

International Bar Association Conferences 2020



2020

15 JANUARY 2020 BANGKOK, THAILAND
IBA Asia Pacific Arbitration Group
International Arbitration Training Day:
Introduction to IBA Soft Laws

15-16 JANUARY 2020 MEXICO CITY, MEXICO
IBA/ABA Environmental Summit of
the Americas

20-21 JANUARY 2020 LONDON, ENGLAND
9th Annual IBA Finance &
Capital Markets Tax Conference

6-7 FEBRUARY 2020 PARIS, FRANCE
8th IBA European Corporate and
Private M&A Conference

8 FEBRUARY 2020 NEW DELHI, INDIA
IBA India Litigation Symposium

19-21 FEBRUARY 2020 SAN FRANCISCO, USA
IBA/ABA International Cartel Workshop

23-25 FEBRUARY 2020 LAGOS, NIGERIA
IBA Anti-Corruption in Africa Conference

26-28 FEBRUARY 2020 TOKYO, JAPAN
4th IBA Asia-based International
Financial Law Conference

2-3 MARCH 2020 LONDON, ENGLAND
25th International Private
Client Conference

4-5 MARCH 2020 MUNICH, GERMANY
1st European Automotive and Mobility
Services Conference

8-10 MARCH 2020 LONDON, ENGLAND
21st Annual International Conference
on Private Investment Funds

12-13 MARCH 2020 ISTANBUL, TURKEY
23rd Annual IBA Arbitration Day

19-20 MARCH 2020 LONDON, ENGLAND
Insurance Without Borders

25-27 MARCH 2020
AMSTERDAM, THE NETHERLANDS
12th Annual Real Estate Investments
Conference

25-27 MARCH 2020 CARTAGENA, COLOMBIA
Biennial IBA Latin American Regional
Forum Conference

26-27 MARCH 2020 BARCELONA, SPAIN
5th Mergers and Acquisitions in the
Technology Sector Conference

28 MARCH 2020
THE HAGUE, THE NETHERLANDS
5th Annual Conference of the War
Crimes Committee: new challenges in
a new landscape for ICL

1-3 APRIL 2020 MADRID, SPAIN
IBA Annual Employment and Diversity
Law Conference

1-3 APRIL 2020 MUNICH, GERMANY
IBA/ABA 20th Annual US and Europe
Tax Practice Trends Conference

1-3 APRIL 2020 ADDIS ABABA, ETHIOPIA
Biennial IBA African Regional Forum
Conference

15-18 APRIL 2020 MARRAKESH, MOROCCO
Biennial Conference of the Section on
Energy, Environment, Natural Resources
and Infrastructure Law (SEERIL)

17-18 APRIL 2020 MUMBAI, INDIA
Mergers and Acquisitions in India:
key opportunities and challenges in
recent times

22-24 APRIL 2020 MADRID, SPAIN
23rd Annual IBA Transnational Crime
Conference

27-28 APRIL 2020 PARIS, FRANCE
31st Annual IBA Communications and
Competition Conference

5-6 MAY 2020 WASHINGTON DC, USA
36th Annual IBA/IFA Joint Conference
on International Franchising

6-8 MAY 2020 BUENOS AIRES, ARGENTINA
IBA Annual Litigation Forum – new
challenges in multijurisdictional litigation

13-15 MAY 2020 VENICE, ITALY
37th IBA International Financial Law
Conference

17-19 MAY 2020 NEW YORK, USA
31st Annual Conference on the
Globalisation of Investment Funds

17-19 MAY 2020 EDINBURGH, SCOTLAND
26th Annual IBA Global Insolvency and
Restructuring Conference

18-19 MAY 2020
AMSTERDAM, THE NETHERLANDS
6th IBA Global Entrepreneurship
Conference

20-21 MAY 2020 VILNIUS, LITHUANIA
15th Anniversary Bar Leaders
Conference and Gala Dinner

2-3 JUNE 2020 NEW YORK, USA
19th Annual International Mergers
& Acquisitions Conference

4 JUNE 2020 WASHINGTON DC, USA
From NAFTA to USMCA

1-6 NOVEMBER 2020 MIAMI, USA
Annual Conference of the
International Bar Association

IBA 2020
MIAMI BEACH CONVENTION CENTER
MIAMI, USA, 1-6 NOVEMBER

BUSINESS LAW INTERNATIONAL

VOL 21 NO 1 JANUARY 2020

Business

Law

International

Vol 21 No 1 pp 1-92 ISSN 1467 632X

January 2020

Ten Points for Choosing the Governing Law of an International Business Contract

Philip R Wood

The New Rules for Providing Financial Services in Switzerland: Fundamental Changes to the Cross-border Provision of Financial Services for Non-Swiss Financial Service Providers and Producers of Financial Instruments for the Swiss Market

Martin Liebi and Merlin Haldemann

Keeping the Freezer Stocked: Interim Relief in Aid of Foreign Proceedings before the DIFC Courts

Patrick Dillon-Malone SC

Regulation of Crowdfunding in Singapore

Adrian Ang and Samuel Kwek

Case Comment: Fiat and Starbucks: the Repurposing of Competition Law for Anti-Tax-Avoidance Schemes

Omar Asfar

Case Comment: The Prorogation Case 2019: Changing the Law to Preserve the Constitution

Charles Falconer



ANNUAL CONFERENCE OF THE INTERNATIONAL BAR ASSOCIATION

IBA 2020

MIAMI BEACH CONVENTION CENTER
MIAMI, USA, 1-6 NOVEMBER



The 2020 Annual Conference will be held in Miami, a major US centre and leading city for finance, commerce, culture, entertainment and international trade.

Miami is also known as the 'capital of Latin America' and houses the headquarters of Latin American operations for more than 1,400 multinational corporations, including: AIG, American Airlines, Cisco, Disney, Exxon, Kraft Foods, Microsoft, Yahoo, Oracle, Sony and Walmart.

Miami is also one of South Florida's premier vacation destinations, with beautiful beaches, great weather, multicultural neighbourhoods, art deco delights, sports and a lively arts and nightlife scene.

With an abundance of business and networking opportunities on offer, this modern metropolis will be a fantastic location for the largest, most prestigious event for international lawyers.



WHAT WILL IBA 2020 OFFER YOU?

