第三章 冻结令与资产披露令

1. 冻结令（Mareva Injunction/Freezing Order）

冻结令是另一种可以向法院[1]"单方面"（*ex parte* 或今天 CPR 中为了减少拉丁文，以浅白的英语称之为"without notice"）[2]申请的"中间禁令"（interlocutory injunction/interim injunction）。在笔者的《禁令》（2000 年）一书第四章有详论，内容非常多，在这里尽量不重复。"Mareva Injunction"与本书第二章之 3 段提到的"搜查令"（"Anton Pillar Orders"）是在同一时期在英国法院被设计与发展出来，而"设计师"也正是上诉庭的 Denning 勋爵。这两种禁令分享了同样的历史进程，在今天的做法上也没有原则性的改变，因此笔者的《禁令》（2000 年）一书详细介绍的内容并没有过时，本章主要对其进行补充与介绍一些《禁令》一书中没有提到的近期先例与发展很快的"资产披露令"（Assets Disclosure Order）。加上相比于第二章介绍的诉前披露命令（Pre-action Disclosure Order）或搜查令而言，对中国公司重要得多[3]，需要更详细的讨论。

"Mareva Injunction"名称的来历是因为这种禁令是在 The "Mareva" (1975) 2 Lloyd's Rep 509 先例[4]中所确立，在今天的 CPR 下这种禁令也被称为"冻结令"（Freezing Orders 或 Freezing Injunctions）[5]。

1.1 冻结令的历史

早在《Common Law Procedure Act 1854》之 Section 82 中赋予了英国法院广泛的给出衡

[1] 向仲裁庭申请的不妥或困难可见 Pacific Maritime (Asia) Ltd v. Holystone Overseas Ltd (2008) 1 Lloyd's Rep 371 先例中 Clarke 大法官所说: "*The arbitral tribunal lacked the power to act effectively to the preservation of assets with s.44(5) of the 1996 Act. It would not bind third parties and would not be buttressed by sufficient sanctions.*"

[2] 这课题在本章之 1.6 段有详细介绍。

[3] 被搜查令针对的主要是住所、工作场所在法院管辖权范围内，即在法院所在地的情况。当然也有一些情况中被申请人处于法院管辖权范围内，法院作出命令要求被申请人"邀请"（invite）申请人前往其处于外国的住所、工作场地等进行搜查，但这种情况不是多数：见 Altertext v. Advanced Data Communications (1985) 1 WLR 456；Cook Industries v. Galliher (1979) Ch 439；Protector Alarms v. Maxim Alarms (1978) FSR 442 先例等。也因此对于中国的公司来说，住所、工作场地都处于国内，也不受到其他有搜查令制度的国家/地区（如英国、香港特区等）之管辖，就不会受到搜查令的影响了。

[4] "Mareva"轮是一艘希腊船东的船舶，之后笔者（杨良宜）也涉及了与该船舶有关的 2 个伦敦仲裁（都是租约争议）。也可见航运业（尤其是干散货运输）中的"好勇斗狠"（litigious）。有关 The "Mareva" (1975) 2 Lloyd's Rep 509 先例会在下一段中进行详细介绍。

[5] 在英国《民事诉讼规则》（Civil Procedural Rules 或简称"CPR"）1999 年生效后就带来这名称上的改变：见 CPR Rule 25.1(1)(f)。

平法救济（主要是各式各样的中间禁令或永久禁令）的权力，只要法院认为是合理与公平（reasonable and just）就可以作出任何形式的禁令。今天的《Senior Courts Act1981》之 Section 37 在措辞/文字上仍然类似，只是改为了"*just and convenient*"。但早期的英国法院并不愿意在此立法下作出冻结令[6]，在当时的环境是认为在诉讼还没结束、不知道双方胜负的时候，作出冻结被告资产的命令是不公平与不道德的，而胜诉以后申请执行则是另一回事了。

在上世纪六十年代末、七十年代初的时候，国际商贸活动涉及的主要是航运与货物买卖。笔者（杨良宜）很有感受的是在早年时，船东只愿意将船舶出租给"名声显赫"（reputable）的"一流租家"（first class charterer），绝少愿意将船舶出租给一些不知名或是在巴拿马等地注册的公司。而到了七十年代后期，大量发展中国家开始蓬勃发展外贸，但由于自身的知识水平不够也认识不到"名声"（reputation）的价值，容易被一些皮包公司骗到生意、签订合约，特别是货物买卖与海上运输合约。这一来大量的皮包公司作为国际货物买卖的中间商，或海上运输的"船舶经营人"（operators）充斥了市场。针对航运的租船市场，船东也就被迫作出改变与这些皮包公司进行交易往来，毕竟他们手中掌握了海上运输的货物。而这些皮包公司也带来了大量的"欺诈"（fraud）或"半欺诈"[7]等行为，海上运输合约中典型的骗局是收取货方的运费、货物装上船舶、签发运费预付提单[8]，不支付运费给船东、卷款逃跑的情况。而货物买卖中，尤其是发展中国家在买入货物时由于怕麻烦与不懂复杂的海上运输而希望采用的 CIF/CFR 买卖，典型的欺诈手法是付运次品或干脆没有任何货物付运，但伪造一套付运单证在银行开出的信用证（Letter of Credit 或简称 L/C）下结汇。在这样的背景下，早期英国法院认为需要在诉讼中分出胜负才能剥夺被告资产的想法就跟不上时代了，毕竟要等作出判决/裁决才能冻结、执行这些皮包公司资产的话往往没有任何意义，到时候连皮包公司背后的骗子都找不到。而且时代的改变使得资产的转移十分容易与方便。也容易通过成立海外公司、设立"虚假信托"（sham trust）、以第三方（包括家人等）名义代持等手段，用来隐藏财产。（当时还不是大法官的）Lawrence Collins 勋爵曾经发表过《The Territorial Reach of Mareva Injunctions》(1989) 105 LQR 262 一文，在其中说：

"（英国法院以冻结令作为应对）*the widespread abolition of exchange controls and the growth of offshore tax havens for cash and securities. These developments, made it easier for defaulters involved in international business to make themselves judgment proof, and for dishonest fiduciaries to enjoy the illegal fruits of breaches of trust.*"

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[6] 见 Lister v. Stubbs (1890) 45 ChD 1 先例，此先例中判不能仅因为原告很可能胜诉就允许原告获得财产保全。在那个年代，不能够通过"对人诉讼"（*in personam* action）进行诉前财产保全，只有通过"对物诉讼"（*in rem* action）。船东对这非常熟悉，即船舶会在世界各地（包括英国港口）被起诉，对船舶起诉的同时也会扣押船舶。被起诉与索赔的类别中的"海事留置权"（maritime lien）是"财产性索赔"（proprietary claim），会带来"优先权"（priority）。即使是在一般"海事争议"（maritime claim）中，申请解除船舶扣押的船东，需要向法院提供担保（bail bond）或者是款项缴存于法院（金额会是索赔金额加上费用、利息等），对扣船的申请人/原告而言就同样达到了保全的目的。早年国际贸易或货物买卖是唯一的国际交往。而由于不存在跨国通讯，一旦船舶与船舶上的货物开航就很难再找回。在英国的原告也难以在英国法院提起一般的"对人诉讼"（*in personam* action），因为无法调查到底谁才是外国船东，更不用说在那个年代难以向外国船东送达告票了。也因此需要对物诉讼来提供诉前保全，以及通过这样的手段让扣船法院获得对实质争议的管辖权，逼迫外国船东前来应诉。

[7] 没有资本的皮包公司在最初交易时没有欺诈意图，但是在出现不妥、现金流无法支撑，甚至是无路可走的时候，这些皮包公司才产生欺诈的歹意。

[8] 有关"运费预付"（freight prepaid）提单可见笔者的《提单与其他付运单证》（2016 年）一书第六章之 7.5 段。

以上是说在 70 年代左右，有许多国家放松或取消外汇管制，加上有越来越多的可以避税与保障机密的国家（可称为“方便旗”[flags of convenience]国家，例如巴拿马）允许国际商业人士注册公司。国际社会上出现越来越多的不诚实或欺诈行为，同时容易隐藏不合法手段获取的金钱，或通过方便旗国家注册的皮包公司的名义进行商贸活动，他们不怕官司败诉，因为判决难以针对这些皮包公司真正执行。这些世界局势的变化也就带来了冻结令的做法。

在英国直到 Nippon Yusen Kaisha v. G and J Karageorgis (1975) 2 Lloyd's Rep 137 先例，处理案件的一审法院仍然根据传统看法拒绝提前颁布/作出冻结令以为索赔提供担保，但此先例中上诉庭的 Denning 勋爵改判，首次改变了英国法院的做法：

“*We are told that an injunction of this kind has never been granted before. It has never been the practice of the English courts to seize assets of a defendant in advance of judgment or to restrain the disposal of them. We were told that Chapman J（另一案件中的法官） in chambers recently refused such an application. In this case also Donaldson J.（一审法院中作出审理的大法官） refused it. We know, of course, that the practice on the continent of Europe is different.*

It seems to me that the time has come when we should revise our practice.”

英国法院的态度转变很快在英国法律圈中成为热点话题，也引起轩然大波，因为当时的国际商贸环境中，对取得诉前担保的需求是很大的。仅在 Nippon Yusen Kaisha v. G and J Karageorgis 先例的 4 周后，就有了 The “Mareva” (1975) 2 Lloyd's Rep 509 先例，也是由 Denning 勋爵批准与作出了冻结令。而“The Mareva”先例也是“Mareva Injunction”的得名由来。

前述两个先例都是“单方面”（*ex parte*）申请的冻结令，而第一个涉及“多方”（*inter partes*）[9]程序的冻结令是 Rasu v. Pertamina (1977) 2 Lloyd's Rep 397 先例。此先例中瑞士公司出售化肥厂设备给印尼国家石油公司，部分设备在利物浦待运前往印尼时，瑞士公司作为申请人要求英国法院冻结被申请人资产，理由是设备一旦离境就有流失风险。但经过双方的激烈争论，在一审法院与上诉庭都拒绝作出冻结令，理由包括了设备的产权（title）究竟属谁都不清楚等[10]。从这也能看到单方面申请冻结令的危险，毕竟只有单方面的“一面之辞”，与多方程序中无论是申请人还是被申请人都可以作出陈述与争辩的情况会有显著不同。有意思的是此先例中被申请人的代表大律师是后来的 Mustill 勋爵，他指出对于冻结令地位的重大政策改变不应该由普通法法院作出，而更适合由立法进行更改，但这被 Denning 大法官拒绝。

经过 Nippon Yusen Kaisha v. G and J Karageorgis 先例与“The Mareva”先例后，已经确认了

[9] 多方程序中，多方当事人都有机会出庭，在法院充分作出陈述与争辩，之后再由法院考虑双方争辩后才决定是否作出中间禁令。显然相比与单方面申请中法院只是听“一面之辞”，这种情况下法院的考虑会是更全面与公平。

[10] 在英国《Sales of Goods Act 1979》之 Section 17 下，国际货物买卖（不论是 CIF 还是 FOB 买卖）中货物的产权何时转让由买卖双方自由约定，卖方往往在收到货款前不愿意转让货物产权。因此一般做法是在信用证结汇时，由卖方背书与转让、交出提单进行结汇，以转让货物产权。当然还会有许多其他不同约定，例如在 The “Aliakmon” (1986) 2 Lloyd's Rep 1 先例中约定买方虽然根据提单提取货物但并不实际获得货物产权，直到转售货物、向卖方付款后产权才会转让。这方面的问题在笔者的《国际货物买卖》与《提单与其他付运单证》（2016 年）等书中有介绍。因此付运中的货物产权由谁所有，货物销售合约以外的第三方（例如是冻结令的申请人）一般是难以知道的。在 Rasu v. Pertamina (1977) 2 Lloyd's Rep 397 先例中，还有额外的争议是，Pertamina 是否已经将设备的产权转让给了印尼政府。

英国法院在此方面的转变，也导致了大量对冻结令的申请，据悉当时很快发展到 1 个月就有 20 宗的冻结令申请（大多数都成功申请到）。而今天越来越深入的全球化经贸合作与越来越多的国际欺诈或不恰当的商业行为，也带来了越来越多的冻结令申请的需要，这已经是英国法院颁布/作出的主要禁令类别之一。

这普通法地位在之后也有立法的确认。在《Supreme Court Act 1981》（之后被改名为《Senior Courts Act 1981》）就赋予了高院广泛的颁布/作出禁令以及委任接管人的权力，只要高院觉得公平与方便（just and convenient），见 Section 37(1)：*"The High Court may by order (whether interlocutory or final) grant an injunction or appoint a receiver in all cases in which it appears to the court to be just and convenient to do so."*在 Section 37(3)更是专门针对了颁布/作出冻结令：*"The power of the High Court under subsection (1) to grant an interlocutory injunction restraining a party to any proceedings from removing from the jurisdiction of the High Court, or otherwise dealing with, assets located within that jurisdiction shall be exercisable in cases where that party is, as well as in cases where he is not, domiciled, resident or present within that jurisdiction."*

1.2 全球冻结令

传统英国法院的冻结令只是针对英国管辖权内的资产，而对于境外资产英国法院无意作出禁令，也往往存在具体实现上的困难。但现代"全球冻结令"（Worldwide Freezing Orders 或简称 WFO，也可称 Worldwide Freezing Injunctions）的做法越来越多，这是因为在越来越国际化的现代，只是冻结英国境内被申请人名下资产往往并不足够，需要将英国境外被申请人直接或间接持有的资产也考虑在内，毕竟今天国际转移或隐藏资产是相对容易的（包括通过第三方或海外公司名义上代持、信托等方式），此时英国法院就可能愿意颁布/作出全球冻结令。这种情况就出现在 Derby v. Weldon (No. 1) (1990) Ch 48 先例中，因此需要英国法院禁止被申请人处置与流失全球任何地方的资产。

全球冻结令的做法最早出现在 Babanaft International Co SA v. Bassatne (1990) Ch 13 先例中，之后在 Derby v. Weldon (No. 1)等先例中确认了英国法院作出全球冻结令的权力。而且由于伦敦是国际金融中心，世界各大银行一般都在英国有分行，这就处于英国法院的管辖范围，这些银行作为第三方不能协助违反冻结令，否则也会构成"藐视法院"（contempt of court）：见 Z Ltd v. A-Z and AA-LL (1982) 1 Lloyd's Rep 240 先例。当然有的银行在英国并没有分行，不在英国法院的管辖范围内，就无须理会英国法院的冻结令，但估计这些银行一般是资本与规模较小的地区性银行。

在 1999 年生效的英国《民事诉讼规则》（Civil Procedural Rule 或简称"CPR"）之 Rule 25.1 针对冻结令作出规定，也明确包括了全球冻结令，可以节录如下：

"*PART 25 - INTERIM REMEDIES AND SECURITY FOR COSTS*

Interim Remedies - Orders for interim remedies

25.1 (1) The court may grant the following interim remedies –

…

(f) an order (referred to as a 'freezing injunction') –

(i) restraining a party from removing from the jurisdiction assets located there; or

(ii) ***restraining a party from dealing with any assets whether located within the jurisdiction or not****;*

(g) an order directing a party to provide information about the location of relevant property or assets or to provide information about relevant property or assets which are or may be the subject of an application for a freezing injunction;"（加黑部分是笔者的强调，针对的是全球冻结令的内容）

全球冻结令的一个问题是财产所在地法院对财产可能作出相反的法院命令，这就会与全球冻结令有冲突。例如在 SEC v. Wang and Lee (The Times, 14 February 1989)先例中原告在纽约法院起诉被告，索赔金额为 57,000,000 美元，并成功在美国法院获取冻结令，包括要求银行冻结被告资产。被告在渣打银行（香港）有资产，渣打银行（纽约）在收到法院要求后，不得不支付了 12,500,000 美元到纽约法院。由于资金是在香港，香港法院才是有真正管辖权的法院，不应该听从任何外国法院的命令行事。被告在香港法院申请到命令要求渣打银行（香港）将该笔金额返还给被告，并不得在美国支付给纽约法院。这一来渣打银行就面对了尴尬的两难地步，无论如何选择都会有藐视纽约法院或香港法院的罪行的"双重危险"（double jeopardy）。

类似对第三方（如无辜的银行）造成两难情况，也发生在不少其他国家与地区，例如涉及北京市高级人民法院的"中国银行股份有限公司北京丽都饭店支行与赵培媛等合同纠纷二审民事判决书（[2014]高民终字第 585 号）"。美国法院作出全球冻结令/执行命令（Worldwide Turnover Orders）[11]，导致不得不遵守命令的中国银行的纽约分行被迫把北京储户的金钱支付出去。但之后在北京的诉讼，高院命令中国银行必须多支付一次给北京的储户。笔者的观点是，从大局上来看北京高院的判法是有必要的，否则所有外国法院会像美国一样，向自己能管辖到的中资银行强制命令支付中国债务人（debtors）或败诉方在该银行中的本属于中国境内的存款，就会是后患无穷了。至于在个别案件中"牺牲"中资银行，使得中资银行面对"双重危险"，也会迫使中资银行在以后面对外国法院（像美国法院一样）颁布/作出全球执行令时有决心进行抗拒，也有更强有力的证据显示这类命令对于无辜的银行来说是不恰当、不合适的。任何外国（包括美国纽约或英国伦敦）想要维持自己国际金融、银行中心的地位都会因此而更谨慎地予以处理。

所以英国法院担心资产所在地法院（这也是真正适合管辖资产的法院）会超越其他命令，也因此在全球冻结令中会有但书条文（proviso）针对外国法院"插手"的情况，这在 Babanaft International Co SA v. Bassatne 先例中就已经出现，也被称为"Babanaft Proviso"。之后这条但书条文经过不少改良，在今天 CPR PD 25A 附上的冻结令范本中的有关措辞/文字如下：

[11] 这个课题可见笔者《仲裁法——从开庭审理到裁决书的作出与执行》（2010 年）一书第十四章之 8.3.3 段。

"*20. Assets located outside England and Wales*

Nothing in this order shall, in respect of assets located outside England and Wales, prevent any third party from complying with –

(1) what it reasonably believes to be its obligations, contractual or otherwise, under the laws and obligations of the country or state in which those assets are situated or under the proper law of any contract between itself and the Respondent; and

(2) any orders of the courts of that country or state, provided that reasonable notice of any application for such an order is given to the Applicant's solicitors."

即使有上述的考虑，国际社会普遍接受（或被迫接受）在英国法院申请全球冻结令的做法行之有效、肯定与可预期，也节省精力与时间。也因此在英国法院申请全球冻结令更受到国际商贸社会（尤其是西方国家的公司）欢迎。已经提到过，有不少先例中可以看到英国法院将自己视为商业欺诈案件中的"国际警察"（international police）。有关全球冻结令的话题在《禁令》（2000 年）一书第四章之 2.4 段有介绍，不在这里大篇幅重复其中内容，只是着重针对一些近期先例进行介绍。

刚刚已经提到了在 Derby v. Weldon (No. 1)等先例中已经确定了英国法院可以作出全球冻结令，但对于英国法院如何在境外实现自己作出的禁令仍然存在疑问。在 Derby v. Weldon (No. 1)先例中建立起来的做法是虽然法院同意作出禁令针对全球资产，但是为了防止在颁布/作出全球冻结令后，"财大气粗"的申请人在全球各地提起对被申请人特定资产的保全（preservation）诉讼，从而导致过度"压迫"（oppress）被申请人（甚至是第三方），因此要求申请人承诺，如果想在境外执行全球冻结令，必须先申请英国法院的"允许"（permission），让英国法院能够有控制全局的能力。

在 CPR PD 25A 附件中的冻结令的范本中，有关此问题申请人对法院的承诺（undertaking）范本条文可以节录如下：

"*SCHEDULE B UNDERTAKINGS GIVEN TO THE COURT BY THE APPLICANT*

… (10) The Applicant will not without the permission of the court seek to enforce this order in any country outside England and Wales [or seek an order of a similar nature including orders conferring a charge or other security against the Respondent or the Respondent's assets]."

在过往先例中，都没有详细标准指出在什么情况下英国法院才会允许在国外执行全球冻结令，直到 Dadourian Group International Inc v. Simms (2006) EWCA Civ 399 先例。在 Dadourian Group International Inc v. Simms & Others 先例中，成功获得英国法院作出全球冻结令的申请人想要执行被申请人位于瑞士的财产，上诉庭的 Arden 大法官在考虑了 Derby v. Weldon (No. 1)建立的申请人承诺的说法后，给出了所谓的"Dadourian guidelines"，对于法院在行使是否允许的自由裁量权时的考量标准给出指引，不妨节录如下：

"*Guideline 1: The principle applying to the grant of permission to enforce a WFO abroad is*

that the grant of that permission should be just and convenient for the purpose of ensuring the effectiveness of the WFO, and in addition that it is not oppressive to the parties to the English proceedings or to third parties[12] *who may be joined to the foreign proceedings.*

Guideline 2: All the relevant circumstances and options need to be considered. In particular consideration should be given to granting relief on terms, for example terms as to the extension to third parties of the undertaking to compensate for costs incurred as a result of the WFO and as to the type of proceedings that may be commenced abroad. Consideration should also be given to the proportionality of the steps proposed to be taken abroad, and in addition to the form of any order.

Guideline 3: The interests of the applicant should be balanced against the interests of the other parties to the proceedings and any new party likely to be joined to the foreign proceedings.

Guideline 4: Permission should not normally be given in terms that would enable the applicant to obtain relief in the foreign proceedings which is superior to the relief given by the WFO .

Guideline 5: The evidence in support of the application for permission should contain all the information (so far as it can reasonably be obtained in the time available) necessary to make the judge to reach an informed decision, including evidence as to the applicable law and practice in the foreign court, evidence as to the nature of the proposed proceedings to be commenced and evidence as to the assets believed to be located in the jurisdiction of the foreign court and the names of the parties by whom such assets are held.

Guideline 6: The standard of proof as to the existence of assets that are both within the WFO and within the jurisdiction of the foreign court is a real prospect, that is the applicant must show that there is a real prospect that such assets are located within the jurisdiction of the foreign court in question.

Guideline 7: There must be evidence of a risk of dissipation of the assets in question. Guideline 8: Normally the application should be made on notice to the respondent, but in cases of urgency, where it is just to do so, the permission may be given without notice to the party against whom relief will be sought in the foreign proceedings but that party should have the earliest practicable opportunity of having the matter reconsidered by the court at a hearing of which he is given notice."

以上"Dadourian guidelines"中这 8 条指引内容太多，不进行一一介绍。不妨举一个较近期的 LMAA Arbitration, Re (2013) EWHC 8950 (Comm)先例来看这指引是如何在个别不同的案件中适用的。

[12] "第三方"（third parties）一般指的是银行。全球冻结令对第三方造成压迫影响可见本段前文中介绍的 SEC v. Wang and Lee (The Times, 14 February 14 1989)先例。此先例就是典型的美国法院在作出冻结令时没有考虑第三方（渣打银行）困难的情况。

在 LMAA Arbitration, Re 先例中，涉及了伦敦海事仲裁协会（LMAA），也显然是一个海事案件。案情是一个期租合约的履行期间，船舶在经过修理后，承租人坚持要求船舶先试航（sea trial）证明船舶的履约能力，否则不支付租金。而船东则认为在租约下承租人没有要求先试航的权利，因此承租人拒绝支付租金是违约/毁约（repudiation）[13]的言行。船东接受了这违约/毁约并终止租约，并根据租约启动伦敦仲裁索赔损失。船东也成功申请并获得英国法院颁布/作出全球冻结令，金额高达 1 千 6 百万美元。在全球冻结令中，船东显然也对英国法院作出承诺，在未获得英国法院的允许之前不会在境外执行此全球冻结令。为了辅助全球冻结令，法院也作出了附属的资产披露令（Assets Disclosure Order）。

作为被申请人（承租人，在名义上是注册在巴拿马的皮包公司）并没有按时遵守资产披露令，这被英国法院认定属于藐视法院，而该巴拿马公司的首席执行官被判处 18 个月监禁。被申请人事后被迫作出誓章（affidavit）进行资产披露。虽然该资产披露的具体内容没有在案例报道中显示，但估计让申请人知道了被申请人有其他间接拥有的资产，包括其他单船公司的船舶等。

之后不久，申请人在境外某个港口扣押[14]了被申请人间接拥有的一艘船舶，要求被申请人提供 15,728,363.06 美元担保才会放船。对于此事，申请人并没有向英国法院申请与获得允许。而这显然对被申请人带来极大的"压迫"，毕竟全球冻结令冻结的 1 千 6 百万美元，加上扣船能获取的接近相同金额的担保，加起来的总金额远超出申请人所需要的保护。因此，被申请人向英国法院申请撤销全球冻结令，而且还指控申请人在没有获得允许之前在境外扣船，这是违反对法院的承诺与构成藐视法院。被申请人指出申请人只能够满足“Dadourian guidelines”中的第 6 条指引（需要有证据向英国法院证明有真正可能全球冻结令下被针对的资产实际处于外国法院的管辖权内），而且对以下指引有明确违背：

（1）第 3 条指引，需要在申请人的利益（interests）与其他当事人（尤其是在外国程序中可能被加入的其他当事人）的利益之间进行平衡。在此先例中，被扣押的船舶名义上属于另一家船公司，扣船会带来的延误、放船要提供担保等带来利益上的损害。

（2）第 4 条指引，如果申请人要在境外获取的救济比英国法院的全球冻结令更优越（superior），一般是不会被允许的。在此先例中船东/申请人通过扣船取得的担保就比英国法院的全球冻结令更加优越。通常在申请时，英国法院会在听取外国法的专家证人意见后，才决定是否允许。例如境外资产所在地没有其他保全做法，只有这种更优越的保全，而情况非要这样做才能保障申请人利益。

（3）第 7 条指引，申请人需要提供证据显示资产有流失风险。而此先例中被扣的船舶既非被申请人拥有，而且处于营运中的船舶也不见得能够证明有流失风险。

从表面看来，申请人是违反了对英国法院的承诺，这会构成藐视法院，申请人就有自己被判监禁的风险了。但实际上对船舶的扣押/扣船（arrest of ships）程序虽然也是索赔方（claimants）获取诉前或审前担保的行为，但与全球冻结令在本质上是不同的。这包括扣船

[13] 关于违约/毁约可见笔者《合约的履行、弃权与禁反言》一书第一章。

[14] 案例报告没有显示什么港口，估计是因为仲裁案件的机密性保护，笔者估计是南非的港口，因为南非法律不仅仅允许扣押直接拥有的船舶，还允许扣押联营船（associated ships）。

已是有数百年历史，直到在 1975 年有冻结令（Mareva Injunction）做法之前，扣船是唯一能取得诉前、审前担保的做法。在本章之 1.1 段的脚注 6 中已经提到，在以前古老的年代，航运/外贸是唯一的国际交往。由于那个年代缺乏通讯手段，英国或任何其他国家的人士蒙受外国船舶造成的损害（包括是由于侵权或合约），要作为原告对外国船东提起诉讼与索赔是非常困难甚至做不到的。作为原告无法知道或查到外国船东的身份与地址，难以送达告票等各类文书，所以无法"诉人"（action *in personam*）。因此只能允许"诉物"（action *in rem*），通过"诉船"以及扣舶船舶，迫使外国船东出面抗辩或赔钱。因此本质上全球冻结令是"对人"，是法院命令被申请人不得导致资产流失，命令本身没有针对以任何资产提供担保。而扣船是"对物"，属于资产保全，特别是海事索赔中会属于"海事留置权"（maritime lien），是十分优越与优先的担保（security），这个差异在本章之 1.10 段也有进一步的介绍。

所以在 LMAA Arbitration, Re 先例中，Hamblen 大法官认为全球冻结令下申请人的承诺并不是在境外采取任何法律行动都需要申请英国法院的允许，这是不切实际与不必要的。需要申请允许的，只是与冻结令有关的命令（Orders of a similar nature）。也因此在此先例中判申请人没有违反承诺，也不构成藐视法院。

1.3《Senior Courts Act 1981》下为了让冻结令有效可以作出的附属命令

在本章上一段已经谈到，由于冻结令（Freezing Orders 或 Freezing Injunctions）在 1975 年被推出后越来越受欢迎、被英国法院频繁颁布/作出，为了确保冻结令能够有效实施，不至于沦为一句空谈，英国法院根据立法《Senior Courts Act 1981》之 Section 37(1)下赋予的广泛权力，开发了一些附属命令（ancillary orders）。尤其是针对被申请人，要求被申请人披露在英国或全球资产的资产披露令（Assets Disclosure Order）。毕竟即使是颁布/作出针对被申请人（尤其是外国被申请人）冻结一笔特定金额资产的冻结令，如果根本不知道被申请人有什么资产与/或知道的资产无法被强制执行，这命令是很难被真正履行的，因此往往同时会附属资产披露令。如果没有依照命令披露资产，也会属于藐视法院（Contempt of Court）的行为[15]。

在《Commercial Injunctions》（2016 年，第 6 版）一书之 23-001 段列出了 8 种附属命令：

（1）"*requiring the defendant to give disclosure of documents or provide information about his assets[16], where situated[17]*" 资产披露令是冻结令或全球冻结令的主要附属命令，会在本章之 2 段进行详细介绍。

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[15] 藐视法院会带来的后果可见本章之 1.9 段的介绍。在近期也有著名的 Mobile Telecommunications Co KSC v. HRH Prince Hussam bin Abdulaziz au Saud (2018) EWHC 3749 (Comm)先例，认定沙特王子 Hussam bin Abdulaziz au Saud 行为违背止诉令（anti-suit injunction）藐视法院，判处其有期徒刑十二个月。在香港也有 La Dolce Vita Fine Dining Co Ltd v. Zhang Lan (2019) HKCFI 618 先例，原俏江南董事长张兰没有依从法院的资产披露令披露 50 万港币以上价值的资产，在 2019 年 3 月被法院判处 1 年监禁。

