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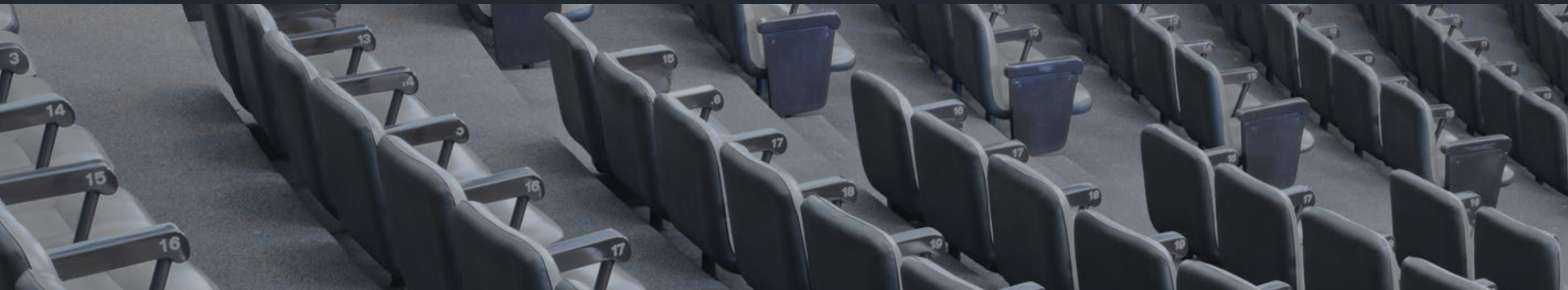
XXIV Old Buildings Commercial Litigation Conference 2025



Chair’s opening remarks

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‘Nuclear’ remedies

John Carl Townsend, Timothy Sherwin, Jessica Lavelle and Niamh Davis explore how and when to drop the bomb

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Whisky fraud – new tricks for old scams

'I have terminal cancer and lost my life savings to whisky barrel scammers'

Millions lost in cask fraud scams

Cask whisky investment fraud: ‘it’s going to be a bloodbath’

Trade reaction: BBC shines light on whisky cask scams

31 MARCH 2025

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Norwich Pharmacal v Commissioners of Customs & Excise [1974] UKHL 6

- Relief sought against **respondents** not defendant(s) (***AB Bank Ltd v Abu Dhabi Commercial Bank PJSC* [2016] EWHC 2082 (Comm); [2017] 1 W.L.R. 810; [2016] C.P. Rep. 47** (Teare J) at [10])
- Respondent likely to have relevant documents or information
- Good arguable case of wrongdoing
- Respondent is involved in the wrongdoing
- Order necessary in the interest of justice
- Cross-undertaking in damages
- Part 8 claim form vs. Part 23 application notice

Freezing orders

***J&J Snack Foods Corporation & Anor v Ralph Peters & Sons Limited & Anor* [2025] EWHC 436 (Ch)**

Don’t stop me now: critical features of Anti-Suit Injunctions

Hugh Miall, Max Archer and Tim Koch explore the law on anti-suit injunctions, reviewing recent cases and discuss how to obtain, resist and enforce them.

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The Anti-Suit Injunction – Overview

- An anti-suit injunction is an injunction obtained against a person which instructs them not to commence or continue foreign proceedings.

- Origin of the injunction can be traced back to at least the 17th Century when the Court of Chancery would grant *"common injunctions"* preventing persons from proceeding in the common law courts.

- Did not take long for orders to be made concerning matters outside England owing to the nature of the order being made.

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The Anti-Suit Injunction – Overview cont

- The jurisdiction is not founded on any pretension to the exercise of judicial rights abroad and an order is not addressed to the foreign court.
- It is an equitable jurisdiction exercised *in personam* over a defendant who is subject to the personal jurisdiction of the Court – either territorially or through recognised grounds for service out on them.
- Whilst the power was original found in the jurisdiction of the equitable courts, it is now given statutory force under s.37 Senior Courts Act 1981.
- The injunction can be prohibitive or mandatory. Ultimately the grant of an order is aimed at securing the ends of justice, although certain principles as to their grant have been developed.