- Listen to industry thought leaders and experts sharing their advice to enable you to re-engineer your approach to business
- Build strategies for success by sharing your experiences and issues with lawyers from all practice areas from across the globe
- Generate more work and referrals by making connections with a network of over 6,000 international lawyers from more than 2,700 law firms, corporations and regulators
- Save time and money by meeting all of your legal contacts under one roof



TO REGISTER YOUR INTEREST:

Visit: www.ibanet.org/Conferences/Miami-2020.aspx Email: ibamarketing@int-bar.org

To receive details of all advertising, exhibiting and sponsorship opportunities for the IBA Annual Conference in Miami, email andrew.webster-dunn@int-bar.org

Guidelines for Contributors

1. *Business Law International*, published by the Legal Practice Division of the IBA, is the leading law journal devoted to issues of relevance to the international commercial, legal and academic community. All 14,000 members of the IBA Legal Practice Division receive the journal as part of their membership. It is also available to individual subscribers and libraries.
2. *Business Law International* articles break new ground on legal issues affecting business, provide an in-depth discussion of current developments and timely issues, and offer a survey of the law in areas of particular interest to our international readership. The Editorial Board welcomes the submission of articles which consider legal problems or issues currently confronted by international organisations or private enterprises, by setting them within their general legal, economic or business context. Articles are welcome from private practitioners, in-house counsel and academics.
3. Articles should typically be around 3,500–5,000 words, although articles up to 10,000 words will be considered for publication.
4. Except in special circumstances, the Editorial Board will not consider articles published or to be published elsewhere. Authors are asked to confirm that their typescript is not and will not be so published, or to explain the relevant circumstances.
5. Copyright in the article will normally be assigned to the IBA.
6. Title and author of the article should be clearly indicated together with the brief personal description (max 50 words) that the author would wish to see appear.
7. Contributors are asked to provide a brief headnote of around 100 words describing the contents of their article.
8. All articles are refereed to ensure both accuracy and relevance. Authors may be asked to revise their articles before final acceptance.
9. Referencing in IBA publications follows *The Oxford Standard for Citation of Legal Authorities*. Please visit www.competition-law.ox.ac.uk/published/oscola.shtml for further details.
10. All footnotes should be numbered from 1–99 and should be as concise as possible. Footnotes should be checked for accuracy, completeness and consistency.
11. The citation for the journal is in the following style: (2018) 19 BLI.
12. All materials for the journal must be in English. In special circumstances articles written in a foreign language will be considered for translation and publication. Such articles when submitted to the Editorial Board must be accompanied by a synopsis in English.
13. All materials should be submitted as a Word document via email.
14. Contributors are recommended to retain a copy of their article.
15. The author should supply his or her contact details for further correspondence.

All typescripts to:
Simon Fuller at simon.fuller@int-bar.org

International Bar Association

4th floor, 10 St Bride Street, London EC4A 4AD

Tel: +44 (0)20 7842 0090 Fax: +44 (0)20 7842 0091 Email: editor@int-bar.org

Terms and Conditions for Submission of Articles

1. Articles for inclusion in this journal should be sent to **simon.fuller@int-bar.org**.
2. The article must be the original work of the author, must not have been previously published, and must not currently be under consideration by another journal. If it contains material which is someone else's copyright, the unrestricted permission of the copyright owner must be obtained and evidence of this submitted with the article and the material should be clearly identified and acknowledged within the text. The article shall not, to the best of the author's knowledge, contain anything which is libellous, illegal, or infringes anyone's copyright or other rights.
3. Copyright shall be assigned to the IBA and the IBA will have the exclusive right to first publication, both to reproduce and/or distribute an article (including the abstract) itself throughout the world in printed, electronic or any other medium, and in turn to authorise others (including Reproduction Rights Organisations such as the Copyright Licensing Agency and the Copyright Clearance Center) to do the same. Following first publication, such publishing rights shall be non-exclusive, except that publication in another journal will require permission from and acknowledgment of the IBA. Such permission may be obtained from the Managing Editor at **editor@int-bar.org**.
4. The rights of the author will be respected, the name of the author will always be clearly associated with the article.

Keeping the Freezer Stocked: Interim Relief in Aid of Foreign Proceedings before the DIFC Courts

Patrick Dillon-Malone SC*

Introduction

It is a common feature of financial fraud schemes for the proceeds of the fraud to be scattered across several jurisdictions, frequently through a network of connected entities. For the victims of the fraud, the first step in attempts to salvage their investments will often be to seek a worldwide freezing order in the courts of the country in which the defendants and their activities are centred. In many such cases, however, the freezing order in the primary jurisdiction will not be sufficient to effectively prevent dissipation of assets elsewhere, and it may therefore be necessary to approach courts in other jurisdictions, where some of the defendants or their ill-gotten gains

* Patrick Dillon-Malone is Senior Counsel, International Litigation Group, Al Tamimi & Company, Dubai. The author can be contacted at p.malone@tamimi.com. This article was finalised on 1 November 2019. A summary version appeared under the title 'Friends in Need and International Comity: Interim Freezing Orders in aid of Foreign Proceedings before the DIFC Courts' in *Law Update* (Al Tamimi, June–July 2019) with Diego Carmona. The author is grateful to Rupert Reed QC of Serle Court Chambers, London, for his comments on this longer version.

are located, with a request that they grant ancillary freezing orders in aid of the main proceedings.¹

The Dubai International Financial Centre (DIFC) Court of First Instance has recently had the opportunity to affirm its jurisdiction to grant freezing orders in aid of foreign proceedings.² The issue arose in *United States Securities and Exchange Commission v Wintercap SA and Others*,³ in which the claimant (SEC), represented by Al Tamimi & Company, successfully obtained a freezing order in aid of an interim worldwide asset freeze order granted by the US District Court of Massachusetts on 16 November 2018 (the ‘US asset freeze order’).

In the course of the case before the DIFC Court, which was heard over several return dates in January and February 2019, the Court considered a number of issues, including the following:

- What was the precise legal basis for the Court’s jurisdiction, and how did it relate to other potentially overlapping elements of the Court’s powers of recognition and enforcement of foreign judgments, and to the Court’s powers of direct international judicial assistance?
- What weight should be given to the US Court’s findings and to the freezing orders granted in the main US proceedings?
- To what extent could the Court grant an ancillary freezing order over assets located outside the DIFC, in onshore Dubai (or potentially elsewhere in the United Arab Emirates), and what were the relevant factors in considering whether to do so?
- To what extent was it appropriate for the Court to direct the provision of information by non-DIFC entities relating to funds and assets held by them outside the DIFC?

1 See generally White Book Service 2019, Civil Procedure Volume 2, 15-B-5(d) *Freezing Injunction in Aid of Proceedings in Other Jurisdictions*; also Volume 1 s A at 25.4.2; *Zuckerman on Civil Procedure: Principles of Practice* (3rd edn), 10-169 to 10-173 and 10.201 *et seq.* *Dicey Morris & Collins on the Conflict of Laws* (15th edn) 8-025 and 8-029 to 8-040.