[16] Maclaine Watson & Co Ltd v. International Tin Council (No.2) (1989) Ch 286 先例，A v. C (1981) QB 956 先例，Bekhor Ltd v. Bilton (1981) QB 923 先例，CBS United Kingdom v. Lambert (1983) Ch 37 先例。

[17] Babanaft International Co SA v. Bassatne (1990) Ch 13 先例，Republic of Haiti v. Duvalier (1990) 1 QB 202 先例，Derby v. Weldon (No. 1) (1990) Ch 48 先例等。

（2）“*requiring the defendant not to leave the jurisdiction and to deliver up his passport*[18]”限制被申请人出境等课题将在本章之 2.4 段介绍。

（3）“*requiring the defendant to attend court for immediate cross-examination about his assets*[19]”，命令被申请人出庭接受有关资产信息的盘问。

（4）“*requiring the defendant to deliver up forthwith certain of his assets into the custody of the claimant's solicitor*[20]*;*”命令被申请人将特定资产交给申请人代表律师代为托管。

（5）“*requiring the defendant to sign a document directing his bank to disclose information to the claimant*[21]*. If the defendant fails to comply with the order, the court could nominate a person to sign the necessary document in the name of the defendant pursuant to s.39 of the Senior Courts Act 1981. The bank would then be bound to treat the document for all purposes as if it had been signed by the defendant;*” 命令被申请人签署文件要求其银行披露信息。如果外国的被申请人不理睬，英国法院可以指示法院官员以被申请人名义代签，而有关银行必须将其视为等同于被申请人签署：见 Astro Exito Navegacion SA v. Chase Manhattan Bank (1983) 2 AC 787 (The “Messiniaki Tolmi”)先例。在此先例中涉及“Messiniaki Tolmi”轮的买卖，应当在高雄港交船，但买方拒绝签署准备就绪通知书（notice of readiness），导致卖方无法向开出信用证的美国大通银行结汇与收取卖船的款项。英国法院指示法院官员代为签署，并命令美国大通银行将其视为买方的签署。

（6）“*requiring the provision of a power of attorney*[22]*;*” 命令被申请人提供授权书。在 Ras Al Khaimah Investment Authority v. Bestfort Development LLP (2015) EWHC 3383 (Ch)先例中，英国法院颁布/作出冻结令的同时委任了接管人（receiver）[23]，但估计资产所在地（拉脱维亚）法院不熟悉、也不承认接管人的做法，因此英国法院命令被申请人提供将资产交出给接管人的授权书。

（7）“*by way of Anton Pillar relief in aid of injunction*[24]*;*” 有关搜查令的课题已经在本书第二章之 3 段有详细介绍。在 Arcelor Mittal USA LLC v. Essar Steel Limited (2019) EWHC 724 (Comm)先例中也有这种做法，英国法院针对在伦敦曾经为被申请人提供专业服务的金融业人士颁布/作出搜查令，估计就找到了与被申请人隐藏的资产有关的文件资料。

（8）“*requiring the solicitors of a defendant to provide information about how to contact the defendant or his location.*” 命令被申请人代表律师提供如何联络被申请人、被申请人的住所地等信息。

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[18] Bayer v. Winter (No. 1) (1986) 1 WLR 497 先例，Morris v. Murjani (1996) 1 WLR 848 先例，Oriental Credit, Re (1988) Ch 204 先例等。

[19] House of Spring Gardens Ltd v. Waite (1985) FSR 173 先例，Bayer v. Winter (No. 1) (1986) 1 WLR 497 先例。

[20] CBS United Kingdom v. Lambert (1983) Ch 37 先例，Johnson v. L & A Philatelics Ltd (1981) FSR 286 先例。

[21] Bank of Crete v. Koskotas (1991) 2 Lloyd's Rep 587 先例，Bayer v. Winter (No. 3) (1986) FSR 357 先例等。

[22] 命令被申请人提供授权书：见 Huinac Copper Mines, Re (1910) WN 218 先例，Derby v. Weldon (No. 6) (1990) 1 WLR 1139，Ras Al Khaimah Investment Authority v. Bestfort Development LLP (2015) EWHC 3383 (Ch)等先例。

[23] 这个课题也可见本章之 1.8 段。

[24] Distributori Automatici Italia SpA v. Holford General Trading Co (1985) 1 WLR 1066 先例，Emanuel v. Emanuel (1982) 1 WLR 669 先例，CBS United Kingdom v. Lambert (1983) Ch 37 先例。

1.4 冻结令不带来优先权利

无论是在“诉前”（pre-action）[25]、“诉中”（in the proceedings）还是在判决或裁决书的“执行”（execution）[26]阶段都可以申请冻结令（Freezing Orders）。冻结令的作用表面看来是为了取得“保全”（preservation）、“扣押”（attachment）或担保（security）。但冻结令并不会给申请人带来任何优先权利，不会从“无担保债权人”（unsecured creditor）变成“有担保债权人”（secured creditor）。冻结令也不会产生对被冻结资产的“财产性索赔”（proprietary claim），正如在本章之 1.2 段已经介绍过的 LMAA Arbitration, Re (2013) EWHC 8950 (Comm)先例中所说，冻结令实际上是对人诉讼（action *in personam*），是法院命令被申请人不得导致资产转移（transfer）与/或流失（dissipate），与财产权（property right）无关。因此冻结令虽然间接地达到担保的效果，但实际上并不是一种担保。纯粹是法院给出命令禁止资产转移与/或流失。正如 Cretanor Maritime v. Irish Marine Management (1978) 1 WLR 966 上诉庭先例中 Buckley 大法官所说：“*it is, I think, manifest that a Mareva injunction cannot operate as an attachment.*”

可以在接下去的段落分别根据不同的情况进行介绍。

1.4.1 被申请人资不抵债的情况

申请人获取胜诉判决或裁决后，可以针对有关资产进行执行。但这需要走程序以及需要时间。所以为了防止在期间资产流失，也要马上或尽快单方面（*ex parte*/without notice）申请冻结令。

如果被申请人仍然是运行中的公司或是未破产的自然人，那自然是没有问题。一旦公司或自然人资不抵债，处于破产状态，而且有无数有担保贷款的债权人（secured creditor）时，即使通过冻结令成功冻结资产对于判决的优先执行也意义不大：见 Cretanor Maritime v. Irish Marine Management (1978) 1 WLR 966; The “Angel Bell” (1980) 1 Lloyd’s Rep 632；Flightline v. Edwards (2003) EWCA Civ 63 等先例。加上在许多国家或地区的破产法中都有类似条文，在公司破产清算时禁止对公司采取进一步的诉讼行为，包括已经作出的冻结令也将在“清算人”（liquidator）的申请下被解除/撤销，例如在英国《Insolvency Act 1986》之 Section 130(2)规定：“*When a winding up order has been made or a provisional liquidator has been appointed, no action or proceeding shall be proceeded with or commenced against the company or its property, except by the leave of the court and subject to such terms as the court may impose.*”

在 The “Angel Bell”先例中 Goff 大法官说：“*I do not believe that the Mareva jurisdiction was intended to rewrite the English law of insolvency in this way. Indeed it is clear from the authorities that the purpose of the Mareva jurisdiction was not in any way to improve the position of claimants in an insolvency but simply to prevent the injustice of a foreign defendant removing his*

[25] 但需要已经有诉因（cause of action）。如果没有诉因是无法成功申请冻结令的：见 The “Veracruz 1” (1992) 1 Lloyd’s Rep 353 先例。

[26] 有关对法院判决（judgment）或仲裁裁决（award）的执行可见《仲裁法——从开庭审理到裁决书的作出与执行》（2010 年）一书第十四章之 8 段。

assets from the jurisdiction which otherwise might have been available to satisfy a judgment…"

所以，申请人不能阻止破产信托人接管被申请人所有的资产：见 Peasegood v. Peasegood（unreported, CA Civ, 9 March 1981）先例。但生效的冻结令可以持续，只是资产被冻结不仅仅是为了申请人的利益，而是为了所有普通债权人的利益：见 Mercantile Group (Europe) AG v. Aiyela (1993) FSR 745；Eco Quest Plc v. GFI Consultants Ltd (2015) BPIR 244 等先例，以及 Lawindi v. Elkatab (2001) NSWSC 865 澳大利亚先例等。

1.4.2 有担保债权人可以自由地对资产实现担保权利

这方面可见近期的 Taylor v. Van Dutch Marine Holding Ltd (2017) EWHC 636 (Ch)先例。此先例中原告（Taylor）已经获得了针对多个被告的胜诉判决，并成功获得法院针对多个被告的资产作出的冻结令。第三方作为其中第二被告的有"担保债权人"（secured creditor）[27]，希望实现/执行自己对有担保财产的权利。但为了防止自己的行为涉嫌违反冻结令而被判藐视法院，因此向法院申请更改措辞。高院的 Mann 大法官确认了冻结令的作用是为了防止被申请人/被告导致资产流失，这不妨碍第三方对冻结令针对的资产行使其本享有的权利。换句话说被申请人有资产属于冻结令针对的资产，并不妨碍对该资产的"有担保债权人行使独立权利"（"*an exercise of the secured creditor's own independent rights*"）。例如有担保债权人对该资产有"押记"（charge）的权利，可以出售该资产以归还欠下的债务，有担保债权人在行使权利时无需提前获得法院的允许[28]：

"… a freezing order … did not give security to the judgment creditor or affect the genuine rights of third parties over their assets… that principle therefore did not stand in the way of a secured creditor enforcing its security over charged assets caught by a freezing order, and such a person would not need to obtain permission in order to exercise that security because the exercise of disposal rights under that security was not an act prohibited by the order…"

但 Mann 大法官也对这种第三方想要处置被冻结令针对资产时面对的困境表示理解，毕竟如果不事先向法院申请就可能面临藐视法院的后果，在此先例中 Mann 大法官最后对冻结令的措辞/文字作出更改，明示允许该第三方/有担保债权人行使自己对第二被告资产的权利。

1.4.3 被冻结令冻结的资产也允许正常生意上债务与生活支出而扣减

在冻结令（freezing orders）下冻结资产（assets）并非保全措施，也不是英国法院协助作为申请人/原告向作为被申请人/被告施加压力。毕竟还没有在实质争议中对"谁是谁非"作

[27] 有关担保债权，可见笔者的《船舶融资与抵押》一书第三章，在其中介绍了担保权益中的"留置权"（lien）、"质押"（Pledge）、"押记"（Charge）、"抵押"（Mortgage）等内容。

[28] 当然作为有担保债权人的第三方的行为，不能名义上是行使自己的独立权利，但实际上是协助、帮助被申请人处置资产（"*a disposal amount to aiding and abetting a disposal by the defendant*"），否则就会被冻结令的有关措辞/文字所针对了，有关冻结令的措辞/文字见本章之 1.7.3.8 段的介绍。

出审理与判决或裁决。笔者的经验是很多针对中国公司的冻结令中，申请人其实并没有站得住脚的案件，而是利用这种手段向中国公司敲一笔钱，但也经常成功。因此即使资产被冻结令冻结，也不影响被申请人正常的资金流动，也就是其他“生意上债务”（trade debts）从被冻结的资产中扣减/流失。要知道正常生意上债务通常不是有担保的债务（secured debt）。但作为被申请人的公司在正常营运中需要按时与按需要支付这种生意上债务。一旦资产被冻结后就无法支付正常生意上债务与开支（包括没钱委任律师代表被申请人抗辩，或支付办公地点的水费或电费等），有了冻结令就让申请人把被申请人“逼死”，被申请人由于资产被全面冻结，作为公司而没有办法继续营运下去就此“结业”，或作为自然人没有办法生活下去，这是说不通也不合理的。

允许在被冻结的资产中扣减正常生意上的债务，也显示了由于申请冻结令的索赔尚待判决或裁决的结果，因此本身被冻结的资产相比已经在日常营运中产生的债务没有什么优先权利，并不是担保（security），而且冻结令的申请人并不会由于冻结令就变成有担保债权人。

正如 The “Angel Bell” (1980) 1 Lloyd’s Rep 632 先例中 Goff 大法官所说：“*I find it difficult to see why, if a plaintiff has not yet proceeded to judgment against a defendant but is simply a claimant for an unliquidated sum, the defendant should not be free to use his assets to pay his debts. Of course, if the plaintiff should obtain a judgment against a defendant company, and the defendant company should be wound up, its previous payments may thereafter be attacked on the ground of fraudulent preference, but this is an entirely different matter which should be dealt with at the stage of the winding up.*[29] *It is not to be forgotten that the plaintiff's claim may fail, or the damages which he claims may prove to be inflated.*[30] *Is he in the meanwhile, merely by establishing a prima facie case, to preclude the bona fide payment of the defendant's debts?... It does not make commercial sense that a party claiming unliquidated damages should, without himself proceeding to judgment prevent the defendant from using his assets to satisfy his debts as they fall due and so put him in the position of having to allow his creditors to proceed to judgment with consequent loss of credit and of commercial standing.* ”

类似的情况还有如果被申请人是自然人，正常生活支出（ordinary living expenses）也可以从被冻结的资产中扣减/流失：见 TDK Tape Distributor (UK) Ltd v. Videochoice Ltd (1986) 1 WLR 141 等先例。在 Halifax Plc v. Chandler (2001) EWCA Civ 399 先例中被申请人支出的律师费用也被认为可以从被冻结的资产中扣除/流失。这些情况甚至可以一步步将被冻结的资产（金额不高的情况）扣除/流失为零价值。

在今天商业案件作出的冻结令中，也一般都会包括一条明示条文针对前述生意上正常债务与开支、正常生活支出的例外（被称为“Angel Bell 例外”），如：

“*EXCEPTIONS TO THIS ORDER*

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29 即使在冻结令申请人已经获得对实质争议的胜诉判决、确定了对被申请人的债权时，如果被申请人将资产支付给其他债权人、其他生意上债务，然后宣布破产清算，这也属于选择性优待个别债权人，破产“清算人”（liquidator）可以向被优待的债权人追讨这笔被支付的金钱（有时还可以要求进入破产清算公司的董事以个人名义承担责任）。

30 更何况一般的冻结令中，冻结令的申请人仍然处于对实质争议的诉讼中，还没有确定对被申请人的债权。冻结令的申请人完全可能在诉讼中败诉或成功索赔金额被大幅度减低等。

a. *this Order does not prohibit the respondent from spending up to [金额] a week … towards his individual ordinary living expenses … nor does it prohibit the respondent from spending a reasonable amount on legal advice and representation. But before spending any money on legal advice and representation the respondent must notify the Bank's legal representatives in writing where the money to be spent is to be taken from.*

b. *This Order does not prohibit the respondent from dealing with or disposing of any of his assets in the ordinary and proper course of any business conducted by him personally.*"

但如果冻结令是为了协助判决或裁决的执行（execution），就没有生意上正常债务与开支、正常生活支出的例外了：见 Camdex International Ltd v. Bank of Zambia (No.2) (1997) 1 WLR 632 先例。毕竟执行判决或裁决，针对的是已经确定的"判决债务"（judgment debt），在这时已经没有让生意上正常债务与支出、正常生活支出优先成为例外的必要了。这种情况出现在近期的 Michael Wilson & Partners Ltd v. John Forster Emmott (2019) EWCA Civ 219 先例。

在 Michael Wilson & Partners Ltd v. John Forster Emmott 先例中，Emmott 在伦敦仲裁中胜诉，而败诉的前合伙人 Michael Wilson & Partners（或简称"MWP"）没有根据裁决作出支付，Emmot 就申请并获得英国法院颁布/作出冻结令，在一审高院还成功排除了类似 The "Angel Bell"先例中的这种例外情况。冻结令的措辞/文字如下：

"*The exception in paragraph 13(2) of the freezing order that formerly did not prohibit the respondent from dealing with or disposing of any assets in the ordinary and proper course of its business is hereby deleted so that MWP is not permitted to deal with or dispose of any of its assets as defined in paragraph 9 of the freezing order up to the values set out in paragraph 2 hereof.*"

MWP 就提出上诉，指称即使是在判决或裁决后为了协助执行、防止资产流失而颁布/作出的冻结令，同样需要给仍然在营运中的被申请人提供 Angel Bell 例外，只有在没有任何其他办法作为最后手段时才可以排除。上诉庭的 Gross 大法官对正确的法律地位进行了总结，可以节录如下：

"*1. Mareva injunction can no longer be described as rare and, whether they are pre or post-judgment, are not intended to confer a preference in insolvency. They are granted to facilitate execution, by guarding against a risk of dissipation over the period between judgment and the process of execution taking effect.*

2. By reason of its nature, a post-judgment Mareva will increase the pressure on a defendant to honour the judgment debt, but the mere increase in such pressure does not make it illegitimate or "in terrorem".

3. It cannot be said that (without more) the Angel Bell exception would be inappropriate in a post-judgment Mareva.

4. It can be said, however that it will sometimes and perhaps usually be inappropriate to

include the exception in a post-judgment Mareva injunction.

5. Refusal of the exception in a post-judgment Mareva is neither a starting point, a presumption, or a remedy of last resort, the appropriateness or otherwise of the exception should be treated as a question turning on all the facts in the individual case.”

换言之，上诉庭指出即使判决或裁决后，也不代表就一定会排除 Angel Bell 例外，是否排除仍是个别法官根据特定案件行使裁量权（discretion）的问题。但在此先例中看来 MWP 并非不能支付（can’t pay），而是不愿意支付（won’t pay）。一审的 Cooke 大法官认定这是例外情况应该行使裁量权排除 Angel Bell 例外，对此上诉庭不应干预。显然高院与上诉庭也并非是要终止 MWP 的营运而排除 Angel Bell 例外。要解决问题也很容易，只要抗拒支付的 MWP 作出支付，就可以马上解除冻结令了。

1.4.4 无辜买方、受让人或其他判决债权人对冻结令资产的地位

在冻结令之前订立的买卖合约下买方在不知情的情况下，接受货物的交付，即使该货物被包括在冻结令针对的资产中，也不影响买方获得货物的财产权（property）。毕竟已经订立的买卖合约需要履行，而且由于是在冻结令颁布/作出之前就已经订立，也谈不上协助被申请人违反冻结令，不会是藐视法院。当然如果买方在货物交付前已经知道冻结令的存在，会向法院申请更改（vary）冻结令的措辞/文字，说明允许交付这批货物，这是较为谨慎的做法。在《Commercial Injunctions》（2016 年，第 6 版）一书之 3-005 段中就提到：

“*However a third party can be in contempt of court even though he has not aided and abetted a breach of the court order. This is under the principle that a third party must not deliberately frustrate the purpose of the order. The purpose of the order is the court’s purpose in making the order. That purpose is normally to be defined from the terms of the order. Thus the purpose of the Mareva is to preserve the assets which are caught by the injunction subject to the financial limit and the permitted uses authorised under the order.*”

冻结令生效前订立的转让（assignment）、押记（charge）等协议也是与前述买卖合约同样的地位与做法。

而如果在冻结令生效之后，第三方在对被申请人的诉讼中胜诉成为判决债权人（judgment debt creditor），要求执行被冻结的资产，这一般也是被允许的。毕竟冻结令的申请人的索赔仍有待判决或裁决、胜负未分，这没有理由阻碍已经分出胜负的判决/裁决的执行。看来对自己索赔有信心胜诉的申请人，在取得冻结令后要尽快推进诉讼/仲裁以早日获得胜诉判决/裁决，以免被冻结的本就有限的资产再被第三方先一步获得，导致剩余的资产不足以支付申请人最终胜诉的金额。这方面可节录《Commercial Injunctions》（2016 年，第 6 版）一书之 3-004 到 3-005 段：

“*The injunction can be said to operate as if it had an effect on an asset in rem, in that the*

defendant is precluded from dealing with the assets, and third parties with knowledge of the other must not aid and abet a breach or defeat the purpose of the order.

Since the Mareva injunction gives the claimant no propriety rights over the defendant's assets, ***a bona fide purchaser or assignee for value or charge of the assets without notice of the injunction will obtain good title or good security. Similarly, anyone with an existing charge over the assets is entitled to enforce it.***

In principle, judgment creditors *of the defendant who is subject to a Mareva injunction* ***can execute their judgments against any of his assets.*** *This is the consequence of the principle that the Mareva creates no security and the principle that prior to insolvency of a defendant a judgment creditor can enforce his judgment as soon as he obtains it.*

Execution by a third party under a court order would not normally, in itself, amount to a breach of the terms of the injunction. *This is because the dealing with the assets is by order of the court and not by an act of the defendant and because the restraint is a personal restraint on the defendant and does not operate directly against the assets: see further Re Noel Ling Ex p Enrobook Pty Ltd*[31]*. See also the dicta of Robert Goff J in Iraqi Ministry of Defence v. Arcepey Shipping (The Angel Bell)*[32]*, and of Parker J in A v. B (X intervening)*[33]*, which appear to suggest that a judgment creditor does not need to seek a variation of the Mareva injunction before executing the judgment on the assets.*"（加黑部分是笔者的强调）

也值得一提的是，法院不一定会允许判决债务人执行被冻结的资产。这主要是在被申请人已经处于破产程序中，或者已经濒临破产的时候。因为判决债务人并非（也常常不是）有担保债权人时，有了胜诉的判决或裁决并不会改变这个地位。法院一旦允许执行被冻结的资产，就会对破产的公司或自然人的其他债权人不公平。即使是破产前取得支付，事后也可能被清盘人（liquidator）或破产信托人（trustee）以优待支付（preferential payment）为由追回。这方面也可以节录《Commercial Injunctions》（2016 年，第 6 版）一书之 3-005 段如下：

"*There can be circumstances when even though a judgment has been obtained by a third party the court will refuse to allow the frozen assets to be taken in satisfaction of that judgment. That the judgment debtor is insolvent would be a powerful reason for refusing to make a final third party debt order. Likewise, if winding-up proceedings or bankruptcy proceedings are about to be commenced or it is clear that the judgment debtor is insolvent, the court should preserve the frozen assets for the benefit of creditors generally pending the commencement of the insolvency proceedings and not permit the judgment creditor to obtain priority over other creditors.*"

[31] Noel Ling Ex p Enrobook Pty Ltd, Re (1996) 142 ALR 87 先例。
[32] The "Angel Bell" (1980) 1 Lloyd's Rep 632 先例。
[33] A v. B (X intervening) (1983) 2 Lloyd's Rep 532 先例。

1.4.5 冻结令“转变”为担保与有优先权的情况

冻结令是法院命令中的“核武器”（nuclear weapon），对于被申请人来说，在自己的资产被冻结令冻结后，会面对资金链断裂的问题与来自方方面面的商业压力。被申请人会寻求各种方式让申请人尽快撤回冻结令，例如是提供替代方式给出金钱上的担保，以换取对特定资产冻结令的解除。一种做法是“款项缴存于法院”（payment into court），这在替代了被冻结资产的同时，会使得申请人对这笔金钱有“押记”（charge），成为有担保债权人。例如在 Flightline v. Edwards (2003) EWCA Civ 63 先例中，上诉庭的 Jonathan Parker 大法官的判词中就对此有所陈述：

“*… the judge*（一审法院的法官）*referred to the two distinct lines of authority which had been cited to him. One such line of authority (exemplified by In re Ford [1900] 2 QB 211 , W A Sherratt Ltd v. John Bromley (Church Stretton) Ltd [1985] 1 QB 1038 CA , Halvanon Co Ltd v. Central Reinsurance Corpn [1988] 1 WLR 1122 , and Re Mordant [1996] 1 FLR 334) establishes that where money is paid into court by a defendant as a condition of the grant of permission to defend the action or as an offer of compromise under the relevant procedural rules, or where it is paid into an account out of court but with the intention that the same consequences shall follow as if it had been paid into court,* ***the claimant has a charge on the money so paid to secure any judgment obtained by him in the action.***”（加黑部分是笔者的强调）

换句话说，在款项缴存于法院后，原来申请冻结令的申请人就会变成有担保债权人（secured creditor）了。但是在此先例中的问题是，申请人与被申请人达成协议，由被申请人将金钱支付至代表律师管理的“代管账户”（escrow account），并约定一旦申请人成功获得胜诉判决，申请人就有权从代管账户中取出相应的胜诉金额。而这被上诉庭判并没有同样效力，无法使得申请人变成有担保债权人。

1.5 冻结令管辖权的扩张

冻结令原有的一些局限在今天也已经逐渐解除，而且冻结令的颁布/作出有所扩大。已经从最早的海事争议，延伸到各式各样的非海事争议，甚至是与商业合约无关的其他类型争议中也会颁布/作出冻结令。例如在家事案件，特别是夫妻离异带来的争产案件中，包括妻子担心丈夫会处置与/或隐藏金钱等“财产”（property），以逃避财产分割或支付赡养费，就会通过申请冻结令并附上资产披露令（Assets Disclosure Order）[34]予以应对。在国际化、全球化的环境中，针对各种类型的国际争议，特别是涉及国际欺诈的争议，以及对全球法院判决或仲裁裁决（不论是否英国法院或伦敦仲裁）的执行中，冻结令、尤其是全球冻结令（Worldwide Freezing Orders 或 WFO）的做法已经被广泛使用。

今天也不只是英国法院作出冻结令，也有许多其他国家或地区法院会作出冻结令（以及全球冻结令），包括美国、欧盟国家、澳大利亚、百慕大、巴哈马、英属维尔京群岛、开曼群岛、加拿大、香港特区、新加坡、马来西亚、直布罗陀、马恩岛、新西兰、印度、爱尔兰

[34] 有关资产披露令可见本章之 2 段的介绍。

等。但对比英国法院，这些其他国家或地区法院作出的冻结令无论是在数量上还是频率上都远远不及。在此只是简单提一提几个与中国公司关系较密切的一些国家或地区（这些也往往是国际上的金融中心）的法律与先例：

- 欧盟于 2017 年 1 月 18 日适用规章《Regulation (EU) 655/2014 of the European Parliament and of the Council of 15 May 2014》，申请人在所有成员国法院（除了没有选择参与的英国与丹麦）都可以申请"European Account Preservation Order"，冻结被申请人在所有成员国内银行之银行账户中的资产。

- 美国曾经在 Grupo Mexicamo de Desarrollo SA v. Alliance Bond Fund Inc, 527 US 308 (1999)最高院先例中判联邦法院在普通法下没有作出冻结令的权力，有一些地方法院作出类似判法，但也有地方法院有不同判法。之后美国通过《Uniform Asset Freezing Order Act 2013》立法，赋予法院作出冻结令的权力，解决了这个问题。

- 香港特区在 2009 年"民事诉讼改革"（Civil Justice Reform）后有《High Court Ordinance》（Cap 4）之 Section 21M 赋予香港法院颁布/作出全球冻结令的权力：Compania Sud Americana De Vapores SA v. Hin-Pro International Logistics Limited (2016) 19 HKCFAR 586 先例[35]；Huangpu v. Dry Bulk Services (2016) HKCU 3097 先例等。还可见近期的 Chen Hongqing v. Mi Jingtian, HCMP 962/2017 先例中，香港法院作出了替代冻结令的"接管命令"（Receivership Order）[36]对贸仲（CIETAC）的仲裁案件予以支持。

- 新加坡：见 Karaha Bodas Co LLC v. Pertamina Energy Trading Ltd (2006) 1 SLR(R) 112；Seift-Fortune Ltd v. Magnifica Marine SA (2006) 1 SLR(R) 629；Petroval SA v. Stainby Overseas Ltd (2008) 3 SLR(R) 856；Multi-Code Electronics Industries (M) Bhd v. Toh Chun Toh Gordon (2009) 1 SLR(R) 1000 等先例。

过去"判决债务"（judgment debt）的执行（execution）并不需要应用主要是为了获取诉前、诉中担保的冻结令。但是今天冻结令已经被广泛应用在对法院判决、仲裁裁决书的执行的协助中，Phillips 大法官在 Camdex International Ltd v. Bank of Zambia (No.2) (1997) 1 WLR 632 上诉庭先例中，对此的解释是：

"A Mareva injunction granted after judgment is a comparatively rare form of such relief. In Deutsche Schachtbau-und Tiefbohrgesellschaft m.b.H v. R'As al-Khaimah National Oil Co. [1990] 1 A.C. 295… Sir John Donaldson M.R. said: 'The Mareva innovation, which time has shown to be one of the most imaginative, important and, on the whole, most beneficent of modern times, lay in giving a plaintiff some degree of protection before he became a judgment creditor and in anticipation that he would become one. Judgment creditors had little need of new protection since they were usually adequately protected by their right to levy execution by a writ of fi. fa., attachment of debts or the appointment of a receiver.'

