in the State of origin.
- (6) An application for registration under the Judgments Regulation must, in addition to the evidence required by that Regulation, be supported by the evidence required by paragraphs (1)(b) and (2)(e) of this rule.

74.5 Security for costs

- (1) Subject to paragraphs (2) and (3), section II of Part 25 applies to an application for security for the costs of –
 - (a) the application for registration;
 - (b) any proceedings brought to set aside the registration; and
 - (c) any appeal against the granting of the registrationas if the judgment creditor were a claimant.

²⁶ 1980 c. 11.

- (2) A judgment creditor making an application under the 1982 Act or the Judgments Regulation may not be required to give security solely on the ground that he is resident out of the jurisdiction.
- (3) Paragraph (1) does not apply to an application under the 1933 Act where the relevant Order in Council otherwise provides.

74.6 Registration orders

- (1) An order granting permission to register a judgment ('a registration order') must be drawn up by the judgment creditor and served on the judgment debtor –
 - (a) by delivering it to the judgment debtor personally;
 - (b) as provided by –
 - (i) section 725 of the Companies Act 1985;²⁷ or
 - (ii) the Companies Act 2006;²⁸ or
 - (c) in such other manner as the court may direct.
- (2) Permission is not required to serve a registration order out of the jurisdiction, and rules 6.40, 6.42, 6.43 and 6.46 apply to such an order as they apply to a claim form.
- (3) A registration order must state –
 - (a) full particulars of the judgment registered;
 - (b) the name of the judgment creditor and his address for service within the jurisdiction;
 - (c) the right of the judgment debtor –
 - (i) in the case of registration following an application under the 1920 or the 1933 Act, to apply to have the registration set aside;
 - (ii) in the case of registration following an application under the 1982 Act or under the Judgments Regulation, to appeal against the registration order;
 - (d) the period within which such an application or appeal may be made; and
 - (e) that no measures of enforcement will be taken before the end of that period, other than measures ordered by the court to preserve the property of the judgment debtor.

74.7 Applications to set aside registration

- (1) An application to set aside registration under the 1920 or the 1933 Act must be made within the period set out in the registration order.
- (2) The court may extend that period; but an application for such an extension must be made before the end of the period as originally fixed or as subsequently extended.
- (3) The court hearing the application may order any issue between the judgment creditor and the judgment debtor to be tried.

74.8 Appeals

- (1) An appeal against the granting or the refusal of registration under the 1982 Act or the Judgments Regulation must be made in accordance with Part 52, subject to the following provisions of this rule.
- (2) Permission is not required –
 - (a) to appeal; or
 - (b) to put in evidence.
- (3) If –
 - (a) the judgment debtor is not domiciled within a Contracting State or a Regulation State, as the case may be, and
 - (b) an application to extend the time for appealing is made within two months of service of the registration order the court may extend the period for filing an appellant's notice against the order granting registration, but not on grounds of distance.
- (4) The appellant's notice must be served –
 - (a) where the appeal is against the granting of registration, within –
 - (i) one month; or
 - (ii) where service is to be effected on a party not domiciled within the jurisdiction, two months of service of the registration order;
 - (b) where the appeal is against the refusal of registration, within one month of the decision on the application for registration.

74.9 Enforcement

- (1) No steps may be taken to enforce a judgment –
 - (a) before the end of the period specified in accordance with rule 74.6(3)(d), or that period as extended by the court; or

²⁷ 1985 c. 6.

²⁸ 2006 c. 46.

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- (b) where there is an application under rule 74.7 or an appeal under rule 74.8, until the application or appeal has been determined.
- (2) Any party wishing to enforce a judgment must file evidence of the service on the judgment debtor of –
- (a) the registration order; and
- (b) any other relevant order of the court.
- (3) Nothing in this rule prevents the court from making orders to preserve the property of the judgment debtor pending final determination of any issue relating to the enforcement of the judgment.

74.10 Recognition

- (1) Registration of a judgment serves as a decision that the judgment is recognised for the purposes of the 1982 Act and the Judgments Regulation.
- (2) An application for recognition of a judgment is governed by the same rules as an application for registration of a judgment under the 1982 Act or under the Judgments Regulation, except that rule 74.4(5)(a) and (c) does not apply.

74.11 Authentic instruments and court settlements

The rules governing the registration of judgments under the 1982 Act or under the Judgments Regulation apply as appropriate and with any necessary modifications for the enforcement of –

- (a) authentic instruments which are subject to –
- (i) article 50 of Schedule 1 to the 1982 Act;
- (ii) article 50 of Schedule 3C to the 1982 Act; and
- (iii) article 57 of the Judgments Regulation; and
- (b) court settlements which are subject to –
- (i) article 51 of Schedule 1 to the 1982 Act;
- (ii) article 51 of Schedule 3C to the 1982 Act; and
- (iii) article 58 of the Judgments Regulation.

SUPPLEMENTAL DIRECTIONS

PRACTICE DIRECTION – ENFORCEMENT OF JUDGMENTS IN DIFFERENT JURISDICTIONS

1. This practice direction is divided into two sections –
- (1) Section I – Provisions about the enforcement of judgments
- (2) Section II – The Merchant Shipping (Liner Conferences) Act 1982

Section I ENFORCEMENT OF JUDGMENTS

2. Meaning of 'judgment'

In rule 74.2(1)(c), the definition of 'judgment' is 'subject to any other enactment'. Such provisions include –

- (1) section 9(1) of the 1920 Act, which limits enforcement under that Act to judgments of superior courts;
- (2) section 1(1) of the 1933 Act, which limits enforcement under that Act to judgments of those courts specified in the relevant Order in Council;
- (3) section 1(2) of the 1933 Act, which limits enforcement under that Act to money judgments.

3. Registers

There will be kept in the Central Office of the Supreme Court at the Royal Courts of Justice, under the direction of the Senior Master –

- (1) registers of foreign judgments ordered by the High Court to be enforced following applications under –
- (a) section 9 of the 1920 Act;
- (b) section 2 of the 1933 Act;
- (c) section 4 of the 1982 Act; or
- (d) the Judgments Regulation;
- (2) registers of certificates issued for the enforcement in foreign countries of High Court judgments under the 1920, 1933 and 1982 Acts, and under article 54 of the Judgments Regulation;
- (3) a register of certificates filed in the Central Office of the High Court under rule 74.15(2) for the enforcement of money judgments given by the courts of Scotland or Northern Ireland;
- (4) a register of certificates issued under rule 74.16(3) for the enforcement of non-money judgments given by the courts of Scotland or Northern Ireland;
- (5) registers of certificates issued under rules 74.17 and 74.18 for the enforcement of High Court judgments in Scotland or Northern Ireland under Schedule 6 or Schedule 7 to the 1982 Act; and
- (6) a register of Community judgments and Euratom inspection orders ordered to be registered under article 3 of the European Communities (Enforcement of Community Judgments) Order 1972.

Private International Law : Conflicts of Law

4.1 Making an application

Applications for the registration for enforcement in England and Wales of –

- (1) foreign judgments under rule 74.3;
 - (2) judgments of courts in Scotland or Northern Ireland under rule 74.15 or 74.16; and
 - (3) European Community judgments under rule 74.20,
- are assigned to the Queen's Bench Division and may be heard by a Master.

4.2 An application under rule 74.12 for a certified copy of a High Court or county court judgment for enforcement abroad must be made –

- (1) in the case of a judgment given in the Chancery Division or the Queen's Bench Division of the High Court, to a Master or district judge;
- (2) in the case of a judgment given in the Family Division of the High Court, to a district judge of that Division;
- (3) in the case of a county court judgment, to a district judge.

4.3 An application under rule 74.17 or 74.18 for a certificate or a certified copy of a High Court or county court judgment for enforcement in Scotland or Northern Ireland must be made –

- (1) in the case of a judgment given in the Chancery Division or the Queen's Bench Division of the High Court, to a Master or district judge;
- (2) in the case of a judgment given in the Family Division of the High Court, to a district judge of that Division;
- (3) in the case of a county court judgment, to a district judge.

4.4 The following applications must be made under Part 23 –

- (1) applications under rule 74.3 for the registration of a judgment;
- (2) applications under rule 74.7 to set aside the registration of a judgment;
- (3) applications under rule 74.12 for a certified copy of a judgment;
- (4) applications under section III for a certificate for enforcement of a judgment;
- (5) applications under rule 74.20 for the registration of a Community judgment;
- (6) applications under rule 74.23 to vary or cancel the registration of a Community judgment; and
- (7) applications under rule 74.25 for the registration of an order of the European Court that the enforcement of a registered Community judgment should be suspended.