2 The existence of the DIFC Court’s jurisdiction in this area was rejected in a decision of Deputy Chief Justice Sir David Steel in December 2017 (on an *ex parte* application) [2017] DIFC CFI 052 (5 December 2017). However, the decision of the Judge in that case was based upon a characterisation of the DIFC Rules of Court that has been superseded by the judgment of the DIFC Court of Appeal in *Nest Investment Holding Lebanon SAL & Others v Deloitte & Touche (ME)* [2018] DIFC CA 011 (13 March 2019). Further, the statutory evolution of the equivalent jurisdiction in England and Wales, upon which the Judge relied, has not prevented courts elsewhere (relying *inter alia* on Lord Nicholl’s influential dissent in *Mercedes Benz v Leiduck* [1996] 1 AC 284) from recognising the jurisdiction as falling within the wider jurisdiction to grant interim relief. Cf *Akhmedova v Akhmedov and Another (‘The Luna’)* [2018] DIFC CA 003 (19 June 2018), in which DIFC recognition and enforcement proceedings issued to give effect in the UAE to an English Commercial Court worldwide freezing order.

3 [2019] DIFC CFI 003 (4 March 2019).

Although the DIFC Court did not deliver a written judgment setting out its reasoning on these issues, its conclusions on the core matters in issue are confirmed by the terms of the order that was ultimately issued on 4 March 2019 (the ‘final freezing order’). It is therefore instructive to consider the arguments advanced by the SEC in the course of the case and to consider the extent to which these arguments may have found favour with the Court in shaping its final freezing order.

The US and DIFC Court proceedings

The US proceedings were a securities enforcement action brought by the SEC against a so-called microcap securities fraud scheme.⁴

Under the relevant US statutory provisions, the US federal courts have power to order disgorgement of the proceeds of fraud together with a civil penalty by way of damages against the perpetrators in favour of the SEC. The proceedings are a civil action for compensation as distinct from a regulatory prosecution.⁵

The respondents in the DIFC proceedings, who were also each named defendants in the US proceedings, were:

- a Swiss entity controlled by a British individual who at the time of the DIFC proceedings was in custody in Massachusetts (the ‘Swiss entity’);
- a Fujairah entity controlled by the same British individual (the ‘Fujairah entity’); and
- a Dubai Multi Commodities Centre (DMCC) entity controlled by a French individual who resided in Germany and was believed at the time of the DIFC proceedings to be at large in Europe (the ‘DMCC entity’).

The assets sought to be frozen in the DIFC proceedings were, respectively, funds and equities held in the name of the Swiss entity by a DIFC licensed financial services provider, funds held in an onshore Dubai bank account of the Fujairah entity and funds held in an onshore Dubai bank account of the DMCC entity. The two onshore banks and the DIFC financial services provider were each named notice parties in the DIFC proceedings. Neither of the onshore banks had branches within the DIFC.

After various applications on behalf of the SEC after the first return date, on the basis of demonstrated difficulties and obstacles to service, the DIFC

4 See *Securities and Exchange Commission v Roger Knox and Others*, US District Court, District of Massachusetts, Record No 18-CV-12058-RGS.

5 *SEC v Happ*, 392 F 3d 12 (2004), judgment of US Court of Appeals First Circuit, 10 December 2004; and *US Securities and Exchange Commission v Manterfield* [2009] EWCA Civ 27. See also *Evans v European Bank* [2004] NSWCA 82; and Ashe, ‘The Long Arm of the SEC’ (2009) 30 *Company Lawyer* 193-194. See also and compare *Blue Holding (Pte) Limited v United States* [2015] 1 WLR 1917.

Court granted the SEC orders of alternative service in respect of the Swiss entity and the Fujairah entity by serving the British individual in accordance with the requirements of US federal and Massachusetts law. In addition, it deemed service good on the DMCC entity as having been validly served in accordance with Fujairah law. None of the respondents thereafter engaged with the DIFC Court process.

Source and character of the DIFC Court's jurisdiction

In common with many (but not all) common law jurisdictions, the DIFC Court's power to grant a freezing order in aid of foreign proceedings is a feature of its general injunctive jurisdiction⁶ and does not derive from any dedicated statutory provisions.⁷

In *SEC v Wintercap*, the Court in its final order identified the legal basis for its jurisdiction as residing in Article 5(A)(1)(e) of the Judicial Authority Law, Article 32(b) of the DIFC Court Law and Rules 25.1.6(a), 25.1.6(b), 25.1.7 and 25.24 of the Rules of the DIFC Courts (RDC). To these could be safely added Article 22(2) of the DIFC Court Law, which essentially repeats and is co-extensive with Article 32(b) in providing for the DIFC Court's general power to grant injunctive relief wherever it considers it 'appropriate' to do so.⁸

Of these provisions, only the last – RDC Rule 25.24 – specifically mentions interim relief in aid of other proceedings. It provides that where a party wishes to apply for an interim remedy but the remedy is sought in relation to proceedings that are taking place, or will take place, outside the DIFC, such an application must be made in accordance with Part 8 of the Rules.⁹ The focus of the provision, therefore, is procedural, but it is important

6 See, eg, *Black Swan Investments ISA v Harvest View and Others* BVIHCV 2009/339 (Eastern Caribbean S Ct, Bannister J); *Meespierson (Bahamas) Ltd v Grupo Torras SA* [2001] 1 LRC 627;n and recently the judgment of Hargun CJ for the Supreme Court of Bermuda in *Dawson-Damer v Lyndhurst Limited* [2019] SC (Bda) 8 Civ (6 February 2019).

7 The express statutory basis in English law is unusual but see also in Hong Kong s 21M of the High Court Ordinance (Cap 4); and in Cayman s 11A rule 1(n) of the Grand Court Law (2008 Revision) (as amended). For a consideration of the differing statutory language, see *Classroom Investments Inc v China Hospitals Inc and Another* [2015] 1 CILR 451 (Cayman Grand Court).

8 The word 'appropriate' in the DIFC legislative framework is the equivalent of the English statutory wording, as to whether it is 'not inexpedient' to grant such relief, see Field J in *Larmag Holding BV v First Abu Dhabi Bank PJSC and Another* [2019] DIFC CFI 030 (19 July 2019) at [25].

