

The following is a paper delivered by Richard Aird, Advocate and Barrister, a member of the Murray Stable of Advocates to a Conference on Insolvency Law and Practice held in Edinburgh on 7th. November 2006. Richard Aird was the Chairman of the Conference and was joined throughout the day by other distinguished speakers who included Simon Catto of HBJGateley Wareing, Calum Jones of Boyds LLP, Professor Gerry Maher QC of Scottish Law Commission, Hamish Patrick of Tods Murray and Gregor Murray of RBS macdonald. The Conference was organised by CLT Scotland.

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INSOLVENCY CONFERENCE 2006*

The “Best Kept Secret” in Commercial litigation:

..... and it has been changed?

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Richard Aird was called to the English Bar in 1976 and to the Scots Bar in 1979 and is one of the very few Counsel jointly in practice at the English and Scots Bars where he practices predominantly in the **commercial** and **insolvency** fields. Regularly called upon for advice and advocacy in those areas Richard is able to provide the additional dimension of an awareness of English and Foreign cross border issues and remedies. These may result in decisive early consequences for litigants. This work has involved two appearances in House of Lords and attendances in the Court of Session on numerous occasions, most Sheriff Courts in Scotland as well as Arbitrations.

He is the author of **The Scots Dimension to Cross Border Litigation**, the only textbook on cross border litigation within the United Kingdom, and has written a number of articles in professional journals. He is a Contributing Editor of **Commercial Litigation : Pre-Emptive Remedies (4th Ed)**, Sweet & Maxwell to which he writes both the Scottish and the International Sections.

INTRODUCTION

Even before the reign of Mary Queen of Scots the Scottish pursuer possessed powers to obtain tactical advantage even before judgment in the form of a arrestment that secured an advantage over other creditors in the event of insolvency. Similar rights applied to inhibitions. From the international perspective perhaps the most remarkable of all the pre trial remedies is the commission and diligence procedure in terms of section 1 Administration of Justice (Scotland) Act 1972. All these remedies are well understood by the Scottish Litigant and the effects of Bankruptcy & Diligence (Scotland) Bill on them is part of our discussions today. The best kept secret is how the familiar Scottish Remedies compare with those a stone throws away across the border and with those of the Civil Law systems of Continental Europe. The commercial edge of the comparison is Article 31 of Judgement etc Regulations (44/2001)[which largely succeeded Brussels & Lugano Conventions] This makes “ provisional , including protective measures” potentially widely available.

Key Illustration:

A, an Italian National , proceeds in Paris with jurisdiction under the Judgment etc. Regulations against B , a German National .

B’s assets whether moveable or immoveable, tangible or intangeable,in the form of debts owed by trade debtors or credits held by banks whether directly held or held by third parties have the potential to be seized in

ANY REGULATION JURISDICTION

to the extent provided by their internal law.

The tactical possibilities of this have become known as forum dipping.

THE LINK.

Civil Jurisdiction & Judgments Act 1982

Powers of the Scottish Courts

The Court of Session has discretionary power to grant the three most usual interim protective remedies.

- S.27 (1)(a) Arrestment of any asset situated in Scotland
- (b) Inhibition over any property situated in Scotland
- (bb) Interim Attachment of corporeal moveable property in Scotland
- (c) Interim Interdict

To obtain a) b) & bb) the foreign proceedings must have commenced but are not concluded. The interdict provisions are wider in two important ways :

The foreign action need only be "to be commenced"Interim interdict may be granted not only before the main action has been started but also once it has commenced and not been concluded." (see Maher Provisional and Protective Measures in respect of Foreign Proceedings 1998 SLT 29p322)

The interim interdict may extend to a form not previously available in Scots law eg To mirror a Mireva Injunction (see proviso to S.27(2)) L. Adv.v Campbell 1988 GWD 9-370)

Section 27 has now been extended by Statutory Instrument(SI 2001/3929)

" The courts can now make provisional and protective orders (where otherwise competent) in respect of foreign actions on such matters as questions of status, rights in matrimonial property , succession , insolvency and arbitration." (Maher op cit p225)

Section 28 . Where foreign proceedings are brought or are likely to be brought Court of Session may grant an order in terms of s. 1 Administration of Justice Act 1972 for commission and diligence.