5. Applications under the 1933 Act

Foreign judgments are enforceable in England and Wales under the 1933 Act where there is an agreement on the reciprocal enforcement of judgments between the United Kingdom and the country in which the judgment was given. Such an agreement may contain particular provisions governing the enforcement of judgments (for example limiting the categories of judgments which are enforceable, or the courts whose judgments are enforceable). Any such specific limitations will be listed in the Order in Council giving effect in the United Kingdom to the agreement in question, and the rules in Section I of Part 74 will take effect subject to such limitations.

6.1 Evidence in support of an application under the Judgments Regulation: rule 74.4(6)

Where a judgment is to be recognised or enforced in a Regulation State, the Judgments Regulation applies.

6.2 As a consequence of article 38(2) of the Judgments Regulation, the provisions in Chapter III of that Regulation relating to declaring judgments enforceable are the equivalent, in the United Kingdom, of provisions relating to registering judgments for enforcement.

6.3 Chapter III of, and Annex V to, the Judgments Regulation are annexed to this practice direction. They were originally published in the official languages of the European Community in the Official Journal of the European Communities by the Office for Official Publications of the European Communities.

6.4 Sections 2 and 3 of Chapter III of the Judgments Regulation (in particular articles 40, 53, 54 and 55, and Annex V) set out the evidence needed in support of an application.

6.5 The Judgments Regulation is supplemented by the Civil Jurisdiction and Judgments Order 2001, SI 2001 No. 3929. The Order also makes amendments, in respect of that Regulation, to the Civil Jurisdiction and Judgments Act 1982.

7.1 Certified copies of judgments issued under rule 74.12

In an application by a judgment creditor under rule 74.12 for the enforcement abroad of a High Court judgment, the certified copy of the judgment will be an office copy, and will be accompanied by a certificate signed by a judge. The judgment and certificate will be sealed with the Seal of the Supreme Court.

7.2 In an application by a judgment creditor under rule 74.12 for the enforcement abroad of a county court judgment, the certified copy will be a sealed copy, and will be accompanied by a certificate signed by a judge.

7.3 In applications under the 1920, 1933 or 1982 Acts, the certificate will be in Form 110, and will have annexed to it a copy of the claim form by which the proceedings were begun.

7.4 In an application under the Judgments Regulation, the certificate will be in the form of Annex V to the Regulation.

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8.1 Certificates under section III of Part 74

A certificate of a money judgment of a court in Scotland or Northern Ireland must be filed for enforcement under rule 74.15(2) in the Action Department of the Central Office of the Supreme Court, Royal Courts of Justice, Strand, London WC2A 2LL. The copy will be sealed by a court officer before being returned to the applicant.

8.2 A certificate issued under rule 74.17 for the enforcement in Scotland or Northern Ireland of a money judgment of the High Court or of a county court will be in Form 111.

8.3 In an application by a judgment creditor under rule 74.18 for the enforcement in Scotland or Northern Ireland of a non-money judgment of the High Court or of a county court, the certified copy of the judgment will be a sealed copy to which will be annexed a certificate in Form 112.

9.1 Material additional to section IV of Part 74

Enforcement of Community judgments and of Euratom inspection orders is governed by the European Communities (Enforcement of Community Judgments) Order 1972, SI 1972 No. 1590.

9.2 The Treaty establishing the European Community is the Treaty establishing the European Economic Community (Rome, 1957); relevant amendments are made by the Treaty of Amsterdam (1997, Cm. 3780).

9.3 The text of the Protocol of 3 June 1971 on the interpretation by the European Court of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters is set out in Schedule 2 to the Civil Jurisdiction and Judgments Act 1982.

9.4 The text of the Protocol of 19 December 1988 on the interpretation by the European Court of the Convention of 19 June 1980 on the Law applicable to Contractual Obligations is set out in Schedule 3 to the Contracts (Applicable Law) Act 1990.

Section II THE MERCHANT SHIPPING (LINER CONFERENCES) ACT 1982

10. Content of this Section

The Merchant Shipping (Liner Conferences) Act 1982 (*the Act*) contains provisions for the settlement of disputes between liner conferences, shipping lines and shippers. This Section of the Practice Direction deals with the enforcement by the High Court under section 9 of the Act of recommendations of conciliators, and determinations and awards of costs.

11. Exercise of powers under the Act

The powers of the High Court under the Act are exercised by the Commercial Court.

12.1 Applications for registration

An application under section 9 of the Act for the registration of a recommendation, determination or award is made under Part 23.

12.2 An application for the registration of a recommendation must be supported by written evidence exhibiting –

- (1) a verified or certified or otherwise authenticated copy of –
 - (a) the recommendation; (b) the reasons for it; and (c) the record of settlement;
- (2) where any of those documents is not in English, a translation of it into English –
 - (a) certified by a notary public or other qualified person; or
 - (b) accompanied by written evidence confirming that the translation is accurate; and
- (3) copies of the acceptance of the recommendation by the parties on whom it is binding, or otherwise verifying the acceptance where it is not in writing.

12.3 The evidence in support of the application must –

- (1) give particulars of the failure to implement the recommendation; and
- (2) confirm that none of the grounds which would render it unenforceable is applicable.

12.4 An application for the registration of a determination of costs or an award of costs must be supported by written evidence –

- (1) exhibiting a verified or certified or otherwise authenticated copy of the recommendation or other document containing the determination or award; and
- (2) stating that the costs have not been paid.

13.1 Order for registration

The applicant must draw up the order giving permission to register the recommendation, determination or award.

13.2 The order must include a provision that the reasonable costs of the registration should be assessed.

14. Register of recommendations

There will be kept in the Admiralty and Commercial Registry at the Royal Courts of Justice, under the direction of the Senior Master, a register of the recommendations, determinations and awards ordered to be registered under section 9 of the Act, with particulars of enforcement

Private International Law : Conflicts of Law

Judgments Rendered Within the EC.

With regard to judgments being rendered within Contracting States of the EC, there are provisions under *Council Regulation (EC) No 44/2001* and *semble* under the *Brussels Convention of 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters* (the '1968' or '*Brussels Convention*') which are very protective of the defendant in that, *inter-alia*, they ensure that the only court he is sued in is one with which he has a substantial connection - usually the court of his domicile. Having benefitted from these protective measures there is then no reason why, once the court with which he has that substantial connection gives judgment against him, it should not be enforced against him in any other Contracting State of the EC. Indeed, *Article 38(1)* of the *Regulation and likewise Article 31* of the *Brussels Convention* specifically provides that: *A judgment given in a Contracting State and enforceable in that State shall be enforced in another Contracting State when, on the application of any interested party, it has been declared enforceable there.*

Summary

The functions of the English Conflict of Laws are, firstly, to ascertain which court has jurisdiction over the case in question and, then, to select the appropriate system of law for determining an action which contains a foreign element. Once the applicable legal system is selected and the appropriate choice of law is applied the essential function of the Conflict of Laws is completed.

In addition to the first two functions relating to *Jurisdiction in personam* and the determination of the appropriate *Choice of Law rules*, the *Recognition and Enforcement of Foreign Judgements* constitutes the third of the three principal functions of the conflict of laws.

Civil Procedure Rules

CPR PART 74

IV ENFORCEMENT IN ENGLAND AND WALES OF EUROPEAN COMMUNITY JUDGMENTS

74.19 Interpretation

In this Section –

- (a) 'Community judgment' means any judgment, decision or order which is enforceable under –
 - (i) article 244 or 256 of the Treaty establishing the European Community;
 - (ii) article 18, 159 or 164 of the Euratom Treaty;
 - (iii) article 44 or 92 of the ECSC Treaty;
 - (iv) article 82 of Council Regulation (EC) 40/94 of 20 December 1993 on the Community trade mark; or
 - (v) article 71 of Council Regulation (EC) 6/2002 of 12 December 2001 on Community designs;
- (b) 'Euratom inspection order' means an order made by the President of the European Court, or a decision of the Commission of the European Communities, under article 81 of the Euratom Treaty;
- (c) 'European Court' means the Court of Justice of the European Communities;
- (d) 'order for enforcement' means an order under the authority of the Secretary of State that the Community judgment to which it is appended is to be registered for enforcement in the United Kingdom.

74.20 Application for registration of a Community judgment

An application to the High Court for the registration of a Community judgment may be made without notice.