9 As in English procedure, the Part 8 DIFC Court procedure is the alternative procedure for decisions on questions unlikely to involve a substantial dispute of fact and other specified proceedings not requiring the fuller exchange of pleadings required under RDC Part 7.

nonetheless in confirming the existence of the underlying jurisdiction of the DIFC Court to grant interim relief in aid of foreign proceedings.¹⁰

The provision in RDC Rule 25.24 for granting interim relief in aid of ‘other proceedings’ reflects, at the international level and in a fraud context, the widespread recognition of common law courts that the nature of international fraud requires courts, within the limits of comity, to render whatever assistance they properly can. For this purpose, the absence of an international convention is no obstacle, and it is sufficient that the requested court has its own jurisdictional basis, either as part of its inherent power to grant injunctive relief or otherwise by statute, to grant interim relief in aid of foreign proceedings.¹¹

In the course of argument before it in *SEC v Wintercap*, the DIFC Court raised the question of how its jurisdiction to grant a freezing order in aid of foreign proceedings differed from the Court’s powers to recognise and enforce foreign judgments and orders under RDC Part 45. In response, it was pointed out that the US asset freeze order – which was itself an interim or ‘temporary’ order – continued to have its own independent life and effect as a matter of Massachusetts and US federal law, including worldwide extraterritorial effects.¹² The DIFC Court was here being called upon to grant an independent order, albeit an ancillary one, based upon the established criteria for granting a freezing order, namely a good arguable case, a real risk of dissipation in the event of refusal of relief¹³ and that it is just and convenient in all the circumstances to grant the freezing order.¹⁴

10 It has been confirmed in this regard that in an appropriate case the Rules of the DIFC Courts may ground jurisdiction as ‘DIFC Regulations’ within the meaning of Article 5(A) (1) (e) of the Judicial Authority Law, *Nest Investment Holding Lebanon SAL & Others v Deloitte & Touche (ME)* [2018] DIFC CA 011 (13 March 2019).

11 See, eg, *Credit Suisse Fides Trust SA v Serghio Cuoghi Ditto* [1988] QB 818, 827-28; *Refco v Eastern Trading* [1999] Lloyd’s Rep 159; *Motorola Credit Corporation v Uzan (No 2)* [2004] 1 WLR 113, 147-49; *Dacey Morris & Collins on the Conflict of Laws* (15th edn), 8-040; and recently *ArcelorMittal USA LLC v Essar Steel Ltd* [2019] 2 All ER (Comm) 414.

12 Under either the ‘conduct test’ or the ‘effects test’ for US extraterritorial jurisdiction, see for example the judgment of the Second Circuit Court of Appeals in *SEC v Berger*, 322 F 3d 187 (2d Cir 2003).

13 *Tugushev v Orlov and Others (No 2)* [2019] EWHC 2031 (Comm) (Carr J) at [49]–[93]; *Thane Investments Ltd v Tomlinson* [2003] EWCA Civ 1272 at [28]; also *Yukos CIS Investments Limited v Yukos Hydrocarbons Investments Limited* (HCVP 2010/028); *State Bank of India and Others v Mallya and Others* [2018] 1 WLR 3865 at [103]–[110]; also *JST BTA Bank v Abyazov* [2014] HKEC 296.

14 See *Ras Al Khaimah Investment Authority and Others v Bestfort Development LLP and Others* [2018] 1 WLR 1099 (CA); *JSC BTA Bank v Mukhtar Abyazov* [2009] EWHC 2840 (Comm); *Ninemaria Maritime Corp v Trave Schiffahrtsgesellschaft mbH & Co KG (‘The Niedersachsen’)* [1984] 1 All ER 398 (Mustill J); *Danone Asia PTE Limited v Golden Dynasty Enterprise Limited* BVIHCV 2007/0262 at [33]. On whether it is ‘just and convenient’ to make the order, see Lord Donaldson MR in *Polly Peck International plc v Nadir* [1992] 4 All ER 769 at 785E–786A.

As such, the DIFC Court had to itself address the substance of whether the test for the granting of relief had been met, and while it would conceivably have been open to the SEC to apply for recognition and enforcement of the US asset freeze order in the DIFC,¹⁵ it was equally open, and it offered a more adaptable and tailored solution, to apply for interim relief as requested.

The Court was also concerned to ensure that by granting the injunction it would not be cutting across or acting contrary to the principles and practice of the UAE courts in a recognition and enforcement context to respect the limits of its jurisdiction vis-à-vis the jurisdiction of onshore UAE courts; including in particular the courts of Dubai.¹⁶ In response to this concern it was argued that the *Motorola* test developed by the English courts for guarding against exorbitant jurisdiction in this context, which was now the established test across the common law world including in financial free zones where such questions frequently arose,¹⁷ was the appropriate and correct test to apply. This test is considered later.

The final question of a general character raised by the DIFC Court related to how its power to grant a freezing order in aid of foreign proceedings, on the application of the claimants in the proceedings, could be reconciled with its powers of direct judicial assistance, at the request of the foreign court, in any particular case.¹⁸ In response it was indicated that the request here was by the SEC to protect the investors as victims of the fraud, that these were civil proceedings having a compensatory focus and purpose¹⁹ and that it was therefore appropriate and usual for the claimant to seek the ancillary civil remedy before the DIFC Court rather than for the SEC through the US Court to have sought judicial assistance through official intra-court channels.

The evidential position

In the course of submissions, the SEC accepted that the legal and evidential burden upon it was the same as in any freezing order case, as discussed and demonstrated, for example, in *RAK Investment Authority v Bestfort*

15 As, eg, in *The Luna*, n 2 above.

16 Eg, *Oger Dubai LLC v Daman Real Estate Capital Partners Limited* [2016] DIFC CFI 013 (6 July 2016); *Daman Real Partners LLC v Oger Dubai LLC*, Court of Cassation No 1/2016 (JT). See generally Black and Montagu-Smith, 'A Curb on the Jurisdiction of the DIFC Courts?' (XXIV Barristers' Chambers, online).

17 *Motorola Credit Corporation v Uzan (No 2)* [2004] 1 WLR 113. See also *ICICI Bank UK v Diminco NV* [2014] EWHC 3124 (Comm).

18 The various Protocols and Memoranda of Understanding or Guidance between the DIFC Courts and other Courts, within the UAE and internationally, can be accessed in the 'Protocols and Memorandums' section of the DIFC Courts website.

19 See n 5 above.

*Developments.*²⁰ In the present case, it was submitted on the basis of the witness statements and exhibits before it, including the terms of the US asset freeze order – whose mandatory elements had not been complied with – that the necessary threshold had been met. In particular, notwithstanding the US asset freeze order, the SEC had highlighted a number of features of the fraudulent scheme and its operation to date that pointed to a real and continuing serious risk of dissipation of the funds known to be in the UAE should the ancillary freezing order not be granted. It was also just and convenient to grant the ancillary relief, given the protection of investors and the compensatory purpose of the US proceedings, as well as the considerations of comity in this case relevant to the granting of a freezing order over assets located in onshore Dubai (considered further later).

In so submitting, the SEC relied on those English and other comparative common law cases on the degree of ordinary respect that the US Court’s judgment should appropriately be accorded as a matter of comity.²¹ At the same time, it was not contended that the DIFC Court should extend any binding or determinative weight to the reasoning and conclusions of the Massachusetts Court in arriving at the separate US asset freeze order: the DIFC Court had to independently assess and weigh the evidence before it.²²

The order relating to funds located in the DIFC

The bulk of the funds sought to be frozen in the SEC case were funds located in the DIFC, namely funds and equities to the value of more than US\$7.1m held in the name of the Swiss entity by a DIFC licensed financial institution, which was the first notice party in the case.

