

Exxon Mobil Obtains Huge Mareva Injunction Against Venezuelan Oil Company

New York
February 11, 2008

On February 8, 2008, Exxon Mobil Corporation announced that it had obtained an order from a U.K. court freezing bank accounts and assets belonging to Venezuela's state-owned oil company, Petróleos de Venezuela, S.A. (PDVSA) with a value of up to US\$ 12 billion.¹ The freeze was obtained as security for a potential arbitral award in an arbitration proceeding that Exxon Mobil has commenced under the arbitration rules of the International Chamber of Commerce (ICC). As far as we know, this is the largest and most dramatic example of the English "Mareva" injunction, which has been referred to as the "nuclear weapon" of litigation because it permits far-reaching extraterritorial asset freezes at the very outset of a dispute.

Using a Mareva² injunction, now called in English litigation parlance a "freezing order," a plaintiff who can establish a "good arguable case" on the merits against a defendant can obtain a pre-judgment order prohibiting the defendant from transferring its assets, if the plaintiff can show that the defendant is otherwise likely to dispose of them so as to defeat collection of a judgment. The power of an English court to grant such an order was codified under section 37 of the Supreme Court Act 1981. While Mareva itself involved an injunction freezing funds in an English bank, it has subsequently been extended to authorize freezes by English courts of assets of the defendant outside the jurisdiction as

¹ The order states that PDVSA must not "(1) remove from England and Wales any of its assets which are in England and Wales up to the value of US\$ 12,000,000,000 ("US\$ 12 billion"); or (2) in any way dispose of, deal with or diminish the value of any of its assets whether they are in or outside England and Wales up to the same value." Exxon Mobil obtained similar orders from a Netherlands and a Netherlands Antilles court and a much smaller (\$300 million) attachment of New York assets of PDVSA from a New York federal court.

² So named from the case which first upheld its use, Mareva Compania Naviera S.A. v. Int'l Bulkcarriers S.A., [1975] 2 Lloyd's Rep. 509.

well.³ Since a freezing order can be, and typically is, sought *ex parte*, it can subject a defendant, literally before it becomes aware of it, to a potentially serious block on many of its business activities. The size of the freeze obtained by Exxon Mobil is a striking example of why a Mareva injunction is such a powerful tool to get a defendant's attention and, potentially, "tie its hands" before the litigation is even underway.

Mareva injunctions or comparable pre-judgment injunctive remedies to freeze property are not available in the United States. U.S. courts – most notably the Supreme Court in the Grupo Mexicano case – have rejected the use of injunctions for this purpose, on the grounds that they are a recent innovation in traditional equity jurisprudence that has not been authorized by Congress in the federal court system.⁴ New York state courts have reached the same conclusion as a matter of New York law.⁵ U.S. federal and state courts have the power to attach property located within the state under the state's attachment rules, but these rules have no extraterritorial effect and generally require something more than the existence of an arguable claim and a desire for security. Accordingly, in the United States, the mere fact that a defendant is preferring other creditors or transferring its assets in a non-fraudulent manner is insufficient to support an injunction against its continuing to do so.

In the United Kingdom, on the other hand, freezing orders have become relatively common in commercial litigation, and, as the Exxon Mobil example indicates, can be used to tie up staggeringly large amounts of property. Seeking one is not a risk-free proposition for the applicant: besides having to post a bond (which the U.K. court here required in the relatively modest amount of US \$1 million), the applicant must also undertake to pay any damages sustained by the defendant as a result of the freeze if it is ultimately determined that the order was improperly granted. In addition, the order can be vacated if the defendant is able to show, after it has received notice of the order, that it is unnecessary or otherwise

³ E.g., Republic of Haiti v. Duvalier, [1990] 1 Q.B. 202, 215-17; Babanaft Int'l Co. S.A. v. Bassatne, [1988] 2 Lloyd's Rep. 435, 444, 448-49.

⁴ Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308, 332-33 (1999). The reasoning in Grupo Mexicano was that, absent an existing lien on identifiable property or a claim to a specific property or fund, a general unsecured creditor enjoys no cognizable interest in his debtor's assets, either legal or equitable, until a judgment has been obtained, and therefore has no right to interfere with the debtor's use of his property. *Id.* at 318-20.

⁵ Credit Agricole Indosuez v. Rossiyskiy Kredit Bank, 94 N.Y.2d 541, 549, 729 N.E.2d 683, 687, 708 N.Y.S.2d 26, 30 (2000).

unwarranted. Nonetheless, in an appropriate case, a freezing order can prove to be a formidable weapon in the hands of an aggressive claimant.

If you have any questions, please contact Jonathan Blackman, Howard Zelbo, or Carmine Boccuzzi in our New York Office at 212-225-2000.

CLEARY GOTTLIEB STEEN & HAMILTON LLP

Office Locations

NEW YORK

One Liberty Plaza
New York, NY 10006-1470
1 212 225 2000
1 212 225 3999 Fax

WASHINGTON

2000 Pennsylvania Avenue, NW
Washington, DC 20006-1801
1 202 974 1500
1 202 974 1999 Fax

PARIS

12, rue de Tilsitt
75008 Paris, France
33 1 40 74 68 00
33 1 40 74 68 88 Fax

BRUSSELS

Rue de la Loi 57
1040 Brussels, Belgium
32 2 287 2000
32 2 231 1661 Fax

LONDON

City Place House
55 Basinghall Street
London EC2V 5EH, England
44 20 7614 2200
44 20 7600 1698 Fax

MOSCOW

Cleary Gottlieb Steen & Hamilton LLP
CGS&H Limited Liability Company
Paveletskaya Square 2/3
Moscow, Russia 115054
7 495 660 8500
7 495 660 8505 Fax

FRANKFURT

Main Tower
Neue Mainzer Strasse 52
60311 Frankfurt am Main, Germany
49 69 97103 0
49 69 97103 199 Fax

COLOGNE

Theodor-Heuss-Ring 9
50668 Cologne, Germany
49 221 80040 0
49 221 80040 199 Fax

ROME

Piazza di Spagna 15
00187 Rome, Italy
39 06 69 52 21
39 06 69 20 06 65 Fax

MILAN

Via San Paolo 7
20121 Milan, Italy
39 02 72 60 81
39 02 86 98 44 40 Fax

HONG KONG

Bank of China Tower
One Garden Road
Hong Kong
852 2521 4122
852 2845 9026 Fax

BEIJING

Twin Towers – West
12 B Jianguomen Wai Da Jie
Chaoyang District
Beijing 100022, China
86 10 5920 1000
86 10 5879 3902 Fax