Powers of the English Courts.

Section 25. The scope is wider because all forms of " interim relief" are available with two exceptions.

- a warrant to arrest property (other than ships)
- provisions for obtaining evidence

The extent of the powers cover most types of situations where protective measures are necessary. There is dispute as to the extent of the restriction on measures in relation to evidence.

ANALYSIS OF INTERIM PROTECTIVE MEASURES

To simplify the language “provisional including protective measures” is shortened to interim protective measures.

We will examine in some detail the very different remedies in United Kingdom jurisdictions and then have a look at those available in the codified continental systems. Depending on the circumstances of the case ANY jurisdiction under consideration may have the more effective remedy.

1). THE CORE INTERIM PROTECTIVE MEASURE

INJUNCTIVE RELIEF

OR

in SCOTLAND the INTERDICT

English Interim Injunction

See generally CPR25.1 and Practice Direction.

The usual purpose of interlocutory injunction is to preserve the status quo until the rights of the parties have been determined in the action. The injunction will almost always be negative in form to restrain the defendant from doing some act. Very exceptionally it may be mandatory, requiring an act to be done. A cross-undertaking from the plaintiff to be answerable in damages if the injunction proves to have been wrongly granted is almost always required.

Scottish Interim Interdict

Similar concepts - an order binding on individuals available on an interlocutory or permanent basis.

But important differences:

- i) No separate requirement in Scotland for an undertaking as to damages.
- ii) Direct mandatory injunctions not competent in Scotland.

Both systems follow American Cyanamid Co. v. Ethicon (1975 A.C. 396) and other cases such as N.W.L. Ltd. v. Woods 1979 1 W.L.R. 1294 & Cambridge Nutrition Ltd. v. B.B.C. (1990) 3 All E.R. 523.

- i) “Good arguable case”

A serious question to be tried.

Not frivolous or vexatious but with a real prospect of success at trial.

And then

- ii) “The Balancing of the risks of doing injustice”.

BUT in Scotland there is no separate and almost inevitable requirement for a capacity to enter into meaningful and valuable undertakings.

No doubt the capacity to indemnify the party interdicted upon recall is a factor in the balancing Act in a Scottish application. At all events it is more likely an impecunious pursuer can obtain interim interdict where the balance is otherwise in his favour than in England.

2). PRE-EMPTIVE REMEDIES AGAINST PROPERTY

England

“Relevant property or assets” (see CPR 25.1(c))

Property including land which is subject to a claim or as to which any question may arise

Wide powers for detention, custody or preservation - inspection ... samples ... experiment ...

require information concerning the location of such property.

Note the Scottish equivalent can be directly be obtained by s.27 Civil Jurisdiction and Judgments Act.

Administration of Justice (Scotland) Act 1972

Section 1 ... documents and other property ... as to which a question may relevantly arise

Wide powers ... inspection ... custody and detention

Section 1(A) ... Require information concerning witnesses or defenders in any type of action “likely to be brought”.

3). REMEDIES IN SECURITY :

The concepts of the Scottish and English Remedies are completely different.

The principal English remedy is the Freezing Injunction (Mareva Injunction) (CPR25.1(i)g and Practice Direction)

English Concept of Freezing Order

By a resort to the familiar concept of the interlocutory injunction the Respondent is enjoined from parting with assets below a certain figure. Above that figure he is free to alienate assets

-excluded from the prohibition are usually normal business or living expenses and legal costs.

The Scottish concept of Arrestment

- an arrestment is made against a third party who has an obligation to account to the opposing party or who is in possession of property belonging to him.
- the mechanics are an order restraining a third party making a payment or satisfying an obligation to the opposing party.

The Scottish concept of Inhibition

An inhibition strikes at the opposing party's ability to dispose of heritable property. The effect of an inhibition is to restrain the party inhibited from burdening, alienating or otherwise affecting his heritable property (real property to the prejudice of the inhibitor). The Bill makes inhibition available in the Sheriff Courts but reduces its efficacy.

The Scottish concept of Interim Attachment

Corporeal moveable property(but not money) in the debtor's possession which is either owned by the debtor or in common with a third party may be attached as security.