74.21 Evidence in support

- (1) An application for registration must be supported by written evidence exhibiting –
 - (a) the Community judgment and the order for its enforcement, or an authenticated copy; and
 - (b) where the judgment is not in English, a translation of it into English –
 - (i) certified by a notary public or other qualified person; or
 - (ii) accompanied by written evidence confirming that the translation is accurate.
- (2) Where the application is for registration of a Community judgment which is a money judgment, the evidence must state –
 - (a) the name of the judgment creditor and his address for service within the jurisdiction;
 - (b) the name of the judgment debtor and his address or place of business, if known;
 - (c) the amount in respect of which the judgment is unsatisfied; and
 - (d) that the European Court has not suspended enforcement of the judgment.

74.22 Registration orders

- (1) A copy of the order granting permission to register a Community judgment ('the registration order') must be served on every person against whom the judgment was given.

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- (2) The registration order must state the name and address for service of the person who applied for registration, and must exhibit –
 - (a) a copy of the registered Community judgment; and
 - (b) a copy of the order for its enforcement.
- (3) In the case of a Community judgment which is a money judgment, the registration order must also state the right of the judgment debtor to apply within 28 days for the variation or cancellation of the registration under rule 74.23.

74.23 Application to vary or cancel registration

- (1) An application to vary or cancel the registration of a Community judgment which is a money judgment on the ground that at the date of registration the judgment had been partly or wholly satisfied must be made within 28 days of the date on which the registration order was served on the judgment debtor.
- (2) The application must be supported by written evidence.

74.24 Enforcement

No steps may be taken to enforce a Community judgment which is a money judgment –

- (a) before the end of the period specified in accordance with rule 74.23(1); or
- (b) where an application is made under that rule, until it has been determined.

74.25 Application for registration of suspension order

- (1) Where the European Court has made an order that the enforcement of a registered Community judgment should be suspended, an application for the registration of that order in the High Court is made by filing a copy of the order in the Central Office of the Supreme Court.
- (2) The application may be made without notice.

74.26 Registration and enforcement of a Euratom inspection order

- (1) Rules 74.20, 74.21(1), and 74.22(1) and (2), which apply to the registration of a Community judgment, also apply to the registration of a Euratom inspection order but with the necessary modifications.
- (2) An application under article 6 of the European Communities (Enforcement of Community Judgments) Order 1972²⁹ to give effect to a Euratom inspection order may be made on written evidence, and –
 - (a) where the matter is urgent, without notice;
 - (b) otherwise, by claim form.

V EUROPEAN ENFORCEMENT ORDERS

74.27 Interpretation

- (1) In this Section –
 - (a) ‘European Enforcement Order’ has the meaning given in the EEO Regulation;
 - (b) ‘EEO’ means European Enforcement Order;
 - (c) ‘judgment’, ‘authentic instrument’, ‘member state of origin’, ‘member state of enforcement’, and ‘court of origin’ have the meanings given by Article 4 of the EEO Regulation; and
 - (d) ‘Regulation State’ has the same meaning as ‘Member State’ in the EEO Regulation, that is all Member States except Denmark.

74.28 Certification of Judgments of the Courts of England and Wales

An application for an EEO certificate must be made by filing the relevant practice form in accordance with Article 6 of the EEO Regulation.

74.29 Applications for a certificate of lack or limitation of enforceability

An application under Article 6(2) of the EEO Regulation for a certificate indicating the lack or limitation of enforceability of an EEO certificate must be made to the court of origin by application in accordance with Part 23.

74.30 Applications for rectification or withdrawal

An application under Article 10 of the EEO Regulation for rectification or withdrawal of an EEO certificate must be made to the court of origin and may be made by application in accordance with Part 23.

74.31 Enforcement of European Enforcement Orders in England and Wales

- (1) A person seeking to enforce an EEO in England and Wales must lodge at the court in which enforcement proceedings are to be brought the documents required by Article 20 of the EEO Regulation.
- (2) Where a person applies to enforce an EEO expressed in a foreign currency, the application must contain a certificate of the sterling equivalent of the judgment sum at the close of business on the date nearest preceding the date of the application.
(Part 70 contains further rules about enforcement.)

²⁹ S.I. 1972/1590

74.32 Refusal of Enforcement

- (1) An application under Article 21 of the EEO Regulation that the court should refuse to enforce an EEO must be made by application in accordance with Part 23 to the court in which the EEO is being enforced.
- (2) The judgment debtor must, as soon as practicable, serve copies of any order made under Article 21(1) on –
 - (a) all other parties to the proceedings and any other person affected by the order ('the affected persons'); and
 - (b) any court in which enforcement proceedings are pending in England and Wales ('the relevant courts').
- (3) Upon service of the order on the affected persons, all enforcement proceedings under the EEO in the relevant courts will cease.

74.33 Stay of or limitation on enforcement

- (1) Where an EEO certificate has been lodged and the judgment debtor applies to stay or limit the enforcement proceedings under Article 23 of the EEO Regulation, such application must be made in accordance with Part 23 to the court in which the EEO is being enforced.
- (2) The judgment debtor shall, as soon as practicable, serve a copy of any order made under the Article on –
 - (a) all other parties to the proceedings and any other person affected by the order; and
 - (b) any court in which enforcement proceedings are pending in England and Wales;and the order will not have effect on any person until it has been served in accordance with this rule and they have received it.

SUPPLEMENTAL DIRECTIONS

PRACTICE DIRECTION – EUROPEAN ENFORCEMENT ORDERS

Council Regulation

- 1.1 Certification and enforcement of European Enforcement Orders is governed by Council Regulation (EC) No 805/2004 creating a European Enforcement Order for uncontested claims.
- 1.2 The EEO Regulation is annexed to this practice direction and can be found at http://europa.eu.int/eur-lex/pri/en/oj/dat/2004/l_143/l_14320040430en00150039.pdf It was originally published in the official languages of the European Community in the Official Journal of the European Communities by the Office for Official Publications of the European Communities.
- 1.3 Section V of Part 74 sets out the procedure for enforcement under the EEO Regulation. A claim that does not meet the requirements of the EEO Regulation, or which the judgment creditor does not wish to enforce using the EEO Regulation, may be enforceable using another method of enforcement.

Rule 74.28 – Certification of Judgments of the Courts of England and Wales

- 2.1 An application under rule 74.28 for a certificate of a High Court or county court judgment for enforcement in another Regulation State must be made using Form N219 or Form N219A –
 - (1) in the case of a judgment given in the Chancery or Queen's Bench Division of the High Court, or in a district registry, to a Master or district judge; or
 - (2) in the case of a county court judgment, to a district judge.
- 2.2 Where the application is granted, the court will send the EEO certificate and a sealed copy of the judgment to the person making the application. Where the court refuses the application, the court will give reasons for the refusal and may give further directions.

Rule 74.29 – Applications for a certificate of lack of enforceability

- 3.1 An application must be supported by written evidence in support of the grounds on which the judgment has ceased to be enforceable or its enforceability has been suspended or limited.

Rule 74.30 – Application for rectification or withdrawal

- 4.1 An application must be supported by written evidence in support of the grounds on which it is contended that the EEO should be rectified or withdrawn.

Rule 74.31 – Enforcement of European Enforcement Orders in England and Wales

- 5.1 When an EEO is lodged at the court in which enforcement proceedings are to be brought, it will be assigned a case number.
- 5.2 A copy of a document will satisfy the conditions necessary to establish its authenticity if it is an official copy of the court of origin.
- 5.3 If judgment is set aside in the court of origin, the judgment creditor must notify all courts in which enforcement proceedings are pending in England and Wales under the EEO as soon as reasonably practicable after the order is served on the judgment creditor. Notification may be by any means available including fax, e-mail, post or telephone.

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Rule 74.32 – An application for refusal of enforcement

- 6.1 An application must be accompanied by an official copy of the earlier judgment, any other documents relied upon and any translations required by the EEO Regulation and supported by written evidence showing –
- (1) why the earlier judgment is irreconcilable with the judgment which the judgment creditor is seeking to enforce; and
 - (2) why the irreconcilability was not, and could not have been, raised as an objection in the proceedings in the court of origin.

Rule 74.33 – Stay or limitation of enforcement

- 7.1 Unless the court orders otherwise, an application must be accompanied by evidence of the application in the court of origin, including –
- (1) the application (or equivalent foreign process) or a copy of the application (or equivalent foreign process) certified by an appropriate officer of the court of origin; and
 - (2) where that document is not in English, a translation of it into English –
 - (a) certified by a notary public or person qualified to certify a translation in the Member State of the court of origin under Article 20(2)(c) of the EEO Regulation; or
 - (b) accompanied by written evidence confirming that the translation is accurate.
- 7.2 The written evidence in support of the application must state –
- (1) that an application has been brought in the member state of origin;
 - (2) the nature of that application; and
 - (3) the date on which the application was filed, the state of the proceedings and the date by which it is believed that the application will be determined.