Grounds for obtaining an ASJ

1. Personal jurisdiction over the Respondent(s);
2. Sufficient connection with English Forum;
3. Established grounds for relief:
    a. Breach of exclusive jurisdiction agreement
    b. Unconscionable (‘oppressive’ / ‘vexatious’) conduct.
4. ‘Just and convenient’ to grant relief, in all the circumstances.

See ***Deutsche Bank AG v. Highland Crusader Offshore Partners LP*** [2010] 1 WLR 1023 at [50], per Toulson LJ.

(1) & (2) – Jurisdictional Considerations

1. Personal jurisdiction over the Respondent(s) as it is an *in personam* order):
   - Ancillary application to existing proceedings (negative declaration)?
   - Alternatively, grounds for service out (e.g., jurisdiction clause).

2. Connection to England – why should the English Courts care? Relevant also to the exercise of the Court's discretion at stage (4): *"The stronger the connection of the foreign court with the parties and the subject-matter of the dispute, the stronger the argument against intervention."*

Should one first apply to stay proceedings in the foreign court?

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(3)(a) – Contractual Agreements

Existence of a legal right not to be sued in a foreign forum.

> *"An injunction should be granted to restrain foreign proceedings in breach of [a contractual] agreement "on the simple and clear ground that the defendant has promised not to bring them [...] strong reasons are required to outweigh the prima facie entitlement to an injunction."* (***AES Ust-Kamenogorsk Hydropower Plant LLP*** [2013] UKSC 35 at [25])

Key question is often the scope of the jurisdiction clause / arbitration clause: are the foreign proceedings caught?

(3)(b) Unconscionability – Parallel Proceedings?

"The prosecution of parallel proceedings [...] is undesirable but not ***necessarily*** *vexatious or oppressive."* (***Highland Crusader*** at [50](6), per Toulson LJ) (emphasis added)

1. Duplicate vs. parallel proceedings: Mussa v Issa [2024] EWHC 763 (Ch) (i.e., both sets commenced by C).

2. Some other good reason (e.g., interim relief only).

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(3)(b) Unconscionability – what might qualify?

(1) Proceedings commenced in bad faith: ***Vitol Bahrain EC*** [2013] EWHC 3359 (Comm). Hard to prove!

(2) Hopeless or misconceived claims: see e.g., **Cape Intermediate Holdings Ltd** [2024] EWHC 2999 Ch at [135] (US Court appointed receiver purporting to act for CIHL without authority).

(3) Claims seeking to relitigate and/or frustrate an English judgment/arbitral award: e.g., ***Masri (No.3)*** [2008] EWCA Civ 625.

(4) Attack on English orders and/or due process.

(4) What do the interests of justice require?

Relevant considerations might include:

1. The degree of connection with each jurisdiction (and, relatedly, comity);
2. Delay – what stage have the foreign proceedings reached?
3. The circumstance in which the foreign proceedings are brought;
4. The balance of prejudice to each party (e.g., ‘single forum cases’);
5. Scope of any undertakings offered by the Respondent(s).

Enforcement of an ASI

- Generally speaking, the English Court will not grant an order if it would be wholly ineffectual.
- What tools or remedies exist if an ASI is disobeyed?
- Contempt of Court
- Refusal to recognise or enforce.
- Damages?

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Enforcement - Contempt

- No doubt that committal applications can be brought for contempt by way of breach of an ASI (e.g. *Mobile Telecommunications Co v Al Saud* [2018] EWHC 3751 (Comm)).
- Breaches of ASIs are treated as being analogous to breaches of freezing injunctions and are seen as a serious attack on the administration of justice: *Dell Emerging Markets v Systems Equipment Telecommunications Services* [2020] EWHC 1384 (Comm)
- Will commonly attract an immediate custodial sentence and often of significant length (12m+). A reduction may be offered for immediate cessation of the foreign proceedings: *Crypto Open Patent Alliance v Wright* [2024] EWHC 3316 (Ch)

Enforcement – Recognition

- It ought in principle to be possible to resist the recognition and enforcement of a foreign judgment obtained in breach of an ASI.