Bankruptcy and Diligence etc (Scotland) Bill

Main Changes to Arrestments on the Dependence

Maximum Amount Arrestable " more or less" rule abolished.

Broadly the maximum amount that may be arrested is the principle sum sued for + 20% + one years interest and an amount to be set by regulation for expenses.

The court may restrict sums arrested below that figure.

Where the arrestment is made of an individual's bank account which is not a trading account there is a non arrestable sum to protect vulnerable debtors.(for a monthly paid person currently £304)(s.73E)

A duty of disclosure- the arrestee must now disclose to the creditor and the debtor what (if anything) has been arrested on a prescribed form within three weeks of the execution of the arrestment. (73G). Failure to do so may be dealt with as a contempt of court.[Rather a serious consequence for what on the wording of the

section be an oversight without the statutory need for reminders or warnings of position in arrestment in execution]

Main Changes to Inhibitions on the Dependence

Inhibitions no longer secure a preference on insolvency.

[inhibitions may now be granted by Sheriff Court]

Registration by schedule of inhibition and certificate in Register of Inhibitions, but a notice of inhibition may be registered and a schedule served on the debtor. In these circumstances the inhibition takes effect from the date of service of the schedule provided the inhibition is registered within 21 days of registration of the notice (s.155)

Property affected by Inhibition

The court has powers to restrict an inhibition to a specific property and where specific implement is sought inhibition will be limited to that property.(section 15J). [where decree is obtained the all property of the debtor may be inhibited]

Leases

Where a lease is granted over land subject to an inhibition a lease capable of lasting five years (at the date of raising the action) may be reduced. Less than that reduction is possible if fair and reasonable.(s 150)

How Inhibition may be terminated

Inhibition ceases to have effect on the payment of the full amount owing(s.144) or by compliance with the obligation to perform.(s 145). Where the property is bought by a third party in good faith(presumably where a diligent search fails to disclose the inhibition) the inhibition ceases to have effect.

New Powers to obtain Attachment of Corporeal Moveables on the dependence.

The Bill imports powers to obtain an interim attachment on the dependence into Debt Arrangement and Attachment (Scotland) Act 2002. Corporeal moveable property either owned by the debtor or owned in common with a third party may be attached. The messenger of the Court is required to make enquiries about ownership but may assume the debtor's ownership of items and where necessary to

enter into lockfast places before executing an attachment and serving a schedule on the debtor.

After attachment it becomes unlawful to sell , gift , damage or dispose of attached articles (21 of 2002). Any stolen articles must be advised to the creditor together with details of an insurance claim.(21(7) of 2002. When any attached article is damaged , destroyed or stolen others may be attached.(21(10) of 2002) or consignment is possible. Items belonging to third parties may be released by the court(9J(1) of 2002) and articles owned in common may be released where unduly harsh to the third party.(9J (2) of 2002).

Perhaps most important are the categories of corporeal moveables not capable of interim attachment (9B of 2002). These include money, items from inside the debtor's home, equipment required for profession, trade or business with an aggregate value of less than £1,000.A vehicle of under that value. Materials , stock in trade or goods or home gardening equipment.

Where an interim attachment is executed over property and the creditor has without undue delay obtained decree , the interim attachment becomes an attachment in terms of section 10 DA&A (S) Act 2002.

Main Changes to Diligence on the dependence

Introduces new sections to Debtors (Scotland) Act and in the case of Interim Attachments to Debt Arrangement and Attachment (Scotland) Act 2002.The Statutory Provisions largely operate in tandem and are considered together as follows

15 A (1) Court of Session[and Sheriff Court] have equivalent powers to grant warrants for arrestments and Inhibition on the dependence. Same with Interim Attachments

15A (2)(a) Arrestment or Interim Attachment competent only where action contains a conclusion for payment other than expenses. (9A(2) of 202)

15A(2)(b) As above for Inhibitions or additionally for specific implement or another action to make a grant in the creditors favour.

15B Court of Session has power to grant arrestment, interim attachment or inhibition on the dependence of a petition as above.(9 A(3) of 2002)

15C Diligence on the dependence may now be granted for future or contingent debts.

How and When?