FURTHER READING

- Briggs, The Conflict of Laws.* Oxford: OUP, 2002, Ch.1.
Cheshire & North, Private International Law, 12/e. London: Butterworths, 1992, Ch. 1.
Clarkson & Hill, Jaffey on the Conflict of Laws. London: Butterworths, 1997, Ch.1.
Collier, The Conflict of Laws., 2/e. Cambridge: C.U.P., 1994, Ch. 1
Morris, The Conflict of Laws, 5/e. London: Sweet & Maxwell, 2000, Ch. 1.
O'Brien, Smith's Conflict of Laws, 2/e. London: Cavendish, 1999. Chs.1 & 2.
Stone, The Conflict of Laws. London: Longman, 1995, Ch.1

Short-Answer Workshop Questions

1. How, if at all, does the Conflict of Laws differ from other branches of English private law?
2. (a) What significant point of law was confirmed in *Maharanees of Baroda v. Wildenstein* [1972] 2 QB 283?
(b) If this, or a very similar, case was being heard for the first time post 2006, what point of law would you cite as authority for the English courts having / not having jurisdiction?
3. Explain
 - (a) what is meant by 'assumed' or 'extended' or 'exorbitant' jurisdiction; and
 - (b) how the need for this jurisdiction arose.
4. What are the circumstances which have to be satisfied for a writ to be served on a defendant who is neither in England nor domiciled in another EC country?
5. Explain the meaning of *forum conveniens*
6. (a) Explain the significance of the provision contained in *Art.2 of Regulation 44/2001/EC*; and
(b) outline the exceptions to it, if any.
7. Explain the basic rule that determines how the choice of law in a Conflicts case is determined.
8. With reference to appropriate examples,
 - (a) Explain what is meant by characterisation or classification;
 - (b) What is the relationship, if any, between characterisation and the Incidental Question?
9. Outline the type(s) of problem associated with the time factor.
10. To what extent, if at all, might difficulty be encountered in trying to distinguish substantive and procedural issues?
11. Critically assess the influence, if any, of English Law on the determination and meaning of connecting factors.
12. If, in a Conflicts case, country X refers to connecting factor p, whereas country Y refers to connecting factor q, what process will indicate which connecting factor should prevail?
13. Outline the significant points of law that emerged from
 - (a) *Emanuel v. Symon* (1908) and
 - (b) *Buchanan v. Rucker* (1808).
14. What does *Art.38(1) of Regulation 44/2001* specifically provide for?
15. Review
 - (a) the principal elements of the subject 'Conflict of Laws'; and
 - (b) explain how, if at all, it is possible for a foreign law to govern a conflicts case which is heard in an English court.
16. When, if ever, can a foreign judgment be recognised without being enforced?

LECTURE SEVEN

INJUNCTIVE RELIEF IN SUPPORT OF LITIGATION

Part 25 Civil Procedure Rules, supplemented by Practice Direction 25 provide the rules that apply in respect of applications with regard to the court's jurisdiction over and the power to grant interim relief to litigation and arbitral proceedings both in England & Wales and overseas. Many of the conflicts and arbitration judgments concern inter-alia applications for, or challenges to, orders for interim relief. Such actions concern declarations, discovery orders (previously Anton Pillar Orders) to search premises etc for information relevant to proceedings and freezing orders (previously Mareva Injunctions) to prevent assets being dissipated or transferred out of the jurisdiction. Other relief relates to the preservation of information and applications for security of costs.

CIVIL PROCEDURE RULES PART 25

Orders for interim remedies

25.1 (1) The court may grant the following interim remedies –

- (a) an interim injunction;
- (b) an interim declaration;
- (c) an order –
 - (i) for the detention, custody or preservation of relevant property;
 - (ii) for the inspection of relevant property;
 - (iii) for the taking of a sample of relevant property;
 - (iv) for the carrying out of an experiment on or with relevant property;
 - (v) for the sale of relevant property which is of a perishable nature or which for any other good reason it is desirable to sell quickly; and
 - (vi) for the payment of income from relevant property until a claim is decided;
- (d) an order authorising a person to enter any land or building in the possession of a party to the proceedings for the purposes of carrying out an order under sub-paragraph (c);
- (e) an order under section 4 of the Torts (Interference with Goods) Act 1977³⁰ to deliver up goods;
- (f) an order (referred to as a 'freezing injunction') –
 - (i) restraining a party from removing from the jurisdiction assets located there; or
 - (ii) restraining a party from dealing with any assets whether located within the jurisdiction or not;
- (g) an order directing a party to provide information about the location of relevant property or assets or to provide information about relevant property or assets which are or may be the subject of an application for a freezing injunction;
- (h) an order (referred to as a 'search order') under section 7 of the Civil Procedure Act 1997³¹ (order requiring a party to admit another party to premises for the purpose of preserving evidence etc.);
- (i) an order under section 33 of the Supreme Court Act 1981³² or section 52 of the County Courts Act 1984³³ (order for disclosure of documents or inspection of property before a claim has been made);
- (j) an order under section 34 of the Supreme Court Act 1981³⁴ or section 53 of the County Courts Act 1984³⁵ (order in certain proceedings for disclosure of documents or inspection of property against a non-party);
- (k) an order (referred to as an order for interim payment) under rule 25.6 for payment by a defendant on account of any damages, debt or other sum (except costs) which the court may hold the defendant liable to pay;
- (l) an order for a specified fund to be paid into court or otherwise secured, where there is a dispute over a party's right to the fund;
- (m) an order permitting a party seeking to recover personal property to pay money into court pending the outcome of the proceedings and directing that, if he does so, the property shall be given up to him;
- (n) an order directing a party to prepare and file accounts relating to the dispute;
- (o) an order directing any account to be taken or inquiry to be made by the court; and
- (p) an order under **Article 9 of Council Directive (EC) 2004/48** on the enforcement of intellectual property rights (order in intellectual property proceedings making the continuation of an alleged infringement subject to the lodging of guarantees).

(Rule 34.2 provides for the court to issue a witness summons requiring a witness to produce documents to the court at the hearing or on such date as the court may direct)

³⁰ 1977 c.32; section 4 was amended by the Supreme Court Act 1981 (c.54), section 152(1), Schedule 5; by the County Courts Act 1984 (c.28), section 148(1), Schedule 2, Part V, paragraph 64 and by S.I. 1980/397 (NI3).

³¹ 1997 c.12.

³² 1981 c.54. Section 33 was amended by S.I. 1998/2940.

³³ 1984 c.28. Section 52 was amended by the Courts and Legal Services Act 1990 (c.41), Schedule 18, paragraph 43 and by S.I. 1998/2940.

³⁴ 1981 c.54. Section 34 was amended by S.I. 1998/2940.

³⁵ 1984 c.28. Section 53 was amended by the Courts and Legal Services Act 1990 (c.41), Schedule 18, paragraph 44 and by S.I. 1998/2940.

Private International Law : Conflicts of Law

25.1(2) In paragraph (1)(c) and (g), 'relevant property' means property (including land) which is the subject of a claim or as to which any question may arise on a claim.

25.1(3) The fact that a particular kind of interim remedy is not listed in paragraph (1) does not affect any power that the court may have to grant that remedy.

25.1(4) The court may grant an interim remedy whether or not there has been a claim for a final remedy of that kind.

Time when an order for an interim remedy may be made

25.2(1) An order for an interim remedy may be made at any time, including –

- (a) before proceedings are started; and
- (b) after judgment has been given.

(Rule 7.2 provides that proceedings are started when the court issues a claim form)

25.2 (2) However –

- (a) paragraph (1) is subject to any rule, practice direction or other enactment which provides otherwise;
- (b) the court may grant an interim remedy before a claim has been made only if –
 - (i) the matter is urgent; or
 - (ii) it is otherwise desirable to do so in the interests of justice; and
- (c) unless the court otherwise orders, a defendant may not apply for any of the orders listed in rule 25.1(1) before he has filed either an acknowledgment of service or a defence.

(Part 10 provides for filing an acknowledgment of service and Part 15 for filing a defence)

25.2(3) Where it grants an interim remedy before a claim has been commenced, the court should give directions requiring a claim to be commenced.

25.2(4) In particular, the court need not direct that a claim be commenced where the application is made under section 33 of the Supreme Court Act 1981 or section 52 of the County Courts Act 1984 (order for disclosure, inspection etc. before commencement of a claim).

How to apply for an interim remedy

25.3(1) The court may grant an interim remedy on an application made without notice if it appears to the court that there are good reasons for not giving notice.

25.3(2) An application for an interim remedy must be supported by evidence, unless the court orders otherwise.