After arguments on behalf of the SEC on an ex parte basis at the first interim hearing, on 17 January 2019 the Court granted an initial freezing order in respect of the assets of the Swiss entity within the DIFC to the threshold value of the funds and equities. In the final freezing order that was ultimately issued on 4 March 2019, the Swiss entity was additionally ordered not to in any way dispose of, deal with or diminish the value of its assets wherever located up to the same value.

20 *Ras Al Khaimah Investment Authority and Others v Bestfort Development LLP and Others* [2018] 1 WLR 1099 (CA).

21 Notably *Credit Suisse Trust v Cuoghi*, see n 11 above, per Millett LJ at 827–828; *Motorola*, see n 17 above, per Potter LJ at 146–147; and Walker J in *Mobil Cerro Negro Ltd v Petroleos de Venezuela SA* [2008] 1 CLC 542 at [86]–[119]. See also *Yukos CIS Investments Limited v Yukos Hydrocarbons Investments Limited* HCVAP 2010/028.

22 The evidence before the primary court may nonetheless be important as a matter of fair procedures to produce before the ancillary court; see, eg, *VTB Capital plc v Malofeev* [2013] (2) CILR 94.

In circumstances where a short interval was directed for the first return date hearing, the SEC had accepted that the Court did not need in its first interim order to direct the provision of information. Accordingly, the SEC's requests for information, which had been sought in the usual terms as provided in Schedule A to RDC Part 25,²³ were left over to the first and subsequent return dates.

In the event, the first notice party cooperated with the SEC in providing up-to-date information on the funds and assets it managed and held on behalf of the Swiss entity. This information resulted in a valuation of US\$5.66m for the Swiss entity's relevant assets, which the SEC accepted, and in the circumstances the need for an information order as against the Swiss entity fell away in the final freezing order.

The order relating to funds located outside the DIFC

As is apparent from the model RDC Part 25 Schedule A freezing order, and from decided cases, the DIFC Courts may grant a freezing order in relation to funds and assets located outside the DIFC when satisfied that it is appropriate to do so.²⁴ The DIFC test of 'appropriate' is essentially the same in a freezing order context as the English statutory test of 'just and convenient'.²⁵ However, in England, under section 25(2) of the Civil Jurisdiction and Judgments Act 1982, it is additionally provided that the courts may decline to grant interim relief in aid of foreign proceedings if, in the opinion of the court, the fact

23 RDC Part 25, Schedule A, para 9, 'Provision of Information' is directed towards the provision by respondents to the freezing order of information relating to their own assets. For the provision of information by third parties, in an appropriate case the court will make a third party provision of information order and/or a banker's trust type order.

24 See, eg, *Bocimar International NV v Emirates Trading Agency LLC* [2015] DIFC CFI 008 (28 January 2016) and amended freezing order dated 8 February 2016; *DNB Bank ASA v GulfEyadah Corporation and Another* [2015] DIFC CA 007 (25 February 2016); *Akhmedova v Akhmedov and Another ('The Luna')* [2018] DIFC CA 003 (19 June 2018). Cf also in an enforcement context *Meydan Group LLC v Banyan Tree Corporate Pte Ltd* [2014] DIFC CA 005 (3 November 2014); and *X and Another v Y and Another* [2013] DIFC ARB 002 (28 November 2014) (Chadwick J).

25 Per Chadwick J in *Bocimar* at [7]; also Field J in *Larmag Holding BV v First Abu Dhabi Bank PJSC and Another* [2019] DIFC CFI 030 (19 July 2019) at [25].

that the court has no other underlying jurisdiction in relation to the subject matter of the proceedings makes it inexpedient for the court to grant it.²⁶

The statutory modification of the test in England reflects the different considerations that can arise when the freezing order sought is in aid of foreign proceedings. In such cases, there may be special considerations, arising from the threefold relationships and interests in play as between the jurisdiction of the main proceedings (in this case, the federal courts of Massachusetts), the jurisdiction of the requested court (in this case, the DIFC Court) and the jurisdiction of the place where the affected entities or relevant assets are located (in this case, in Fujairah and in onshore Dubai). In general, it is clear that, in the absence of some underlying independent connection to the jurisdiction of the requested court, it will only be in exceptional circumstances that the requested court will extend its ancillary order in aid of foreign proceedings to assets located in a third country.²⁷

In the leading English case, *Motorola Credit Corporation v Uzan (No 2)*, the Court of Appeal (Potter LJ) set out five particular considerations for the court to have in mind in considering whether it is inexpedient to make a worldwide freezing order in aid of foreign proceedings,²⁸ as follows:

- 26 The statutory intervention in England reversed *The Siskina* [1979] AC 210 (HL), see Hartley, 'Jurisdiction in Conflicts of Laws: Disclosure, Third Party Debt and Freezing Orders' (2010) 126 LQR 194, pp211-pp221. *The Siskina* has been superseded by case law – in many other common law jurisdictions, influenced in part by the persuasive dissenting judgment of Lord Nicholls in *Mercedes Benz AG v Leiduck* [1996] 1 AC 284, eg, *Solvatub Ltd v Match Investments Ltd* [1998] ILPr 419 (Jersey). Cf also *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] AC 334 (HL), per Lord Browne-Wilkinson at 341.
- 27 The language of 'sufficient interest' or 'connection' and its link to the principle of comity was initially developed by Lord Goff in the context of anti-suit injunctions in *Airbus v Patel* [1999] 1 AC 119. For the view that a sufficient connection with the matter in question is a necessary but not a sufficient condition for compliance with comity, see Fentiman, 'The Scope of Transnational Injunctions' (2013) 11 NZJPIL 323, and Saranovic, see n 28 below. See in practice *Banco Nacional de Comercio Exterior SNC v Empresa de Telecomunicaciones de Cuba SA* [2007] EWCA Civ 662; *Eastern European Engineering Ltd v Vijay Construction (Pty) Ltd* [2018] EWHC 1539 (Comm); *Belletti v Morici* [2010] 1 All ER (Comm) 412; *Masri v Consolidated Contractors International (UK) Ltd (No 2)* [2009] QB 450; *Parbulk II AS v PT Humpuss Intermoda Transportasi TBK ('The Mahakam')* [2012] 2 All ER (Comm) 513; *Black Swan Investment ISA v Harvest View Limited et al*, BVIHCV 2009/399; *Natali Osetinskaya v Usilett Properties Inc BVIHCV 2013/03*; *Yukos CIS Investments Limited et al v Yukos Hydrocarbons Investments Limited HCVAP 2010/028*; *PT Ventures SGPS SA v Tokeyna Management Limited*, BVIHC (Com) 2015/0134 (4 March 2016).
- 28 [2004] 1 WLR 113 at [147]. For criticism see Hartley, 'Jurisdiction in Conflicts of Laws: Disclosure, Third Party Debt and Freezing Orders' (2010) 126 LQR 194, pp194–221; and Saranovic, 'Jurisdiction and Freezing Injunctions: A Reassessment' (2019) 68 ICLQ pp639–664.