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35 这是有关提单争议的案件，英国法院在针对同一争议的案件中作出了针对中国的"止诉禁令"（anti-suit injunction），在《提单与其他付运单证》（2016 年）一书第四章之 2.4.8.1 段有提到。

36 有关"接管人"（receiver）的课题可见《仲裁法——从开庭审理到裁决书的作出与执行》（2010 年）一书第十四章之 8.6 段的详细介绍。有关接管人与冻结令的关系可见本章之 1.8 段。

A Mareva can properly be granted after judgment in circumstances… where this is necessary to prevent the removal or dissipation of an asset before the process of execution can realise the value of that asset for the benefit of the judgment creditor."（加黑部分是笔者的强调）

以上节录内容说的是，在判决或裁决作出之后，胜负已分的情况下，仍然存在实际执行之前败诉方的资产流失（dissipate）的风险。这就要冻结令对这风险予以防范。另外执行也会暂时中止（stay of execution），例如是败诉方向仲裁所在地的监督法院（supervising court）申请撤销（set aside），此时就需要冻结令来保障胜诉方：见 Goldtron v. Most Investment Ltd (2002) JLR 424，SPL Private Finance (PF1) IC Ltd v. Arch Financial Products LLP (2015) EWHC 1124 (Comm)等先例。

发展到今天，相比于为了获取诉前、诉中担保申请冻结令，为了执行英国或外国裁决书申请冻结令或全球冻结令相对容易，而且成功机会更高。正如 Orwell Steel (Erection and Fabrication) Ltd v. Asphalt and Tarmac (UK) Ltd (1984) 1 WLR 1097 先例中，Farquharson J 大法官所说："*… in one sense it could be said that there is greater justification for restraining a defendant from disposing of his assets after judgment than before any claim has been established against him.*"

为了执行而单方面申请冻结令也可以免去很多要件[37]。例如是不必向法院显示有"良好论据的案情"（good arguable case）；证明资产有流失风险的标准也会是很低，甚至根本不需要，因为被申请人不马上支付判决债务本身就表面显示了有流失风险；申请人也不需要提供交叉担保（cross-undertaking），因为判决/裁决已经作出，黑白分明，不存在错误申请导致被申请人损失的风险。英国法院也将协助判决或裁决的执行视为政策性导向，在 Maclaine Watson & Co Ltd v. International Tin Council (No.2) (1989) Ch 286 先例中 Kerr 大法官说："*… it is, within proper limits, the policy of these courts to prevent a defendant from removing its assets from the jurisdiction or concealing them within it, so as to deny a successful plaintiff the fruits of his judgment*"

为了英国本身的庞大经济与政治利益，英国法院也欢迎为了协助执行仲裁裁决书（无论是英国还是外国仲裁）前来申请冻结令或全球冻结令（以及资产披露令），正如 Republic of Haiti v. Duvalier (1990) 1 QB 202 先例中，Staughton 大法官所说："*our courts are more willing to restrain a defendant from dealing with his assets after, than before, judgment has been given against him.*"

在这里可以简单介绍一个近期的 Great Station Properties SA v. UMS Holding Ltd (2017) EWHC 3330 (Comm)先例。在此先例中，就涉及了对裁决的执行中法院作出了全球冻结令。此先例涉及了乌克兰/俄罗斯的两个富豪，原告是从事石油、天然气等能源产业的 Vladimir Lukyanenko 先生名下的公司，被告是从事钢铁产业的 Konstantin Grigorishin 先生名下的公司，Grigorishin 先生原本是乌克兰人，但后来移民到俄罗斯。原告指称（1）被告（利用实际由被告控制的公司）从一家双方合资的乌克兰涡轮压缩机企业中非法转移利润；（2）被告未能

[37] 有关申请冻结令的要件指引可见本章之 1.7 段。

让原告行使自己对一家双方合资的塞浦路斯企业的"看跌期权"（put option）等。经过 LCIA[38] 仲裁裁决，判被告需要向原告支付共 305,800,000 美元的赔偿。但由于俄罗斯与乌克兰之间的紧张关系，被告很可能无法继续维持已经日渐紧张的经济现状，原告因此寻求法院命令先冻结被告资产用以执行裁决书。高院的 Teare 大法官指出："*… the policy of the law is to enforce judgments (and particularly so where the judgment enforces a London arbitration Award) so that freezing orders can, in an appropriate case, be granted after judgment. They also show that such orders may more readily be made after judgment than before. That may be because it is easier to infer a risk a dissipation.*"

同时 Teare 大法官经过衡量，指出在面对如此巨额的未执行裁决书，而且有确实证据被告有可能转移资产[39]的情况下，愿意作出冻结令帮助执行，并指出："*the balance of convenience comes firmly down in favour of the freezing order.*"

换句话说在今天资产非常容易转移、流失的情况下，冻结令可以有效针对英国或外国仲裁裁决书的败诉方/判决债务人（judgment debtor）在执行前转移资产、导致资产流失的行为。而且今天英国法院作出很多的全球冻结令，这使得对于英国法院本没有管辖权实际执行的资产（例如是败诉的被告在境外的资产，要执行这些资产需要依赖有管辖权的资产所在地的法院）、以及对于无法确定的被申请人在全球范围所有的特定资产，可以通过在全球冻结令泛泛地针对被申请人的"任何资产"（any asset）的方式被包括在内。以及可以通过资产披露令（Assets Disclosure Order）协助胜诉方/判决债权人（judgment creditor）在全球执行债务，有关这方面内容可见本章之 2 段。

1.5.1 冻结令是独立程序，英国法院可以作出冻结令辅助外国诉讼程序

1.5.1.1 从针对有实质管辖权的英国诉讼到全球诉讼的"CJJA 1982"与"1997 Order"

原本冻结令与其他"禁令"（injunction）一样，本质上是"中间措施"（interim measure）与"中间禁令"（interim injunction），只有英国法院（或仲裁）有对实质争议的管辖权（jurisdiction）时才可以作出冻结令：见 The "Siskina" (1978) 1 Lloyd's Rep 1 贵族院先例。这导致针对很多国际欺诈行为，由于没有约定在英国法院诉讼或伦敦仲裁，英国法院对实体争议并没有管辖权，也因此无权作出冻结令。英国法院认为有必要填补这也被称为"黑洞"（black hole）的局限，Nicholls 勋爵在 Mercedes Benz AG v. Leiduck (1996) AC 284 先例中说："*(被告*

[38] "英国伦敦国际仲裁院"（"London Court of International Arbitration"，简称 LCIA）。

[39] "确实证据"（solid evidence）包括 Grigorishin 先生在仲裁中的证词里说谎，谎称自己不知道从乌克兰合资公司中转移利润的公司属谁所有。而仲裁庭根据证据毫不犹豫地认定该转移利润公司实际是被告通过一个乌克兰人实际控制的，纯粹因为在乌克兰与俄罗斯紧张的政治局势下，被告作为俄罗斯国民如果控制该转移利润公司，会容易被乌克兰政府挑毛病等。这也是法院认定被告"缺乏诚信"（"*a lack of probity*"）的原因之一。

的) argument comes to this: his assets are in Hong Kong, so the Monaco court cannot reach them; he is in Monaco, so the Hong Kong court cannot reach him. That cannot be right. That is not acceptable today. A person operating internationally cannot so easily defeat the judicial process. There is not a black hole into which a defendant can escape out of sight and become unreachable."

之后根据欧盟的公约《Brussels Convention 1980》，英国通过了《Civil Jurisdiction and Judgment Act 1982》（简称"CJJA 1982"），用立法的方式改变了 The "Siskina"贵族院先例的普通法地位，将管辖权扩大到可以针对与支持其他欧盟国家的实质争议。之后又通过了《Civil Jurisdiction and Judgments Act (Interim Relief) Order 1997》立法（简称"1997 Order"）全面针对这个问题，全面扩大英国法院的管辖权到可以针对全球范围。在 1997 Order 中这样规定："*the High Court... shall have power to grant interim relief under Section 25(1) of the CJJA 1982 in relation to proceedings of the following descriptions, namely (a) proceedings commenced or to be commenced otherwise than in a Brussels or Lugano Contracting State*[40]*; (b) proceedings whose subject matter is not within the scope of the 1968 Convention.*"

这一来冻结令的申请是"独立"（freestanding）程序，不再只是"附属"（ancilliary）于英国诉讼（法院诉讼或仲裁）的程序，也可以对外国程序进行支持。无论是世界任何地方进行实质争议的诉讼，英国法院都可以予以协助颁布/作出冻结令。由于伦敦是全球的金融、银行、法律、保险与商业中心，加上美国与其他西方国家"同声同气"，所以在调查、追踪全球资产并加以冻结的能力特别强。

冻结令程序在今天变成独立程序，对世界都会有很大影响，包括对中国内地。笔者时常遇到中国公司或律师提出问题，涉及在他们与欧洲、英美等国家的公司打交道、发生争议时，需要在中国法院提起诉讼（或者在贸仲[CIETAC]仲裁）。但由于外国公司看来"不上路"，有逃避债务或赔偿的倾向，非常心急地想进行财产保全，但不知道有什么办法可以对这些外国公司不在中国境内的财产进行保全。据悉在中国仲裁中，仲裁庭没有作出此类中间措施（例如是冻结令等）的权力。而中国法院虽然可以进行财产保全等，但笔者没有听过可以作出全球冻结令的做法。这时中国公司或律师大可以考虑在英国法院申请全球冻结令以支持外国程序（中国法院或仲裁程序）。同样也可以在其他有同样做法的国家或地区法院，例如是香港法院等进行申请：见本章之 1.5 段提到的 Chen Hongqing v. Mi Jingtian, HCMP 962/2017 先例。至于中国公司需要去什么国家或地区法院申请，就要根据具体的事实（例如是被申请人所在地、财产所在地等）决定，如果是针对欧洲或美国等公司，在英国法院申请就会比香港法院申请与执行更有效。

总之英国法院对冻结令管辖权（Mareva Jurisdiction）的不断扩张到"无远弗届"，是要成为国际商贸活动（甚至其他活动）的国际警察与国际法官，实际上是要以这类长臂管辖权（long-arm jurisdiction）的手段（至少在法律方面）恢复大英帝国的法律秩序（law and order），唯一的区别是给其他国家（尤其是发展中国家）一点"虚面子"，低调地避免敏感的政治问题。当然，英国这样的做法也确实有其积极的一面，使国际商贸活动更有秩序。

[40] 1968 年布鲁塞尔《民商事司法管辖的判决执行公约》以及 1988 年卢加诺《民商事司法管辖权和判决执行公约》。根据此条文也将中间禁令管辖权扩大到非欧盟国家。

1.5.1.2《Arbitration Act 1996》：赋予支持英国与外国仲裁程序颁布/作出冻结令的权力

法院也可以颁布/作出冻结令等对伦敦仲裁予以支持，这可见《Arbitration Act 1996》之 Section 44："*Unless otherwise agreed by the parties, the court has for the purposes of and in relation to arbitral proceedings the same power of making orders about the matters listed below as it has for the purposes of and in relation to legal proceedings…*"，尤其是其中的 Sub-section (e)："*(e) the granting of an interim injunction or the appointment of a receiver.*"

在《Arbitration Act 1996》下，法院在支持仲裁的管辖权方面也已经明示放宽到可以支持外国仲裁，见《Arbitration Act 1996》之 Section 2："*2. Scope of application of provisions (1) The provisions of this Part apply where the seat of the arbitration is in England and Wales or Northern Ireland. … (3) The powers conferred by the following sections apply* ***even if the seat of the arbitration is outside England and Wales or Northern Ireland or no seat has been designated or determined*** *- … (b) section 44 (court powers exercisable in support of arbitral proceedings)；but the court may refuse to exercise any such power if, in the opinion of the court, the fact that the seat of the arbitration is outside England and Wales or Northern Ireland, or that when designated or determined the seat is likely to be outside England or Wales or Northern Ireland, makes it inappropriate to do so.*"（加黑部分是笔者的强调）

即无论是本土仲裁还是外国仲裁（但外国仲裁中需要解释为何英国法院的冻结令比寻求仲裁地法院救济更"恰当"[expedient][41]），英国法院都有权力作出中间禁令支持仲裁。

而如果是伦敦仲裁已经作出了裁决书（award），那么仲裁程序已经结束，《Arbitration Act 1996》不再适用。而裁决书的执行（execution），会是资产所在地的法院程序。此时如果需要英国法院作出禁令以协助执行，那就是依据《Senior Courts Act 1981》。正如《Russell on Arbitration》（2015 年，第 24 版）之 7-191 段说："*Once an award has been issued and enforcement proceedings are underway, s.44（《Arbitration Act 1996》之 Section 44） will no longer apply, assuming the arbitral proceedings have concluded. This is because s.44 is exercisable only 'for the purpose of and in relation to arbitral proceedings'. The court's jurisdiction to grant injunctions after the arbitration proceedings have concluded is derived from its general powers to grant injunctions rather than s.44.*"

看来在《Senior Courts Act 1981》之 Section 37 以及《Arbitration Act 1996》之 Section 44(2)(e) 这两个立法下，英国法院都有权作出冻结令等中间禁令，而后者看来情况较为狭窄与受限（只针对"*for the purposes of and in relation to arbitral proceedings*"，而且需要是已经开始或准备中

[41] 例如英国法院如果是对中国贸仲（CIETAC）仲裁予以支持，会先认定由英国法院作出冻结令比由仲裁地的中国法院作出有关命令更"恰当"，不论是在时间上还是在有效性上。例如，中国没有全球冻结令的做法，但如果一个贸仲仲裁涉及了有关国际商业欺诈的案件，没有全球冻结令的支持就难以避免资产流失，这一来英国法院就有很大机会认为这是适合与恰当的。

的仲裁程序[42]）。因此有如何对待这两种立法下赋予的权力的分析。

在 Cetelem SA v. Roust Holdings Ltd (2005) 2 Lloyd's Rep 494 上诉庭先例中 Clarke 大法官指出："*The relationship between the powers of the court under section 37 of the SCA and section 44 of the 1996 Act will at some stage require detailed consideration because there is a tension (to put it no higher) between the apparently wide powers conferred on the court by section 37 and the much narrower powers conferred on the court by section 44 . The resolution of that tension must await another day.*"

之后在 Starlight Shipping Co v. Tai Ping Insurance Co Ltd (2008) 1 Lloyd's Rep 230 先例中 Cooke 大法官也给出了同样看法。

而在较近期的 Ust-Kamemogorsk JSC v. AES Ust-Kamemogorsk (2013) UKSC 35 最高院先例中，Mance 勋爵指出："*… the court's powers listed in section 44 are exercisable* ***only 'for the purposes of and in relation to arbitral proceedings' and depend upon such proceedings being on foot or 'proposed'…*** *That alone is sufficient in my opinion to lead to a conclusion that section 44 has no bearing on the question whether section 37 empowers the court to restrain the commencement or continuation of foreign proceedings in the light of an arbitration agreement under which neither party wishes to commence an arbitration[43]… The better view, in my opinion, is that the reference in section 44(2)(e) to the granting of an interim injunction was* ***not intended either to exclude the Court's general power to act under section 37 of the 1981 Act in circumstances outside the scope of section 44 of the 1996 Act*** *or to duplicate part of the general power contained in section 37 of the 1981 Act.*"（加黑部分是笔者的强调）

在实践中如果是对于仲裁案件的支持，申请人一般都会在《Arbitration Act 1996》之 Section 44 下申请中间禁令，但一般都会同时依赖《Senior Courts Act 1981》之 Section 37。毕竟在特殊的情况下（还没有启动仲裁或存在可能的仲裁时），法院需要在《Senior Courts Act 1981》之 Section 37 下作出中间禁令。正如《Russell on Arbitration》（2015 年，第 24 版）一书之 7-188 段说："*When an application is made under s.44, s.37 of the Senior Courts Act 1981 is also often relied upon in parallel. However, it would only be in exceptional cases that the courts would exercise its powers under s.37 in circumstances where the detailed statutory requirements of s.44 were not met.*"

1.5.1.3 支持裁决书的执行

在本章前文中已经提到了，在法院判决（judgment）或仲裁裁决（award）作出之后，

[42] 对于诉讼程序或仲裁程序，都要求是已经开始或即将开始，通常是申请冻结令时"誓章/誓词"（affidavit / affirmation）中对情况予以说明。在 Fourice v. Le Roux (2007) UKHL 1 先例中 Bingham 勋爵说："*But he (申请人) must at least point to proceedings already brought, or proceedings about to be brought, so as to show where and on what basis he expects to recover judgment against the defendant.*"

[43] 如果当事人没有开始伦敦仲裁的意愿，那么《Arbitration Act 1996》之 Section 44 就无法被适用。此时英国法院就可以根据《Senior Courts Act 1981》之 Section 37 作出中间禁令，例如是今天经常作出的"止诉禁令"（anti-suit injunction）。换句话说这两个立法是在互补不足。

胜负已分，一般法院也就不再有作出冻结令的顾虑，申请人如果可以证明财产存在流失（dissipate）风险（这个证明标准也很低，因为败诉后不依据判决或裁决支付表面上来看就很有问题），就会作出冻结令。也已经介绍了 Great Station Properties SA v. UMS Holding Ltd (2017) EWHC 3330 (Comm)先例中的有关说法。

类似支持裁决书执行而颁布/作出冻结令（Freezing Orders/Injunctions）或全球冻结令（Worldwide Freezing Orders）的先例还有很多，包括 Rossel NV v. Oriental Commercial Shipping (UK) (1990) 1 WLR 1387[44]；Banco Nacional de Comercio Exterior SNC v. Empresa de Telecommmunicaciones de Cuba SA (2008) 1 WLR 1936[45]；Conocophillips China Inc v. Greka Energy (International) BV (2013) EWHC 2733 (Comm)[46]；Taurus Petroleum Ltd v. State Oil Marketing Co of the Ministry of Oil, Republic of Iraq (2018) AC 690[47]；Great Station Properties SA v. UMS Holding Ltd (2017) EWHC 3330 (Comm)[48]；Eastern European Engineering Ltd v. Vijay Construction (Pty) Ltd (2018) EWHC 1539 (Comm)[49]；Arcelor Mittal USA LLC v. Essar Steel Limited (2019) EWHC 724 (Comm)先例[50]等。

正由于今天英国法院在《Senior Courts Act 1981》之 Section 37 下独立（freestanding）与广泛的权力，法院是否可以作出冻结令的关键在于要考虑行使裁量权（discretion）是否公平（just）与方便（convenient）。也不仅仅是可以针对在英国法院执行的英国或外国仲裁，即使是在外国法院执行英国或外国仲裁，也可能在英国法院申请到针对被申请人的冻结令甚至是全球冻结令。这与《Civil Jurisdiction and Judgment Act 1982》与《Civil Jurisdiction and Judgments Act (Interim Relief) Order 1997》立法（简称“1997 Order”）的立法精神也是一致的。

至于什么时候才能满足这公平与方便的要求，在 Conocophillips China Inc v. Greka Energy (International) BV 先例中，Popplewell 大法官对过往先例在这方面的原则总结如下（这总结

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44 在此先例中实质争议由纽约仲裁解决并已经作出裁决书，胜诉方在英国法院申请协助执行，要求向败诉方颁布/作出全球冻结令。一审法院与上诉庭一致只愿意对英国境内的资产颁布/作出冻结令，拒绝颁布/作出全球冻结令。上诉庭的 Donaldson 勋爵说，涉及外国判决或裁决，英国法院要作出协助，例如根据《纽约公约》协助仲裁的执行，此时针对英国境内资产没有问题，这也是英国作为公约成员国的义务。但只有在特殊的“例外”（exceptional）案件，法院才会针对外国判决或裁决颁布/作出全球冻结令。在 Rossel NV v. Oriental Commercial Shipping (UK)先例中全球冻结令看来由作为仲裁地法院的纽约法院颁布/作出更合适。不妨节录 Donaldson 勋爵所说如下：“*Where this court is concerned to determine rights then it will, in an appropriate case, and certainly should, enforce its own judgment by exercising what would be described as a long arm jurisdiction. But, where it is merely being asked under a convention or an Act of Parliament to enforce in support of another jurisdiction, whether in arbitration or litigation, it seems to me that, save in an exceptional case, it should stop short of making orders which extend beyond its own territorial jurisdiction.*”

45 在意大利都灵获得法院胜诉判决后，由于被告在英国境内有资产，原告成功申请到英国法院颁布/作出一般冻结令冻结被告在英国的资产。但英国法院拒绝颁布/作出全球冻结令，理由包括一般冻结令已经足够针对英国境内资产，而针对英国境外资产的全球冻结令与英国属地管辖权（territorial jurisdiction）没有连接点（connecting factors），而且有可能与都灵法院的命令不一致的风险等。

46 在新加坡仲裁胜诉后，胜诉方成功申请到英国法院颁布/作出全球冻结令支持对仲裁裁决的执行。

47 在巴格达仲裁胜诉后，胜诉方成功申请到英国法院颁布/作出第三方债务命令（third party debt orders）与接管人命令（receivership orders）支持对仲裁裁决的执行。虽然这不是有关冻结令，但原理是一致的。

48 在伦敦仲裁胜诉后，胜诉方在英国法院申请执行并成功申请到全球冻结令。

49 在法国仲裁胜诉后，胜诉方成功申请到英国法院颁布/作出一般冻结令针对败诉方在英国境内资产。但由于原告被告都是塞舌尔公司，案件与英国没有太多或任何联系（link），也不涉及国际欺诈（international fraud），并非特殊例外（exceptional）。而且被告主要财产所在地塞舌尔法院在对裁决书的执行中刚刚撤销了针对被告的中间措施/禁令，因此除非有很强的原因，否则英国法院在“事不关己”的情况下不会作出相反决定，最后英国法院没有颁布/作出全球冻结令。

50 在美国明尼苏达 ICC 仲裁胜诉后，胜诉方成功申请到英国法院颁布/作出全球冻结令。

也在之后先例中被认可）：

"*Drawing these strands together, I （Popplewell 大法官） derive the following principles as applicable when the court is asked to grant a freezing order in support of relief which has been or is to be granted under s 101 of Arbitration Act 1996 to enforce a New York Convention arbitration award obtained abroad:*

(1) The principles are the same as those applicable where the court is asked to grant freezing order relief in support of foreign proceedings in exercise of its jurisdiction under s 25 of the Civil Jurisdiction and Judgments Act 1982. The relief is treated as ancillary to the substantive rights contained in the award, which arise at the seat of the arbitration. The relief is not treated as ancillary to an English judgment which is for these purposes to be treated in the same way as a judgment of the English court determining the merits of a substantive dispute between a Claimant and a Defendant over whom it has assumed in personam jurisdiction. There is, in this context, a distinction between the two, which was emphasised by Lord Donaldson MR in the Rosseel case.[51]

(2) In such cases, it will rarely be appropriate to exercise jurisdiction to grant a freezing order where a Defendant has no assets here and owes no allegiance to the English court by the existence of in personam jurisdiction by domicile, or residence, or some other reason. Protective measures should normally be left to the courts where the assets are to be found or where the Defendant resides.[52]

(3) Where there is reason to believe that the Defendant has assets within the jurisdiction, the English court will often be the appropriate court to grant protective measures by way of a domestic freezing order over such assets. That is so, whether or not the Defendant is resident or, for some other reason, is someone over whom the English court would assume in personam jurisdiction.[53]

(4) Where the Defendant is resident within the jurisdiction or is someone over whom the court has or would assume in personam jurisdiction for some other reason, a worldwide freezing order may be granted applying the same principles as apply to the grant of such an order in aid of foreign substantive proceedings under s25 of the Civil Jurisdiction and Judgments Act[54]*, as*

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51 这里涉及了区分对案件实质争议有管辖权而作出的英国判决或英国仲裁裁决的执行，以及纯粹是支持外国判决或根据《纽约公约》支持外国仲裁的不同。虽然英国法院在 Babanaft International Co SA v. Bassatne (1990) Ch 13 先例后有权颁布/作出全球冻结令，但只有在特殊的"例外"（exceptional）案件，法院才会针对外国判决或裁决颁布/作出全球冻结令。也可见本段前文脚注中提到的 Rossel NV v. Oriental Commercial Shipping (UK) (1990) 1 WLR 1387 先例与 Eastern European Engineering Ltd v. Vijay Construction (Pty) Ltd (2018) EWHC 1539 (Comm)先例。

52 一般情况下，除非是被申请人在英国有资产，也就是英国法院有可供执行的财产，所以有对物管辖权（*in rem* jurisdiction），或者是例如是被申请人是英国人、在英国注册的公司、居住地在英国等导致英国法院有对人/属人管辖权（*in personam* jurisdiction，），否则英国法院不会颁布/作出此类禁令协助外国的法院判决（例如是欧盟国家的法院判决）或仲裁裁决。这措施更适合由诉讼地或仲裁地的法院颁布/作出。

53 如果是资产在英国境内，一般是适合与愿意颁布/作出冻结令的，这也无论英国法院是否有对人管辖权。但此时一般的冻结令就已经足够保护，无须全球冻结令。

54 如果是英国法院对被申请人有对人管辖权，也是合适颁布/作出冻结令的，但要视乎情况作出决定是一般

explained in the Cuoghi, Motorola and Banco Nacional cases.

(5) Where the Defendant is neither resident within the jurisdiction nor someone over whom the court has or would assume in personam jurisdiction for some other reason, the court will only grant a freezing order extending to foreign assets in exceptional circumstances. It is likely to be necessary for the Applicant to establish at least three things[55]:

(a) That there is a ***real connecting link between the subject matter of the measures sought and the territorial jurisdiction of the English court****,[56]*

(b) That the case is one where ***it is appropriate within the limits of comity for the English court to act as the international policeman in relation to assets abroad.*** *That role will not be appropriate unless* ***it is practical for an order to be made****, and unless* ***the order can be enforced in practice if it is disobeyed****. The court will not make an order, even if within the limits of comity, if there is no effective sanction it could apply if the order were disobeyed. That may often be the case if the Defendant has no presence or assets within the jurisdiction.[57]*

(c) The court will only grant worldwide relief if it is just and expedient to do so, taking into account the discretionary factors identified at para 115 of the judgment in the Motorola case. They are: (1) whether the making of the order will interfere with the management of the case in the primary court, eg where the order is inconsistent with an order in the primary court or overlaps with it; (2) whether it is the policy in the primary jurisdiction not itself to make worldwide freezing/disclosure orders; (3) whether there is 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, in particular the courts of the state where the person enjoined resides or where the assets affected are located; (4) whether at the time the order is sought there is likely to be a potential conflict as to jurisdiction rendering it

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冻结令还是全球冻结令。

55 如果败诉方或被申请人在英国境内既没有资产，英国法院也没有对人管辖权，那么必须至少满足 3 个条件，英国法院才会认定为了与英国无关的案件或外国判决与裁决书的执行，颁布/作出全球冻结令（看来不会是一般冻结令，毕竟在英国境内没有资产）是公平与方便的，属于特殊例外（exceptional）。

56 第一个条件是，虽然资产不在英国，英国也没有对被申请人的对人管辖权，但被申请人与被申请的禁令有关的任何事实，与英国法院属地管辖权（territorial jurisdiction，与英国境内任何人、事、物有关联）之间有真实的连接点（real connecting factors）。真实连接点也是 CJJA 之 Section 25 的要求，也不仅仅适用于冻结令与资产披露令，其他任何禁令都是如此。

57 第二个条件是英国法院这样当“国际警察”的做法是合适的。这包括要尊重外国法院，可以有措施保证禁令被遵守等。例如在 Arcelor Mittal USA LLC v. Essar Steel Limited and others 先例中，法院就考虑了被申请人所在地（毛里求斯）法院也是可以颁布/作出全球冻结令的，因此如果毛里求斯法院已经颁布/作出有关命令的话，英国法院颁布/作出的全球冻结令就要被重新考虑了。又例如是此先例中仲裁地（美国明尼苏达）法院看来不倾向于也无法作出全球冻结令，此时英国法院就会更愿意颁布/作出这类命令，这还可见 Motorola Credit Corp v. Uzan (No 2) (2004) 1 WLR 113 上诉庭先例。在 Motorola Credit Corp v. Uzan 先例中，作为原告的美国公司在美国诉讼程序中指称 4 个被告（土耳其家庭）欺诈与串谋。之后美国公司申请英国法院的支持，要求颁布/作出全球冻结令，冻结每个被告各自 2 亿美元的资产。而实际上只有第一被告与第四被告在英国有资产（也没有证据显示这些资产会与第二被告或第三被告共同拥有），以及有第一被告住所地在英国。第二被告与第三被告与英国没有任何连接点（connecting factors）。再加上当时土耳其还没有加入欧盟，即使是针对第二被告与第三被告颁布/作出冻结令，也没什么办法强制执行。因此上诉庭维持了针对第一被告与第四被告的冻结令与资产披露令，但撤销了针对第二被告与第三被告的全球冻结令。

inappropriate and inexpedient to make a worldwide order; and (5) whether, in a case where jurisdiction is resisted and disobedience to be expected, the court will be making an order which it cannot enforce.[58]"

除了本段前文中的脚注以外，还可以简单总结 Popplewell 大法官对英国法院在不同案件中如何行使有关冻结令的裁量权的说法如下：

（1）只要法院相信被申请人在英国境内有资产，那么英国法院会有对物管辖权（*in rem* jurisdiction）。此时只要满足其他申请冻结令的要件（例如有资产流失风险），法院就会愿意颁布/作出冻结令。

（2）如果对被申请人有对人管辖权（*in personam* jurisdiction），在满足其他申请冻结令的要件的情况下，英国法院会视乎情况颁布/作出全球冻结令（例如针对英国公司或自然人，但资产都在外国）。

（3）如果在英国境内既没有资产，对被申请人也没有对人管辖权，那么只有在特殊例外（exceptional）情况中英国法院才会做"国际警察"。会成为例外情况至少要满足 3 个条件。（一）案情与英国有真实连接点（connecting link）。（二）英国法院做国际警察行使长臂管辖权不会影响国际友好，以及现实中能够对全球冻结令强制执行。例如全球冻结令会涉及的外国银行在伦敦有分行[59]。这一来即使是英国法院无法强制被申请人本身也不妨碍可以强制对冻结令的执行。（三）是各种其他因素让英国法院考虑是否公平与方便。例如对案件本就有管辖权的法院是否可以颁布/作出类似命令，如果可以就会避免干预外国法院对案件的管理。又例如本有管辖权的法院已经拒绝颁布/作出类似命令，英国法院就不应该再颁布/作出全球冻结令等。

什么是"特殊例外"的一个好例子是涉及了国际欺诈（international fraud）的情况。一旦涉及国际欺诈，看来英国法院也会更倾向于颁布/作出冻结令予以支持：见 Republic of Haiti v. Duvalier (1990) 1 QB 202 先例。此先例虽然并非是冻结令支持判决或裁决书的执行，但是很好地显示了什么情况属于可以颁布/作出全球冻结令支持外国诉讼的特殊例外。此先例中实体争议是指称被告涉及国际欺诈，在全球范围频繁转移资产。但是实际上英国法院对实体争议既没有对人也没有属地管辖权，实体争议也是在法国法院解决。但案件本身还涉及了英国律师，就被法院认为是有连接点，是公平与方便颁布/作出全球冻结令。

