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Freezing injunctions in the BVI: a recent development from England

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The recent English Court of Appeal decision in **Dos Santos v Unitel SA** [2024] EWCA Civ 1109 provides welcome clarification as to the test for obtaining a freezing injunction.

The English Court of Appeal found that an applicant need not prove that its claim has a better than 50% chance of success in order to obtain a freezing injunction. As such, the court confirmed that there is a relatively low bar.

The basics

Freezing injunctions are a common feature of the BVI legal landscape. A freezing injunction is an interlocutory order of the court granted in aid of enforcement of a present or future judgment. Its purpose is to preserve the assets of the defendant when the court thinks that such preservation is necessary to satisfy a money judgment obtained by the claimant. They are a powerful tool for claimants to prevent the dissipation of a defendant's assets pending resolution of their underlying claim. They are also often granted in the BVI in aid of foreign proceedings and arbitrations.

BVI law typically follows English law as to the requirements for the grant of a freezing injunction. One of those requirements, which applies where the freezing order is founded on an underlying cause of action or claim, is that the claimant must have a good arguable case. Exactly what that means, however, has been subject to debate for some time.

What does good arguable case mean?

On one formulation a good arguable case is one *"which is more than barely capable of serious argument, and yet not necessarily one which the judge believes to have a better than 50% chance of success."* This is the traditional understanding set out in **The Niedersachsen** [1983].

On another formulation a good arguable case is one where the applicant must have the *"better of the argument"*, in other words, a relative test with a higher threshold than the **Niedersachsen** test.

Part of the confusion has been caused by the fact that there are different contexts where the good arguable case test is applied, and it was unclear up until now whether it was the same good arguable case test that should be applied across those contexts.

The court's decision

In **Dos Santos v Unitel SA** the English Court of Appeal decided that the formulation of the good arguable case test set out in **The Niedersachsen** is the correct one in the freezing order context. Further, the Court of Appeal found that the good arguable case test that applies in the freezing order context should be equated with the *"serious issue to be tried"* test that applies for other interim injunctions other than freezing orders (i.e. those granted under the test set out in **American Cyanamid Co v Ethicon Ltd** [1975] AC 396). In so doing the English Court of Appeal has effectively harmonised this aspect of the test across different types of interim injunctions.

There were a number of reasons why the English Court of Appeal preferred the lower threshold, including that the purpose of a freezing order is to hold the ring pending resolution of the claim at trial, and that requiring an applicant to prove the higher test at the outset places too high a burden on the applicant. The court also noted that respondents are often protected to a large degree by the cross undertaking in damages that an applicant must provide as a condition of obtaining a freezing order.

Time will tell if the English Court of Appeal decision in **Dos Santos v Unitel SA** will be appealed to the Supreme Court. In the meantime, the BVI courts are likely to follow the **Niedersachsen** test as clarified by the English Court of Appeal in relation to freezing injunctions.

Please feel free to contact a member of our Carey Olsen dispute resolution team should you require advice concerning freezing orders in the BVI or in any of our other offshore jurisdictions.

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