- Will the making of the order interfere with the management of the case in the primary court, for example, where the order is inconsistent with an order of the primary court or overlaps with it?²⁹
- Is it the policy of the court in the primary jurisdiction not to make worldwide freezing/disclosure orders?
- Is there a danger that the orders made will give rise to disharmony or confusion and/or risk of conflicting, inconsistent or overlapping orders in other jurisdictions?
- Whether at the time the order was sought there is likely to be a potential conflict as to jurisdiction rendering it inappropriate and inexpedient to make a worldwide order.
- Whether the court will be making an order it cannot enforce.³⁰

Although made in the context of the equivalent statutory jurisdiction in England, these considerations have been recognised as providing valuable guidance on the limits of ancillary freezing orders in aid of foreign proceedings in those common law including offshore financial jurisdictions where the question has since been examined.³¹

At the interim *ex parte* stage in *SEC v Wintercap*, the DIFC Court did not hear detailed submissions on the *Motorola* test and, in the event, the Court decided for the purposes of the initial interim order to limit the freezing order to assets located in the DIFC.

The SEC's submissions

On the first and subsequent return dates, the SEC contended that this geographic limitation was unwarranted, that it was contrary to the practice of the DIFC Court and to the model wording of freezing orders as set out in Schedule A to RDC Part 25 and that it deprived the Court's order of substantial effect. Therefore, in the draft continuing order placed before the Court the relevant limiting words were omitted, and it was submitted that the order as continued should be varied accordingly. In support of the SEC's case it was argued:

²⁹ In many jurisdictions this will be apparent from the anchor jurisdiction's freezing order, as, eg, the standard undertaking in the model English and DIFC law freezing orders 'not without the permission of the court seek to enforce the freezing order in any country outside the jurisdiction or seek an order of a similar nature including orders conferring a charge or other security against the respondent or the respondent's assets'. See in this regard *Akcinė Bendrovė Bankas Snoras v Antonov* [2018] EWHC 887 (Comm).

³⁰ Cf *ICICI Bank UK plc v Diminco NV* [2014] EWHC 3124.

³¹ See, eg, Bannister J for the BVI Commercial Court in *VTB Capital plc v Nutritek International Corp BVIHC (COM) 103* of 2011; and see recently, for an overview of the authorities on the *Motorola* test, the judgment of Jacobs J in *ArcelorMittal USA LLC v Essar Steel Ltd* [2019] 2 All ER (Comm) 414.

- The jurisdiction of the DIFC Court to grant worldwide freezing orders including in respect of assets located in onshore UAE was well established and was reflected in the standard model wording of Schedule A to RDC Part 25 as given effect to in previous leading cases.
- In the present case, the Court had jurisdiction pursuant to RDC Rule 25.24 to grant a freezing order in aid of the US proceedings. The respondents were all named defendants in the US proceedings and were entities against whom the US asset freeze order had been expressly made. The Court had therefore correctly assumed jurisdiction over each of the respondents in granting the interim freezing order as sought, albeit with some modifications.
- In addition, it was argued that under Article 5(A)(1)(a) of the Judicial Authority Law the Court had jurisdiction over the claim or action as one to which a DIFC entity was party, that is, subject-matter jurisdiction over the action as a whole. In this regard, it was pointed out that the funds at issue, including the funds held by the onshore Dubai banks, were the fruits of a complex international fraud in which the respondents and the persons and entities who controlled them were core co-conspirators. In such circumstances, it was clear on comparative authority that the jurisdiction of the Court to assist in combating international fraud through orders in aid of the foreign court primarily seized could not be gainsaid.³²
- In addition, it was pointed out that the SEC investigation had unearthed significant movements of funds, being the proceeds of the fraud, by way of transfers into and out of the DIFC and into and out of onshore Dubai accounts in the name of the respondents, to and from connected entities, during the previous 18 months. Further, based on the SEC's review and analysis of all the accounts and all movements of funds since late 2016, as put in evidence, the movement of funds to international accounts associated with the DMCC entity and its controllers accounted for the bulk of funds generated by the activities of the Swiss entity, and these transfers included substantial transfers to accounts in the UAE.
- Based on all of the aforementioned, it was a matter of reasonable inference that the funds paid into the onshore UAE accounts were and remained intimately connected to and were indistinguishable from the totality of the funds under inquiry in the US proceedings. As the pleadings in the US

32 See, eg, *Royal Bank of Scotland plc v FAL Oil Company Ltd* [2012] EWHC 3628 (Comm); *ICICI Bank UK v Diminco NV* [2014] EWHC 3124 (Comm); *Mobil Cerro Negro Ltd v Petroleos de Venezuela SA* [2008] 1 CLC 542; *Belletti v Morici* [2010] 1 All ER (Comm) 412; and *VTB Capital Plc v Nutritek International Corp* [2011] EWHC 2526 (Ch) (Roth J); *Banca Turco Romana SA (In Liquidation) v Cortuk* [2018] EWHC 662 (Comm) (Poplewell J).

proceedings and in the DIFC proceedings in aid of the US proceedings made clear, the funds that were the subject of the SEC's investigations had been moving around in a complex network of entities and accounts controlled by the respondents and by their co-conspirators and agents.

- In these circumstances, it was submitted that all of the funds were controlled in common by the respondents and by persons and entities who controlled the respondents, and it was argued that it would therefore be artificial, contrary to the established practice of international commercial courts in respect of complex frauds³³ and inimical to efforts at recovery by and on behalf of the victims of those frauds for the DIFC Court to limit the scope of its order in the manner adopted in the interim order.
- It was not a requirement for establishing jurisdiction in respect of the non-DIFC entities' funds that the banks in which the funds were held should have branches in the DIFC.³⁴ The banks were not respondents in the DIFC proceedings, nor even third parties with any independent interest in the proceedings, but simply named notice parties or non-cause of action defendants (NCADs) which, in their capacity as banks, were known to hold funds in the name and to the account and control of the Fujairah and DMCC entities. Therefore, the consideration that the banks were onshore entities and that the relevant funds were held by them onshore did not have an impact upon the jurisdiction of the DIFC Court – they were no different in this respect than any NCAD or person who had been given notice of the freezing order.³⁵

33 Relying, inter alia, on *Credit Suisse Fides Trust SA v Serghio Cuoghi* [1988] QB 818, 827–28. See also the authorities in n 32 above. On the issue of common control, see para 116 of the judgment of the Court of Appeal (Potter LJ) in *Motorola Credit Corporation v Uzan*, n 11 above.