25.3(3) If the applicant makes an application without giving notice, the evidence in support of the application must state the reasons why notice has not been given.

(Part 3 lists general powers of the court)

(Part 23 contains general rules about making an application)

Application for an interim remedy where there is no related claim

25.4(1) This rule applies where a party wishes to apply for an interim remedy but –

- (a) the remedy is sought in relation to proceedings which are taking place, or will take place, outside the jurisdiction; or
- (b) the application is made under section 33 of the Supreme Court Act 1981 or section 52 of the County Courts Act 1984 (order for disclosure, inspection etc. before commencement) before a claim has been commenced.

25.4(2) An application under this rule must be made in accordance with the general rules about applications contained in Part 23.

(The following provisions are also relevant –

Rule 25.5 (inspection of property before commencement or against a non-party)

Rule 31.16 (orders for disclosure of documents before proceedings start)

Rule 31.17 (orders for disclosure of documents against a person not a party))

Inspection of property before commencement or against a non-party

25.5(1) This rule applies where a person makes an application under –

- (a) section 33(1) of the Supreme Court Act 1981 or section 52(1) of the County Courts Act 1984 (inspection etc. of property before commencement);
- (b) section 34(3) of the Supreme Court Act 1981 or section 53(3) of the County Courts Act 1984 (inspection etc. of property against a non-party).

25.5(2) The evidence in support of such an application must show, if practicable by reference to any statement of case prepared in relation to the proceedings or anticipated proceedings, that the property –

- (a) is or may become the subject matter of such proceedings; or
- (b) is relevant to the issues that will arise in relation to such proceedings.

25.5(3) A copy of the application notice and a copy of the evidence in support must be served on –

- (a) the person against whom the order is sought; and
- (b) in relation to an application under section 34(3) of the Supreme Court Act 1981 or section 53(3) of the County Courts Act 1984, every party to the proceedings other than the applicant.

LECTURE SEVEN

Interim payments – general procedure

- 25.6(1)** The claimant may not apply for an order for an interim payment before the end of the period for filing an acknowledgment of service applicable to the defendant against whom the application is made.
(Rule 10.3 sets out the period for filing an acknowledgment of service)
(Rule 25.1(1)(k) defines an interim payment)
- 25.6(2)** The claimant may make more than one application for an order for an interim payment.
- 25.6(3)** A copy of an application notice for an order for an interim payment must –
(a) be served at least 14 days before the hearing of the application; and
(b) be supported by evidence.
- 25.6(4)** If the respondent to an application for an order for an interim payment wishes to rely on written evidence at the hearing, he must –
(a) file the written evidence; and
(b) serve copies on every other party to the application, at least 7 days before the hearing of the application.
- 25.6 (5)** If the applicant wishes to rely on written evidence in reply, he must –
(a) file the written evidence; and
(b) serve a copy on the respondent, at least 3 days before the hearing of the application.
- 25.6 (6)** This rule does not require written evidence –
(a) to be filed if it has already been filed; or
(b) to be served on a party on whom it has already been served.
- 25.6 (7)** The court may order an interim payment in one sum or in instalments.
(Part 23 contains general rules about applications)

Interim payments – conditions to be satisfied and matters to be taken into account

- 25.7(1)** The court may only make an order for an interim payment where any of the following conditions are satisfied –
(a) the defendant against whom the order is sought has admitted liability to pay damages or some other sum of money to the claimant;
(b) the claimant has obtained judgment against that defendant for damages to be assessed or for a sum of money (other than costs) to be assessed;
(c) it is satisfied that, if the claim went to trial, the claimant would obtain judgment for a substantial amount of money (other than costs) against the defendant from whom he is seeking an order for an interim payment whether or not that defendant is the only defendant or one of a number of defendants to the claim;
(d) the following conditions are satisfied –
(i) the claimant is seeking an order for possession of land (whether or not any other order is also sought); and
(ii) the court is satisfied that, if the case went to trial, the defendant would be held liable (even if the claim for possession fails) to pay the claimant a sum of money for the defendant's occupation and use of the land while the claim for possession was pending; or
(e) in a claim in which there are two or more defendants and the order is sought against any one or more of those defendants, the following conditions are satisfied –
(i) the court is satisfied that, if the claim went to trial, the claimant would obtain judgment for a substantial amount of money (other than costs) against at least one of the defendants (but the court cannot determine which); and
(ii) all the defendants are either –
(a) a defendant that is insured in respect of the claim;
(b) a defendant whose liability will be met by an insurer under section 151 of the Road Traffic Act 1988 or an insurer acting under the Motor Insurers Bureau Agreement, or the Motor Insurers Bureau where it is acting itself; or
(c) a defendant that is a public body.
- 25.7(4)** The court must not order an interim payment of more than a reasonable proportion of the likely amount of the final judgment.
- 25.7(5)** The court must take into account –
(a) contributory negligence; and
(b) any relevant set-off or counterclaim.

Powers of court where it has made an order for interim payment

- 25.8 (1)** Where a defendant has been ordered to make an interim payment, or has in fact made an interim payment (whether voluntarily or under an order), the court may make an order to adjust the interim payment.

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- 25.8** (2) The court may in particular –
- (a) order all or part of the interim payment to be repaid;
 - (b) vary or discharge the order for the interim payment;
 - (c) order a defendant to reimburse, either wholly or partly, another defendant who has made an interim payment.
- 25.8** (3) The court may make an order under paragraph (2)(c) only if –
- (a) the defendant to be reimbursed made the interim payment in relation to a claim in respect of which he has made a claim against the other defendant for a contribution, indemnity or other remedy; and
 - (b) where the claim or part to which the interim payment relates has not been discontinued or disposed of, the circumstances are such that the court could make an order for interim payment under rule 25.7.
- 25.8**(4) The court may make an order under this rule without an application by any party if it makes the order when it disposes of the claim or any part of it.
- 25.8**(5) Where –
- (a) a defendant has made an interim payment; and
 - (b) the amount of the payment is more than his total liability under the final judgment or order,
- the court may award him interest on the overpaid amount from the date when he made the interim payment.

Restriction on disclosure of an interim payment

- 25.9** The fact that a defendant has made an interim payment, whether voluntarily or by court order, shall not be disclosed to the trial judge until all questions of liability and the amount of money to be awarded have been decided unless the defendant agrees.

Interim injunction to cease if claim is stayed

- 25.10** If – (a) the court has granted an interim injunction other than a freezing injunction; and
(b) the claim is stayed other than by agreement between the parties,
the interim injunction shall be set aside unless the court orders that it should continue to have effect even though the claim is stayed.

Interim injunction to cease after 14 days if claim struck out

- 25.11**(1) If :- (a) the court has granted an interim injunction; and
(b) the claim is struck out under rule 3.7 (sanctions for non-payment of certain fees),
the interim injunction shall cease to have effect 14 days after the date that the claim is struck out unless paragraph (2) applies.
- 25.11**(2) If the claimant applies to reinstate the claim before the interim

Security for costs

- 25.12** (1) A defendant to any claim may apply under this Section of this Part for security for his costs of the proceedings.
(Part 3 provides for the court to order payment of sums into court in other circumstances. Rule 20.3 provides for this Section of this Part to apply to Part 20 claims)
- 25.12**(2) An application for security for costs must be supported by written evidence.
- 25.12**(3) Where the court makes an order for security for costs, it will –
- (a) determine the amount of security; and
 - (b) direct – (i) the manner in which; and
(ii) the time within which
the security must be given.

Conditions to be satisfied

- 25.13** (1) The court may make an order for security for costs under rule 25.12 if –
- (a) it is satisfied, having regard to all the circumstances of the case, that it is just to make such an order; and
 - (b) (i) one or more of the conditions in paragraph (2) applies, or
(ii) an enactment permits the court to require security for costs.
- 25.13**(2) The conditions are –
- (a) the claimant is –
 - (i) resident out of the jurisdiction; but
 - (ii) not resident in a Brussels Contracting State, a Lugano Contracting State or a Regulation State, as defined in section 1(3) of the Civil Jurisdiction and Judgments Act 1982;³⁶
 - (c) the claimant is a company or other body (whether incorporated inside or outside Great Britain) and there is reason to believe that it will be unable to pay the defendant's costs if ordered to do so;

³⁶ 1982 c. 27, as amended by the Civil Jurisdiction and Judgments Act 1991 (c. 12) and by S.I.1989/1346, S.I. 1990/2591, S.I. 1993/603, S.I. 2000/1824 and S.I. 2001/3929.