类似地在 Mobil Cerro Negro Ltd v. Petroleos de Venezuela SA 先例中，Walker 大法官更是明确地说在涉及国际欺诈的案件中，英国法院在认定是否属于特殊例外的时候会较为宽松。在近期的 Arcelor Mittal USA LLC v. Essar Steel Limited (2019) EWHC 724 (Comm)先例中，Jacobs 大法官更是（表面看来）大幅度放宽对"国际诈骗"的定义。此先例涉及一个 10 年的铁矿供应合约，被告违约/毁约后在 ICC 仲裁中败诉，并转让公司资产与准备宣布倒闭。这就被 Jacobs

[58] 第三个条件是，Popperwell 大法官还谈到了这些例外情况也一样要符合公平与方便的要求，并举例了一些会纳入考虑的因素，例如是否会干涉对实体争议有管辖权的法院的案件管理；是否符合公共政策；是否有会与其他法院（尤其是资产所在地法院以及对被申请人有对人管辖权的法院等）命令重复、不一致、矛盾或导致混乱的风险；颁布/作出全球冻结令是否不适当、不方便；如果不被服从是否有可行的强制措施等。

[59] 明知有禁令但允许违反，例如明知有冻结令，但仍允被申请人提款，会构成藐视法院：见 Z Ltd v. A-Z and AA-LL (1982) 1 Lloyd's Rep 240；Attorney General v. Punch (2002) UKHL 50 等先例。

大法官认为足够属于特殊例外情况，虽然本来案件本身与英国无关，但英国法院更愿意插手并颁布/作出全球冻结令了。

在笔者看来，今天由于伦敦作为世界经济中心之一，虽然很多公司并没有实际财产在伦敦，住所地也不在伦敦。但经营国际业务的公司多少会与伦敦有关系。而但凡有这些关系，甚至只是公司合作的银行在伦敦、有伦敦的专业人士为公司提供服务、与公司有关的文件可以在伦敦被获取，就可能被英国法院认为有连接点，足以公平与方便作出命令：见 Arcelor Mittal USA LLC v. Essar Steel Limited & Others 先例。

在前文中已经简单提到的 Arcelor Mittal USA LLC v. Essar Steel Limited & Others 先例中，涉及的是美国明尼苏达的 ICC 仲裁，裁决书的败诉方也就是债务人是一间毛里求斯公司（背后的老板是印度人），债务人在英国只有两个银行帐号，并没有什么实际资产在英国境内。甚至公司的董事也并非英国人。债务人与英国并没有什么关系。申请人已经单方面（*ex parte*/without notice）申请到了针对被申请人资产的全球冻结令（WFO）与资产披露令（Assets Disclosure Orders）、搜查令（Search Orders）以及第三方披露令（Norwich Pharmacal Orders），并通过资产披露令与搜查令了解到了被申请人的资产信息。申请人想要继续延续这些命令的效力，但遭到被申请人的反对。

此先例中法院显然是考虑到了被申请人有严重的不恰当行为（在仲裁中途，估计是明知败诉机会极高，就暗中转移达 15 亿资产），因此法院会是更倾向于作出禁令的。即使被申请人并非英国公司在英国也实际没什么资产，也会属于例外情况：

"*There is no precise definition of what is meant by the phrase 'international fraud' found in the case-law, If there is a strong case of serious wrongdoing comprising conduct on a large or repeated scale whereby a company, or the group of which it is a member, is acting in a manner prejudicial to its creditors, and in bad faith, then* ***I see no reason why the English court should not be willing to intervene rather than to stand by and allow the conduct to continue*** *and, to put the matter colloquially, to let the wrongdoer get away with it. In the present case, I would regard the attempted dissipation of Essar Steel's US$ 1.5 billion asset, in the face of the commencement of arbitration proceedings, as sufficient in itself potentially to warrant intervention under the 'international fraud' exception, or* ***as constituting 'exceptional circumstances.***"（加黑部分是笔者的强调）

在此先例中一个对法官影响很大的事实是通过单方面申请的资产披露令与搜查令确实获取了能够锁定被申请人资产信息的文件。尤其是在此先例中，被申请人看来是在伦敦寻求金融专业人士的服务，因此有不少关键文件被存储在伦敦。换言之，一旦委任过英国伦敦的专业人士（包括是律师：见 Republic of Haiti v. Duvalier [No 2]先例）并在伦敦存储了关键文件，就与英国有了"连接点"，可能会被认为属于特殊例外情况的第一个条件。针对这方面，可以节录 Jacobs 大法官所说如下：

"*It has obtained documentation as a result of the search order and disclosures made pursuant to the court's orders. These have provided, it seems to me, important information which enables AMUSA（申请人，也是仲裁裁决的胜诉方，债权人） to identify and pursue at least one major asset of Essar Steel（被申请人，仲裁裁决的败诉方，债务人）, namely the US$ 1.5 billion*

receivable. The fact that AMUSA has already obtained important information reflects the core reason why AMUSA took proceedings in this jurisdiction. Whilst it appears to be the case that Essar Steel itself does not carry on business in England, and has no substantial assets here, there are nevertheless material connections between Essar Steel and this jurisdiction. For some time, professional services were provided to Essar Steel and its ultimate parent EGFL by Essar Capital Services operating from Lansdowne House in London. Essar Capital Services employed a number of professional staff whose services were provided to other entities pursuant to various service agreements… During the time that these professionals were employed, Essar Capital Services was party to a shared services agreement with another Essar Group company relating to the premises at Lansdowne House, and this is where these professionals worked. There is a server at Lansdowne House, referred to in these proceedings as the 'Oil server', and this holds documents that were generated or saved by employees based at Lansdowne House, which previously included Essar Capital Services employees when it had professional employees."

1.5.2 对投资仲裁的支持与协助

到目前为止，冻结令的管辖权还无法延伸到对"ICSID 仲裁"/投资仲裁程序的支持与协助。众所周知，"ICSID"是 1966 年生效的《The Convention on the Settlement of Investment Disputes of 18 March 1965》即《华盛顿公约》下，世界银行（World Bank）于华盛顿建立的"International Center for Settlement of Investment Disputes"（简称"ICSID"）。ICSID 管理的仲裁，即被称为"ICSID 仲裁"。具体而言，例如在国家 A 与国家 B 之间签订双边或多边协议，而国家 A 的投资者在国家 B 投资时遇到国家 B 违反签订的国际双边协议（"Bilateral International Treaty"或简称"BIT"）对投资者的保障时，即根据《华盛顿公约》与 BIT 中约定的仲裁协议，于 ICSID 开始针对国家 B 的仲裁，因此也常称为"投资仲裁"（investment arbitration）。为了避免受到国家或地区法院管理的问题，投资仲裁与一般国际商业仲裁不同，并没有"仲裁地"（arbitral seat）的概念。也因此可以完全独立，不受制于任何国家的法律。在今天有大量的投资者针对国家的投资仲裁，往往涉案金额巨大，在今天世界各地都有许多高调、针对投资仲裁的胜诉裁决书的执行案件。例如是香港有提请人大释法的有关刚果（金）与中国中铁案件：见 FG Hemisphere Associate LLC v. Democratic Republic of Congo, China Railway Group (Hong Kong) Limited & Ors (2008) HKCFI 1110 先例，又例如是仍在世界各地作出抗争的俄罗斯败诉了 500 亿美元的 Yokus 仲裁裁决。

1.5.2.1 英国法院无权支持投资仲裁颁布/作出冻结令

在本章之 1.5.1.2 段已经提到，针对一般的仲裁（无论是英国或外国仲裁），英国法院可以根据《Arbitration Act 1996》之 Section 44 作出冻结令等中间禁令（interim injunction）予以支持。但是对于投资仲裁则并不适用《Arbitration Act 1996》。英国对于《华盛顿公约》与投资仲裁有专门的立法：《Arbitration (International Investment Disputes) Act 1966》，之后经由《Arbitration Act 1996》之 Section 107(1)以及 Schedule 3 的修改了的 Section 3(1)有如下规定：

"*The Lord Chancellor may by order direct that any of the provisions contained in sections 36 and 38 to 44（这是在《Arbitration Act 1996》中赋予法院作出中间禁令支持仲裁的条文） of*

the Arbitration Act 1996 (provisions concerning the conduct of arbitral proceedings & c.) shall apply to such proceedings pursuant to the Convention as are specified in the order with or without any modifications or exceptions specified in the order."

即"御前大臣"（Lord Chancellor）可以颁布命令，根据命令中的措辞/文字，使得《Arbitration Act 1996》之 Section 36、38 与 44 适用在投资仲裁，但是御前大臣并没有颁布过这样的命令：见 Republic of Ecuador v. Occidental Exploration and Production Company (2005) EWCA Civ 1116 上诉庭先例。笔者至今也没有获悉有颁布过此类命令。因此对于投资仲裁来说，目前的英国法院并没有作出冻结令等中间禁令予以支持的权力。

对此也可见《Russell on Arbitration》（2015 年，第 24 版）一书之 7-186 段："*Section 44 does not apply to ICSID Arbitrations. The nature of ICSID arbitration is that the parties may only seek provisional measures from the ICSID tribunal itself, and not from any national court*"。

此说法的有关先例是 ETI Euro Telecom International NV v. Republic of Bolivia (2008) EWCA Civ 880 上诉庭先例，将在本章下一段进行介绍。

1.5.2.2 ETI Euro Telecom International NV v. Republic of Bolivia 上诉庭先例

在 ETI Euro Telecom International NV v. Republic of Bolivia (2008) EWCA Civ 880 上诉庭先例中，涉及了英国法院是否有权力作出冻结令针对投资仲裁、外国诉讼程序等的问题。

此先例中的原告（ETI）是一家荷兰公司，1995 年与玻利维亚（Bolivia）政府和玻利维亚的一间电讯公司（Entel）签订了一系列合约，由玻利维亚政府对 Entel 进行私有化（privatisation），ETI 通过支付 610,000,000 美元的对价，换取 Entel 中 50%的股权（剩余的股权中，47.5%由两间玻利维亚社保基金持有，以及 2.5%由 Entel 员工持有），以及对 Entel 的管理控制地位。但在 2006 年 6 月，玻利维亚政府公布国家发展计划，显示玻利维亚将重新将私有化的公司收归国有。ETI 就指称玻利维亚政府实行了一系列行为旨在影响 ETI 在 Entel 中的投资价值，以及征用（expropriate）ETI 的利益但不支付合理赔偿等。在 2007 年 10 月 ETI 正式向 ICSID 提交了针对玻利维亚政府的投资仲裁申请书[60]。而在 2008 年，玻利维亚政府颁布命令，将全部的 Entel 股权收归国有，而实际根本没有给予 ETI 任何赔偿，理由是之前 ETI 对 Entel 的管理控制中存在违章、逃税等问题："*compensation 0, due to the irregularities found.*"之后玻利维亚警察还控制了 Entel 的总部，并由玻利维亚的电讯监管部门接管了 Entel 公司。

由于 Entel 在美国纽约摩根大通（JP Morgan Chase）有定期存款，因此 ETI 于 2008 年先

[60] 在荷兰与玻利维亚的 BIT 中约定的争议解决方式是 ICSID 仲裁："*… any disputes that may arise from investment between one of the Contracting Parties and a national of the other Contracting Party shall, in accordance with the provisions of that Convention, be submitted for conciliation or arbitration to the International Center for Settlement of Investment Disputes…*"玻利维亚在 2007 年 5 月正式申请退出《华盛顿公约》，根据《华盛顿公约》的要求将在 6 个月后即 2007 年 11 月生效，因此 ETI 要赶在"死线"来临前开始投资仲裁。

在美国纽约法院成功单方面申请到"扣押令"（order of attachment），以对正在进行中的投资仲裁提供协助："*an action for an order of attachment in aid of arbitration… without an order of attachment, the arbitral award will be rendered ineffectual…*"之后由于 Entel 在伦敦德意志银行（Deutsche Bank）中还有 50,000,000 美元定期存款，因此 ETI 就想要在英国申请冻结令，冻结这些资产。

在本章上一段中已经提到了在《Arbitration Act 1996》或是没有生效的《Arbitration (International Investment Disputes) Act 1966》下，英国法院没有权力作出冻结令等中间禁令针对投资仲裁予以支持。因此 ETI 看来只能依赖《Senior Courts Act 1981》之 Section 37 下法院一般与广泛的权力了。同时由于此先例中无论是纽约法院程序、还是投资仲裁程序都并非英国本土的诉讼程序，因此 ETI 需要依赖了前文中提及的 CJJA 1982 之 Section 25 以及 1997 Order。这里的争议焦点就是 CJJA 1982 或 1997 Order 中的外国诉讼"程序"（Proceedings），是否包括投资仲裁或是之后的纽约法院程序呢？

首先针对仲裁，上诉庭判法是 CJJA 1982 或 1997 Order 中所指的"程序"不包括仲裁程序，仲裁程序将另行针对[61]："*I am satisfied that it is plain that arbitral proceedings are not 'proceedings' for the purposes of the 1997 Order. The 'proceedings' referred to in sections 25(3)(a) and (b) were not intended to refer and did not refer to arbitration proceedings since these were specifically dealt with in section 25(3)(c). Sections 25(3) (a) and (b) referred to court proceedings which were not then within the ambit of section 25 either because of their forum or their subject matter. It could not have been intended in 1982 to include arbitration in section 25(3)(b) if an entirely separate sub-section (section 25(3)(c)) was devoted expressly to arbitration. In addition, the operation of section 25(5) , dealing with the repeal of part of the Arbitration Act 1950 , was limited to section 25(3)(c) , and it is plain that arbitration was intended to be treated separately under section 25(3)(c) and 25(5) and not by way of section 25(3)(b) …*"

而对于纽约法院程序，上诉庭也认为不属于 CJJA 1982 或 1997 Order 下的"程序"，因为上诉庭总结说 CJJA 1982 或 1997 Order 所指"程序"是实体程序而非扣押令、冻结令等附属程序，正如 Collins 大法官在总结了过往先例与解释有关立法后说："*I am satisfied that the foreign proceedings to which section 25 and the 1997 Order are referring are* ***proceedings on the substance of the matter****…In my judgment, this ground of appeal fails because on any view the English proceedings are not in aid of, or related to, any substantive proceedings in New York,*

[61] 在 CJJA 1982 中有 Section 25(3)(c)专门针对仲裁，但被《Arbitration Act 1996》之 Schedule 3"废除"（repeal）。之后在 1997 Order 中就没有再加入此条文。在贵族院的判词中也提到："*I have set out above section 25 as originally enacted in 1982. In particular section 25(3) provided that the power to grant interim relief in aid of foreign proceedings could be extended in three ways:… and (3) to arbitration proceedings (section 25(3)(c))…On 31 January 1997, Schedule 3 of the Arbitration Act 1996 came into force. This repealed section 25(3)(c) so as to remove arbitration proceedings from the description of the proceedings to which the power to extend section 25(1) could be applied by Order in Council… As I have said the 1997 Order was made shortly after the Arbitration Act 1996 was passed, and came into effect on 1 April 1997. Because of the repeal of section 25(3)(c) the 1997 Order provides (as amended) for the application of section 25(1) only to two categories of proceedings (a) proceedings commenced or to be commenced otherwise than in a Brussels or Lugano Contracting State or a Judgments Regulation State; and (b) proceedings whose subject matter is not within the scope of the Judgments Regulation as determined by Article 1 of the Judgments Regulation… The reason for the repeal of section 25(3)(c) was that the Arbitration Act 1996 made provision for the grant of interim relief by a court in support of arbitrations by section 44 . By section 2(3) of the 1996 Act, the powers conferred by section 44 applied even if the seat of the arbitration was outside England or if the arbitration had no seat.*"

however liberally those expressions are interpreted. As I have said, the complaint in the SDNY describes the proceedings as an 'an action for an order of attachment in aid of arbitration' and founds jurisdiction and venue on the fact that property belonging to Entel and/or Bolivia was situate in New York. The SDNY attachment proceedings constitute interim relief to protect assets pending the outcome of the ICSID arbitration. ***The New York proceedings are directed solely at assets in New York, and proceedings in England directed at assets in England cannot be ancillary to the New York attachment.***"（加黑部分是笔者的强调）

毕竟纽约法院程序只是为了针对在纽约的资产（在摩根大通的存款），而在英国法院的申请针对的是在伦敦的德意志银行中的存款，扯不上对纽约法院程序有什么支持。

1.5.2.3 英国法院可以支持投资仲裁裁决书的执行

当然，在本章之 1.5.1.3 段也已经提到了如果是对生效仲裁裁决书的执行（execution）程序，由于本质上已经是法院程序（伦敦或外国仲裁程序已经结束）。对于这英国或外国法院的执行程序，英国法院是可以作出各种中间禁令（例如申请英国法院颁布/作出 CPR Part 72 中的第三方债务命令[Third Party Debt Orders][62]）予以支持的，这也包括了对已生效投资仲裁裁决书的执行程序：见 Kensington International Ltd v. Republic of Congo (2007) EWCA Civ 1128 先例。

Kensington International Ltd v. Republic of the Congo 先例涉及一个典型的投资仲裁，原告（Kensington）是一家对诉讼/仲裁提供第三方资助（Third-party unding）的金融机构，作为受让人（assignee）买下了败诉的刚果政府欠下的"主权国家判决债务"（sovereign judgment debts）的债权，金额高达 1 亿多美元。原告已经成功取回部分金钱，但仍需要继续努力追讨剩下的金钱。其中一个手段是在瑞士日内瓦法院，申请向一家瑞士企业（名为 Vitol 的能源集团）颁布/作出第三方债务扣押令，扣押 Vitol 欠下刚果政府的债务（interim attachment of debts owe by Vitol to Congo）。

之后原告从市场上听说了 Vitol 的伦敦分公司刚与刚果政府有安排，分别通过 Vitol 租用的"New Vision"轮与"Elizabeth Angelikossi"轮从刚果出口石油。原告就单方面（*ex parte*）在英国法院申请禁止 Vitol 向刚果政府支付任何有关这两笔货物的金钱，同时申请"第三方披露令"（Norwich Pharmacal Order）要求作为第三方的 Vitol 提供一些刚果政府资产的信息。Vitol 质疑英国法院是否有管辖权颁布/作出这种命令，但被高院与上诉庭否定。

高院与上诉庭均指出，在立法（CJJA 1982 与 1997 Order）下为了支持与协助欧盟与其他外国法院的实质程序（substantive proceedings），英国法院有权力作出此类命令。而类似英国 CPR Part 72 下执行判决债务的"第三方判决债务命令"（Third-Party Judgment Debt Orders）是英国法院的实质程序。当然在这一个先例中作为对瑞士法院的支持与协助，而不是重复瑞士法院的第三方债务扣押令，就需要两者的救济相配合。只要查明瑞士的法律，英国法院作出的命令并非重复与/或有矛盾，那么无论英国法律最终做出的命令是第三方债权

[62] 有关第三方债务命令的课题可见《仲裁法——从开庭审理到裁决书的作出与执行》（2010 年）一书第十四章之 8.3 段。

命令或是冻结令等形式，都是立法针对的为了支持与协助瑞士法院的实质程序。在上诉庭的判决中，Moore-Bick 大法官说：

"Section 25 of the Civil Jurisdiction and Judgments Act 1982 gives the court power to grant interim relief in support of substantive proceedings in other jurisdictions. In deciding the proper scope of any interim relief it is necessary, therefore, to have regard to the nature of the substantive proceedings and their possible outcome if one is to ensure that an order made in this country will be effective to achieve its purpose. … that the principle which underpins section 25 is that the court should be willing to assist the courts of other jurisdictions by providing such interim relief as would be available if it were itself seised of the substantive proceedings. It follows … that the first of the two principles proceed on the assumption that substantive proceedings of the same kind leading to the same potential outcome are pending in this country. Mr Gruder's （原告） argument assumes that the substantive proceedings are an application for a third party debt order under CPR Pt 72 , but they are not, and it may be the case that the eventual outcome of the proceedings in Geneva will not be the same in all respects as that of an application under Part 72 . It may also be the case that the scope of the interim attachment order already made in those proceedings is more extensive than the relief that it would normally be appropriate to grant in support of an application for a third party debt order in this country….

These and other issues fall to be resolved in the Swiss proceedings. It is sufficient for present purposes, as the judge observed, that it is at least arguable that contracts for the purchase of oil which provide for prepayments of part of the price, even if only at the request of the Congo, are capable of giving rise to obligations which fall within the scope of the interim attachment order and of any final attachment order that may be made in due course. That being so, it is necessary for the interim relief granted in this country to be no less extensive, if it is to provide effective support for the proceedings in Geneva. That was the basis on which the judge reached his decision and in my view he was clearly right. "

1.6 "单方面"（*ex parte*/without notice）申请冻结令

1.6.1 申请中间禁令/命令的一般规则

冻结令（Freezing Orders）是一种中间禁令/命令（interlocutory/interim injunctions/orders）。所谓"中间"，是指这个命令并非永久性，而是持续到实质争议的最后判决（judgment）或裁决（award）。所谓的"禁令"（injunction）在英国《民事诉讼规则》（Civil Procedure Rules，或简称 CPR）之 Rule 2.2(1)有解释或定义："*A court order prohibiting a person from doing something or requiring a person to do something*."

如果没有严格遵守法院的禁令/命令，就可能带来藐视法院（Contempt of Court）的后果。藐视法院是刑事罪行，在法治社会对一般商业人士有很大的阻吓力。因此法院一旦颁布/作出禁令/命令，也一般会被严格遵守。即使被申请人有了极大困难无法严格遵守命令，也不能自说自话，以是否合理作为自己是否严格遵守命令的判断标准。被申请人必须先向法院作

出申请并获得法院的同意更改（或撤销）该禁令/命令的部分或全部内容，否则无论有多不不情愿或有多大的困难，被申请人都必须严格遵守，要不然就有藐视法院的危险。

向法院申请禁令/命令的一般规则或做法（general rule）是必须通知（with notice）另一方当事人（other parties）或被申请人：见 CPR rule 34.1(1)，这才是公平合理的做法。只有两种情况下才有例外：

（1）在十分紧急的情况中没有时间通知被申请人。此时除非还额外涉及了机密性问题，否则仍要向被申请人作出非正式（informal）的临时通知：见 CPR 之 Practice Direction（"PD"）23A Paragraph 4。

（2）通知被申请人会带来禁令/命令的申请失去意义（defeat the purpose of the injunction）的风险。例如在冻结令（或搜查令）生效前，被申请人就可能导致资产流失（或毁灭证据）。

1.6.2 单方面申请的危险与不公平之处

实践做法中的冻结令的申请往往是"单方面"（*ex parte*/without notice）作出。单方面申请禁令对被申请人/被告极为不利，存在严重不公平之处。对法官（或仲裁员）而言，也是极不愿意只听"一面之词"就作出重要决定，这样的决定也有很高的危险是错误的。在 L v. K (2013) EWHC 1735 (Fam)先例中 Mostyn 大法官的说法是这种单方面申请是"*violation of the elementary rule of natural justice and alteram partem*"（违背基本的自然公正与"兼听原则"[*alteram partem*]），同时 Mostyn 大法官还引用了 Hoffmann 勋爵在 National Commercial Bank Jamaica Ltd v. Olint Corp Ltd (Jamaica) (2009) UKPC 16 先例中的说法，不妨节录如下：

"*First, there appears to have been no reason why the application for an injunction should have been made ex parte, or at any rate, without some notice to the bank. Although the matter is in the end one for the discretion of the judge,* ***audi alterem partem is a salutary and important principle****. Their Lordships therefore consider that* ***a judge should not entertain an application of which no notice has been given unless either giving notice would enable the defendant to take steps to defeat the purpose of the injunction*** *(as in the case of a Mareva or Anton Piller order)* ***or there has been literally no time to give notice*** *before the injunction is required to prevent the threatened wrongful act. These two alternative conditions are reflected in rule 17.4(4) of the Civil Procedure Rules 2002. Their Lordships would expect cases in the latter category to be rare, because* ***even in cases in which there was no time to give the period of notice*** *required by the rules, there will usually be no reason why* ***the applicant should not have given shorter notice or even made a telephone call. Any notice is better than none.***"（加黑部分是笔者的强调）

即一般情况下禁令的申请都不应该是单方面，而应该通知被申请人。毕竟兼听原则是重要的"自然公正"（Natural Justice）或"正当程序"（Due Process）的一部分，只有在特殊情况下（例如本书第二章之 3 段介绍的搜查令）才能够给予例外。这些特殊情况就包括一旦给予通知，被申请人就会采取行动，导致禁令即使被成功申请也无法达到目的。例如是针对银行账户，被申请人可能一个电话就能将银行账户内的资金转移，还没有成功申请到禁令，就已

经没有申请的必要了。另一个特殊情况是在时间过于紧迫只能先向法院申请，但这种情况是很少出现的，毕竟绝大部分情况下往往都会有给予被申请人一个很简短的通知（即使是口头、电话通知）的时间。即使是在紧急申请（例如是在下班后的申请）中，法院仍然会尽可能要求通知对方，例如通过电话会议兼听双方的观点后再作出决定[63]。

类似的说法也被 Mostyn 大法官在几个家事法（family law）先例中作出陈述，不妨列举如下：

- 在 EZ v. SZ (2011) 1 FLR 64 先例中说："*It is worth my expressing the view that in the short term that I have been sitting as a full time judge I have been shocked at the volume of spurious ex parte applications that are made in the urgent applications list.* ***It is an absolutely elementary tenet of English law that save in an emergency a court should hear both sides before giving a ruling.*** *The only recognised exception to this rule (apart from those instances where an ex parte procedure is specifically authorised by statute) is where there is a well founded belief that the giving of notice would lead to irretrievable prejudice being caused to the applicant for relief.* ***I have the distinct impression that a sort of lazy, laissez-faire practice or syndrome has grown up which says that provided the return date is soon, and provided that the court is satisfied that no material prejudice will be caused to the respondent, then there is no harm in making the order ex parte. In my opinion this is absolutely wrong and turns principle on its head.***"（加黑部分是笔者的强调）

- 在 ND v. KP (2011) 2 FLR 662 先例中说："***As a matter of principle no order should be made in civil proceedings without notice to the other side unless there is very good reason for departing from the general rule that notice must be given,*** *for example, where to give notice might defeat the ends of justice. To grant an interim remedy in the form of an injunction without notice 'is to grant an exceptional remedy': the authority for that is Moat Housing Group-South Limited v. Harris [2006] QB 606 .*"（加黑部分是笔者的强调）

- 在 L v. K 先例中所说："*That an application for a freezing injunction might be made without notice* ***only*** *where there was exceptional or it was essential to the effectiveness of the order sought that the respondent should not be made aware of the application, or some other circumstance stipulated in paragraph 5.1 of Practice Directions 18A supplementing FPR Pt 18 applied, and that* ***even in case of exceptional urgency, short informal notice should be given to the respondent unless it was essential that he should not be made aware of the application.***"（加黑部分是笔者的强调）

[63] 在 CPR PD 25A Para 4.2 规定："*Urgent applications and applications without notice… 4.2 4.2 These applications are normally dealt with at a court hearing but cases of extreme urgency may be dealt with by telephone.*"

1.6.3 临时通知

已经多次提到，只有在有限的情况下（尤其是如果事先通知对方就会造成禁令无法实现申请目的时），才允许单方面申请冻结令。在 National Commercial Bank Jamaica Ltd v. Olint Corp Ltd (Jamaica) (2009) UKPC 16 先例中，Hoffmann 勋爵提到了在单方面申请中，除非通知对方会导致冻结令等禁令失去意义（在冻结令中，就要看冻结令针对的资产包括哪些），否则要尽可能给被申请人以"临时通知"（short notice），以防止单方面申请会造成不公平。这在一些近期先例中被 Tugendhat 大法官强调：

（1）在 O'Farrell v. O'Farrell (2013) 1 FLR 77 先例中说："*Like Mostyn J, I* ***too have been shocked at the volume of spurious ex-parte applications that are made in the Queens Bench Division.*** *The number of occasions on which CPR Part 25.2 and CPR 15.3(1) and (3) and PD 25A para 4(3) are flouted is a matter of real concern.* ***In these days of mobile phones and emails it is almost always possible to give at least informal notice of an application.*** *And it is equally almost always possible for the Judge hearing such an application to communicate with the intended defendant or respondent, either in a three way telephone call, or by a series of calls, or exchanges of e-mail. Judges do this routinely, including when on out of hours duty.* ***Cases where no notice is required for reasons given in PD 25A para 4.3(3) ['where secrecy is essential'] are very rare indeed*** *… The giving of informal notice of an urgent application is not only an elementary requirement of justice. It may also result in a saving of costs. The parties may agree an order, thereby rendering unnecessary a second hearing on a return date.*"（加黑部分是笔者的强调）

（2）在 AB v. Barristers Benevolent Association Ltd (2011) EWHC 3413 (QB)先例中说："*I have prepared this judgment in accordance with what is now the usual practice in such case. It may also serve the purpose of* ***reminding practitioners of the importance of giving notice, however late, of any application by telephone to the Judge on duty out of hours. In these days of mobile phones and emails it is almost always possible to do this. And it is equally almost always possible for the Judge to communicate with the intended defendant or respondent, either in a three way telephone call, or by a series of calls, or exchanges of e-mail. Cases where no notice is required for reasons given in PD 25A para 4.3(3) are very rare indeed.***"（加黑部分是笔者的强调）

在上述这两个先例中，由于 AB v. Barristers Benevolent Association Ltd 先例涉及的是保护机密性的禁令而并非冻结令，因此不在此多作介绍。而 O'Farrell v. O'Farrell 先例涉及的是家事争议中的冻结令，可以作为例子在此简单介绍。一对夫妻（丈夫一位是英国军人，妻子是德国人）在德国离婚，法院已经作出判决，前夫需要赡养前妻与女儿。但前夫只支付了赡养女儿的费用。因此前妻在英国委任律师要求在英国执行德国的判决，并单方面（*ex parte*）或无通知（without notice）申请冻结令，要求冻结前夫由于即将退伍会获得的金钱。

英国法院的 Tugendhat 大法官十分不满意作为申请人的前妻没有通知前夫的做法，因为在申请冻结令时，明知道距离他退伍还有一段时间，他也不大可能之前就先拿到这笔钱，因此没理由不给正式通知让前夫有出庭抗辩的机会。Tugendhat 大法官说：

"*No reason is given by Mr Reid*（前妻的代表律师，申请冻结令的誓章是由他作出）*in the affidavit dated 27 July 2011 for the application being without notice. He states that it was on 11 July 2011 that he had learnt that Mr O'Farrell's discharge was due on 31 July, but the application was not made until 27 July. Even if there may have been a reason for that delay, the only reference by Mr Reid to the hearing being without notice is in paragraph 20 of his affidavit. That reads as follows:*

'The Applicant believes that this application should be heard in private and without notice because if the Respondent was told that the application was to be made he would do his best to dispose of, conceal or dissipate his assets before being formally notified of or served with an injunction'

However, the only asset of Mr O'Farrell which is identified in the affidavit is the payment to be made upon discharge from the army. Since he was due to be discharged on 31 July, as stated in the affidavit, and since nothing in the affidavit suggests that there was any likelihood of him being paid that money earlier than 31 July, it is difficult to follow on what basis Mr Reid deposed that there was a real fear of that asset being dissipated or disposed of if Mr O'Farrell was given notice in advance of the application for the Freezing Injunction.