34 Eg, *Bocimar*, see n 24 above.

35 It is established in a freezing order context that relief may issue as against non-cause of action defendants (NCADs) where there is good reason to suppose that the assets would be amenable to execution of a judgment obtained against the cause of action defendant (CAD). For this purpose the NCAD may be outside the jurisdiction where the freezing order issues, see *PJSC Vseukrainskyi Aktsionernyi Bank v Maksimov et al* [2013] EWHC 422 (Comm) (Poplewell J); and [2013] EWHC 3203 (Comm) (Blair J); *Algoasibi v Saad Investments Co Ltd* [2011] 1 CILR 178 (Cayman CA); *Gilfanov v Polyakov*, BVIHCMAPP 2016/0009 at [52] (BVI CA); *Linsen International Ltd v Humpuss Sea Transport Pte Ltd* [2012] 1 BCLC 651; *Lakatamia Shipping Company Ltd v Nobu Su* [2014] EWCA Civ 636 at [42] per Rix LJ with reference to the so-called Chabra Jurisdiction deriving from *TSB Private Bank International SA v Chabra* [1992] 2 All ER 245. See also, in respect of operating assets, *Osetinskaya v Golante and Usilett*, BVIHC 2013/0037 at [11] per Bannister J; and, for the equivalent BVI statutory jurisdiction in aid of arbitration, *Koshigi Limited and Another v Donna Union Foundation*, BVIHCMAPP 50/2018 (BVI CA).

- The fact that the banks were included for reasons of courtesy and practicality as named notice parties did not deprive the Court of the jurisdiction it undoubtedly had to grant a worldwide freezing order that could be communicated to persons onshore and, as appropriate, could be enforced through letters of execution or other judicial cooperation enforcement measures as between the DIFC Court and the Courts of Dubai and Fujairah, respectively. In this regard, the established boundaries of judicial competence between the DIFC Court and other courts in the UAE,³⁶ and the special mechanisms that exist for recognising and enforcing each other's orders,³⁷ appropriately and necessarily informed the application of that test in a UAE context.

It was further submitted on behalf of the SEC that none of the five considerations identified by the English Court of Appeal in *Motorola Credit Corporation v Uzan (No 2)* told against the making of an order that would extend to the accounts in onshore Dubai. In particular:

1. The making of an order would not interfere with the management of the case in the US District Court of Massachusetts – on the contrary, it was by way of ultimate assistance to the US Court.
2. It was not the policy or the practice of the US Court to itself decline to grant the type of relief sought – on the contrary, it had done so.
3. There was no danger that the order sought in respect of the onshore accounts would give rise to disharmony, confusion or risk of conflicting inconsistent or overlapping orders in onshore Dubai. In the first place, the Dubai courts would be called upon to give effect to the same US asset freeze order as the DIFC Court; and second, in the event of any parallel proceeding that risked a conflict the mechanism of the Joint Judicial Committee (JJC) would be available to resolve the conflict.³⁸ In this last regard, it was submitted that the consideration that the JJC might resolve any such conflict of concurrent jurisdiction in favour of the courts where the funds were located was not a reason for the DIFC Court – in the absence of any actual or even threatened or suggested onshore proceedings – to decline jurisdiction in the first place.³⁹

36 These boundaries are of a constitutional character, see, eg, Dubai Court of Cassation, Case No 389 of 2011 (Civil), judgment of 9 September 2012

37 See generally *DIFC Courts Enforcement Guidelines* (Edition 4, 2016), paras 4 to 21.

38 As provided for by Dubai Law No19 of 2017. For an overview see Black and Montagu-Smith, *A Curb on the Jurisdiction of the DIFC Courts?* (XXIV Barristers' Chambers, online); and for an analysis of recent JJC decisions see Carmona, *DIFC Courts' Update: The Conduit Jurisdiction Dilemma*, 'Law Update' (Al Tamimi, September 2018).

39 The JJC's jurisdiction to resolve any conflict arising is predicated on the existence of parallel proceedings in being, and further, as a matter of recent practice, an application to the JJC does not give rise to an automatic stay of either proceeding.

4. There was no likely potential conflict as to jurisdiction rendering it inappropriate or inexpedient to make an order in the terms sought.
5. In the event of disobedience of the order the DIFC Court would not later be adjudged to have made an order that could not be enforced. This was because the DIFC Court's order could be enforced under the special execution mechanism between the DIFC Court and the Dubai Courts,⁴⁰ and through the special enforcement mechanisms available for enforcement of DIFC Court orders in Fujairah including under Article 221 of the Federal Civil Procedures Law.⁴¹

The Court's final order

Ultimately, in its final order, having heard the aforementioned and other submissions on the requested scope of its eventual order, the Court modified the freezing order by extending it in terms to the Fujairah entity's funds held in its identified Dubai bank accounts. In a further modification of its original order, the Court ordered that the Swiss entity and the Fujairah entity should not dispose of, deal with or diminish the value of their assets up to the value of their respective frozen thresholds whether they were in or outside the DIFC.

Both entities were also ordered to provide information within ten working days in respect of their assets (1) within the DIFC and (2) in the UAE exceeding US\$5,000 in value whether in their own names or whether solely or jointly owned, giving the value, location and details of all such assets (subject to the usual procedural terms and safeguards as set out in the RDC Part 25 Schedule A freezing order⁴²).

In order to protect against the risk of having extended its jurisdiction in an impermissibly exorbitant way, and following the example that had been set some years before in a previous DIFC case,⁴³ the DIFC Court took the precaution of stipulating in the final freezing order that, in respect of assets located outside the DIFC, nothing in its order should prevent any third party from complying with any orders of the courts of the country or state where those assets were situated, provided that reasonable notice of any application for such an order would be given to the SEC's legal representatives, or from complying with what it reasonably believed to be its sole obligations under

40 As described in the *DIFC Courts Enforcement Guidelines*, see n 37 above. See, eg, *DNB Bank ASA v Gulf Eyadah Corporation and Another* [2015] DIFC CA 007 (25 February 2016)

41 The procedure under Art 221 of the Federal Civil Procedures Law is described at paras 17 to 21 of the *DIFC Courts Enforcement Guidelines*, see n 37 above.

42 In particular as contained in RDC Part 25, Schedule A, para 9(2) (self-incrimination) and para 19 'Persons outside the DIFC'.