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- (d) the claimant has changed his address since the claim was commenced with a view to evading the consequences of the litigation;
- (e) the claimant failed to give his address in the claim form, or gave an incorrect address in that form;
- (f) the claimant is acting as a nominal claimant, other than as a representative claimant under Part 19, and there is reason to believe that he will be unable to pay the defendant's costs if ordered to do so;
- (g) the claimant has taken steps in relation to his assets that would make it difficult to enforce an order for costs against him.

(Rule 3.4 allows the court to strike out a statement of case and Part 24 for it to give summary judgment)

Security for costs other than from the claimant

25.14(1) The defendant may seek an order against someone other than the claimant, and the court may make an order for security for costs against that person if –

- (a) it is satisfied, having regard to all the circumstances of the case, that it is just to make such an order; and
- (b) one or more of the conditions in paragraph (2) applies.

25.14(2) The conditions are that the person –

- (a) has assigned the right to the claim to the claimant with a view to avoiding the possibility of a costs order being made against him; or
- (b) has contributed or agreed to contribute to the claimant's costs in return for a share of any money or property which the claimant may recover in the proceedings; and

is a person against whom a costs order may be made.

(Rule 48.2 makes provision for costs orders against non-parties)

Security for costs of an appeal

25.15(1) The court may order security for costs of an appeal against –

- (a) an appellant;
 - (b) a respondent who also appeals,
- on the same grounds as it may order security for costs against a claimant under this Part.

25.15(2) The court may also make an order under paragraph (1) where the appellant, or the respondent who also appeals, is a limited company and there is reason to believe it will be unable to pay the costs of the other parties to the appeal should its appeal be unsuccessful.

PRACTICE DIRECTION – INTERIM INJUNCTIONS

Jurisdiction

1.1 High Court Judges and any other Judge duly authorised may grant 'search orders'³⁷ and 'freezing injunctions'.³⁸

1.2 In a case in the High Court, Masters and district judges have the power to grant injunctions:

- (1) by consent,
- (2) in connection with charging orders and appointments of receivers,
- (3) in aid of execution of judgments.

1.3 In any other case any judge who has jurisdiction to conduct the trial of the action has the power to grant an injunction in that action.

1.4 A Master or district judge has the power to vary or discharge an injunction granted by any Judge with the consent of all the parties.

Making an application

2.1 The application notice must state:

- (1) the order sought, and
- (2) the date, time and place of the hearing.

2.2 The application notice and evidence in support must be served as soon as practicable after issue and in any event not less than 3 days before the court is due to hear the application.³⁹

2.3 Where the court is to serve, sufficient copies of the application notice and evidence in support for the court and for each respondent should be filed for issue and service.

2.4 Whenever possible a draft of the order sought should be filed with the application notice and a disk containing the draft should also be available to the court in a format compatible with the word processing software used by the court. This will enable the court officer to arrange for any amendments to be incorporated and for the speedy preparation and sealing of the order.

³⁷ Rule 25.1(1)(h).

³⁸ Rule 25.1(1)(f).

³⁹ Rule 23.7(1) and (2) and see rule 23.7(4) (short service).

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Evidence

- 3.1 Applications for search orders and freezing injunctions must be supported by affidavit evidence.
- 3.2 Applications for other interim injunctions must be supported by evidence set out in either:
- (1) a witness statement, or
 - (2) a statement of case provided that it is verified by a statement of truth,⁴⁰ or
 - (3) the application provided that it is verified by a statement of truth,
- unless the court, an Act, a rule or a practice direction requires evidence by affidavit.
- 3.3 The evidence must set out the facts on which the applicant relies for the claim being made against the respondent, including all material facts of which the court should be made aware.
- 3.4 Where an application is made without notice to the respondent, the evidence must also set out why notice was not given.
(See Part 32 and the practice direction that supplements it for information about evidence.)

Urgent applications and applications without notice

- 4.1 These fall into two categories:
- (1) applications where a claim form has already been issued, and
 - (2) applications where a claim form has not yet been issued,
- and, in both cases, where notice of the application has not been given to the respondent.
- 4.2 These applications are normally dealt with at a court hearing but cases of extreme urgency may be dealt with by telephone.
- 4.3 Applications dealt with at a court hearing after issue of a claim form:
- (1) the application notice, evidence in support and a draft order (as in 2.4 above) should be filed with the court two hours before the hearing wherever possible,
 - (2) if an application is made before the application notice has been issued, a draft order (as in 2.4 above) should be provided at the hearing, and the application notice and evidence in support must be filed with the court on the same or next working day or as ordered by the court, and
 - (3) except in cases where secrecy is essential, the applicant should take steps to notify the respondent informally of the application.
- 4.4 Applications made before the issue of a claim form:
- (1) in addition to the provisions set out at 4.3 above, unless the court orders otherwise, either the applicant must undertake to the court to issue a claim form immediately or the court will give directions for the commencement of the claim,⁴¹
 - (2) where possible the claim form should be served with the order for the injunction,
 - (3) an order made before the issue of a claim form should state in the title after the names of the applicant and respondent '*the Claimant and Defendant in an Intended Action*'.
- 4.5 Applications made by telephone:
- (1) where it is not possible to arrange a hearing, application can be made between 10.00 a.m. and 5.00 p.m. weekdays by telephoning the Royal Courts of Justice on 020 7947 6000 and asking to be put in contact with a High Court Judge of the appropriate Division available to deal with an emergency application in a High Court matter. The appropriate district registry may also be contacted by telephone. In county court proceedings, the appropriate county court should be contacted,
 - (2) where an application is made outside those hours the applicant should either –
 - (a) telephone the Royal Courts of Justice on 020 7947 6000 where he will be put in contact with the clerk to the appropriate duty judge in the High Court (or the appropriate area Circuit Judge where known), or
 - (b) the Urgent Court Business Officer of the appropriate Circuit who will contact the local duty judge,
 - (3) where the facility is available it is likely that the judge will require a draft order to be faxed to him,
 - (4) the application notice and evidence in support must be filed with the court on the same or next working day or as ordered, together with two copies of the order for sealing,
 - (5) injunctions will be heard by telephone only where the applicant is acting by counsel or solicitors.

Orders for injunctions

- 5.1 Any order for an injunction, unless the court orders otherwise, must contain:
- (1) an undertaking by the applicant to the court to pay any damages which the respondent sustains which the court considers the applicant should pay.
 - (2) if made without notice to any other party, an undertaking by the applicant to the court to serve on the respondent the application notice, evidence in support and any order made as soon as practicable,
 - (3) if made without notice to any other party, a return date for a further hearing at which the other party can be present,

⁴⁰ See Part 22.

⁴¹ Rule 25.2(3).

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- (4) if made before filing the application notice, an undertaking to file and pay the appropriate fee on the same or next working day, and
- (5) if made before issue of a claim form –
 - (a) an undertaking to issue and pay the appropriate fee on the same or next working day, or
 - (b) directions for the commencement of the claim.

5.1A When the court makes an order for an injunction, it should consider whether to require an undertaking by the applicant to pay any damages sustained by a person other than the respondent, including another party to the proceedings or any other person who may suffer loss as a consequence of the order.

5.2 An order for an injunction made in the presence of all parties to be bound by it or made at a hearing of which they have had notice, may state that it is effective until trial or further order.

5.3 Any order for an injunction must set out clearly what the respondent must do or not do.

Freezing Injunctions

Orders to restrain disposal of assets worldwide and within England and Wales

6.1 An example of a Freezing Injunction is annexed to this practice direction.

6.2 This example may be modified as appropriate in any particular case. In particular, the court may, if it considers it appropriate, require the applicant's solicitors, as well as the applicant, to give undertakings.

Search Orders

7.1 The following provisions apply to search orders in addition to those listed above.

7.2 The Supervising Solicitor

The Supervising Solicitor must be experienced in the operation of search orders. A Supervising Solicitor may be contacted either through the Law Society or, for the London area, through the London Solicitors Litigation Association.

7.3 Evidence:

- (1) the affidavit must state the name, firm and its address, and experience of the Supervising Solicitor, also the address of the premises and whether it is a private or business address, and
- (2) the affidavit must disclose very fully the reason the order is sought, including the probability that relevant material would disappear if the order were not made.