Whether it would have been possible to give informal notice in the present case is not known. No attempt was made."

另外，在本章之 1.7.4.3 段会介绍的 Yves Charles Edgar Bouvier v. Accent Delight International Ltd (2015) SGCA 45 新加坡上诉庭先例中，Sundaresh Menan 首席大法官提到了 4 个撤销（discharge/dismiss/set aside）冻结令与资产披露令的理由，在其中（第二个理由）也批评了申请人在非必须的情况下单方面作出申请，不通知被申请人的做法。

1.6.4 建议严惩对单方面申请冻结令的滥用

但是在现实中，笔者所见过的冻结令申请都是单方面（*ex parte*/without notice）的。毕竟在商贸社会中，大部分冻结令要针对的是很容易被被申请人处置（dispose）与导致流失（dissipate）的资产，例如是银行存款、股票，或者针对泛泛的任何资产（any assets）。即使是针对不像银行的存款这么容易处置与流失的资产，例如付运的机器（见 Rasu v. Pertamina [1977] 2 Lloyd's Rep 397 先例）；保险的赔付（见 The "Siskina" [1978] 1 Lloyd's Rep 1; TDK Tape Distributor [UK] Ltd v. Videochoice Ltd [1986] 1 WLR 141 等先例）；房产买卖的款项（见 Barclay-Johnson v. Yuill [1980] 1 WLR 1259 先例）；汇票（见 Nova [Jersey] Knit Ltd v. Kammgarn Spinneret GmbH [1977] 1 WLR 713; Montecchi v. Shimco [UK] Ltd [1979] 1 WLR 1180 等先例）；船舶（涉及并非海事索赔，不能通过扣船进行财产保全，就要依赖冻结令了，见 The "Rena K" [1978] 1 Lloyd's Rep 545 先例）；飞机（见 Allen v. Jambo Holdings [1980] 1 WLR 1252 先例）等，看来冻结令的申请也大都是单方面的。

在 Thane Investments Ltd v. Tomlinson (2003) EWCA Civ 1272 先例，上诉庭也对这种经常不通知被申请人，也没有根据 CPR PD 25A para. 3.4 对为什么单方面申请作出解释的情况有不

满。Evans 大法官说如果这是常见的做法，法院应该推动改变这种做法：

"*Counsel says that it is normal practice to apply ex parte for an order of this sort, and he said also that it is common for notice to be given. I am sure that may be right – I do not suggest that it is not – because the very nature of a freezing order ... is that it may be necessary to apply without notice, hence the importance of paragraph 3.4 of the Practice Directions, which requires an explanation of the reason why no notice has been given in the particular case. I would be very surprised to hear that it is common or normal practice to make an application without notice and at the same time to disregard the rules which expressly cover that very situation.* ***If that is common, and it appears to have happened here, then I sincerely hope that this judgment will do something to bring that practice to an end.***"（加黑部分是笔者的强调）

Belair LLC v. Basel LLC (2009) EWHC 725 (Comm)先例是比较罕见的在临时通知（short notice）了被申请人的情况下申请的冻结令，冻结令针对的资产是（格鲁吉亚前总统府的）土地，但这看来也没有对采取这种比较公平做法的申请人带来什么好处。Blair 大法官说：

"*The Claimant suggested in argument that the duty of full and frank disclosure was in some way reduced in this case because notice of the application (albeit short notice) was given to the Respondent. I reject that suggestion. It is true that the duty to make full and frank disclosure when applying for a freezing order arises in part because the application is normally without notice (on the basis that notice would increase the asserted risk of dissipation of assets). But as the authorities show, the duty is also of fundamental importance because of the drastic effect that such an order can have on the party against which it is made. The fact that a few days advance notice may be given does not necessarily make any difference…*"

可以说对申请人而言，特别是想对被申请人施加压力并取得好处的时候，单方面申请冻结令与资产披露令的诱惑（temptation）实在太大。现实中采取这样的行动后，产生引爆"原子弹"的效果，被申请人（好像二战中的日本一样）无条件投降的情况经常有听闻。所以申请人不会想在申请前通知被申请人，由于有被申请人的抗辩导致申请失败的后果。看来如果英国法院将来想减少对冻结令的滥用（abuse），必须更严厉地对待明明可以通知但没有通知的情况，例如事后作出严格惩罚与撤销冻结令。

这方面可节录笔者在大连海事大学出版的《船舶买卖法律与实务》（2004 年）一书，其中不少有篇幅谈到了这个问题，只节录部分内容（259-261 页）如下：

§12. 总结之四：申请冻结命令/禁令能否去单方面以"一面之词"申请？

单方面以"一面之词"（ex parte）申请命令/禁令经常会造成不公平，因为被告没有申辩机会已被法官做出命令/禁令而马上会造成困难/危机。所以，法院对此做法十分小心严格，只会在 In re First Express Ltd. (Oct. 8, 1991, The Times Law Report)所讲的情况下允许：

"It was a basic principle of justice that an order should not be made against a party without

giving him an opportunity to be heard.[64] *The only exception was when two conditions were satisfied*[65]*:*

First, that giving such an opportunity appeared likely to cause the applicant injustice, by reason either of delay or action which it appeared likely the respondent or others would take before the order could be made.[66]

Second, when damage to the respondent was compensatable under a cross-undertaking or when the risk of uncompensatable loss was clearly outweighed by the risk of injustice to the applicant if the order were not made.[67]*"*

一般的 Mareva 禁令是对付被告的银行户口/账号内的钱，这种申请是要单方面以一面之词进行，偷偷地别让被告知悉，是毫无疑问恰当与必须的。但二手船买卖的买方申请一个 Mareva 禁令对付即将支付的船价，即使有诉因支持，也存在一个争议是这种申请何必要单方面（ex parte）进行，何不双方都可争辩（inter parte），然后法官才下决定是否下令冻结这笔将付的船价与冻结金额多少？

照说，买方通知卖方有关申请 Mareva 禁令不应有所恐惧，船价在买方手中仍未支付给卖方，绝对走不了。再说买方若真有一个"表面良好论据案件"（a good arguable case），是"真金不怕火炼"，何不在交船前迫卖方面对，看看他有什么或可去反驳。正如 Evans 大法官在 The "P" (1992) 1 Lloyd's Rep 470 所说：

"… the plaintiffs had nothing to lose by giving advance notice. It was even to their advantage to have this issue, if it was to be raised, decided before delivery took place."

说不定，卖方会心虚，在 inter parte 下去做出让步，例如与买方同意一笔赔偿金额或交船前进行修理/补救。

至于买方提出的理由去支持单方面行动，在法律都站不住脚，如卖方若知道买方在设法冻结大部分或全数的船价（这不是不可能，因为一艘老船卖不了几个钱，但这要修理，费用会比新船更贵。再加上船期损失与一定程度对损失估计的夸大，索赔金额比船价高也不奇怪），会不惜毁约（repudiation）去拒绝交船。但买方想接船，市场在涨，所以要偷偷申请。

所以，在好几个介绍的先例，买方以"一面之词"单方面去申请交船前的 Mareva 禁令/冻结令都被大力批评：The "Assios" (1979) 1 Lloyd's Rep 331; The "Niedersachsen" (1983) 2 Lloyd's Rep 600; The "Great Marine" Rep (No.1) (1990) 2 Lloyd's Rep 245; The "Veracruz 1" (1992) 1 Lloyd's Rep 353; The "P" (1992) 1 Lloyd's Rep 470; The "World Horizon" (1993) 2 Lloyd's Rep 56 等。而且，这个做法会被卖方稍后去作为理由申请撤销 Mareva 禁令：The "Veracruz 1" 先例

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64 基本公平原则是：如果事前没有给一方当事人一个申辩的机会，不要去对他下命令。

65 唯一例外是以下两个条件有符合/被满足：

66 一是给了这个申辩机会是可能对申请人造成不公平，因为被告或其他人在命令仍未做出前很可能去延误或采取一些逃避行动。（例如在冻结令/Mareva 禁令仍未做出前把银行的存款汇走/取走。）

67 二是若对被告造成损失，有"交叉保证"去赔偿反索赔损失：这方面情况可见《禁令》一书第四章之 6.2.3.1 小段。

（此先例中申请人在申请时没有诉因）。

但笔者有一个疑问，是所有上述先例没有提到，但它会构成以 inter parte 而不是 ex parte 申请 Mareva 禁令的潜在危险。就是，卖方若知道买方在申请 Mareva 禁令，但法院仍未下命令/禁令，卖方先一步去安排与发出"转让"（assignment）通知，把这笔即将支付的船价转让给第三方（如他的银行）。当然这也不是太容易去"瞒天过海"，因为随便去找一个第三方（例如是集团的母公司）转让这笔船价，但说不出什么理由要去转让，会在本章之 3.3 小段谈的 "Chabra 类型管辖权"（TSB Private Bank International SA v. Chabra [1992] 1 WLR 231）下被法院去扩大 Mareva 禁令，把集团的母公司会受让船价的户口/账号也去冻结起来，理由是母公司只是以"信托人"（trustee）或"代名人"（nominee）为卖方去拥有这些财产。甚至是，由于看来母公司（共同被告）参与卖方（原被告）去避债，法院会下令去冻结母公司所有的财产（general assets），不去区分是否为卖方信托。

1.6.5 "Persons Unknown"或不知名被告

由于今天欺诈横行（例如是电话、网络诈骗），很难知道谁是骗子，一旦金钱被汇出，但事后发现是存在欺诈，最重要的就是如何追回这笔金钱。会想到的一个办法就是通过单方面（*ex parte*）或无通知（without notice）申请冻结令（Freezing Orders），甚至是全球冻结令（WFO）冻结收款银行账户，并希望收款账户内的钱还没有被转走。另一个需要同时进行的就是要求收款银行披露收款账户的具体资料，包括收款人的真实姓名等，这就涉及本书第二章之 4 段介绍的第三方披露令（Norwich Pharmacal Orders）。另外如果这笔金钱已经从收款账户中转走，还需要要求收款银行提供金钱去向的信息，以便继续追踪（trace）这笔金钱，这就涉及本书第二章之 4.8 段介绍的"Bankers Trust Order"。

但是刚刚提到的这些一连串行动都会面临的问题是，不知道骗子的真实身份，也就是无法确认谁是真正的被申请人。毕竟即使单方面申请这一个独立程序，仍有必要知道与说明针对的被申请人是谁。早在 Iveson v. Harris (1802) 7 Ves 251 先例，Eldon 勋爵就说禁令只是用来针对诉讼中的（对方）当事人："*… you cannot have an injunction except against a party to the suit*"。而刚刚提到的这些命令在今天虽然都是独立（freestanding）程序（冻结令在本章之 1.5.1 段介绍了属于独立程序，第三方披露令[Bankers Trust Order 属于第三方披露令的一种]在今天属于实质诉讼），但也需要知道谁是被告才能开始法院程序（然后再将银行[如果知道是谁]或其他第三方加入作为共同被告）。当然开始这些程序的真正目的都是为了针对银行账户内的金钱（例如在冻结令下，银行无论是否属于被告都不能允许转走这笔金钱），而不是为了针对骗子本身，也不关心谁是骗子。

在 CPR Rule 55.6 中提到，针对"非法侵入土地者"（trespassers），有将"Persons Unknown"作为被告的做法："*Where, in a possession claim against trespassers, the claim has been issued against 'persons unknown'…*"这样土地产权人可以无须明确是谁侵入土地，任何侵入土地的人都会违反法院命令，以广泛地保护自己在土地上的权益：见 Hampshire Waste Service v. Persons Unknown (2003) EWHC 1738 (Ch)与 Jockey Club Racecourses Ltd v. Persons Unknown (2018) EWHC 3234 (Ch)[68]先例。而在今天有做法将这种办法应用在冻结令：见 CMOC v. Persons

[68] 在 Jockey Club Racecourses Ltd V Persons Unknown (2018) EWHC 3234 (Ch)先例，涉及一个中间禁令。原告

Unknown (2017) EWHC 3599 (Comm)先例[69]，以及应用在第三方披露令中：见 Lockton Companies International v. Persons Unknown (2009) EWHC 3423 (QB)先例。

近年来电话诈骗、电子网络犯罪越来越猖獗，例如电话冒充公安、海关诈骗，或是入侵电脑系统获得资料后勒索事主并得手等。事后受害人（甚至有关政府当局）想要在国际上追回这笔钱，就会涉及全球冻结令。而由于不知道骗子真正的身份，就只能针对"Persons Unknwon"。这正因为受害人的需求，这方面的管辖权完善得很快：见 PML v. Person(s) Unknown (2018) EWHC 838 (QB); Clarkson Plc v Person or Persons Unknown (2018) EWHC 417 (QB)等先例。

要对"Persons Unknwon"开始法院程序并获取冻结令等法院命令，需要满足的一个重要门槛就是法院对案件有对人管辖权（*in personam* jurisdiction）。在 CMOC v. Persons Unknown 先例中，由于欺诈行为的损失是在英国伦敦，因此英国法院可以有管辖权。无论欺诈事件是发生在世界上什么地方，一般而言要跨越英国管辖权的门槛，就需要依赖证据证明虽然不明确被告是谁，但结合具体案件的案情来看，法院会对被告有管辖权，例如骗子很可能来自英国。

在成功申请了针对"Persons Unknwon"的冻结令后，还涉及了怎样送达（service）的问题。虽然可以猜到这些人士不会在法院规定的时间出庭抗拒冻结令，但程序上还是必须送达冻结令。针对这方面的困难，HHJ Waksman QC 大法官在 CMOC v Persons Unknown (2018) EWHC 2230 (Comm)先例中说可以采用法院根据每一个案件不同情况批准的替代送达方式（例如电邮、Facebook 平台、微信平台等）[70]，说：

"***Service by Facebook Messenger and Whatsapp Messenger platforms***

These days it is not uncommon where alternative modes of service are justified to find examples of service by posting the relevant materials on a public Facebook platform. But here what was used was the Facebook Messenger service, which is a private service channel. In addition, on 11 May 2018, Mr Justice Knowles permitted service by WhatsApp messenger. This has had the particular virtue that the service will show the sender of the message when the message has been sent by the addressee and when it has been read by the addressee. As the judge noted on that occasion, he was not setting any precedent, but the short point, in my view, is that the court will consider proactively different forms of alternative service where they can be justified in the particular case.

Service by access to data room

As the amount of material in this case expanded, but given that alternative service by email had often been granted, the question then arose as to the most convenient way of serving banks,

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赛马会指称在它所拥有的地方进行黄牛活动是非法入侵土地，要求法院作出禁令，以打击黄牛活动。该中间禁令在 2019 年 4 月变为永久禁令。

[69] 有关 CMOC v. Persons Unknown (2017) EWHC 3599 (Comm)先例的案情可见本章之 1.12.5 段介绍的同系列的 CMOC v Persons Unknown (2018) EWHC 2230 (Comm)先例。

[70] 这方面也可见本书第八章之 3.3.3.1 段。

and later named defendants as they were joined, with all the background evidence that had been deployed in obtaining the various interlocutory orders. CMOC proposed a system for the defendants, which I approved, which involved sending the relevant party by a previously approved Court method (e.g. email or hard copy) a link to a data room, and by a separate email, an access code to the data room. If the code was used, it would enable the user to view all of the evidence thus far adduced together with all applications and orders made. Processes were adopted which required CMOC first to serve each defendant by another Court approved method before it could serve by data room. For the banks, CMOC was not required first to serve them by another Court approved method before it could serve by data room. One cannot tell the extent of the access since the named defendants have not engaged substantively with the litigation, but certainly, as reported to me and as set out in the evidence, banks around the world which have been joined as no cause of action defendants, for the purpose of supplying information, have found this a most useful facility and have not required service of all of the underlying documents by hard copy or email only.

That is certainly an innovative feature of this litigation. As with other forms of alternative service, it can clearly be justified and appropriate in such cases."

1.6.6 针对第三方的冻结令

本章上一段中介绍了针对不知名（Persons Unknown）被申请人的冻结令，也简单提到了有情况需要针对第三方颁布/作出冻结令或加入为共同被告（co-defendants）。这一个课题在本章之 1.7.3.3 段有关 "针对第三方名下资产的 Chabra Jurisdiction"有详尽介绍，在这里只介绍一下一般性的概念。

在仍没有冻结令管辖（Mareva jurisdiction）的时候，就已有申请人申请禁令阻止第三方（third party）协助原禁令被申请人违反原禁令的做法：见 Bullus v. Bullus (1910) 102 LT 399; Hubbard v. Woodfield (1913) 57 SJ 729 等先例。当然，两个命令有不同针对，所以措辞/文字会有所不同。

在冻结令中，通常要针对第三方的做法，是在冻结令中将第三方列为共同被申请人：见 SCF Finance Co v. Masri (1985) 1 WLR 876; Allied Arab Bank v. Hajjar (1988) QB 787; TSB Private Bank International SA v. Chabra (1992) 1 WLR 231; Mercantile Group (Europe) AG v. Aiyela (1994) QB 366; C Inc v. L (2001) 2 Lloyd's Rep 459; JSC BTA Bank v. Ablyazov (2014) EWCA Civ 602 等先例。很多先例中，第一被申请人（或被告）涉嫌把资产隐藏在家人（特别是配偶）名下，所以有必要把配偶的资产（中的有关部分）也冻结起来。需要这样做的原因在 Cardile v. LED Builders Pty Ltd (1999) HCA 18 澳大利亚联邦法院先例中有很好的解释：

"*... although having no vested or accrued cause of action against the third party, may become entitled to have recourse to the third party or his assets to meet his debt, and there is a danger that the third party will send his assets abroad or otherwise dispose of them*."

加入第三方作为被申请人的原则与做法在 SCF Finance Co v. Masri 上诉庭先例中，Lloyd

大法官有提到说：

" (i) Where a plaintiff invites the court to include within the scope of a Mareva *injunction assets which appear on their face to belong to a third party, e.g. a bank account in the name of a third party, the court should not accede to the invitation without good reason for supposing that the assets are in truth the assets of the defendant.*

(ii) Where the defendant asserts that the assets belong to a third party, the court is not obliged to accept that assertion without inquiry, but may do so depending on the circumstances. The same applies where it is the third party who makes the assertion, on an application to intervene.

(iii) In deciding whether to accept the assertion of a defendant or a third party, without further inquiry, the court will be guided by what is just and convenient, not only between the plaintiff and the defendant, but also between the plaintiff, the defendant and the third party.

(iv) Where the court decides not to accept the assertion without further inquiry, it may order an issue to be tried between the plaintiff and the third party in advance of the main action, or it may order that the issue await the outcome of the main action, again depending in each case on what is just and convenient. …"

在 SCF Finance Co v. Masri 先例中，原告在作出令状/告票（writ）时，同时申请冻结令针对被告（一个约旦人）的伦敦银行账户。但不久发觉被告的公司金钱往来是通过被告妻子名下的账户进行，所以申请将妻子列为第二被申请人。妻子出庭抗辩，声称账户的钱是她自己的，并要求撤销针对自己的冻结令。但一审与上诉庭均拒绝撤销，认为需要进一步的调查与证实。

在较早提到的 Cardile v. LED Builders Pty Ltd 澳大利亚先例中，也提到第三方资产会在一下情况中被一并冻结：

"(i) the third party holds, is using, or has exercised or is exercising a power of disposition over, or is otherwise in possession of, assets, including 'claims and expectancies', of the judgment debtor or potential judgment debtor; or

(ii) some process, ultimately enforceable by the courts, is or may be available to the judgment creditor as a consequence of a judgment against the actual or potential judgment debtor, pursuant to which, whether by appointment of a liquidator, trustee in bankruptcy, receiver or otherwise, the third party may be obliged to disgorge property or otherwise contribute to the funds or property of the judgment debtor to help satisfy the judgment against the judgment debtor."

以上第(ii)段是重点，所以笔者稍作解释。无论是配偶或其他家人或任何第三方，都是独立的个体，如果其资产与被申请人没有关系就不能被包括在冻结令中。这一个"关系"是要申请人能够表面说明如果最终胜诉执行债务判决，通过一切法律渠道，例如法院委任的清

盘人、破产信托人或接管人，可以将这笔第三方名下的特定资产追回来以支付判决债务。

在 Coxton Pty Ltd v. Milne (unreported, 20 Dec 1985 NSW CA) 澳大利亚上诉庭先例中，也提到了申请将冻结令延伸到针对第三方名下资产的 5 点十分重要的原则：

"*Without attempting to define or to limit the extent of the exception, the necessary circumstances will exist when (1) the affairs of a defendant sued by a creditor for an alleged debt and of the third party against whom the injunction is sought are intermingled, (2) the alleged debtor and the disposition of his assets are effectively controlled, de jure or de facto, by the third party, (3) the debtor's assets will be insufficient to meet the debt, (4) the creditor, although having no vested or accrued cause of action against the third party, may become entitled to have recourse to the third party or his assets to meet his debt, and (5) there is a danger that the third party will send his assets abroad or otherwise dispose of them. "*

在 Winter v. Marac Australia (1986) 6 NSWLR 11 澳大利亚先例也提到了上述重要原则中的第(4)点，指出作为申请人/原告必须能够说服法院相信（在单方面申请中，通常是调查取证后，在誓章/誓词[affidavit/affirmation] 中进行说明）将来被申请人败诉后，会可以（例如通过破产信托人或清盘人）直接或间接以该第三方的资产获得支付：

"*It must be shown that the person against whom judgment may be obtained has some right in respect of or control over or other access direct or indirect, to the relevant assets so that they or the proceeds of their sale or other disposition could be required to be applied in discharge of the judgment debt.*"

1.7 申请冻结令的要件指引

在 Third Chandris v. Unimarine SA (1979) 3 WLR 122 上诉庭先例中 Denning 勋爵建立了所谓的"Denning Guidelines"以指引法院面对单方面（*ex parte*/without notice）申请，如何决定是否批准作出冻结令："*Much as I am in favour of the Mareva injunction, it must not be stretched too far lest it be endangered. In endeavouring to set out some guidelines… these are the points which those who apply for it should bear in mind…*"

指引包括 5 个要件，可以先节录如下：

（1）申请人必须对法院有必要知悉的重要事实作出"全面与坦率的披露"（full and frank disclosure）："*The plaintiff should make full and frank disclosure of all matters in his knowledge which are material for the judge to know: see Negocios Del Mar S.A. v. Doric Shipping Corporation S.A. (The Assios) [1979] 1 Lloyd's Rep. 331.*"

（2）申请人要对自己向被申请人索赔的具体情况，包括索赔的理由、实际的金额等作出披露，还要公平地假设被申请人可能存在的抗辩理由与自己的回应："*The plaintiff should give particulars of his claim against the defendant, stating the ground of his claim and the amount thereof, and fairly stating the points made against it by the defendant.*"

（3）申请人要说服法院相信被申请人有资产在英国境内，例如有一个银行户口，虽然申请人是不会知道账户内有多少存款。这是要靠冻结令生效后，有关银行向法院披露与被申请人的资产披露才会知道。例如在著名的 The "Mareva" (1975) 2 Lloyd's Rep 509 先例，在冻结令生效后被银行告知账户只有 3 美元。注意在该先例中 Denning 勋爵作出主要指引时，仍没有全球冻结令（Worldwide Freezing Orders）的做法，全球冻结令是 1990 年的 Babanaft International Co SA v. Bassatne (1990) Ch 13 与 Derby v. Weldon (No. 1) (1990) Ch 48 先例后发展起来的。所以这里的指引要求申请人相信有证据显示被申请人在英国有资产："*The plaintiff should give some grounds for believing that the defendant has assets here… In most cases the plaintiff will not know the extent of the assets. He will only have indications of them. The existence of a bank account in England is enough, whether it is in overdraft or not.*"

（4）申请人必须显示一些为什么相信被申请人在判决或裁决被作出后但被执行前，资产有被转移（remove）、处置（dispose）或流失（dissipate）的风险的依据。仅仅是被申请人/被告是外国人或身处国外是不足够的，否则一家外国公司无论多声名显赫，都可能面临冻结令的困扰，这是不可以接受的。Denning 勋爵接下去指出了有些情况中被申请人作为一家外国公司法人，在公司结构上（主要在透明度与监管方面）存在严重缺陷，例如公司注册地的法律非常宽松以至于申请人无法获知任何具体信息，公司没有经营活动、没有雇员、没有资产，公司没有成员信息、管理机制、资产、收费等信息，无法对该公司执行判决书，根本就是一个空壳子，像爱丽丝梦游仙境中的柴郡猫一样不可捉摸[71]等，导致即使获得了判决或裁决，也无法真正取得胜诉的钱。这就会让法院愿意作出冻结令。当然也会有很多其他例子或理由，但原理是类似的。这也是非常重要的一个指引："*The plaintiff should give some grounds for believing that there is a risk of the assets being removed before the judgment or award is satisfied. The mere fact that the defendant is abroad is not by itself sufficient. No one would wish any reputable foreign company to be plagued with a Mareva injunction simply because it has agreed to London arbitration.*[72] *But there are some foreign companies whose structure invites comment. We often see in this court a corporation which is registered in a country where the company law is so loose that nothing is known about it - where it does no work and has no officers and no assets. Nothing can be found out about the membership, or its control, or its assets, or the charges on them. Judgment cannot be enforced against it. There is no reciprocal enforcement of judgments. It is nothing more than a name grasped from the air, as elusive as the Cheshire Cat. In such cases the very fact of incorporation there gives some ground for believing there is a risk that, if judgment or an award is obtained, it may go unsatisfied. Such registration of such companies may carry many advantages to the individuals who control them, but they may suffer the disadvantage of having a Mareva injunction granted against them… Other grounds may be shown for believing there is a risk. But some such should be shown.*"

（5）申请人必须对一旦错误申请（例如事后冻结令被撤销或最终败诉）所造成的损失提供交叉担保（cross-undertaking），否则法院不会作出冻结令："*The plaintiff must, of course, give an undertaking in damages - in case he fails in his claim or the injunction turns out to be unjustified… and the injunction only granted on it being given, or undertaken to be given.*"

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[71] 例如是一些 BVI、巴拿马、利比里亚、塞普洛斯等国家注册的公司。

[72] Denning 勋爵还提到了"只要同意了伦敦仲裁"（"*it had agreed to London Arbitration*"），但在今天由于本章之 1.5 段介绍的英国法院管辖权扩张，已经无论是英国还是外国诉讼或仲裁，英国法院现在都可以作出冻结令。

在今天来看，Denning 勋爵给出的 5 点要件的指引中有部分细节已经过时，但在框架上仍然对冻结令的申请、颁布/作出与执行非常有帮助，因此将在以下段落针对这 5 项指引的内容逐一介绍。

1.7.1 指引一：全面与坦率的披露

1.7.1.1 申请人代表律师对法院的义务

向法院单方面（*ex parte*）或无通知（without notice）申请冻结令的时候，申请人有义务或责任以绝对善意（utmost good-faith）作出披露。在披露范围上，需要涵盖所有与案件有关的重要（material）事实[73]与法律论据[74]，让法院可以考虑是否适合对（没有抗辩机会的）被申请人颁布/作出冻结令，以及冻结令应是什么内容。

在单方面申请冻结令时，申请人的这个责任显然是必要的。即使申请人向被申请人发出非正式的临时通知（short notice），也仍有这个责任，毕竟临时通知没有给被申请人及其委任的代表律师足够准备对抗的时间：见 Belair LLC v. Basel LLC (2009) EWHC 725 (Comm); CEF Holdings Ltd v. Mundey (2012) EWHC 1524 (QB); Hussain v. Seymour (unreported, 13 March 2014) 等先例。

而多方（*inter partes*）或有通知（with notice）的申请中，申请人就没有这个责任。因为双方完全有时间准备各自的案件以及在法院进行争辩，现实中申请人即使不全面与坦率披露，被申请人也会反驳与/或补充。

英国法院是严格对待这披露要求的。作为对法院的义务，英国律师需要小心谨慎地提出有关案件的全面事实与法律论据，绝对不能讲一半、不讲一半，避实就虚、避重就轻，更不能有误述（misrepresentation），因此通常申请的方式是要求申请人代表律师以誓章/誓词（affidavit / affirmation）的方式[75]作出申请与披露有关文件证据。