> "It would seem to be me prima facie that if someone proceeds in breach of, and with notice of, an injunction granted by the English court to obtain judgments abroad, those judgments should not, as a matter of public policy, be recognised in the UK": Waller J, *Philip Alexander Securities & Future Ltd v Bamberger* [1996] CLC 1757

- Query whether this is possible if the foreign claims have been defended (s.32 CJJA 1982): *Spliethoffs v Bank of China* [2015] EWHC 999 (Comm) but criticised.
- It is possible to obtain anti-enforcement order as part of ASIs: *Louis Dreyfus Company Suisse SA v International Bank of St Petersburg JSC* [2021] EWHC 1039 (Comm).

Enforcement – Damages?

- In *SD Rebel BV* [2025] EWHC 376 (Admlty), the Court made reference to making a final ASI and awarding Cs damages for the costs expended by virtue of being forced to defend Dutch proceedings brought *"in breach of the jurisdiction agreement and the interim anti-suit injunction."*
- s.50 SCA 1981 gives the Court power to award damages in addition to or in substitution for an injunction. This is not a separate cause of action for damages but is simply a statutory jurisdiction over the defendant.
- In principle, damages under s.50 are compensatory for loss sustained from not having an injunction (although plainly can be awarded in addition).
- If an injunction is breached, however, it becomes ineffective. It seems there is no reason why damages could not be awarded under s.50 in addition to or in place of that injunction in such a case.

The Outer Limits of ASI Relief

- UniCredit (and other banks) issue advance payment guarantees to RusChemAlliance (RCA) in relation to the construction of a liquefied natural gas plant in Russia. Plant to be built by a German construction company.
- Sanctions issued- construction contract terminated.
- RCA makes demands under the Guarantees for recovery of the advance payments. UniCredit refuse.

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UniCredit Contd.

- The Guarantees contained an arbitration clause providing for ICC arbitration with Paris as the seat of the arbitration.
- The governing law of the arbitration agreement was not specified.
- The Guarantees were governed by English law.
- RCA issued proceedings in Russia against UniCredit seeking recovery.
- UniCredit sought an ASI from the English court in support of the Paris seated arbitration.

At First Instance

- *G v R* [2023] EWHC 2365 (Comm)
- Refused to grant an ASI.
- Arbitration agreement within the Guarantees governed by French law, not English law.
- No grounds or basis to effect service out of the jurisdiction.
- Notwithstanding that ASI's unavailable in France- England not the appropriate forum to enforce the arbitration agreement. France was the forum through which this could and should be done, principally through the award of damages.

In the Court of Appeal

- *UniCredit Bank GmbH v RusChemAlliance LLC* [2024] EWCA Civ 64
- The governing law of the arbitration agreement is English Law: in the absence of choice, the governing law is that which the arbitration agreement is most closely connected (Enka v Chubb).
- England was the appropriate forum. Relief ordered in the arbitration unenforceable in Russia. Absent ASI from England Russian court could injunct UniCredit and prevent them from pursuing arbitration.
- English law holds parties to their bargains in contracts governed by English Law. Ergo the French court would not see the ASI as an interference with its jurisdiction, principles of comity upheld.

In The Supreme Court

- *UniCredit Bank GmbH v RusChemAlliance LLC* [2024] UKSC 30

- The Supremes applied *Enka v Chubb*. English law applied to the Guarantees, nothing within the Guarantees indicated that the arbitration agreement was exempted from this. The parties had therefore chosen English law to govern the arbitration agreement.

In The Supreme Court

- *Spiliada* principles did not apply to the determination of the forum question. Neither party was asserting that England was the appropriate forum!
- The question is: does the English court's intervention interfere with comity?
  - No court is more convenient than any other when it comes to the enforcement of parties' decision to arbitrate.
  - England, Russia and France are all New York Convention signatories. French Court would not object to English Court enforcing ASI.
  - England the proper place to bring the ASI unless the fact that the fact that the seat of the arbitration agreement was foreign made it inappropriate in some way.