43 *Bocimar*, see n 24 above.

the law of that country or state, or under the proper law of any contract between itself and any of the respondents.⁴⁴

In respect of the DMCC entity, no eventual freezing order was made as it had been indicated on its behalf in a direct communication to the Court from one of its promoters, and the SEC had accepted, that it now held no funds or assets greater than US\$5,000 in value within the UAE. In those circumstances it was accepted that the need for a DIFC Court freezing order fell away.

Yet, notwithstanding that a freezing order was no longer required, the Court in its final order, following submissions by the SEC on the potential frustration of the Court's process, maintained its order as against the DMCC entity for the provision of information. In doing so, the Court directed the DMCC entity to identify the date or dates when the funds in the DMCC entity's specified onshore bank account fell below US\$5,000 in value following the institution of the DIFC Court proceedings, as well as the precise destination(s), recipient(s) and account(s) to which such funds were transferred.

Conclusion

The order made in *SEC v Wintercap* is an important precedent confirming the jurisdiction of the DIFC to grant freezing orders in aid of foreign proceedings. It is also significant as a precedent in which, after a detailed engagement by the Court on the application of the *Motorola* test to the facts of the case, the Court granted relief consistent with the recognition of that test in DIFC law. In the absence of a written judgment, however, some caution must be exercised in drawing definitive conclusions for the future from the order made.

What can be said with certainty is that the Court identified and affirmed the legal basis of its jurisdiction as recited in its final continuing order of 4 March 2019. It can also be said with confidence that the Court had no hesitation in granting the freezing order in respect of the Swiss entity's funds located in the DIFC and that it eventually agreed that this was an appropriate case in which, exceptionally, to extend the freezing order to the identified account of a non-DIFC entity located in an onshore Dubai bank that had no branch within the DIFC.

44 Together the orders typically made in DIFC Court freezing orders mirror the so-called *Babenaft* and *Baltic* provisos derived from *Babenaft International Co SA v Bassatne* [1990] Ch 13 and *Baltic Shipping v Translink* [1995] 1 Lloyd's Rep 673 in English freezing order practice, cf *Derby & Co Ltd v Weldon (Nos 3 & 4)* [1990] Ch 65 (CA); *Bank of China v IBM LLC and Others* [2001] EWCA 1933 (CA); and *MacKinnon v Donaldson, Lufkin & Jenrette Corp* [1986] Ch 482, 494–95 per Hoffmann J.

Further, the Court was content on the particular facts to grant the order preventing dissipation of assets below the relevant thresholds as against both the Swiss entity and the Fujairah entity on the usual worldwide terms.

It is also of interest that the DIFC Court, once satisfied as to its freezing order jurisdiction, was prepared to grant information orders as against the respondents to the proceedings even though they were already subject to the primary disclosure obligations of the US asset freeze order.⁴⁵

At the same time, it has to be borne in mind that this was an international securities enforcement action prosecuted by the world's foremost financial regulator; that the entity that had no funds in the DIFC was a UAE rather than a truly international entity; that its funds were located in onshore Dubai and were therefore amenable to the special enforcement mechanism as between the DIFC Court and the Courts of Dubai; that the Court further included additional wording in its final freezing order to guard against exorbitant jurisdiction; and, last but not least, that the Court's attention had been drawn by the SEC to specific features of the evidence that arguably brought the case within the category of cases where the DIFC Court in any event had an underlying jurisdiction over the subject matter of the dispute.

A further practical advantage that stood to the benefit of the claimants here was that the DIFC Court accepted, in line with comparative international practice, that as a law enforcement body charged with tackling international fraud the SEC ought not be required to give the usual undertakings as to damages in support of the freezing orders sought.⁴⁶

More generally, in considering whether to advise a party in possession of an existing worldwide freezing order to seek to obtain a 'reflective' freezing order in the DIFC Court, for the purposes of onward enforcement in onshore Dubai or other emirates in the UAE, it will be important in each case to consider whether the absence of connecting factors to the DIFC will be

45 As a freestanding remedy there are limits to how far information orders in aid of foreign proceedings can be maintained as against third parties. In English law, it has been held that *Norwich Pharmacal* relief does not constitute 'interim relief' for the purposes of C.J.J.A 1982, s 25(1), see *AB Bank Limited v Abu Dhabi Commercial Bank PJSC* [2017] 1 WLR 810 (Comm, Teare J); and more generally Hartley, *op cit*, n 25, 203–205; Gee on Commercial Injunctions (6th edn, 2016 and updates), 23-059; *Mackinnon v Donaldson, Lufkin and Jenrette Securities Corp*n [1986] Ch 482, 493G, 495C–496E, 497C–E and 498D–E, per Hoffmann J; cf also *Raja v Hoogstraten* [2004] EWCA Civ 968 (Chadwick J); *Ramilos Trading v Buyanovsky* [2016] 2 CLC 896; *Miles Smith Broking Ltd v Barclays Bank Plc* [2017] EWHC 3338 (Ch); *Bascuñan v Elsaca* BVIHC (Com) 2015/0128; and recently *Q v R Corp* (BVI Commercial Court, Wallbank J, *ex tempore*, see *BVI Commercial Court provides welcome guidance on Norwich Pharmacal Relief in aid of foreign proceedings* (Harneys, 21 March 2019)).

46 *United States Securities & Exchange Commission v Manterfield* [2010] 1 WLR 172; *Financial Services Authority v Sinaloa Gold plc and Another* [2013] 2 AC 28.

likely to defeat the application for relief. In this regard, the application of the *Motorola* test in practice may to some extent mirror the hesitations in an enforcement context that the DIFC Court not be used as a pure conduit for enforcement onshore, and to that extent not represent a viable alternative to the enforcement route where DIFC connecting factors are absent.

In addition, practitioners will need to be conscious of the need to show that a 'reflective' DIFC Court freezing order in aid of a foreign interim order, notwithstanding that it may extend in terms to assets onshore, is sufficiently 'final' to come within the relevant enforcement Protocols.⁴⁷

Notwithstanding these points of caution, the SEC case serves as a useful reminder that in appropriate cases, as an ancillary remedy in support of primary proceedings elsewhere, claimants may have available to them a distinct and standalone injunctive remedy to freeze assets in the DIFC, and potentially in onshore Dubai and other UAE emirates, without the need to commence full substantive proceedings and without having to bring a recognition and enforcement action.

47 In *Bocimar*, see n 24 above, the worldwide freezing order was post-judgment and could therefore be said to have been a final order. In cases where the continuing DIFC Court freezing order is in aid of a foreign interim order, as will be the case with most urgent worldwide freezing orders, the order will be one made prior to or during the course of proceedings and will therefore need to record on its face that it is an 'Enforcement Order' (*Summary of The Protocol of Enforcement between Dubai Courts and DIFC Courts*, 21 June 2009, DIFC Courts website, 'Protocols and Memorandums').