申请人或他/她的代表律师以誓章/誓词作出披露是因为在单方面的申请下，必须保障被申请人的利益以及让他/她知道是根据什么原因会向他/她颁布/作出冻结令，让他/她考虑怎样回应，如申请撤销（discharge）冻结令。这在 Siporex Trade SA v. Comdel Commodities Ltd (1986) 2 Lloyd's Rep 428 先例有说：

"*[The applicant] must, for the protection and information of the defendant, summarise his case and the evidence in support of it by an affidavit or affidavits sworn before or immediately after the application.*"

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[73] 申请人代表律师的誓章/誓词中应提供尽量多的文件证据作为附件，如果在时间紧急的情况下无法提供所有文件，申请人会被要求承诺将事后在短时间内呈上/送达所有有关文件。

[74] 包括有关先例、立法等，例如时效、责任限制、适用法、双方已经有与会有的争辩等。

[75] 律师作出誓章/誓词，如果在事后发现其中陈述有问题的话，律师也会被要求承担费用、纪律处分、藐视法院罪名等惩罚：见 TDK Tape Distributor (UK) Ltd v. Videochoice Ltd (1986) 1 WLR 141 等先例。这课题在本章之 1.7.1.7.2 段有详论。

在 CPR 下，申请冻结令（或搜查令）一定要以誓章/誓词支持，而不可以使用证人证言（witness statement）[76]：见 CPR PD 25A para. 3.1 与 Thane Investments Ltd v. Tomlinson (2003) EWCA Civ 1272 先例。在 Thane Investments Ltd v. Tomlinson 先例，申请人使用证人证言被法院认为是不足够，等于是没有证据支持这一个申请。绝大部分冻结令申请的誓章/誓词都是由申请人的代表律师作出的，因为已经提到冻结令是一种“核武器”，律师作为“法院的官员”（officer of the court）作出的誓章/誓词应该能提高被法院取信的机会。但作出誓章/誓词的人士在誓章/誓词中提到的所有内容都必须是他/她知道或相信的，如果是传闻证据，就必须指出信息的来源。曾经有争议是是否可以在誓章/誓词中包括二手传闻证据（second hand hearsay evidence），现在在 Deutsche Ruckversicherung AG v. Walbrook Insurance Co (1995) 1 WLR 1017 先例中已经明确只要写明来源是可以包括二手传闻证据的。但在比较罕见的例子中誓章/誓词会是客户自己/公司内知情的人士作出，因为事实真实与否只有他/她知道（例如他/她个人的想法）并且富有争议。这可节录 Steven Gee QC 的《Commercial Injunctions》一书之 8-021 段，如下：

“*Where the evidence lies within the personal knowledge of a party and in contentious it is appropriate that the affidavit is made by that person and not deposed to by a solicitor acting on information and belief based on what he has been told by his client. For example, a defendant to allegations of dishonesty who seeks to persuade the court not to continue freezing relief based on his account of contentious matters should make the affidavit personally.*[77] *The reason is that the individual should be prepared to take personal responsibility for its accuracy. This goes to the weight which should be given to the evidence.*”

在冻结令作出后，如果申请人有任何遗漏或讲错的事实需要去向法院补充或更改，或者事实上有一些新的发展，也是要以誓章/誓词的形式。

已经提到英国律师是法院的官员，所以在法律上他/她有一个很大的责任（比保护客户利益更大）去作出全面与坦率的披露。正如在 O’Regan v. Iambic Productions (1989) 139 NLJ 1378 先例，Sir Peter Pain 大法官说：

“*I find [the solicitor’s] attitude very disappointing coming from a solicitor. I could understand a litigant in person not familiar with the procedure adopting [that altitude] … but [the person in question] is a solicitor and an officer of the court. If the Anton Piller (*冻结令也是同样地位*) jurisdiction is to work at all, the court must rely on its officers to be very careful and lean over backwards to make sure there is full disclosure, especially if it is to the client’s disadvantage … The point is that it is the duty of the solicitor to apprise the court of the facts so that there is full disclosure at the hearing of the application.*”

要求代表律师以誓章/誓词方式作出全面与坦率的披露，也自然强加给代表律师责任，需要在向法院作出申请前先对案件进行询问（inquires）并掌握案件的全貌：见 Brink's Mat Ltd v. Elcombe (1988) 1 WLR 1350; Kuwait Oil Tanker Co SAK v. Al Bader (No.1) (unreported, CA, 27

[76] 形式上誓章/誓词一定要在授权人士面前宣誓作出，这就是与一般证人证言的区别，无论证人证言是否公证。

[77] 见 Bracken Partners Ltd v. Gutteridge & Ors (2001) EWHC 568 (Ch)先例。

Nov 1995)等先例。

但这也要看现实情况如何，因为正常情况下申请冻结令都是非常紧急，没有这么多时间让申请人代表律师向客户与有关证人仔细询问，以及取得有关文件证据作为誓章/誓词的附件。所以询问需要到什么程度要看案件的本质（例如涉及重大国际欺诈案件就是一个极端，而完全正常的商业争议就会是另一个极端）、申请的冻结令与其他附属命令是什么、对被申请人会带来什么影响、紧急的程度与现实容许询问的时间等：见 Tchigirinski v. Orton Oil Co Ltd (2009) EWHC 1739 (Comm)先例。

在冻结令颁布/作出后，被申请人有机会出庭对抗（并试图撤销冻结令）前，代表律师这个绝对善意披露的责任是持续的（continuous duty），一旦发觉在申请的时候没有全面披露或善意地误述了事实，都必须马上向法院做出补充与/或更正。又例如在法院已经作出了冻结令后，申请人获知了有关的新信息或有了不同的确信（例如被申请人还不知道冻结令的情况下向申请人作出和解要约），就仍然有义务及时通知法院：见 O'Regan v. Iambic Productions 先例。同样如果已经提供的信息或确信有所改变，也要及时通知法院，例如申请人的财力发生变动，公司亏本、经济状况变差等，导致提供给法院的交叉担保承诺没有足够的后盾，就要及时通知法院与被申请人：见 Staines v. Walsh (2003) All ER (D) 117 先例。

1.7.1.2 什么才是"重要"事实?

至于什么是重要（material）事实会是包括方方面面，并且由法院而非申请人自己决定的。对于申请人而言，提出的事实与提交有关文件证据越多、越肯定越好。提交的文件证据也不仅仅是针对申请人已知的事实，还要包括根据申请当时的情况，通过合理的询问（inquiries）或调查就能够获得的事实与文件[78]。正如 Parker 大法官在 The "Tatiangela" (1980) 2 Lloyd's Rep. 193 先例中说：

"*I am unable to see how, if he has made no enquiries at all, a cargo-owner can properly submit that he has a good arguable case. He simply does not know and he has made no attempt to find out. It may be different if he has made inquiries and met with no answers or evasive answers. It may be that in that case it would be right to invite the Court to infer that there was a good arguable case, but it would in my judgment imperil the continued existence of the Mareva injunction if it were granted on loss of cargo without more.*"

在笔者看来，这与保险法律下"绝对善意"（utmost good-faith）的要求差不多。例如在保险合约中，要求被保险人（Assured）在投保时有向保险公司作出披露的义务。长期以来在《Marine Insurance Act 1906》之 Section 18 中的规定[79]是：

"*(1) Subject to the provisions of this section, the assured must disclose to the insurer, before*

[78] 例如是丑化被申请人的指称（如被申请人欠下其他人士的债务拒不偿付或者是"光棍"等），但事后被申请人指出已经偿清了其他人士的债务或自己有其他资产，只要申请人合理讯问或调查就可以知悉。这就会导致申请人未尽"全面与坦率披露"的义务。

[79] 目前的《Insurance Act 2015》立法取消了此 Section 18，因为对被保险人/投保人而言过于苛刻，也容易被保险人滥用以拒绝理赔。

the contract is concluded, every material circumstance which is known to the assured, and the assured is deemed to know every circumstance which, in the ordinary course of business, ought be known by him. If the assured fails to make such disclosure, the insurer may avoid the contract. (2) ***Every circumstance is material*** *which would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk…*"（加黑部分是笔者的强调）

在这个披露义务下，被保险人需要披露可能会影响保险人（Insurer）是否愿意承保、保费多少的所有事实，这就与冻结令的申请人的披露义务类似。至于什么是对保险人而言重要或不重要的事实，就要根据要求全面与坦率披露的目的（aim）进行推断（infer）与假设（presume）。如果保险人认为被保险人或其代理人遗漏某个事实没有披露，而这个事实是"重要"的，但被保险人不认为这是重要事实，遗漏也无妨，就会各自找一位中立与有经验的"谨慎保险人"（prudent insurer）作为专家证人给出意见，然后让法院作出决定。这方面法律经常带来争议，也发生了不少被保险人在事故后由于被指称没有全面披露而得不到理赔的情况。所以今天不少类型的保险有不同做法。这方面的课题可见笔者的《海上货物保险》（2010 年）一书第二章。

冻结令的申请中需要全面与坦率披露重要事实，目的是为了让法院了解整个案件的案情与其他有关的方面，以决定是否颁布/作出冻结令，以及冻结令的内容如何。在这个基础上可以推断与假设申请人需要披露的事实是什么。而披露的范围则是所有对法院权衡（balancing）与掌握轻重（weighing）有影响的事实（以及本章下一段介绍的指引二中提到的双方可能会有的争辩与法律论据），申请人都要披露。

不妨节录一些先例中对何谓"重要事实"的权威说法。首先是很早期的 Boyce v. Gill (1891) 64 LT 824 先例，虽然当时还没有冻结令的做法，但这个说法是普遍适用在其他需要单方面申请禁令/命令："*… the court should be in a position to weigh all matters which might influence it so as to decide whether … an injunction should be granted*."

在 Siporex Trade SA v. Comdel Commodities Ltd (1986) 2 Lloyd's Rep 428 先例，Bingham 大法官说："*must disclose all the facts which reasonably could or would be taken into account by the Judge in deciding whether to grant the application.*"

另在 Brink's Mat Ltd v. Elcombe (1988) 1 WLR 1350 先例，Ralph Gibson 大法官说："*The material facts are those which it is material for the judge to know in dealing with the application as made.*"

在 Memory Corp v. Sidhu (No. 1) (2000) 1 WLR 1443 先例中，上诉庭的 Mummery 大法官说："*… high duty to make full, fair and accurate disclosure of material information to the court and to draw the court's attention to significant factual, legal and procedural aspects of the case. It is the particular duty of the advocate to see that the correct legal procedures and forms are used;… and that at the hearing the court's attention is drawn by him to unusual features of the evidence adduced, to the applicable law and to the formalities and procedure to be observed.*"

以上所讲是在冻结令的申请中，要向法院对所有的有关事实作出全面、公平与准确的披露，同时要向法院重点指出与案件有关的重要事实、法律问题（包括有关先例、立法等，例

如时效、责任限制等课题）以及程序问题（例如是准备如何与在哪里开始诉讼或仲裁、在境外法院或仲裁庭已经开始等，都是法官应当知道的重要事实，因为法院在作出冻结令的时候要知道自己是否有管辖权，与/或考虑是否会对被告造成过多压迫）。申请人的代表律师要坦诚协助法官理解有关的重要事实与法律论据，采用正确的法律程序，在进行法官庭审时要指引法官注意在附件的文件证据中的不寻常之处等。

笔者在无数的有关先例中随意挑一个介绍，在 The "Nicholas M" (2008) 2 Lloyd's Rep 602 先例，Flaux 大法官说："*The owners allege that the charterers made a number of misrepresentations to the court on the ex parte application, alternatively failed to make full and frank disclosure to the court on that occasion.* ***The importance of making full and frank disclosure to the court of all matters material to the court's decision on an ex parte application for relief cannot be emphasised too strongly****, particularly in the case of an application prejudice to the defendant.* ***The matters which are 'material' are all matters relevant to the Court's assessment of the application, including matters which may be adverse to the application."*** （加黑部分是笔者的强调）

作为申请人的代表律师，有时说服客户对重要事实披露也不容易。笔者（杨大明律师）可以给一个近期的简单例子。在该案件中，笔者代表客户申请冻结令。其中负责提供誓章的公司董事在中国境内涉嫌参与一些有关的不当行为而正在面对诉讼程序。在讨论这些"尴尬事"是否需要披露，以满足申请冻结令要作出全面与坦率披露的要求时，笔者提供的意见是如果对方稍后在申请解除冻结令时，会利用这方面资料作为抗辩的一部分（大致上会说这位董事的证供不可靠），而这方面的资料会对法院有影响，就应该披露。

1.7.1.3 全面披露去显示一个有"良好论据的案件"

什么是"全面与坦率披露"视乎案件案情的不同而千变万化，而披露后是可让法院客观认定被申请人的资产会流失与申请人的索赔实质上是一个良好论据的案件，才会成功申请到冻结令。毕竟如果只是"富争议的案件"/"可争辩的案件"（controversial/arguable case）或者是"无望的案件"（hopeless case）的话，虽然"胜负未分"，法院并不愿意颁布/作出冻结令提前对被申请人造成压力、不便与损失。只有在初步与表面看来是"铁一般牢靠的案件"/"不应败诉的案件"（cast-iron case），如欺诈案件，或至少是"良好论据的案件"（good arguable case）法院才会愿意颁布/作出冻结令：见 The "Niedersachsen" (1983) 2 Lloyd's Rep 600 先例。什么是有良好论据案件，在有关冻结令的早期 The "Niedersachsen"先例，Mustill 大法官说是凭申请人代表律师的誓章/誓词的内容与附件证据（应是包括所有有关案件的全面与重要事实与法律论点），这不光是一个可去严肃争辩的案件（这通常对有水平的律师都不是问题，几乎大部分的案件在他们手中都找得出一些有条有理可以争辩的理据），而是一个对申请人而言更站得住脚的案件。虽然这也不一定需要行使裁量权的法官认为申请人有超过 50%以上的胜诉机会，才算是过了法院会做出冻结令的分水岭（watershed）。

以大部分读者都会熟悉的国际货物买卖为例，以下的案情几乎肯定是一个表面看来良好论据的案件：

（一） 买方提取了货物，但没有按照买卖合约支付全部或部分的货款。

（二） 卖方曾经以电文等书面方式向买方认错，说因为市场上涨无法按照合约交货。

（三） 买方曾经以电文等方式向卖方说：“因为市场下跌，除非你愿意减价，否则我现在不要这批货了。”

而一个表面看来是可争辩的案件（除非有其他的重要事实与证据显示申请人有个更好的案件）可举以下例子：

（一） 买方在卸货港接收货物有货损货差，而这到底是谁的责任是很难从表面判断。因为这可能是海上运输时造成，这就是买方应承担的风险。但也可能是货物本身质量的问题，这就应由卖方承担。除非买方在申请冻结令时附上了更好的证据，如卸港的共同检验报告证明货物在装船前就已经有这个损坏。

（二） 买卖双方在卸港船舶延误的滞期费争议。

这同样的说法在后来的案例被重复与跟从，例如在 Alternative Investment Solutions (General) Ltd v. Valle De Uco Resort & Spa SA (2013) EWHC 333 (QB)先例，Cranston 大法官说：

“*there must be a good arguable case on the merits of the substantive claim, in other words, 'a case which is more than barely capable of serious argument, and yet not necessarily one which the judge believes to have a better than 50 per cent chance of success': Lakatamia Shipping Company Limited v Nobu SU Limited (2012) EWCA Civ 1195 , per Longmore LJ at [19] and [25]-[28]; … The "Niedersachsen" (1983) 2 Lloyd's Rep 600 , per Mustill J, at 603, 605; …,* ***the court should not attempt to try the issues but takes into account the apparent strength or weakness of the respective cases to decide whether the claimant's case, on the merits, is sufficiently strong to reach the threshold.***” （加黑部分是笔者的强调）

上述加黑部分是说实质索赔必须在强弱或谁对谁错方面显示了申请人有一个良好论据的案件才能是过了可以颁布/作出冻结令的分水岭。但法院不应试图在早期阶段作出争议的定论，而只是看案件表面的强弱决定申请人的索赔是否过了分水岭。

即使是单方面申请，只是听从申请人的一面之辞，只要申请人在誓章/誓词中尽可能地展示全面的事实与双方的争辩（通过假设）与法律论据，有经验与小心的法官仍可以见微知著地了解案件的强弱与实际情况。因此也有说法是申请人在冻结令的申请中有“坦诚义务”（duty of candour）去帮助法院：见 Arena Corporation Ltd v. Schroeder (2003) EWHC 1089 (Ch)；ND v. KP (2011) 2 FLR 662 等先例。

1.7.1.4 传闻证据、特免权证据或非法获取的证据披露

这些课题的内容在本书多处有提及或详细探讨过，不在此重复，只介绍这些课题与申请人必须严格向法院作出全面与坦率披露的责任之间的关系与处理办法。

要全面与坦率的披露有关案件的实质争议（substantive dispute）的所有重要事实

（material facts），就不能光是让申请人去“讲故事”，而必须有足够与有说服力的证据支持。显然披露的证据（主要会是文件证据）是越多越好，加上如果是优质的话，申请人成功取得冻结令的机会就高多了。

讲到优质的证据，首先去一提的是“传闻证据”（Hearsay Evidence）。这个课题在本书多处提到，例如是第十二章之 4.3.2.2 段。当然传闻证据并不代表是不可信，只是申请人代表律师需要披露传闻证据的准确来源，可让法院给予该证据恰当的重量（weight）。申请人代表律师需要在誓章/誓词中恰当地确定“信息”（information）与“确信”（belief）的来源。很宽泛地说“根据询问”或者是“根据有关文件”是不够的，而是要能够说出是根据谁的调查（例如是委任了什么调查机构、人士），根据自己的哪一份文件所作出的推断等。

接下去是可享有特免权的文件（privileged document）。本书有一半内容都是详细针对这一个重要课题，特别是“法律业务特免权”（Legal Professional Privilege 或 LLP）。简单说，可享有法律业务特免权的文件（主要会是客户与律师之间的通讯）在普通法的公共政策（Public Policy）下可享有机密，任何人士包括法院在任何情况下都不能要求与强制享有特免权一方当事人放弃这一个权利。这一来，就带来一个问题是申请人如果有相关冻结令的重要事实是在一些特免权文件中，申请人是否仍要披露？如果申请人主张（assert）他/她可以享有的特权，因此没有作出全面与坦率的披露，两者之间的冲突怎么样处理?

举一个简单（但发生得不多）的例子，原告有一些资料与证据显示被告不可信，资产会在半年、一年后作出判决/裁决后“流失”（dissipate）。但原告为了小心还是委任了律师，并通过律师再委托私家侦探对被告作出全面的调查与摸底。但事后作出的调查报告显示被告的经济状况与商业上的操守并非是原告原先片面了解得这么坏。这一来，原告如果仍向法院申请冻结令（背后真正的企图可能是为了向被告施压，希望对方作出投降性的和解），可否不披露委任律师作出的调查报告，因为这些文件可以享有特免权？

更多的情况会是涉及“无损害特免权”（Without Prejudice Privilege），这主要是涉及了双方当事人试图和解谈判解决争议的事实与在这一个过程中制造的文件。这也可以简单介绍一个例子，就是申请人在向法院作出申请冻结令之前不久，被申请人/被告曾经向申请人作出过一个和解要约（settlement offer），说是愿意赔付一半或更高的比例，并会提供银行担保去分两期或三期支付。但这被申请人拒绝了，而这些通信往来也就可享有无损害特免权。问题是，这些事实是否要在申请冻结令的时候向法院披露？

在千变万化的情况中多去举一个例子，就是被申请人/被告曾经向原告做出一个和解要约，但只是很少的一笔钱，与强而有力的索赔完全不成正比。被告同时暗示原告说他如果不接受这一个和解要约，就什么钱都拿不到了，因为他是不会再给钱，即使原告胜诉也是一场空。这显然是很好的证据让法院看到被申请人的资产确有流失的风险。但如果文件是可享有“无损害特免权”，对这个特免权作出披露给第三方的法院是需要双方同意弃权（waiver）[80]。所以，申请人单方面申请冻结令是否可以向法院披露？

显然，这都是有关被申请人的资产将来会否流失以避免败诉时要赔钱的十分重要的信息。如果较早前被申请人/被告作出的和解要约，看来是完全公平合理，充分显示了被告诚意去

[80] 见本书第十三章之 6 段。

尽早和解并作出赔付。反而看来是申请人野心太大，欺人太甚。这一来，法院会否去颁布/作出冻结令是可想而知。

这方面的法律是已经明确，就是单方面向法院作出冻结令的申请有责任全面与坦率的披露，包括所有关于双方不成功的和解谈判的事实与/或受特免权保护的信息：见 The "Giovanna" (1999) 1 Lloyd's Rep 867; Somatra v. SRT (2000) 2 Lloyd's Rep 673；Pearson Education Ltd v. Prentice Hall India Private Ltd (2005) EWHC 636 (QB); Linsen International v. Humpuss Sea Transport (2010) EWHC 303 (Comm)等先例。

另要探讨的是支持申请冻结令的证据是通过非法手段获得（illegally obtained）的情况。这种情况经常会在民事诉讼中发生，也在本书多处提及，特别是在本书第五章之 2.2.2 段。在本段所探讨的课题会带来的问题是这一个事实是否在单方面申请冻结令时需要全面与坦率的披露给法院？

虽然证据是通过非法手段获得与其可靠性、可信度不一定有关，这应该看是什么非法手段。如果非法手段是极端的以非法威逼利诱获得的，这会影响取得证据的可靠程度与/或全面性。

这里也可能会涉及"自证其罪特免权"（Self-incrimination Privilege），就是申请人自己参与非法取证，所以在公开的法院披露是以严重非法手段获得的证据后，会导致申请人将来要面对民事或刑事的诉讼。但申请人如果不想向法院披露，将来就会有危险取得的冻结令被撤销（discharge）。看来，申请人要自己考虑，并在平衡利弊后选择是否依赖非法获得的证据支持冻结令的申请。从另一个角度来看，也会是英国法院在道德上不鼓励当事人以非法手段获得证据，虽然在民事诉讼，平衡了两方面的公共政策后，这些证据仍是可以被采纳（admit）。

这方面可节录较近期的 L v. K (2013) EWHC 1735 (Fam)先例，如下：

"*Subject to the point about privilege mentioned above, the solicitor is entitled to give advice on her recollection and can draft an affidavit in support of a freezing application. But if the wife（申请人） elects to go down this route she is bound in that affidavit candidly to reveal that her knowledge derives from illegitimately obtained documents, and must explain how she got them. She must do this even if this leads to a civil suit or criminal proceedings. That is the price that she will (potentially) have to pay for making an application based on illegitimately obtained knowledge. Of course, there is no question of the wife being forced to incriminate herself as she has a free choice whether to go down this route.*"

此先例中法院指出即使申请人以非法方式获得了文件，并在了解其中信息后想将这些信息加入誓章/誓词，法院是可以接受这些信息的，但是在誓章/誓词中需要作出全面与坦率的陈述，记录申请人获得信息的非法方式（例如是通过盗窃获得的信息）

1.7.1.5 申请人其他对被申请人法律行动的披露

如果申请人有涉及与申请冻结令相关的诉讼或法律行动，特别是英国法院不会知道的在

外国法院的诉讼（foreign proceedings），是有必要向英国法院作出披露，让法院能够知道申请人作为原告其他对付被告的法律行动，也可考虑如果颁布/作出冻结令会对整体上带来怎样的后果与影响：见 Behbehani v. Salem (1989) 1 WLR 723; Republic of Haiti v. Duvalier (1990) 1 QB 202 等先例。

披露已经开始了的法律行动（比如是某外国法院经作出过或拒绝过一个冻结令），应该是清楚明了，就是把相关的事实包括在申请人代表律师的誓章/誓词（affidavit/affirmation）中。但对于仍未开始的法律行动，也需要向法院作出披露。如针对一个外国裁决书的执行，已经在仲裁地点指示律师向法院申请要求承认与批准执行。

但会有情况是被申请人/被告尚不知道原告对付他/她的计划中的所有法律行动。比如申请人刚知悉被告在香港有资产（例如是一批即将付运的货物），但仍在最后确定。而一旦确定后就会马上指示律师在香港法院申请冻结令。显然申请人是不想提前让被申请人/被告知道这一个意图，否则也不必去单方面申请了。但在英国申请冻结令一旦成功，就需要将有关向法院披露的文件送达给被告。这一来，如果在香港的计划仍没有开始行动，就会是提前告诉了被告，这不是申请人希望见到的情况。一种办法是把这个机密（confidential）信息在申请时以口头告诉（或披露给）英国法院，并承诺稍后会以文书通知被申请人有关在香港的法律行动。反正这一来，就可以多几天的缓冲时间，不必提前告诉被申请人以防他/她在香港做出相应的回避行动。因为被申请人如果有意图对抗冻结令并委任有经验的律师，通常第一步是向法院申请要求提供一份单方面申请时的庭审记录（transcript），这个过程往往需要几天时间。总之，必须保证在被申请人出庭对抗并企图撤销（discharge）冻结令的时候（这通常是在作出命令后的 7-14 日），他/她是知道申请人在单方面向法院申请时披露与提供的所有资料与信息。

这方面在 Steven Gee QC 《Commercial Injunctions》一书之 9-018 段有详及，可节录如下：

“*One of the matters which can be material on an application for Mareva ... is whether the applicant intends to commence, or has commenced, proceedings abroad connected with his claim, particularly proceedings in which relief may be sought or has been sought to assist in the prosecution or enforcement of the claim. If the judge is not informed of the applicant's intention to use the order in support of another application abroad the judge is likely to have an inadequate or incomplete appreciation of the likely consequences of making the requested order. If the intention is to launch proceedings, the applicant often commences the overseas proceedings at the same time as the English proceedings; there will then be no difficulty in referring to the intended foreign application in the affidavit made in support of the ex parte application, or recording the information relied on in the application.*

It may be, however, that intended foreign proceedings cannot be commenced immediately and that the applicant has good grounds for concealing his intentions from the defendant for the time being. In these circumstances the applicant cannot justify failure to disclose his intentions to the court on the grounds that the defendant might, on obtaining this information, take steps designed to frustrate an order made by the foreign court. The appropriate procedure is to inform the court of the applicant's intentions on the ex parte application. This can be done orally, with

the information being set out in a separate document prepared by the applicant, with the intention of serving it on the defendant following commencement of the foreign proceedings. This procedure results in full disclosure to the court on the ex parte application and does not involve disclosing the information prematurely to the defendant. On the other hand, it will not infringe the principle that the defendant is entitled, albeit at a later stage, to full information about what has occurred before the court on the ex parte application. Once the defendant applies to have the order set aside, however, he must be told of all that took place on the ex parte application."