15A(1) Debtors (Scotland) Act 1987 & 9 C(1) of DA&A (S)2002

A warrant for diligence on the dependence may be applied for granted and executed before service of summons. BUT if summons is not served before the end of 21 days (subject to applications to extend) the diligence ceases to have effect.(15G) (9G of 2002)

Normally the warrant requires to be intimated to and provide details of the debtor AND any interested party - Presumably this includes the arrestee.

The application must also state if warrant is being sought before the hearing. (15D) (9D of 2002)

In special situations the warrant may be obtained ex parte where the creditor satisfies the court of a real and substantial risk of prejudice were intimation and hearing to take place and on other specific grounds;

- (a) Prima facie case
- (b) A real and substantial case of frustration of the object of the diligence if intimated because
 - i) debtor's insolvency or verging on insolvency
 - ii) concealment , burdening or adverse dealings
- c) Reasonable to grant warrant including taking account of the effects on any interested person.

When granting an ex parte order the court orders a date for a hearing which must be intimated to the debtor and interested parties (15F) (9D(4) of 2002). An unsuccessful creditor may apply for a " hearing on the application" but the Bill seems to require intimation to the debtor and any person appearing to the court to have an interest .Does the Bill really mean that where an application is made ex parte for fear of tipping off the debtor if the court is not satisfied on a private reading of the papers a subsequent hearing requires to be intimated?

Where a hearing takes place the creditor must satisfy the court of the specific grounds set out above except that the focus is on the real and substantial risks which require security for the claim and no longer also those of intimation.(15F) (9D(4) of 2002)

The court may not make any order without giving an opportunity to be heard to any person intimated and any other person the court is satisfied has an interest. The criteria are the specific grounds (15F(3) (9D(2) of 2002)

Where the court refuses a warrant the court may impose conditions (15F(6) (9D(6) of 2002) and require a debtor to consign provide caution or give other security.

Recall of Diligence on Dependence

There are wide powers for recall of diligence on the dependence at the instance of the debtor or anyone having an interest.(15 K) (9L(2)of 2002) .In these applications the onus to justify the diligence remains on the creditor. The court retains powers to

impose conditions upon the debtor. Conditions imposed may also be recalled (15L) (9 M of 2002)

Expenses

Generally the creditor is entitled to expenses in obtaining warrant and for executing diligence on the dependence.(15M) (9P(1) of 2002)Where the creditor can be shown to have acted unreasonably in applying the debtor may obtain expenses. Expenses may be modified in circumstances which include the outcome of the action.

Expenses shall be expenses in process.

A COMPARISON OF THE CONCEPTS OF FREEZING ORDERS AND DILIGENCE ON THE DEPENDENCE

The arrestment on the dependence has no equivalent in English law. It has some resemblance to a Freezing Injunction, but it is much more like a garnishee order, except that it may be obtained at the outset of an action. A Freezing Injunction does not, of course, involve the seizure of goods. Similarly the inhibition is unlike any English remedy but the consequences are not unlike those of a caution placed on the Land Registry against a particular entry. The interim attachment appears at this early stage to be a relatively straightforward remedy which is simpler than the Freezing Order. Some of the principal differences between Scottish Remedies and the Freezing Injunctions are:

The Freezing Order may only be granted by High Court Judges or authorised judges. The applicant must demonstrate “ a good arguable case” on the merits and of a real risk of dissipation or secretion. The applicant as a practical necessity will have to enter the usual undertakings to meet any damages to the respondent on recall and the expenses of Third Parties. Often security or consignment for part of these sums will be required as a condition for the order. A Freezing Order is a major forensic and organisational step with implications on parties and Third Parties. The form of the remedy is an injunction against removal of funds normally below a specified sum with permitted withdrawals eg for living expenses, legal fees etc.Because of the injunctive origins “ equitable” features remain eg. contempt and traces of equitable doctrine such as a requirement to act fairly.

As soon as a bank obtains notice it must freeze the respondent’s accounts. There may be hundreds of these and each one effected should be specified in the order. Since the order normally permits some withdrawal Banks may be required to apply their minds to the terms of the order and what sums may be taken out. The position of third parties in possession of the respondents assets has also to be taken into account. Before becoming liable for contempt in paying over or alienating assets, third parties require to be furnished with notice of the order and that the respondent threatens not to observe the terms.

