



Dispute resolution focus

No liability for failing to comply with freezing order

Commercial Court symposium

The UAE ratifies the New York Convention

No liability for failing to comply with freezing order

The House of Lords recently overturned a decision of the Court of Appeal and held that a bank that inadvertently pays out funds in breach of a freezing order will not be liable to damages to the third party that obtained the order. However, it may be punished for contempt of court depending on the nature of the error.

The Lords unanimously held that the bank did not owe any duty of care to the third party that had obtained the freezing injunction to ensure no payments were made out of the account and that it would not be fair, just or reasonable to impose such a duty on a bank, particularly given the absence of any real voluntary aspect to the bank's involvement. Although the judgment makes clear that banks must do their best to ensure compliance with freezing orders, the Lords emphasised that a bank, which has not been entrusted with the provision of any public service and has simply been notified of a court order in respect of one of its customers, cannot be held liable to the party that obtained the order, especially given the very large sums sometimes caught by such orders and the protective measures already in place designed to ensure compliance with them.

The points to be highlighted from this judgment are the extent of the burden on banks, and other third parties in control of debtors' assets, not to allow freezing orders to be flouted and, conversely, for those obtaining freezing orders to take all possible practical steps to ensure that the order is urgently notified to the most appropriate elements of the organisation in control of the debtor's assets.

Commercial Court symposium

The Commercial Court held a symposium on 30 October that examined case management procedures in the light of the collapses of the BCCI and Equitable trials, both of which were abandoned before their conclusion, even though they were well advanced and considerable time and money had been spent on them. The symposium also considered whether there was a need for special procedures to be introduced for so-called supercases. The Commercial Court wanted to learn whether the failure of those two cases resulted from imperfections in its practice or procedure and, if so, how these could be overcome to preserve the court's international reputation.

This highly unusual and invitation-only event, chaired by Mr Justice Steel, was attended by about 100 delegates including judges, leading barristers and representatives from major litigation firms and commercial clients. Mr Justice Steel sought written contributions from interested parties before the symposium. Twenty-six such contributions were received, including 'The Freshfields' Proposal' from our dispute resolution team, which listed 21 steps for protecting and enhancing the civil justice system, some involving procedural changes and others relating to the court's approach to case and trial management.

The key comments and ideas from all the contributions were synthesised into a note for attendees. None of the contributors thought there were systemic problems in the Commercial Court with heavy, complex litigation or that there was a need for a distinct procedure to be adopted

for supercases. There was a broad consensus on particular themes for improvement, such as judges:

- being specifically assigned to heavy cases;
- having sufficient pre-reading time; and
- engaging in active trial management, including limiting the time available for openings and cross-examination.

Half a dozen speakers, including Stephen Pearson of the Royal Bank of Scotland and Sean McGovern of Lloyd's, each addressed the symposium. This led to a general discussion, with various delegates primed to raise issues of particular interest. The discussion was constructive and ended with Mr Justice Steel announcing that he would be establishing a working party to look into potential improvements or rule changes and consider the issues raised. He subsequently issued a press release indicating that key suggestions from the symposium that were likely to be adopted in the Commercial Court Guide included, in addition to the themes mentioned in the note, the facility for judges to give indications as to the merits, restrictions on expensive disclosure of electronic material and limitations on the length and cost of witness statements.

The contributors felt that litigation remained an important tool in dispute resolution and that the Commercial Court in London was among the very best places in the world for disputes to be litigated. It is worth noting that 80 per cent of cases in the Commercial Court involve at least one party from outside the UK and that the number of cases given trial dates rose from 222 in 2004 to 277 in 2005.

The UAE ratifies the New York Convention

The UAE recently ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. The convention, which entered into force in June 1959, sets out the procedures for recognising and enforcing foreign arbitral awards, while specifying limited grounds on which a contracting state may refuse to recognise and enforce such awards.

The convention was the first of a series of major steps taken by the United Nations to aid the development of international commercial arbitration. Ratified by more than 135 signatories, it is widely regarded as a cornerstone of international arbitration.

Most of the world's major trading nations have acceded to the convention, including most of the countries in the Middle East. A notable exception had been the UAE, where the absence of internationally recognised rules governing the enforcement of foreign awards – with the exception of treaties with France and the countries of the Gulf Cooperation Council (GCC) – meant that foreign arbitral awards could not be enforced by the UAE courts. As a result, foreign investors unaware of the treaties with France and the GCC countries typically did not take the risk of designating a neutral arbitral seat and instead chose to arbitrate in Dubai; an option that carries its own enforcement risks, as local awards are subject to the scrutiny of the Dubai courts.

The UAE's formal accession to the convention, which is pending, should represent a significant step forward in permitting foreign investors to resolve disputes with their local partners in a neutral forum with the expectation that the ensuing award would be recognised by the Dubai courts, subject only to the limited grounds for non-recognition set forth in the convention. In practice, however, much will depend on the conduct of the local courts and their readiness to abandon their previous practice by curtailing the review of foreign arbitral awards as mandated by the convention.

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