1.7.1.6 案情外的披露：申请人与被申请人的经济状况与相关事实

申请人需要向法院全面披露的远不止有关案件的案情与证据，为了让法院能够掌握全貌与案件的强弱看是否过了冻结令的分水岭（watershed），披露还包括法院决定是否颁布/作出冻结令与冻结令内容时应该想知道的其他方面。这里只谈两个方面：

（一）申请人有良好论据质疑被申请人的财力或更准确地说是欠缺财力、加上其他问题如品德与其他相关事实，显示申请人的资产有流失（dissipate）的风险。毕竟，法院作出冻结令的最重要原因就是被申请人的资产会流失，导致将来的法院判决或裁决在作出后无法被胜诉的申请人实际执行。

当然申请人必须通过询问（inquiries）与调查（investigate）被申请人的经济状况与公司营运状况，再加上其他许多不同渠道取得有关被申请人的品德、言行等等的证据与信息。而这些证据与信息无论是否对冻结令申请有利（例如有部分不利），都要向法院作出全面与坦率的披露：见 Thermax v. Schott Industrial Glass (1981) FSR 289; Naf Naf SA v. Dickens (London) Ltd (1993) FRS 424 等先例。

（二）申请人自己的财力或欠缺财力（例如申请人已经在破产边缘，负债累累等）。这里的原因是如果冻结令申请成功，申请人要向法院提供交叉担保（cross-undertaking for damages），作为对如果被申请人将来胜诉，证明冻结令是错误申请与作出，对被申请人所带来的损失作出赔偿的"保护措施"（safeguard）。

所以申请人代表律师最好是在誓章/誓词（affidavit/affirmation）中写明申请人对法院作出的担保承诺，并显示申请人有足够的财产与经济能力（例如是提供公司账目、年报、银行账户信息等）可面对将来会来自被申请人的损失索赔。如果能够显示财务状况良好，可以避免法院的质疑，也可以避免法院要求其他额外的金钱担保。

如果申请人的财政有问题，但在申请冻结令时不向法院披露，这会构成没有向法院作出全面与坦率的披露。一般如果申请人不披露问题，法院是假设申请人的经济与财力是足够将来赔偿被申请人会因为冻结令而蒙受的损失，也就是在 Minor Electronicsv. Dickson (1988) RFC 618 先例所说的"*adequate for the purpose of the cross-undertaking*"。

如果后来被发觉有问题，但没有披露（这会是被申请人后来在调查后告知法院），就会导致成功获取的冻结令因为申请人没有在申请时向法院作出全面与坦率披露有关财政状况而撤销（discharge 或 dismiss）。例如在 Block v. Nicholson (1986) 4 WLUK 94 先例，申请人没有向法院披露他曾经被警察因为欺诈拘捕，后来"东窗事发"导致冻结令被撤销。在很多这种情况下，申请人代表律师也应该或可以知道，所以作为"法院官员"（officer of the court）的

代表律师也会被惩罚，例如在早期的 Schmitten v. Faulks (1893) WN 64 先例，因为申请人代表律师在单方面作出申请的时候，没有或不去披露当时客户正在申请破产，Chitty 大法官命令申请人代表律师要代为赔偿被申请人因禁令所蒙受的损失。

1.7.1.7 没有向法院作出全面与坦率披露的后果

己经提到过，一贯以来在任何形式需要单方面（ex parte 或 without notice）向法院申请禁令/命令时，都有要向法院作出全面与坦率披露的沉重责任：见早期的 Dalgish v. Jarvie (1850) 2 Mac & G 231 等先例。在有了搜查令（Search Order）与冻结令（Freezing Order）这种法院的核武器（nuclear weapons），会对/将对没有机会出庭争辩（因为没有收到通知）的被申请人带来严重的不公平与后果后，有说法是这个加在申请人的头上的全面与坦率披露（full and frank disclosure）的责任变得是更加沉重。并且法院不断在提前警告说一旦有违反，会给申请人带来严厉（strict）与可以是不对称/不成比例（disproportional）的后果。其中撤销（discharge 或 dismiss）已经颁布/作出冻结令会是在所难免。这也带来申请人“劳民伤财”，花了不少高昂的律师费用，结果是一场空的严重后果。更严重的会是在向法院提供的交叉担保（cross-undertaking）下，还要赔偿被申请人因为冻结令蒙受的损失。虽然，由于这冻结令很快被撤销，应该说是对被申请人造成的损失是比较有限。但根据每一个案件不同的案情，这也难说死。例如虽然是短暂时间被冻结资产，但已经是足够令被申请人无法在一个重要与赚钱的交易（transaction）去完成“交割”（closing），导致有重大损失。

这尤其是在一些冻结令早期先例，估计当时法院也理解到这种禁令/命令是威力无穷，而单方面去作出决定在本质上是不公平（对被申请人）。加上早期经验不足，英国法院也是要经过“摸着石头过河”的阶段。所以，不断找机会在先例中去“恐吓”任何单方面作出冻结令申请的当事人，如果违反向法院作出全面与坦率披露的义务就会受到严惩。显然，如果没有披露的是重要事实，很有可能令原来颁布/作出冻结令的大法官作出不同的决定（通常是指会拒绝作出冻结令），在加上法院能感觉到是有想要误导法院的成分，这种违反肯定会导致冻结令被撤销：见 Behbehani v. Salem (1989) 1 WLR 723 等先例。但也有说法是法院在单方面申请冻结令时有很大的裁量权（discretion），天知道被遗漏披露的事实或误述（特别是表面看来较次要）会对法院带来怎样的影响或结果。在 Boyce v. Gill (1891) 64 LT 824 先例有说：“*what the court would have done if all the facts had been known, I cannot say.*”

所以，有说法是没有向法院作出全面与坦率的披露，无论是重要或次要，而且可假设在单方面申请时没有这个遗漏与违反，法院仍会颁布/作出同样的冻结令，但仍会去撤销该“来路不正”的冻结令，让申请人重新再去申请。但是这样一来，如果被申请人的资产真有“流失”（dissipate）的风险，短短的半天、一天要去重新申请期间，就已经是足够让这些资产流失了。这是笔者较早前称为“不对称/不成比例”的惩罚。但为了阻吓申请人千万不要轻视这一个重要的责任，也会是无可厚非。

对违反这个全面与坦率披露的责任，除了是针对申请人的严惩处，也延伸到申请人的代表律师头上，这会在接下去的段节介绍。

1.7.1.7.1 对申请人/原告的后果

上段已说到，在冻结令早期的先例，特别是来自上级法院的先例是主张严历惩罚违反了向法院作出全面与坦率的披露责任的申请人/原告。其中最出名与经常在后续先例中被提到（特别是"核武器"的描述）的是 Bank Mellat v. Nikpour (1985) FSR 87 的上诉庭先例，Donaldson 大法官是说：

"*The rule requiring full disclosure seems to me to be one of the most fundamental importance, particularly in the context of the Draconian remedy of the Mareva Injunction. It is in effect, together with the Anton Piller order, one of the Law's two* ***'nuclear' weapons. If access to such a weapon is obtained without the fullest and frankest disclosure, I have no doubt at all that it should be revoked****.*" （加黑部分是笔者的强调）

只说，笔者在比较冻结令后期（也是较近期报道）的先例，感觉法院处理的手法比较有弹性（flexible）与成比例（proportionate）。也看来是对这方面的违反比较宽松，特别是有关申请所遗漏披露的事实是比较次要与/或法院可以接受是申请人无意（innocent）的过错。

主要原因会是在许多复杂的商业案件，被申请人在事后如果出庭抗拒，往往很容易可以挑得出一些在单方面申请的时候，申请人没有向法院披露的事实与/或法律论据。

的确对一个高水平与有经验的申请人代表律师而言，他/她的誓章/誓词（affidavit/affirmation）如何在每一个不同但十分复杂的案件中作出恰当的披露（既不会讲太少而被指控漏了去全面披露，但也不会讲太多让法院看得不耐烦，甚至会怪责律师故意去转移重点、误导法院），是一件很高水平的"艺术品"（work of art）。笔者见过不少在这方面经验不足的业务律师（solicitors），要借助在这方面经验丰富与知道法院想法的大律师（barristers）帮助拟定他/她的誓章/誓词。

另一个笔者看来的原因会是英国法院处理的冻结令越来越多，累尽了大量的经验，也建立与完善了冻结令管辖权（Mareva jurisdiction）。所以，在早期先例处理的慎重与保留意识也相应降低。部分法官行使裁量权时更加宽松，之后也尽量不轻易允许冻结令被撤销。在笔者看来，这也进一步令向英国法院申请冻结令更受到国际社会的欢迎。从 Mareva 禁令的起源是针对海事案件，今天已是广泛用在方方面面的商业话动、家事、规管、国际欺诈、贪污腐败等等。

这些会比较弹性处理的较近期先例的说法，可稍作介绍如下：

（一）在 OJSC Ank Yugraneft, Re (2008) EWHC 2614 ("Millhouse Capital UK Ltd v. Sibir Energy Plc)先例, Christopher Clarke 大法官说：

"*I regard that as a helpful review of the applicable principles, subject to the overriding principle, reflected in proposition (9), that the question of whether,* ***in the absence of full and fair disclosure, an order should be set aside and, if so, whether it should be renewed either in the same or in an altered form, is pre-eminently a matter for the court's discretion****, to which … the*

facts (if they be such) that the non-disclosure was innocent and that an injunction or other order could properly have been granted if the relevant facts had been disclosed, are relevant. In exercising that discretion the court, like Janus, looks both backwards and forwards.

The court will look back at what has happened and examine whether, and if so, to what extent, it was not fully informed, and why, in order to decide what sanction to impose in consequence. The obligation of full disclosure, an obligation owed to the court itself, exists in order to secure the integrity of the court's process and to protect the interests of those potentially affected by whatever order the court is invited to make. The court's ability to set its order aside, and to refuse to renew it, is the sanction by which that obligation is enforced and others are deterred from breaking it. Such is the importance of the duty that, in the event of any substantial breach, the court strongly inclines towards setting its order aside and not renewing it, so as to deprive the defaulting party of any advantage that the order may have given him. This is particularly so in the case of freezing and seizure orders.

As to the future, the court may well be faced with a situation in which, in the light of all the material to hand after the non-disclosure has become apparent, ***there remains a case, possibly a strong case, for continuing or re-granting the relief sought. Whilst a strong case can never justify non disclosure, the court will not be blind to the fact that a refusal to continue or renew an order may work a real injustice, which it may wish to avoid.***

As with all discretionary considerations, much depends on the facts. ***The more serious or culpable the non-disclosure, the more likely the court is to set its order aside and not renew it, however prejudicial the consequences. The stronger the case for the order sought and the less serious or culpable the non-disclosure, the more likely it is that the court may be persuaded to continue or re-grant the order originally obtained. In complicated cases it may be just to allow some margin of error. It is often easier to spot what should have been disclosed in retrospect, and after argument from those alleging non-disclosure, than it was at the time when the question of disclosure first arose****.*"（加黑部分是笔者的强调）

（二）在 Belair LLC v. Basel LLC (2009) EWHC 725 (Comm) 先例, Blair 大法官说："*But as I understand it, such non-disclosure is not now said to be a basis for discharge, but to go to the weight to be attached to the Claimant's evidence. In any event,* ***the outcome remains within the discretion of the court, and overall I am satisfied that these failures are not sufficient to lead to the withholding of relief in this case****.*"（加黑部分是笔者的强调）

（三）在Alternative Investment Solutions (General) Ltd v. Valle De Uco Resort & Spa SA (2013) EWHC 333 (QB)先例，Cranston 大法官说：

"*… Such culpable non-disclosure could well lead to the order being set aside. However, as Christopher Clarke J explained in Millhouse,* ***the court cannot be blind to the fact that a refusal to continue or renew an order may work a real injustice. The claimant has apologised for this error*** *and underlined, correctly, that the defendants do not deny representing that the site had full planning permission which, as I interpret it, means that construction could begin. Taking the circumstances of the case as a whole****, I am persuaded that there are strong reasons to continue***

the order.”（加黑部分是笔者的强调）

在千变万化的案件中，笔者可以举一个极端的例子来说明上述的阐述或总结。例如作为申请人/原告作出的披露存在问题（例如遗漏了只要合理调查就能发现的重要事实，或遗漏了应当知道的被申请人会提出的争议），但申请人可以合理地解释为何出现此问题，法院也觉得即使没有此问题仍会作出冻结令。同时在另一方面，则有文件强烈显示了申请人胜诉机会很大，被申请人十分不诚实，没有冻结令的话有绝大可能诉讼或仲裁根本会是“一场空”。这一来估计有很大机会法院会延续冻结令或作出新的冻结令。

1.7.1.7.2 对申请人代表律师的后果

已经提到过，申请人代表律师除了要为申请人（也是他/她的客户）的利益服务外，在单方面向英国法院申请冻结令并要求申请人承担“全面与坦率披露”（full and frank disclosure）的责任，也是“法院的官员”（officer of the court）。而且两者之间如果发生矛盾，也是后者的责任为先。

但无可避免是难免会有律师犯错或乱来。这会是有个别律师为了业务去迁就客户的要求与利益，毕竟律师行业在今天的竞争十分激烈。也会是，每一个律师的水平也不一样。对法院而言，无论是有意或无意（现实中也很难知道）的不披露、误述、或误导法院都会带来同样结果，就是在设有准确掌握案件的全部重要事实与法律论据，以及其他相关方面的事实，就对被申请人/被告“引爆核武器”，颁布/作出冻结令并造成可能是无法或足够以金钱赔偿作为弥补的损失。所以在这个至关重要的责任，法院是主要依赖申请人的代表律师作为法院的官员去尽这一个重要的责任。法院对英国律师的阻吓力，其中重要的一种惩罚是“浪费费用命令”（wasted costs order）。也就是，法院可以命令有关单方面申请所花的费用要申请人律师自己承担。

法院早在普通法下就已经有过行使这样的权力：见 Myers v. Elman (1940) AC 282 先例。但这种案件很少有，也显示了早期法院一般不会去惩罚代表律师。毕竟律师是申请人自己选定与委任，律师只是代理人。律师如果专业上有疏忽，作为客户的申请人可以直接向他/她索赔疏忽带来的损失。但第三方（例如是被申请人）不可以向申请人的代表律师直接索赔损失。这对法院来说，也是同样的道理。如果申请人通过代表律师没有向法院作出全面与坦率的披露，法院对要负责的申请人的惩罚就会是撤销冻结令，并要求申请人承担所有的费用以及赔偿被申请人因冻结令带来的损失。看来，没有必要针对申请人代表律师作出惩罚。毕竟，申请人作为委托人是要负责他/她的代理人所犯的过错。所以，没有必要区分没有作出全面与坦率的披露是谁的错：见 Boreh v. Republic of Djibouti (2015) EWHC 769 (Comm)等先例。

但这一来，法院无法对代表申请人的英国律师作出阻吓，迫使他们作为法院的官员向法院作出全面与坦率的披露，即使有部分内容会对客户或申请人不利。由于单方面（*ex parte*/without notice）申请搜查令、冻结令、资产披露令与相关禁令/命令越来越多，虽然在普通法下也有这一个权力，但这是不足够让法院安心行使这个权力，也不肯定在怎么样的条件下才可以要求代表律师自己承担浪费的费用。所以，在《Senior Courts Act 1981》的立法下，有了 section 51(7)的“针对律师浪费费用命令的管辖权”（wasted costs exercised over solicitors jurisdiction），如下：

"... any costs incurred by a party -

(a) as a result of any improper, unreasonable or negligent act or omission on the part of any legal or other representative or any employee of such a representative, or

(b) which, in the light of any such act or omission occurring after they were incurred, the court considers it is unreasonable to expect that party to pay."

从近年的先例，可以简单总结这一个立法条文的一些重点，如下：

1. 法院会不会行使这个权利去惩罚律师是法官的管辖权与裁量权：见 Udall v. Capri Lighting Ltd (1988) QB 907; John Fox (A Firm) v. Bannister King & Rigbeys (1988) QB 925 等先例。

2. 有说法是一个律师只是犯了一个简单的判断错误或是遗漏，是不足够严重去让法院行使这种裁量权（A simple mistake or oversight or a mere error of judgment will not, of itself, be sufficiently serious）：见 Harley v. McDonald (2001) 2 AC 678 先例。该先例是新西兰上诉庭的判决被上诉到英国枢密院，Hope 勋爵说：

"*the kind of conduct that can be regarded as involving a serious breach of duty to the court. … before the wasted costs jurisdiction under section 51 of the Supreme Court Act 1981 came into effect: …* ***A simple mistake or oversight or a mere error of judgment will not, of itself, be sufficiently serious to fall into that category****. Something more is required. In Myers v Elman (1940) AC 282 , … Viscount Maugham indicated that the test was whether the conduct* ***amounted to a serious dereliction of duty****, and that negligence could be so described if it was at a sufficiently high level. Lord Atkin described, the kind of negligence that could lead to an exercise of the jurisdiction as* ***gross negligence****. Lord Wright said, that, while a mere mistake or error of judgment is not generally sufficient,* ***a gross neglect or inaccuracy in a matter which it was a solicitor's duty to ascertain with accuracy****, such as whether he had a retainer to act, might suffice.* ***A more precise definition of the level of seriousness is not appropriate.*** *But where negligence or incompetence is alleged the conduct must be put into its proper context.*

The Court of Appeal held that ***serious incompetence, resulting in a failure to appreciate that a claim is untenable, is capable of amounting to a serious dereliction of duty to the court****: … They relied for this proposition on Davy-Chiesman v Davy-Chiesman (1984) Fam 48. In that case ….* ***The solicitor's position was that he had relied on the advice of counsel*** *who had said that the case should continue, and that account should be taken of the forcefulness of counsel's personality and his experience.* ***May LJ rejected this argument****, ..:*

'making all allowances for that I cannot avoid the conclusion, differing respectfully from the judge, that this solicitor did abdicate responsibility for his proper part and role in the relevant litigation. I think that he relied blindly and with no mind of his own on counsel's views upon which, it must or ought to have been apparent to him, some question should have been raised. In my judgment this failure by the solicitor to question counsel's advice, …, was a substantial failure on his part to fulfil his duty to the court to promote in his particular sphere the cause and proper

administration of justice.'

Their Lordships agree with the Court of Appeal's conclusion …, that a duty rests on officers of the court to achieve and maintain appropriate levels of competence and care and that, if he is in serious dereliction of such duty, the officer is properly amenable to the costs jurisdiction of the court. ***But care must be taken not to assume that just because it appears to the court that the case was hopeless there was a failure by the barrister or solicitor to achieve the appropriate level of competence and care****. As Sir Thomas Bingham MR said in Ridehalgh v Horsefield [1994] Ch 205 …:*

'Legal representatives will, of course, whether barristers or solicitors, advise clients of the perceived weakness of their case and of the risk of failure. But clients are free to reject advice and insist that cases be litigated. It is rarely if ever safe for a court to assume that a hopeless case is being litigated on the advice of the lawyers involved. They are there to present the case; it is ... for the judge and not the lawyers to judge it. It is, however, one thing for a legal representative to present, on instructions, a case which he regards as bound to fail; it is quite another to lend his assistance to proceedings which are an abuse of the process of the court ... It is not entirely easy to distinguish by definition between the hopeless case and the case which amounts to an abuse of the process, but in practice it is not hard to say which is which and if there is doubt the legal representative is entitled to the benefit of it.'

The essential point is that it is not errors of judgment that attract the exercise of the jurisdiction, but errors of a duty owed to the court*."*（加黑部分是笔者的强调，而最后一段是说法院惩罚律师是因为他/她违反的是他/她作为法院的官员对法院的责任，至于他/她与客户之间谁对谁错是否存在职业疏忽，则不是法院要考虑的。）

3. 如果是"不恰当、不合理、疏忽、遗漏 … 是一般的有合理水平的律师不会犯的过错"（any improper, unreasonable or negligent act or omission ... failure to act with the competence reasonably to be expected of ordinary members of the profession），法院就会行使这一个浪费费用的管辖权了：见 Ridehalgh v. Horsefield (1994) Ch 205 先例。另是，在明显的错误下，就是依赖了大律师的意见也不是足够的理由：见 Davy-Chiesman v. Davy-Chiesman (1984) Fam 48 先例。

4. 至于律师能否事后向他的客户要回这一笔被法院惩罚的浪费费用（可能会是昂贵），这是要看千变万化的情况。会是，客户在冻结令被法院撤销（discharge）后，已经不再理会律师，连欠下律师的正常费用也不支付，要求客户去补偿这笔浪费费用更加是不可能了。也会是，律师没有向法院作出全面与坦率披露的原因是来自客户的坚持。这一来，客户会是愿意补偿这笔费用给律师。但这只是道德上，如果要通过法律执行就很难。毕竟，律师与作为申请人的客户"串通"瞒骗或误导法院并不是一件光荣的事情。再说，律师是懂法律的，是法院的官员，明知道这样做不可以。但客户就不懂法律，不会知道轻重。当然也会有情况是律师规规矩矩的询问（inquiries）与调查后才向法院作出全面与坦率的披露（以为是），但被客户从中隐瞒了重要的事实。但法院还是行使裁量权，作出浪费费用命令惩罚律师。这一来，律师当然是可以要求客户补偿。

5. 申请人代表律师没有全面与坦率的披露或是误述，是针对向法院提供的交叉担保（cross-undertaking）方面，可能经济后果会更严重。例如，律师没有告知法院申请人是在破产边缘。将来，如果被判是冻结令错误颁布/作出，申请人是赔不起被申请人因为冻结令造成的损失。这一来，法院就会惩罚代表律师去负责赔偿损失：见 Schmitten v. Faulks (1893) WN 64 先例。这也可去节录 Steven Gees QC 的《Commercial Injunctions》（2016 年，第 6 版）一书之 9-015 段所说： *"... If the court accepts a worthless cross-undertaking in damages, the defendant may in consequence be left uncompensated for losses caused by an injunction. If the worthless cross-undertaking was accepted by reason of non-disclosure or misrepresentation, and the solicitor was responsible for this in breach of his duties to the court, this may be dealt with by the court, under its inherent jurisdiction to order solicitors to pay compensation to the other party*."

6. 看来，中国公司如果作为冻结令（与资产披露令）的申请人，在委任代表律师时应该知道他/她的难处与他们对法院的责任。例如，避免去告诉他们一些可讲可不讲的事情或想法后，要求他们不要告诉法院（与对方）。

1.7.1.8 重要先例的总结

最后针对这个申请人与他的代表律师必须向法院作出全面与坦率披露的重要责任，笔者在许多相关案例中随意挑 3 个不同时间对这方面做出的大同小异的总结。

（一）在 Brink's Mat Ltd. v Elcombe (1988) 1 WLR 1350 先例中，Ralph Gibson 大法官这样说：

"In considering whether there has been relevant non-disclosure and what consequence the court should attach to any failure to comply with the duty to make full and frank disclosure, the principles relevant to the issues in these appeals appear to me to include the following.

(1) The duty of the applicant is to make 'a full and fair disclosure of all the material facts:' see Rex v. Kensington Income Tax Commissioners, Ex parte Princess Edmond de Polignac [1917] 1 K.B. 486 , …

(2) The material facts are those which it is material for the judge to know in dealing with the application as made: materiality is to be decided by the court and not by the assessment of the applicant or his legal advisers: see Rex v. Kensington Income Tax Commissioners , …, citing Dalglish v. Jarvie (1850) 2 Mac. & G. 231 , … and Browne-Wilkinson J. in Thermax Ltd. v. Schott Industrial Glass Ltd. [1981] F.S.R. 289 , ….

(3) The applicant must make proper inquiries before making the application: see Bank Mellat v. Nikpour [1985] F.S.R. 87 . The duty of disclosure therefore applies not only to material facts known to the applicant but also to any additional facts which he would have known if he had made such inquiries.

(4) The extent of the inquiries which will be held to be proper, and therefore necessary, must depend on all the circumstances of the case including (a) the nature of the case which the applicant is making when he makes the application; and (b) the order for which application is made and the probable effect of the order on the defendant: … ; and (c) the degree of legitimate urgency and the time available for the making of inquiries: ….

(5) If material non-disclosure is established the court will be 'astute to ensure that a plaintiff who obtains [an ex parte injunction] without full disclosure … is deprived of any advantage he may have derived by that breach of duty:' see per Donaldson L.J. in Bank Mellat v. Nikpour , ….

(6) Whether the fact not disclosed is of sufficient materiality to justify or require immediate discharge of the order without examination of the merits depends on the importance of the fact to the issues which were to be decided by the judge on the application. The answer to the question whether the non-disclosure was innocent, in the sense that the fact was not known to the applicant or that its relevance was not perceived, is an important consideration but not decisive by reason of the duty on the applicant to make all proper inquiries and to give careful consideration to the case being presented.

(7) Finally, it is not for every omission that the injunction will be automatically discharged. A locus poenitentiae may sometimes be afforded: ' per Lord Denning M.R. in Bank Mellat v. Nikpour [1985] F.S.R. 87 …. The court has a discretion, notwithstanding proof of material non-disclosure which justifies or requires the immediate discharge of the ex parte order, nevertheless to continue the order, or to make a new order on terms.

'when the whole of the facts, including that of the original non-disclosure, are before [the court, it] may well grant … a second injunction if the original non-disclosure was innocent and if an injunction could properly be granted even had the facts been disclosed: ' per Glidewell L.J. in Lloyds Bowmaker Ltd. v. Britannia Arrow Holdings Plc. … "

（二）在 Arena Corporation Ltd v. Schroeder (2003) EWHC 1089 (Ch) 权威的先例（后来经常被引用）对违反这方面责任法院会如何应对的总结，如下：

"(1) If the court finds that there have been breaches of the duty of full and fair disclosure on the ex parte application, the general rule is that it should discharge the order obtained in breach and refuse to renew the order until trial.[81] (2) Notwithstanding that general rule, the court has jurisdiction to continue or re-grant the order.[82] (3) That jurisdiction should be exercised sparingly, and should take account of the need to protect the administration of justice and uphold the public interest in requiring full and fair disclosure.[83] (4) The court should assess the degree and extent of the culpability with regard to non-disclosure. It is relevant that the breach was innocent, but there

81 如果法院认为申请人违反了在单方面申请中要全面与坦率披露的义务的话，一般规则是法院要解除/撤销因单方面申请作出的冻结令并在庭审前拒绝延续、更新此命令。
82 法院有权选择拒绝解除/撤销、仍然继续命令的执行，或者是可以选择重新作出新命令。
83 但法院不会随意偏离一般规则，在考虑是否继续命令执行等时，要将保护公平正义、保护（要求全面与坦率披露背后的）公共政策/利益都纳入考虑。

is no general rule that an innocent breach will not attract the sanction of discharge of the order. Equally, there is no general rule that a deliberate breach will attract that sanction.[84] (5) The court should assess the importance and significance to the outcome of the application for an injunction of the matters which were not disclosed to the court. In making this assessment, the fact that the judge might have made the order anyway is of little if any importance.[85] (6) The court can weigh the merits of the plaintiff's claim, but should not conduct a simple balancing exercise in which the strength of the plaintiff's case is allowed to undermine the policy objective of the principle.[86] (7) The application of the principle should not be carried to extreme lengths or be allowed to become the instrument of injustice.[87] (8) The jurisdiction is penal in nature and the court should therefore have regard to the proportionality between the punishment and the offence.[88] (9) There are no hard and fast rules as to whether the discretion to continue or re-grant the order should be exercised, and the court should take into account all relevant circumstances.[89]"

（三）也可见近期的 National Bank Trust v. Yurov (2016) EWHC 1913 (Comm)先例中，Males 大法官所说如下：

" A fact is material if it is one which the judge would need (or wish) to take into account when deciding whether to make the freezing order.

b. Failure to disclose a material fact will sometimes require immediate discharge of the order. This is likely to be the court's starting point, at least when the failure is substantial or deliberate.

c. Nevertheless the court has a discretion to continue the injunction (or to impose a fresh injunction) despite a failure of disclosure; although it has been said that this discretion should be exercised sparingly, the overriding consideration will always be the interests of justice.

d. In considering where the interests of justice lie, it is necessary to take account of all the circumstances of the case including (without attempting an exhaustive list) (i) the importance of the fact not disclosed to the issues which the judge making the freezing order had to decide; (ii) the need to encourage proper compliance with the need for full and frank disclosure and to deter non-compliance; (iii) whether or to what extent the failure to disclose was culpable; and (iv) the injustice to a claimant which may occur if an order is discharged leaving a defendant free to dissipate assets, although a strong case on the merits will never be a good excuse for a failure to disclose material facts.

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84 法院要权衡不全面、不坦率披露之错误行为的程度，例如这错误行为不过是无心之失等。但这并不意味着就一定不会解除禁令，同样地即使是故意错误也未必就一定会导致禁令解除。

85 法院应当权衡未披露的事实对于成功申请到禁令是否重要，例如是否无论这些事实被披露法院都会作出禁令，或者说这些未披露事实对于禁令的作出无足轻重？

86 法院要考虑申请人/原告是否有足够强的案件。但是这并非简单地权衡原告的案件是否足够强而有力，毕竟在单方面申请中，要求申请人/原告作出全面与坦率披露有其背后的公共政策/利益与原则驱使，不能因为原告的案件足够强就无视申请人/原告的披露不全面、不坦率。

87 但这背后的公共政策/利益与原则也不能被无限放大，导致影响个别案件中的公平正义。

88 申请人违反全面与坦率披露的行为的后果毕竟是有惩罚性质的，违反的程度与受到惩罚之间要成比例。

89 对于法院如何行使偏离一般规则（即披露有问题，一般情况下都要解除/撤销冻结令等）的裁量权而言，没有明确与简单快捷的原则，法院要根据个案中的所有的有关事实作出决定。

e. The interests of justice may sometimes require that a freezing order be continued, but that a failure of disclosure be marked in some other way, for example by a suitable order as to costs."

最后可以一提，众所周知申请冻结令很昂贵，其中最大的原因就是要满足本段针对的作出全面与坦率披露的要件。而申请人的律师因为有这个责任，就必须花费大量的时间与金钱进行询问与调查，然后才能向法院作出披露，否则他/她可能需要承担个人责任。

1.7.2 指引二：申请人要披露索赔的有关具体情况与被申请人会有的争辩与法律论据

“指引二”实际上是对本章上一段“指引一”的延伸（extension）。在指引一就已经提到了申请人必须做出全面与坦率的披露，这除了案件的重要事实（material facts）外，也要包括法律论据（legal submission）。但法律论据不只是申请人索赔的法律论据，而且要包括被申请人/被告（defendant）可能会提出的法律论据或争辩。这要求的背后理由十分简单，因为这是单方面（*ex parte*）或无通知（without notice）的申请，所以被申请人没有抗拒与争辩的机会，法院只能听取申请人的一面之词。这一来法院就没有全面（正反两面）的法律论据去客观判断，是否满足冻结令的申请人必须有一个“良好论据案件”（good arguable case）的要求。

在作出冻结令申请之前，双方会是已经就有关争议进行过接触，被申请人也会在书信往来中提出过一些争辩。这些书信往来可以作为附件让法院看到被申请人的争辩与法律论据。但也可能没有这些书信往来，即使有也不表示被申请人当时的争辩是准确与全面的（那时被申请人可能还没有委任律师，只是凭自己想当然）。

所以申请人的义务或责任是“假设”（presumption）被申请人如果出庭的话，全面列出被申请人对每一个争议问题（disputed issues）的争辩与法律论据，并一一答辩（reply）。这样在誓章/誓词（affidavit/affirmation）列出后，法院就可以参考与了解双方案件强弱，不至于被误导（mislead）。

一般而言，申请人的代表律师不需要假设与披露的被申请人的争辩与法律论据是：

（1）被申请人在正常情况下不会提出的争辩与法律论据，例如一个非常刁钻或仍没有明确说法与肯定性的法律论据。如果真这样要求的话，对申请人很不公平，毕竟如果申请人委任的代表律师水平很高，该代表律师想到对方可能以某一很刁钻的角度进行争辩，这如果披露了的话，这可能是提醒与教会了被申请人，让他/她将来在实际争议（诉讼或仲裁）中使用。

（2）被申请人或许会提出，但本质上并不重要的争辩与法律论据，又或者即使提出，将来在法院诉讼或仲裁中也显然会被否定（dismiss）。

至于如何区分（distinguish）或如何找出分水岭（watershed），对有经验与有水平的律师、仲裁员与法官而言并不会太困难，在工作中也常会遇到。如仲裁庭在文件披露（disclosure）

阶段，双方相互要求提供特定文件，仲裁庭在考虑哪些文件是“有关与重要”（relevant and material）时，就需要看双方当事人已经交换了的文书请求（pleadings / submissions）中双方列出的争议问题。仲裁庭会看到哪些是关键性的争议问题，哪些并不重要甚至可以否定。显然如果一方针对不重要或会被否定的争议问题要求对方披露或提供文件（特别是涉及文件很多时），就会被仲裁庭拒绝或大幅度减少了。

有不少权威先例都提到了指引二中的申请人义务或责任，如：

（1）Lloyd's Bowmaker Ltd v. Britannia Arrow (1988) 1 WLR 1337 上诉庭先例中 Glidewell 大法官在参考了有关先例后支持申请人的义务或责任是：“*must disclose any defence he has reason to anticipate may be advanced.*”

（2）在 Town & Country Sport Resorts v. Partnership Pacific Ltd (1988) 49 ATPR 783 先例，澳大利亚联邦法院说：“*to place before the court all relevant matters including such matters which would have been raised by the defendant in his defence if he had been present.*”

（3）在 O'Regan v. Lambic Productions (1989) 139 NLJ 1378 先例，Peter Pain 大法官说：

“*It is clearly the duty of Counsel and of the solicitor to point out to the Judge any points which are to their client's disadvantage, which the Judge should take into account in considering whether or not to grant the injunction. It is difficult for a Judge upon an ex parte application at short notice to grasp all the relevant points.*”

最后可节录 Steven Gee QC 的《Commercial Injunctions》（2016 年，第 6 版）一书之 9-006 至 9-007 段的详细介绍：

“*It is of the utmost importance that the applicant carefully considers the nature of the cause of action and the facts on which it is based before formulating the application. Facts relevant to the strength or weakness of the case on the merits should be put before the court. A thorough check should be made to ensure that all defences actually raised by the defendant are identified and fairly summarized.*

Furthermore, on the hearing of the without-notice application it is the duty of counsel to ensure that defences and evidence in support of them are specifically drawn to the attention of the judge. Merely mentioning the existence of such material without showing it to the judge may in itself be misleading, or give the case a different flavour. Counsel has a personal duty to the court to ensure that the judge sees all the relevant material.