The cost of obtaining a Freezing Order is large- at least in the tens of thousands of pounds. The work involves the initial application, the return day when the respondent to an ex parte application may be heard, discussions and possibly further hearings to clarify or regulate the position of banks and third parties, third party administrative and legal expenses etc.etc..The larger part of these costs will form part of the undertakings to which must be added the additional contingency of potential damages on recall.

A Freezing Order has no direct advantage upon a respondent's insolvency. The order can only apply to funds and assets which the respondent is capable of spending.

A Freezing Order may have extra jurisdictional consequences. As a remedy in personam it is in theory at least portable. Much attention has been given in recent Court of Appeal cases to the extent this may be permitted and to appropriate safeguards.

The Freezing Order may and usually does have ancillary orders attached. These are intended to make the remedy more effective. A particularly useful ancillary remedy is for disclosure of the whereabouts and extent of the respondents assets

The collective criteria for diligence on the dependence has been codified by The Bill. Although a real and substantial risk to the defeat of the fruits of the action and reasonableness are common to the Freezing Order and Diligence on the dependence, the big difference is that in Scotland the remedies require only a prima facie case on the merits (15E (2), 9D(2) of 2002).

The Scottish remedies are much easier to obtain and enforce. Even with judicial consideration at every stage and the inevitability of inter parte hearings at some point, the administrative and legal costs of diligence on the dependence will normally only be in the hundreds of pounds in the Sheriff Court. Court of Session costs may be greater, particularly if section 27 CJ&J Act 1982 is involved in a cross border application. It may be confidently asserted the costs of these proceedings in Scotland are substantially less than their English equivalents.

Although the effectiveness of the inhibition has been reduced by The Bill both the arrestment and interim attachment secure a preference for the creditor on the debtor's insolvency.

Diligence on the Dependence is confined by section 27 CJA 1982 to warrants effected on property in Scotland. Whilst there is the possibility of cross border effect in particular circumstances the English concept of an in personam remedy is more portable. In general the Scottish regime does not permit disclosure orders. There are exceptions eg. Arrestee to creditor & wages arrestment.

4. PRE-EMPTIVE MEASURES TO PRESERVE EVIDENCE

- ALSO BIG DIFFERENCES

Background

The English and Scottish means to obtaining of documentary evidence differ at every stage.

1. in the hands of a party
2. in the hands of a third party
3. for use in and preparation for an action
4. prior to the raising of the action.

In Scotland there is no automatic discovery - the initiative is entirely on a party to seek evidence from an opponent. On the other hand documents may be recovered more easily than in England from a party and particularly a third party before the proof or even before the action is raised. This procedure involves an application to court (unless volunteered) with a Specification of Documents or Specification of Property seeking a Commission and Diligence for recovery against the " haver."

Administration of Justice (Scotland) Act 1972 Section 1:

The Scots courts have a discretion to order commission and diligence for:

Section 1: "...the inspection, photographing, preservation, custody and detention of documents and other property (including where appropriate, land) which appear to the court to be property as to which any question may relevantly arise in any existing civil proceedings before that court, or in civil proceedings which are likely to be brought, and to order the production and recovery of any such property, the taking of samples thereof and the carrying out of any experiment thereon or therewith."

"Likely to be brought" - The ordinary meaning of the words:

Section 1(1A): where proceedings have been brought or are likely to be brought an order may be made against any person to disclose such information as he has to identify any person who appears to the court to be a possible witness or defender.

THE RECOVERY OF EVIDENCE AS A PRE-EMPTIVE REMEDY:

- Usually involving a “Dawn Raid”

The Dawn Raid: English Provisions.

The Search Order (Anton Piller Order)
Section 7 Civil Procedure Act 1997 & see generally CPR25.1(i)h and Practice Directions.

A special form of mandatory injunction. In order to secure advantage the application is invariably made *ex parte* often before the main contact is commenced.

- i) Evidence describing premises and relevant documents of property
- ii) Extremely strong *prima facie* case on the merits
- iii) Strong evidence of serious harm or serious injustice will suffer if order not made
- iv) Orders for disclosure of whereabouts of infringing articles and names and addresses of alleged wrongdoers.