Back to the Court of Appeal

- *UniCredit Bank GmbH v RusChemAlliance LLC* [2025] EWCA Civ 99
- RCA obtained a ruling from the Russian Arbitrazh court prohibiting UniCredit from initiating or continuing any proceedings outside Russia.
- Court ordered UniCredit to ‘cancel the effect of’ the ASI granted by the English Court. Potential penalty of EUR 250m if they did not comply.
- Unicredit applied to the Court of Appeal to revoke or vary the ASI

Back to the Court of Appeal

- The CoA varied the order.
- UniCredit a commercial party acting in its own interests. Obviously unjust to force it to face a substantial penalty in Russia that could be avoided by varying the order.
- Whilst the ASI was a final order, nothing to suggest that it could not be discharged. Distinction between interim and final ASI orders was blurred.
- There were public policy concerns, not least in relation to the sanctions regime and RCA's violation of the English Court's orders: these were outweighed by the practical reality that UniCredit faced a substantial penalty.

After all that….

- A VERY flexible jurisdiction.
- English Court is pro-arbitration. Parties will be held to their decision to arbitrate where there is a sufficient connection to England.
- Address the governing law of the arbitration clause within the contract.
- Realpolitik may ultimately trump the ASI.
- Not every jurisdiction has the same respect for the principles of comity.

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Shareholder lucky D.I.P.S!

Steven Reed, Harry Samuels and James Kane consider recent developments in shareholder litigation in a panel session moderated by Bajul Shah.

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Recent developments affecting shareholder disputes

- Intervention by minority shareholder: *Betta v SC Tomini* [2025] EWCA Civ 595
- Personal claims for dilution of shareholding: *Tianrui v China Shansui* [2024] UKPC 36
- Standing of former shareholder to bring unfair prejudice claims: *Re Contingent and Future Technologies Ltd* [2023] EWHC 2451 (Ch)
- Pre-action disclosure prior to unfair prejudice proceedings: *Dennis v Queenwood Golf Club Limited* [2024] EWHC 3191 (Ch)

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Refreshment Break

16:00 - 16:30

The Shareholder Rule

Are reports of its death following *Aabar Holdings SARL v Glencore PLC* [2024] EWHC 3046 (Comm) greatly exaggerated?

Edward Cumming KC, Nicole Langlois,
Sarah Bayliss and Catherine Hartston

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Aabar Holdings SARL v Glencore PLC
[2024] EWHC 3046 (Comm)

- Claims under FSMA 2000, and contractual and common law claims.
- Aabar was not a shareholder in Glencore, but a successor to a company which (allegedly) had been the ultimate beneficial owner of shares in Glencore
- Could Glencore assert privilege against Aabar?
- **Key issue:** Did the Shareholder Rule exist in English law?

The Shareholder Rule

"a company cannot assert privilege against its own shareholder, save in relation to documents that came into existence for the purpose of hostile litigation against that shareholder." (§15)

- A proprietary basis for the rule?
- A justification based on so-called "joint interest privilege"?

Aabar's position:

A procedural principle, applying in the context of litigation, where parties have a joint interest in the relevant communication (trustee/beneficiary, partners, etc)

Conclusions

- There was no binding authority that the Shareholder Rule was justified on the basis of joint interest privilege
- It was unclear whether “joint interest privilege” had an independent existence
- Even if joint interest privilege did exist, it did not apply in a generalised sense to companies and shareholders

Accordingly:

- The Shareholder Rule was unjustifiable and should no longer be applied.
- Alternatively, if the Shareholder Rule did exist, whether or not a joint interest arose would depend on the facts of each individual case.

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Further issues

If the Shareholder Rule had applied:

- The Shareholder Rule would extend to legal advice privilege and litigation privilege, but not without prejudice privilege
- The Shareholder Rule would extend to Aabar, even if Aabar was:
  - not a direct/registered shareholder
  - a successor to the ultimate beneficial owner of shares
  - not a current shareholder
- The Shareholder Rule would extend to privileged documents belonging to subsidiary companies in Glencore's corporate group

The sharp end of the spear

Oliver Assersohn KC and Tom Stewart Coats lead a panel discussion discussing methods of enforcing and making effective court and tribunal orders, moderated by Steven Thompson KC.

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