7.4 Service:

- (1) the order must be served personally by the Supervising Solicitor, unless the court otherwise orders, and must be accompanied by the evidence in support and any documents capable of being copied,
- (2) confidential exhibits need not be served but they must be made available for inspection by the respondent in the presence of the applicant's solicitors while the order is carried out and afterwards be retained by the respondent's solicitors on their undertaking not to permit the respondent –
 - (a) to see them or copies of them except in their presence, and
 - (b) to make or take away any note or record of them,
- (3) the Supervising Solicitor may be accompanied only by the persons mentioned in the order,
- (4) the Supervising Solicitor must explain the terms and effect of the order to the respondent in everyday language and advise him –
 - (a) of his right to take legal advice and to apply to vary or discharge the order; and
 - (b) that he may be entitled to avail himself of –
 - (i) legal professional privilege; and
 - (ii) the privilege against self-incrimination.
- (5) where the Supervising Solicitor is a man and the respondent is likely to be an unaccompanied woman, at least one other person named in the order must be a woman and must accompany the Supervising Solicitor, and
- (6) the order may only be served between 9.30 a.m. and 5.30 p.m. Monday to Friday unless the court otherwise orders.

7.5 Search and custody of materials:

- (1) no material shall be removed unless clearly covered by the terms of the order,
- (2) the premises must not be searched and no items shall be removed from them except in the presence of the respondent or a person who appears to be a responsible employee of the respondent,
- (3) where copies of documents are sought, the documents should be retained for no more than 2 days before return to the owner,
- (4) where material in dispute is removed pending trial, the applicant's solicitors should place it in the custody of the respondent's solicitors on their undertaking to retain it in safekeeping and to produce it to the court when required,
- (5) in appropriate cases the applicant should insure the material retained in the respondent's solicitors' custody,

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- (6) the Supervising Solicitor must make a list of all material removed from the premises and supply a copy of the list to the respondent,
- (7) no material shall be removed from the premises until the respondent has had reasonable time to check the list,
- (8) if any of the listed items exists only in computer readable form, the respondent must immediately give the applicant's solicitors effective access to the computers, with all necessary passwords, to enable them to be searched, and cause the listed items to be printed out,
- (9) the applicant must take all reasonable steps to ensure that no damage is done to any computer or data,
- (10) the applicant and his representatives may not themselves search the respondent's computers unless they have sufficient expertise to do so without damaging the respondent's system,
- (11) the Supervising Solicitor shall provide a report on the carrying out of the order to the applicant's solicitors,
- (12) as soon as the report is received the applicant's solicitors shall –
 - (a) serve a copy of it on the respondent, and
 - (b) file a copy of it with the court, and
- (13) where the Supervising Solicitor is satisfied that full compliance with paragraph 7.5(7) and (8) above is impracticable, he may permit the search to proceed and items to be removed without compliance with the impracticable requirements.

7.6 General

The Supervising Solicitor must not be an employee or member of the applicant's firm of solicitors.

7.7 If the court orders that the order need not be served by the Supervising Solicitor, the reason for so ordering must be set out in the order.

7.8 The search order must not be carried out at the same time as a police search warrant.

7.9 There is no privilege against self incrimination in:

- (1) Intellectual Property cases in respect of a 'related offence' or for the recovery of a 'related penalty' as defined in section 72 Supreme Court Act 1981;
- (2) proceedings for the recovery or administration of any property, for the execution of a trust or for an account of any property or dealings with property, in relation to –
 - (a) an offence under the Theft Act 1968 (see section 31 of the Theft Act 1968⁴²); 42 or
 - (b) an offence under the Fraud Act 2006 (see section 13 of the Fraud Act 2006⁴³) 43 or a related offence within the meaning given by section 13(4) of that Act – that is, conspiracy to defraud or any other offence involving any form of fraudulent conduct or purpose; or
- (3) proceedings in which a court is hearing an application for an order under Part IV or Part V of the Children Act 1989 (see section 98 Children Act 1989).

However, the privilege may still be claimed in relation to material or information required to be disclosed by an order, as regards potential criminal proceedings outside those statutory provisions.

7.10 Applications in intellectual property cases should be made in the Chancery Division.

7.11 An example of a Search Order is annexed to this Practice Direction. This example may be modified as appropriate in any particular case.

Delivery-Up Orders

8.1 The following provisions apply to orders, other than search orders, for delivery up or preservation of evidence or property where it is likely that such an order will be executed at the premises of the respondent or a third party.

8.2 In such cases the court shall consider whether to include in the order for the benefit or protection of the parties similar provisions to those specified above in relation to injunctions and search orders.

Injunctions against third parties

9.1 The following provisions apply to orders which will affect a person other than the applicant or respondent, who:

- (1) did not attend the hearing at which the order was made; and
- (2) is served with the order.

9.2 Where such a person served with the order requests –

- (1) a copy of any materials read by the judge, including material prepared after the hearing at the direction of the judge or in compliance with the order; or
 - (2) a note of the hearing,
- the applicant, or his legal representative, must comply promptly with the request, unless the court orders otherwise.

⁴² 1968 c. 60.

⁴³ 2006 c. 35.

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FREEZING INJUNCTION

[For injunction limited to assets in England and Wales]

5. Until the return date or further order of the court, the Respondent must not remove from England and Wales or in any way dispose of, deal with or diminish the value of any of his assets which are in England and Wales up to the value of £ .

[For worldwide injunction]

5. Until the return date or further order of the court, the Respondent must not –
(1) remove from England and Wales any of his assets which are in England and Wales up to the value of £ ; or
(2) in any way dispose of, deal with or diminish the value of any of his assets whether they are in or outside England and Wales up to the same value.

[For either form of injunction]

6. Paragraph 5 applies to all the Respondent's assets whether or not they are in his own name and whether they are solely or jointly owned. For the purpose of this order the Respondent's assets include any asset which he has the power, directly or indirectly, to dispose of or deal with as if it were his own. The Respondent is to be regarded as having such power if a third party holds or controls the asset in accordance with his direct or indirect instructions.
7. This prohibition includes the following assets in particular –
(a) the property known as [title/address] or the net sale money after payment of any mortgages if it has been sold;
(b) the property and assets of the Respondent's business [known as [name]] [carried on at [address]] or the sale money if any of them have been sold; and
(c) any money standing to the credit of any bank account including the amount of any cheque drawn on such account which has not been cleared.

[For injunction limited to assets in England and Wales]

8. If the total value free of charges or other securities ('unencumbered value') of the Respondent's assets in England and Wales exceeds £ , the Respondent may remove any of those assets from England and Wales or may dispose of or deal with them so long as the total unencumbered value of his assets still in England and Wales remains above £ .

[For worldwide injunction]

- 8.(1) If the total value free of charges or other securities ('unencumbered value') of the Respondent's assets in England and Wales exceeds £ , the Respondent may remove any of those assets from England and Wales or may dispose of or deal with them so long as the total unencumbered value of the Respondent's assets still in England and Wales remains above £ .
- (2) If the total unencumbered value of the Respondent's assets in England and Wales does not exceed £ , the Respondent must not remove any of those assets from England and Wales and must not dispose of or deal with any of them. If the Respondent has other assets outside England and Wales, he may dispose of or deal with those assets outside England and Wales so long as the total unencumbered value of all his assets whether in or outside England and Wales remains above £ .

PROVISION OF INFORMATION

- 9.(1) Unless paragraph (2) applies, the Respondent must [immediately] [within hours of service of this order] and to the best of his ability inform the Applicant's solicitors of all his assets [in England and Wales] [worldwide] [exceeding £ in value] whether in his own name or not and whether solely or jointly owned, giving the value, location and details of all such assets.
- (2) If the provision of any of this information is likely to incriminate the Respondent, he may be entitled to refuse to provide it, but is recommended to take legal advice before refusing to provide the information. Wrongful refusal to provide the information is contempt of court and may render the Respondent liable to be imprisoned, fined or have his assets seized.
10. Within [] working days after being served with this order, the Respondent must swear and serve on the Applicant's solicitors an affidavit setting out the above information.

EXCEPTIONS TO THIS ORDER

- 11.(1) This order does not prohibit the Respondent from spending £ a week towards his ordinary living expenses and also £ [or a reasonable sum] on legal advice and representation. [But before spending any money the Respondent must tell the Applicant's legal representatives where the money is to come from.]
- (2) This order does not prohibit the Respondent from dealing with or disposing of any of his assets in the ordinary and proper course of business.]
- (3) The Respondent may agree with the Applicant's legal representatives that the above spending limits should be increased or that this order should be varied in any other respect, but any agreement must be in writing.

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- (4) The order will cease to have effect if the Respondent –
(a) provides security by paying the sum of £ into court, to be held to the order of the court; or
(b) makes provision for security in that sum by another method agreed with the Applicant's legal representatives.

COSTS

12. The costs of this application are reserved to the judge hearing the application on the return date.

VARIATION OR DISCHARGE OF THIS ORDER

13. Anyone served with or notified of this order may apply to the court at any time to vary or discharge this order (or so much of it as affects that person), but they must first inform the Applicant's solicitors. If any evidence is to be relied upon in support of the application, the substance of it must be communicated in writing to the Applicant's solicitors in advance.