The Dawn Raid in Scotland

Section 1(3) permits orders under the Administration of Justice (Scotland) Act 1972 to be granted on an *ex parte* basis in exceptional circumstances

- (a) are the documents or other material sought essential for the applicant’s case?
- (b) if so, are they at a real risk of destruction or concealment?

A COMPARISON OF THE CONCEPTS :

The Scots regime extends further than English equivalents:

1. The Scots powers are easier to obtain. Provided the literal terms of the Act are made out an order in terms of Administration of Justice (Scotland) Act may be granted *ex parte* on the basis of a *prima facie case* where the court is satisfied there is a real risk of concealment. The remedy does not take the form of an injunction so there is no necessary requirement for “usual undertakings” and no requirement for an exceptionally strong case on the merits. The Court in both jurisdictions will require to be satisfied the remedy sought is proportionate.

2. There never has been the same concern about recovery from Third Party havens in Scotland as in England. The Scottish rules are rather unclear but certainly permit more widespread recovery from Third Parties.

2. Can a Search Order be carried out in Scotland? Competent yes but discretion not exercised in favour of the grant. Proctor Alarms Ltd v Maxim Alarms Ltd 1978 FSR 442.

3. The ground rules for conducting “dawn raids” are similar. The Scots proceedings are supervised by an independent commissioner. The “haver” has the opportunity to insist on measures being taken to preserve confidentiality and commercial secrets in any material removed, filmed or copied on site. In England the proceedings are supervised by the Supervising Solicitor.

4. In Scotland premises may be searched and items removed in the absence of the respondent or a responsible employee.

5. In both England and Scotland there are powers to order disclosure beyond what is recovered. These are less well tried in Scotland and were only introduced recently. It is unlikely that a Scottish Court could be persuaded to grant wide powers of disclosure.

5). HOW DOES HUMAN RIGHTS ACT VIEW PRE-EMPTIVE REMEDIES ?

Article 1 of Prot 1 European Convention on Human Rights:

“Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No-one shall be deprived of his possessions except in the public interest and subject to the general conditions provided for by law and by the general principles of international law.”

Any restriction on peaceful enjoyment must strike a fair balance between the demands of the general interests of the Community and the requirement to protect an individual’s fundamental rights.

“A reasonable relationship of proportionality between the means employed and the aim pursued.”

(Sporrong and Lonroth v. Sweden (A/52 1983 5 E.H.R.R.)).

In the case of English Injunctive Relief including the freezing and search orders the balancing of the risks of doing injustice is really applied proportionality. The object of the order is to protect the rights and freedoms of the applicant.(see Chappell v U.K.(1989 1FSR 617).The temporary nature of the freezing order with a return day

helps proportionality as does the presence of the supervising solicitor in the case of the search order. The compatibility of the Dawn Raid procedure is assisted because in England the Supervising Solicitor attends and in Scotland a court appointed Commissioner conducts the recovery. Changes made to the Scottish remedies by The Bill have codified human rights considerations raised by cases such as *Karl Construction v Palisade Properties* (2002 SLT 312) & *Advocate General v Taylor*.

B. WHAT REMEDIES ARE AVAILABLE IN OTHER CONVENTION COUNTRIES?

THE CIVIL LAW SYSTEMS

France:

Security: La Saisie Vente
La Saisie Attribution
La Saisie Conservatoire

Evidence: New Code of Civil Procedure
Article 9 - Each party must supply the facts necessary to prove their claim.
Article 10 - Judges may order any measure provided by law.

Germany:

Security: Arrest
Einstweilige Verfügung
Evidence: Selbständiges Beweisverfahren

C. FORUM DIPPING

“ The best Kept secret in commercial litigation”

The principal source of law on the subject of jurisdiction is the Civil Jurisdiction and Judgments Act 1982 which gives effect to the 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, now in part succeeded by Council Regulation 44/2001 "The Judgements Regulations". This

introduces the prospect of a choice of Jurisdiction –i.e. where and therefore in what form the commercial remedy may take.

This choice gives rise to a sea change in thinking which the professions have been slow to comprehend. Yet, tell the client that tactical advantage is possible and the interest is considerable. To take account of the possibilities litigates should now introduce tactical thinking to serve their clients' best interests which begins by an analysis of the available options. Remember just about every commercial company will have assets such as trade debtors in other jurisdictions.

The Conventions mean that forum shopping should no longer be regarded with disdain. Where the choice exists there is no bar to forum shopping which is a natural consequence of the availability of cross border litigation. "Choosing Forum is not a crime. It is a normal incident of multi-jurisdictional litigation." (Per Laddie J. Demel v C & H Jefferson (a firm) & Another 1999 SSR 204 p.212.& Boss Group v Boss France S.A.(1996) IRLR 403).But it would not be legitimate to add a defendant in the absence of a legitimate claim , solely provide jurisdiction against a party who could not otherwise be joined.(see Valerie Gannon v British& Irish Steam Packet Co Ltd.[1993]21R359 & Messier Dowty Ltd v Sabina [200]I Lloyds Rep 428)

ARTICLE 31

Applications may be made to the courts of a Contracting State for such provisional, including protective, measures as may be available under the law of that State, even if, under this Convention, the courts of another Contracting State have jurisdiction as to the substance of the matter.

NOTE: No substantive jurisdiction required.

Need for caution

It would not be a legitimate to use the provisions oppressively by multiplying the security obtained beyond the value of the claim.

Also practitioners must make sure they have personally assimilated and inquired into facts before making these applications particularly if in aid of foreign proceedings. (Lennox Lewis v Panos Eliades, Panix Promotions 2002 WL 45475.)

A choice of Jurisdiction Clause ?

- i) Convening some Jurisdiction for Interim Protective Measures?**
- ii) Excluding some jurisdiction for Interim Protective Measures ?**
- iii) Excluding any Jurisdiction for Interim Protective Measures?**

Probably makes no difference

Recent ECJ cases

Gasser v Misat Srl [2005] QB 1

- An Austrian exclusive Choice of Jurisdiction Clause did not prevent the Italian Courts from considering whether they had jurisdiction to grant a negative declaration

And ten years later.....?

See also Turner v Grovit [2005] 1 AC 101 & Owusu v Jackson 2005 (C-281/02)

HOW PROVISIONAL AND PROTECTIVE MEASURES CAN BE USED

THE MOST USUAL TARGETS FOR AN ARRESTMENT ARE:

- (a) A Scottish Bank or Building Society account
- (b) A shareholding in a Scottish registered company
- (c) An assurance or investment policy with one of the many Scottish Assurance Companies.
- (d) Trade or professional debtors of the target in Scotland
- (f) Possibly an English or foreign branch of a Scottish bank, insurance company
- (e) Sums due under a contract (NB salary or wages)

DEVELOPING THE PROFILE OF AN OPPONENT

Security:

- i) Immoveable Property
- ii) Moveable Property
- iii) Banks and Creditors
- iv) Trade Debts

Evidence:

- i) Witnesses
- ii) Business Records and Documents
- iii) Intellectual Property Material
- iv) Trade Secrets

5. REQUESTS FOR INTERIM PROTECTIVE MEASURES FROM BEYOND THE JURISDICTIONS : THE DISCRETION

Union Carbide Corporation v. B.P. Chemicals 1995 SLT 972

“The court’s predominant concern with the ends of justice requires that account must be taken not only of injustice to the defendant if the plaintiff were to be allowed to pursue the foreign proceedings, but also of the injustice to the plaintiff if he were not allowed to do so. ... If it would be vexatious or oppressive for the order to be granted, especially in view of the nature and scope of the equivalent or similar remedies available in the other jurisdiction, the order should be refused.”

Credit Suisse Fides Trust SA v. Cuoghi 1997 3 WLR 871

“The English court had to recognise that its role was subordinate to and had to be supportive of the court seised with the substantive proceedings.”

Babenaft International Co v. Barrante 1989 2 WLR 232

Republic of Haiti v. Duvalier 1990 1 QB 202

Derby & Co v. Weldon & Ors 1990 CH 84

Omega Corporation v. Myrica (UK) Limited 1998 SCLR 475

Refco v Eastern Trading and Another (1991 1 Lloyds Rep 159)

Considered Credit Suisse case.

Motorola Credit Corporation v. Sem Cengiz Uzam 2003 WL 212 36565

Laureen Ryan & Others v Friction Dynamics Limited & Others (2000 WL 699 392 Mr Justice Neuberger).

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