INTERPRETATION OF THIS ORDER

14. A Respondent who is an individual who is ordered not to do something must not do it himself or in any other way. He must not do it through others acting on his behalf or on his instructions or with his encouragement.
15. A Respondent which is not an individual which is ordered not to do something must not do it itself or by its directors, officers, partners, employees or agents or in any other way.

PARTIES OTHER THAN THE APPLICANT AND RESPONDENT

16. Effect of this order
It is a contempt of court for any person notified of this order knowingly to assist in or permit a breach of this order. Any person doing so may be imprisoned, fined or have their assets seized.
17. Set off by banks
This injunction does not prevent any bank from exercising any right of set off it may have in respect of any facility which it gave to the respondent before it was notified of this order.
18. Withdrawals by the Respondent
No bank need enquire as to the application or proposed application of any money withdrawn by the Respondent if the withdrawal appears to be permitted by this order.

[For worldwide injunction]

19. Persons outside England and Wales
(1) Except as provided in paragraph (2) below, the terms of this order do not affect or concern anyone outside the jurisdiction of this court.
(2) The terms of this order will affect the following persons in a country or state outside the jurisdiction of this court –
(a) the Respondent or his officer or agent appointed by power of attorney;
(b) any person who –
(i) is subject to the jurisdiction of this court;
(ii) has been given written notice of this order at his residence or place of business within the jurisdiction of this court; and
(iii) is able to prevent acts or omissions outside the jurisdiction of this court which constitute or assist in a breach of the terms of this order; and
(c) any other person, only to the extent that this order is declared enforceable by or is enforced by a court in that country or state.

[For worldwide injunction]

20. Assets located outside England and Wales
Nothing in this order shall, in respect of assets located outside England and Wales, prevent any third party from complying with –
(1) what it reasonably believes to be its obligations, contractual or otherwise, under the laws and obligations of the country or state in which those assets are situated or under the proper law of any contract between itself and the Respondent; and
(2) any orders of the courts of that country or state, provided that reasonable notice of any application for such an order is given to the Applicant's solicitors.

COMMUNICATIONS WITH THE COURT

All communications to the court about this order should be sent to –

[Insert the address and telephone number of the appropriate Court Office]

If the order is made at the Royal Courts of Justice, communications should be addressed as follows –

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Where the order is made in the Chancery Division

Room TM 505, Royal Courts of Justice, Strand, London WC2A 2LL quoting the case number. The telephone number is 0207 947 6754.

Where the order is made in the Queen's Bench Division

Room WG08, Royal Courts of Justice, Strand, London WC2A 2LL quoting the case number. The telephone number is 020 7947 6010.

Where the order is made in the Commercial Court

Room EB09, Royal Courts of Justice, Strand, London WC2A 2LL quoting the case number. The telephone number is 0207 947 6826.

The offices are open between 10 a.m. and 4.30 p.m. Monday to Friday.

SCHEDULE A AFFIDAVITS

The Applicant relied on the following affidavits–

[name] [number of affidavit] [date sworn] [filed on behalf of]

SCHEDULE B UNDERTAKINGS GIVEN TO THE COURT BY THE APPLICANT

- (1) If the court later finds that this order has caused loss to the Respondent, and decides that the Respondent should be compensated for that loss, the Applicant will comply with any order the court may make.
- [(2) The Applicant will –
 - (a) on or before [date] cause a written guarantee in the sum of £ to be issued from a bank with a place of business within England or Wales, in respect of any order the court may make pursuant to paragraph (1) above; and
 - (b) immediately upon issue of the guarantee, cause a copy of it to be served on the Respondent.
- (3) As soon as practicable the Applicant will issue and serve a claim form [in the form of the draft produced to the court] [claiming the appropriate relief.
- (4) The Applicant will swear and file an affidavit, cause an affidavit to be sworn and filed, substantially in the terms of the draft affidavit produced to the court confirming the substance of what was said to the court by the Applicant's counsel/solicitors.
- (5) The Applicant will serve upon the Respondent together with this order, as soon as practicable –
 - (i) copies of the affidavits and exhibits containing the evidence relied upon by the Applicant, and any other documents provided to the court on the making of the application;
 - (ii) the claim form; and
 - (iii) an application notice for continuation of the order.
- (6) Anyone notified of this order will be given a copy of it by the Applicant's legal representatives.
- (7) The Applicant will pay the reasonable costs of anyone other than the Respondent which have been incurred as a result of this order including the costs of finding out whether that person holds any of the Respondent's assets and if the court later finds that this order has caused such person loss, and decides that such person should be compensated for that loss, the Applicant will comply with any order the court may make.
- (8) If this order ceases to have effect (for example, if the Respondent provides security or the Applicant does not provide a bank guarantee as provided for above) the Applicant will immediately take all reasonable steps to inform in writing anyone to whom he has given notice of this order, or who he has reasonable grounds for supposing may act upon this order, that it has ceased to have effect.
- [(9) The Applicant will not without the permission of the court use any information obtained as a result of this order for the purpose of any civil or criminal proceedings, either in England and Wales or in any other jurisdiction, other than this claim.]
- [(10) The Applicant will not without the permission of the court seek to enforce this order in any country outside England and Wales [or seek an order of a similar nature including orders conferring a charge or other security against the Respondent or the Respondent's assets].]

NAME AND ADDRESS OF APPLICANT'S LEGAL REPRESENTATIVES

The Applicant's legal representatives are –

[Name, address, reference, fax and telephone numbers both in and out of office hours and e-mail]

LECTURE SEVEN

FREEZING ORDERS

Comdel v Siporex [1997].⁴⁴ Unsuccessful appeal against discharge of a Mareva injunction. Aftermath of protracted prior litigation.

Credit Suisse Fides v Cuoghi [1997].⁴⁵ Mareva and Norwich Pharmacal Orders issued in respect of Cuoghi who was a party to criminal fraud proceedings in Switzerland related to the misappropriation of funds from a bank. Cuoghi sought to limit the Mareva to UK and to limit scope of disclosure so as not to result in self incrimination. Held : Where a Mareva does not result in conflicts with foreign courts – it may be appropriate to issue a world wide injunction.

Tajik Aluminium Plant v Ermatov [2005].⁴⁶ The court having reviewed the evidence of both parties concluded that the freezing orders should be lifted – and discovery orders revoked : concern was that commercial information would be made available to competitors. Case features allegations of fraud and corruption on both sides.

Dadourian v Simms [2006].⁴⁷ Worldwide Freezing Order. CA laid down Guidelines to be known as the Dadourian Guidelines for the granting of a WWF or Worldwide Mareva Injunction.

Dadourian v Simms [2006].⁴⁸ Failed appeal against a freezing order.

Fourie v. Le Roux [2007] HL.⁴⁹ Circumstances in which, and procedure to be adopted for the imposition of a freezing order. (Mareva Injunction).

Banco Nacional v Empresa [2007].⁵⁰ Failed application for variations to a freezing order.

Berghoff v Swinbrook [2008].⁵¹ Application for summary judgement on counterclaim granted : no real prospect of success : accordingly freezing order removed.

⁴⁴ *Comdel Commodities Ltd v Siporex Trade SA* [1997] EWCA Civ 925. Before Butler-Sloss LJ; Peter Gibson LJ; Potter LJ. 5th February 1997.

⁴⁵ *Credit Suisse Fides Trust SA v Cuoghi* [1997] EWCA Civ 1831. Bingham LCJ; 11th June 1997.

⁴⁶ *Tajik Aluminium Plant v Ermatov* [2005] EWHC 2241 (Ch). Mr Justice Blackburne, 21st October 2005.

⁴⁷ *Dadourian Group Int Inc v Simms* [2006] EWCA Civ 399. CA before Ward LJ; Arden LJ ; Moore-Bick LJ. 11th April 2006

⁴⁸ *Dadourian Group International Inc v Simms* [2006] EWCA Civ 1745. CA before The Chancellor ; Arden LJ ; Longmore LJ. 20th December 2006.

⁴⁹ *Fourie v. Le Roux & Ors Rev 1* [2007] UKHL 1. Before Lords Bingham ; Hope ; Scott ; Rodger ; Carswell. 24th January 2007

⁵⁰ *Banco Nacional De Comercio Exterior v Empresa De Telecomunicaciones De Cuba* [2007] EWHC 2322 (Comm). Mr Justice Tomlinson. 11th October 2007.

⁵¹ *Berghoff Trading Ltd v Swinbrook Developments Ltd* [2008] EWHC 1785 (Comm) : Mr Justice Teare. 28th July 2008.