It is usual for a skeleton argument to be used on an application of any complexity. If a skeleton argument is used, it will be one of the primary documents used by the judge in hearing the application and it is very important that it is an entirely fair document. It must not, by failing to mention matters, divert the judge's attention away from material which he should have in mind if he is to have a fair view of the case.

The applicant must identify any defences, which, although not yet taken, would have been available to be taken by the defendant had he been present at the application, provided that:

(1) the defence is one which can reasonably be expected to be raised in due course by the defendant;

(2) the defence is not one which can be dismissed as without substance or importance..."

1.7.3 指引三：冻结令针对的"资产"（asset）[90]

早期的冻结令要求申请人/原告必须提供相信被申请人/被告在英国所有的特定（specific）资产，例如是被申请人在英国有银行账户（无论是否透支）。在大多数案件中申请人不会知道什么银行具体有多少资产，例如不会知道银行账户中有多少钱，但只要知道被申请人有银行帐号（这要通过调查与/或被申请人过往的了解才能知道），就是表明被申请人有资产的迹象。因此冻结令会冻结的是特定金额上限的资产，如果银行账户中的余额超出这笔金额上限，那么只有这笔金额上限的资产才被冻结。当然对于银行账户中到底有多少余额，会同时通过第三方披露令（Norwich Pharmacal Order）[91]与 Bankers Trust Order[92]的附属命令要求银行提供信息。

因此也会有不少情况中作出冻结令但无法真正冻结到资产。例如是在著名的 The "Mareva" (1975) 2 Lloyd's Rep 509 先例中作出的冻结令，作出后才知道被冻结的银行账户中只剩下了 3 美元，涉案金钱已经汇出英国。但今天冻结令（以及资产披露令与第三方披露令）的管辖不断扩大，包括常见的全球冻结令（Worldwide Freezing Order 或简称 WFO），因此再出现"The Mareva"先例的案情，由于仍然可以继续追踪从银行账户中汇出的金钱，就不一定会像"The Mareva"先例一样因未能真正冻结到英国的资产而束手无策。

早期的冻结令先例中，所称资产主要针对的是在被申请人名下、可能离开英国的动产（这表示会流失），例如是：

- 英国的银行帐号：见"The Mareva"先例；
- 飞机：见 Allen v. Jambo Holdings (1980) 1 WLR 1252 先例；
- 船舶：见 The "Rena K" (1978) 1 Lloyd's Rep 545 先例；

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[90] 这里所称"资产"（asset），是在冻结令的背景下对所针对的近义词"财产"（property）的称呼。

[91] 见 Norwich Pharmacal v. Commissioners of Custom & Excise (1973) 2 All ER 943 先例，这课题已在本书第二章之 4 段详论。

[92] Bankers Trust v. Shapira (1980) 3 All ER 353 先例，这个课题可见本书第二章之 4.8 段。另也不妨节录笔者《禁令》（2000 年）一书之 390 页：*之后，在 Bankers Trust v. Shapira (1980) 3 All ER 353，再多了一种叫"Shapira Orders"。它实是"Norwich Pharmacal Orders"更细致/深入的一种，为追查一笔金钱下落向银行下的命令。该先例中，被告用假支票向原告银行支取了大笔金钱(1 百万美元)，存进自己银行后再转汇去外国。原告获得了一个 Mareva 禁令，但一审法官拒绝去作出一个辅助命令要求被告银行提供／披露所有关于被告户口的文件：通讯来往，资金去向，等等。但上诉庭去推翻，并给了这个称为"Shapira Orders"的辅助命令。*

- 期租船舶上的燃油：见 The “Span Terza” (1984) 1 Lloyd’s Rep 119 先例；

- 船舶上的货物：见 The “Eletherios” (1982) 1 Lloyd’s Rep 351 先例；

- 保险收益/保险赔偿（insurance proceeds）：见 The “Siskina” (1978) 1 Lloyd’s Rep 1 先例, The “Angel Bell” (1980) 1 Lloyd’s Rep 632 先例；

- 会被转移的机械设备：见 Rasu v. Pertamina (1977) 2 Lloyd’s Rep 397 先例。

- 汽车、珠宝、艺术工艺品（*objets d'arts*）、权利动产（chose in action）[93]：见 CBS United Kingdom v. Lambert (1983) Ch 37 先例。

- 汇票（bills of exchange）、股票（shares）、公司债券（bonds）：见 Montecchi v. Shimco (UK) Ltd (1979) 1 WLR 1180；Harley Street Capital Ltd v. Tcdhigirinski (No.1) (2005) EWHC 2471 (Ch)等先例。

但早期的先例中也明确有一些资产是不可以被冻结的：如信用证（Letter of Credit）、“索即付保函（Demand Guarantee）、银行担保将要支付的收益（proceeds）。申请对银行担保的冻结令比较困难，因为维持商业人士对此类银行担保的信心是非常重要的，而一旦允许其他人士方便地申请冻结令，就会导致银行无法在这类银行担保下作出支付、打击商贸社会对这类银行担保的信心。因此除非有清楚的证明显示是欺诈，而且银行知悉有关事实，否则都难以成功申请对银行担保的冻结令：见 Practice Note to Bolvinter Oil SA v. Chase Manhattan Bank (1984) 1 WLR 392 先例。但对于这类银行担保支付后的收益，由于并不影响银行担保在商贸社会中的运作，因此是可以作出冻结令的：见 Z Ltd v. A-Z and AA-LL (1982) 1 Lloyd’s Rep 240 先例。但对此类财产会存在的问题是这些收益的受益人（beneficiary）如果在外国，例如是在银行担保下作出支付给巴拿马公司，即使法院作出全球冻结令，也难保能真正冻结到这些钱。

而在今天冻结令（特别是全球冻结令）针对的资产有一定的不同，往往不是针对特定目标的资产[94]。事实上一般会依赖被申请人在附属的资产披露令中对全球资产作出披露，在事前较难以知道被申请人到底在全球会有什么特定资产。例如近期的 JSC BTA Bank v. Ablyazov (2015) UKSC 64 最高院先例中涉及的全球冻结令的措辞/文字如下：

“4. Until judgment or further order … the respondent must not, except with the prior written consent of the Bank’s solicitors –

> *a. Remove from England and Wales any of his assets which are in England and Wales … up to the value of £451,130,000 …*

[93] “权力动产”（chose in action）或也称为“无形动产”、诉讼上的物、无体物等。指可依法占有及处分的权利，如股权、专利权、债权、使用权、收益权、合约权等。

[94] 当然如果明确知道的被申请人部分特定资产，也会在冻结令中明确作出针对。其中一个原因会是英国与财产所在地的法律对特定的财产是否属于冻结令针对的“资产”看法可能不同，英国法下的资产看来范围比较广泛，通过明确特定财产属于冻结令针对的资产来避免争议。

b. In any way dispose of, deal with or diminish the value of any of his assets in England and Wales up to the value of ... £451,130,000 …

c. In any way dispose of, deal with or diminish the value of any of his assets outside England and Wales unless the total unencumbered value … of all his assets in England and Wales ... exceeds £451,130,000 …

5. Paragraph 4 applies to all the respondents' assets whether or not they are in their own name and whether they are solely or jointly owned and whether or not the respondent asserts a beneficial interest in them. For the purpose of this Order the respondents' assets include any asset which they have power, directly or indirectly, to dispose of, or deal with as if it were their own. The respondents are to be regarded as having such power if a third party holds or controls the assets in accordance with their direct or indirect instructions."

从措辞/文字来看非常广泛，例如第四条指出包括了"任何资产"（"*any of his assets*"）。在第五条还对任何资产进行一些解释，无论是"在被申请人名下"（"*in their own name*"）、"独自或与他人共同拥有"（"*solely or jointly owned*"），或是任何申请人有"实益利益"（beneficial interest）的资产都被包括在内。还包括了被申请人"有权力像是自己的一样可以直接或间接处置的资产"（"*any asset which they have power, directly or indirectly, to dispose of, or deal with as if it were their own*"），"第三方根据被申请人的直接或间接指示持有或控制的资产"（"a third party holds or controls the assets in accordance with their direct or indirect instructions"）也属于申请人"有权力"，即属于冻结令范围内的资产。在这样广泛的措辞/文字下，也有很多先例解释哪些是属于其中所称的"资产"。对此问题并不能轻易对待，毕竟一旦没有严格遵守这里的措辞/文字行事，被申请人就可能被认定藐视法院，甚至受到监禁的惩罚（见本章之 1.9 段）。所以虽然这对立法经常会玩"擦边球"并带来好处，但针对法院禁令/命令玩"擦边球"就十分危险。这也是为什么很多银行会向法院申请澄清（clarify）到底哪些属于冻结令范围内的"资产"，以防不小心触犯刑法。

不妨再多举几个近期先例，显示这些针对任何资产的措辞/文字解释的困难。

1.7.3.1 冻结令作出后获得的资产也属于冻结令下的"资产"

在 TDK Tape Distributor (UK) Ltd v. Videochoice Ltd (1986) 1 WLR 141 先例中，判被申请人在冻结令作出后获得的新资产（例如利息、第三方赔付的金钱等）也属于冻结令下所称的"资产"，不需要作为申请人/原告在发现后向法院申请对冻结令针对的资产范围进行延伸。可以简单节录 Skinn 大法官所说：

"*It seems to me that it would be a negation of the purpose of that injunction if, every time the defendant acquired some new asset or property, it was up to the plaintiffs to discover that and make an application to the court that the existing injunction be extended to deal with it. It seems to me that a Mareva injunction is looking to the future and is dealing with the situation between the obtaining of the judgment and its eventual execution, and it will cover any assets which are acquired between the granting of the order and the eventual execution of any*

judgment obtained in the action in question."

1.7.3.2 公司的"商誉"也是冻结令针对的资产

在 Templeton Insurance Ltd v. Thomas (2013) EWCA Civ 35 上诉庭先例中涉及了公司的"商誉"（goodwill）是否属于冻结令所称的"资产"。在此先例中，Thomas 先生（以下简称 T 先生）在 1990 年代创办了 Motorcare Warranties Limited 公司（以下简称"Motorcare"），主要通过建立数百个代理人（主要是汽车经销商）的销售网络，向汽车用户销售、推销对汽车"机械故障险"（mechanical breakdown insurance）的投保。在 2003 年到 2004 年之间，T 先生将生意交给自己的女婿 Panesar 先生（以下简称 P 先生）打理。从 2004 年前后开始，Motorcare 销售的保单由作为原告的保险公司（Templeton Insurance Ltd，以下简称"Templeton"）承保，具体而言是 Motorcare 与 Templeton 签订合约（签订的是一年期限合约，逐年续约），由 Motorcare 作为代理人销售 Templeton 的保单。在 2007 年 Motorcare 与 Templeton 刚刚续约后不久，Templeton 由于发现存在重大亏损，开始调查与 Motorcare 的合作，进而发现了 Motorcare 存在越权代理，向 Templeton 提供虚假信息，以及侵吞保费的不当行为。因此 Templeton 向法院申请，并获得法院作出的针对 Motorcare、T 先生与 P 先生的冻结令。与此处争议焦点有关的是，在冻结令中冻结了 Motorcare 的所有资产，同时有条文明确规定任何被通知的人士，都不得对会违反冻结令的行为进行协助或允许，否则将被处以藐视法院的相关惩罚："*Effect of this Order: It is a Contempt of Court for any person notified of this Order knowingly to assist in or permit a breach of this Order. Any person doing so may be sent to prison, fined or have his assets seized.*"

但是向 Motorcare、T 先生与 P 先生通知了冻结令后，T 先生与 P 先生即刻设立了一间名为 Motorcare Elite 2008 Limited（一下简称"Motorcare Elite"）的公司，从事与 Motorcare 完全相同的业务。Motorcare Elite 采用了 Motorcare 相同的办公地点，同样的员工，访问 Motorcare 的网站会自动将访问者导向 Motorcare Elite 的网站，在网站上还采用的是相同的内容。T 先生与 P 先生还说服了绝大部分自己的销售网络中的人士以建立了 Motorcare Elite 的销售网络，而且还获得了保险公司 AXA 接手 Templeton 的角色。因此 Templeton 向法院指控 T 先生与 P 先生的行为实际上是处置了 Motorcare 的"商誉"资产："*this was a dealing with or disposal of Motorcare's assets inter alia in the form of its goodwill.*"

上诉庭 Rix 大法官就明确指出"商誉"属于冻结令的一般措辞/文字中的"资产"，不妨节录判词如下：

"*… it was submitted that goodwill was not within the freezing order, or at any rate that, without it being explicitly mentioned in the order, there was insufficient particularity or certainty in this respect（这是被告提出的观点）. Reference was made to Darashah v. UFAC (UK) Limited [1982] WL 222, where 'goodwill' was explicitly specified ('and in particular from disposing of the goodwill of the…company'). It was there submitted that 'goodwill' was not an asset caught by the injunction, but this court disagreed: 'Every businessman knows that goodwill is a valuable commodity' said Lord Denning MR. It seems obvious that goodwill is among the most important intangible assets of a business. The fact that goodwill is an intangible makes it no less an asset than other intangibles, such as choses in action. There is nothing in this point.*"

换句话说，“商誉”是一早已经被认可属于公司的无形财产的一种类型，在今天跟本章之 1.7.3 段已经提到的“权利动产”（Chose in Action）一样，属于冻结令下“资产”的一种。

而此先例中还涉及的争议是，T 先生与 P 先生建立的销售网络，是否属于“商誉”的一部分。Rix 大法官就此对什么是“商誉”也进行了简单小结，可以节录如下：

“… it was submitted that the network of agents could not count as an asset amounting to goodwill（这是被告提出的观点）. Goodwill was a more complex notion, including the ‘brand’ and products of a company. I would agree that a company's goodwill may obviously extend beyond any single element of it, as in this case it extended to the brand of ‘Motorcare’ and to Motorcare's physical, postal, telephone, email and website addresses. That does not mean, however, that each element of it does not amount to an asset of the business. Moreover, in Darashah itself（Darashah v. UFAC (UK) Limited [1982] WL 222 先例）, Lord Denning cited, as typical examples of goodwill assets, ‘a list of customers but also the established connections with them’. This plainly applied to the network of Motorcare's representative agents with their established connections to Motorcare over the years, recognised by the FSA. This, together with the policy product, whether supplied by Templeton or subsequently by AXA, was the very foundation of Motorcare's business.”

换句话说，公司商誉包括了非常多的广泛内容，Darashah v. UFAC (UK) Limited (1982) WL 222 先例中 Denning 勋爵也曾经指出公司的客户名单、与客户之间建立的关系就属于商誉的一种。

也因此在此先例中最后法院认定 T 先生与 P 先生确实存在协助或允许转移 Motorcare 资产（商誉）的行为，构成了藐视法院，并最后根据 T 先生与 P 先生的行为对他们处以了监禁的惩罚。

1.7.3.3 针对第三方名下财产的 Chabra Jurisdiction

首先可一提，这与本章之 1.6.6 段针对第三方的冻结令是同一个课题。一般而言，申请冻结令需要对被申请人/被告有一个已经存在的“诉因”（cause of action），无论是否已经开始诉讼或仲裁、无论是否管辖地在英国。没有诉因的时候确实也不应该冻结其他人士的资产，毕竟连应该冻结多少金额的资产都无法确定。Diplock 勋爵在 The “Siskina” (1978) 1 Lloyd’s Rep 1 贵族院先例中说：*“A right to obtain an interlocutory injunction is not a cause of action. It cannot stand on its own, It is dependent on there being a pre-existing cause of action against the defendant arising out of an invasion, actual or threatened, by him of a legal or equitable right of the plaintiff for the enforcement of which the defendant is amenable to the jurisdiction of the court. The right to obtain an interlocutory injunction is merely an ancillary and incidental to the pre-existing cause of action.”*

在本章之 1.5.1.1 段提到了在《Civil Jurisdiction and Judgments Act (Interim Relief) Order 1997》后作出冻结令的管辖权问题，对 The “Siskina”先例的普通法地位（视冻结令为辅助英国有管辖权的诉讼或仲裁的法律行动）已经作出改变。英国法院作出冻结令已经是独立（freestanding）地位，但即使诉讼不是在英国境内，也要求存在外国的诉讼程序。换句话

说实际上仍然有申请人/原告对被申请人/被告有诉因的要求，毕竟没有诉因也无法开始外国的诉讼程序。

但之后在 TSB Private Bank International SA v. Chabra (1992) 1 WLR 231 先例建立了所谓“Chabra Jurisdiction”，将冻结令的被申请人/被告延伸到了申请人/原告没有诉因针对的第三方。此先例中原告银行要执行自己对债务人（debtor）的债权，而此先例的被告印度商人 Chabra 先生是该债务的担保人。由于债务人无力偿还，银行即希望要求担保人 Chabra 先生作出偿还，但 Chabra 先生已经离开英国回到印度。由于 Chabra 先生仍然对英国一间公司持有 90%的股份（Chabra 的妻子持有剩下 10%股份），银行即向法院单方面申请冻结令将这间公司列为共同被告/共同被申请人，但被该公司反对，主要的理由就是银行并没有任何针对该公司的“诉因”（cause of action）。Mummery 大法官判如果针对的只是作为第三方的这间公司作为唯一的被申请人，的确在没有良好论据案件/诉因的情况下不能作出中间禁令针对无诉因的第三方。但是类似此先例中，在冻结令只针对 Chabra 先生并不足以保护银行，而证据显示实际上 Chabra 先生拥有对该公司资产的真正“实益利益”（beneficial interest），即一旦将来获得对 Chabra 先生的胜诉判决的话，公司资产也会属于被执行财产。此时就可以附带性地将公司也列为共同被申请人，冻结公司的资产。看来，法院相信 Chabra 先生将他的资产“隐藏”（conceal）在该公司中，通过在背后操纵会使得公司资产流失，导致在原告胜诉后执行判决时，该公司已经是皮包公司，Chabra 先生持有的 90%股权一文不值。不妨节录 Mummery 大法官的判词如下：

“*… although the court had no jurisdiction to grant an interlocutory injunction in favour of a plaintiff who had no good arguable cause of action against a sole defendant, it had power to grant the injunction against a co-defendant against whom no cause of action lay, provided that the claim for the injunction was ancillary and incidental to the plaintiff's cause of action against the other co-defendant; and that, accordingly, since the injunction made against the first defendant alone was inadequate to protect the plaintiff, it was appropriate to grant the injunction against the second defendant in support of the existing legal right claimed by the plaintiff against the first defendant…*

… In brief, in the light of the plaintiff's evidence and the absence of any detailed evidence on the part of the defendants, I am of the view that there is a good arguable case that there are assets, apparently vested in the company, which may be ***beneficially the property of Mr. Chabra*** *and therefore* ***available to satisfy the plaintiff's claims against him if established*** *at trial. I am also of the view that it is arguable that the company was,* ***in fact****, at relevant times* ***the alter ego of Mr. Chabra*** *and that its assets, or at least some of its assets, may be available to meet the plaintiff's claims against him if established.*”（加黑部分是笔者的强调）

在较近期的 C Inc v. L (2001) 2 Lloyd’s Rep 459 先例中，Aikens 大法官对有关的过往先例进行总结，并将这类做法称为“*Chabra type of jurisdiction*”。不妨节录判词如下：

“***The Court will also grant a freezing order over assets that are held in the name of a third party, against whom no claim for substantive relief is made****, if it is satisfied that there is an arguable case that the assets are, in fact, those of the Defendant to the claim… This type of order has been made in a pending action, and also where a judgment has been obtained against the*

principal defendant. The rationale for what has been called the "Chabra type of jurisdiction" was explained by Mummery J in the Chabra case... The action is against the principal defendant; the objective of the freezing order is to preserve his assets to ensure that there is a fund to meet the judgment against the principal defendant if it is obtained; ***if the Court is satisfied that the third party holds assets that are arguably those of the principal defendant, then the freezing order is 'ancillary and incidental' to the main cause of action against the principal defendant****. That reasoning was approved by the Court of Appeal in the Aiyela case*[95]*. In that case, as Hoffmann LJ pointed out, the Claimant had more than a substantive claim against the principal defendant, Mr Aiyela. It had a 'substantive right' in the form of a judgment debt owed by Mr Aiyela. The freezing order was made against his wife because there was an arguable case that assets in her name were those of Mr Aiyela.*"（加黑部分是笔者的强调）

换句话说在 Chabra Jurisdiction 下，如果申请人提供证据并说服法院第三方控制、持有的资产"可争论地"（arguably）实际属于被告的资产，那么在针对被告的冻结令中可以附带性地冻结第三方的资产。

之后在 Yukong Line Ltd of Korea v Rendsburg Investments Corporation of Liberia (No. 2) (1998) 1 Lloyd's Rep 322 先例中，虽然无法明确确认第三方持有资产中的哪些部分属于将来会被执行的资产，但法院仍然认为可以属于 Chabra Jurisdiction，作出了针对第三方的一般资产的冻结令："*… up to the amount of the principal defendant's assets of which he appears to have possession and control* ."

C Inc v. L 先例看来对 Chabra Jurisdiction 进行了进一步扩大。在 C Inc v. L 先例中，原告已经获得了针对被告（L 女士）的"判决债务"（judgment debt），同时也获得了针对 L 女士的冻结令，但经过 L 女士披露其实际上并没有什么资产，所有与原告之间的交易往来都是作为 L 先生资产的"信托受托人"（trustee）或"代理人"（agent）进行，持有的资产也是作为 L 先生资产的信托受托人或代理人代为持有。因此原告就希望申请冻结第三方 L 先生的资产。与之前的 Chabra Jurisdiction 有关的系列先例的不同之处在于，此先例中资产看来根本是属于第三方，并非属于被告。

在《Senior Courts Act 1981》之 section 37(1)下，英国法院有广泛的作出禁令的权力，只要法院认为做法是"公平"（just）与"方便"（convenient）的，在遵循过往先例"已经建立的原则"（established principle）的情况下就可以作出禁令。在是否可以针对此先例中的情况的第三方资产作出冻结令的问题上，Aikens 大法官在过往英国先例中没有找到有关此问题判法的先例（"*there are no English cases to which Miss Dias（申请人的代表大律师） can point in which the English Court has granted a freezing order over assets of a third party, where the defendant to the action [against whom there is a judgment] claims to hold assets but only as trustee or agent of that third party.*"）。但法院之后提到了澳大利亚高院的 Cardile v. LED Builders Pty Limited (1999) HCA 18 先例，并总结澳大利亚高院的判法如下：

[95] Mercantile Group (Europe) AG v. Aiyela (1994) QB 366 先例。此先例中的被告 Aiyela 先生有一些资产在妻子的名下，原告对 Aiyela 的妻子并没有诉因，但法院对申请人/原告没有诉因的妻子也作为共同被申请人/被告作出冻结令。

"*It seems to me that the High Court of Australia has stated that, in Australia, the assets of a third party can be frozen in aid of enforcing a pending or actual judgment, even where those assets are not beneficially owned by the actual or potential judgment debtor… the High Court of Australia is stating that* ***there must be some causal link between the fact that the Claimant has obtained a judgment against the principal defendant and thus has a legal right, as a consequence of the liability giving rise to the judgment, to go against the assets of the third party****. I will delay deciding whether English law permits the exercise of the freezing order jurisdiction where there is such a causal link until I have considered the remaining two factors I have identified.*"（加黑部分是笔者的强调）

换句话说根据澳大利亚高院的判法，在原告对被告获得胜诉判决并执行与被告有针对第三方的权利之间存在"因果连接"（causal link）的情况下，才可以作出冻结令针对没有诉因的第三方资产。之后此先例的判词中对这种判法予以认可，并指出愿意在英国法院予以适用：

"*… critically, the High Court of Australia held that the right of A to a freezing order against C is dependent upon A having a right against B and that right itself giving rise to a right that B can exercise against C and its assets. Therefore the freezing order sought by A against C is 'incidental to' A's substantive right against B and it is also 'dependent upon' that right. In this case the Claimant has a substantive right against Mrs L; it has the default judgment. Because of that right, indeed because of the antecedent liability of Mrs L to the Claimant, Mrs L has (arguably) a right to an indemnity from Mr L. That can either be enforced by her, or if she will not do so, by a Receiver appointed by the Court. That receiver would have the right to claim against Mr L and to satisfy any judgment out of his assets. I have concluded that, upon analysis, the English Court can and should adopt the same approach as the Australian High Court. Therefore the Court does have the legal power to grant a freezing order against Mr L. Such an order is 'incidental to' the substantive right that the Claimant has against Mrs L. The order is also 'dependent upon' the substantive right that the Claimant has against Mrs L.*"

这样的判法也是有一定道理的。毕竟类似此先例中的情况，冻结 L 女士的资产是毫无争议的，而即使不能在此冻结令中一并冻结 L 先生的资产，一旦之后 L 女士无力支付判决债务，法院在委任资产"接管人"（receiver）[96]处理 L 女士的资产时，接管人也可能要向 L 先生提起"补偿"（indemnity）之诉（L 女士声称自己是作为 L 先生的信托受托人或代理人行事），与要求冻结 L 先生的资产。例如 Cruz City 1 Mauritius Holdings v. Unitech Ltd (2014) EWHC 3704 (Comm)先例中就对此指出：

"*However, the Chabra jurisdiction has since been extended to cases which are not limited to beneficial ownership of assets. Applying Australian authority (Cardile v LED Builders Pty Ltd [1999]*

[96] 委任接管人是执行的办法之一。对于较麻烦的判决债务人资产，需要通过管理、监督与控制才能获得金钱以满足债权的时候，就可以向法院申请委任接管人，接管人会接管判决债务人的资产，包括业务、公司等：见 Derby v. Weldon (No.3 and 4) (1990) Ch 65 先例等。在笔者的《仲裁法——从开庭审理到裁决书的作出与执行》(2010 年)一书第十四章之 8.6 段有介绍接管人的做法。在《Senior Courts Act 1981》之 Section 37(1)，除了可以作出冻结令外，还赋予了英国法院广泛的委任接管人的权力："*The High Court may by order (whether interlocutory or final) grant an injunction or appoint a receiver in all cases in which it appears to the court to be just and convenient to do so.*"在《Arbitration Act 1996》之 Section 44 (c)也提到的是："*… the granting of an interim injunction or the appointment of a receiver…*"

HCA 18), it has been held that a freezing order may be granted to preserve assets which are or may be available to the judgment creditor, if necessary by the appointment of a liquidator or receiver, by exercising the rights of the judgment debtor to compel the third party to disgorge property or otherwise contribute to the funds or property of the judgment debtor."

但毕竟冻结令是会带来严重后果的禁令，违反、未履行冻结令会导致藐视法院、带来罚款、监禁等惩罚。尤其在 Chabra Jurisdiction 下针对的是与本诉无关的第三方，在冻结令中针对第三方，就使得第三方也面对了前述风险，因此法院指出对此类冻结令需要尤其小心对待。在 ETI Euro Telecom International NV v. Republic of Bolivia (2008) EWCA Civ 880 上诉庭先例中指出："*… Issues as to the grant of a freezing injunction and its scope are always fact-specific. I do not think that the court could or should lay down specific rules as to when such injunctions may be made against parties against whom the claimant has no cause of action, particularly where as in the present case the parties have not made submissions on the point.* ***However, the grant of such injunctions must be even more exceptional than the grant of freezing injunctions against defendants against whom a claimant has a cause of action. Applications for injunctive relief against a third party must be supported by clear evidence showing exceptional grounds,*** *even on the initial application made without notice.* ***The jurisdiction to grant such injunctions must be exercised with great caution.***"（加黑部分是笔者的强调）

以上节录内容提到，法院将无诉因第三方作为共同被申请人/被告作出冻结令完全是例外，只有在特殊情况中才会适用。无论是 TSB Private Bank International SA v. Chabra 与 C Inc v. L 先例，或是提到的澳大利亚先例等，实际上法院都有怀疑被告通过第三方在隐藏资产的味道。

在近期的 PJSC Vseukrainskyi Aktsionernyl Bank v. Maksimov (2013) EWHC 422 (Comm)先例中对 "Chabra Jurisdiction"予以认可，确认了只要是有"良好的猜测理由"（"*good reason to suppose*"）被申请人（被告名下的公司）的资产会最终在执行程序中被执行，法院就可以作出针对这些第三方（通常会是一家公司法人、妻子、子女等）作为共同被申请人的冻结令。不妨节录 PJSC Vseukrainskyi Aktsionernyl Bank v. Maksimov 先例中，Popplewell 大法官对 Chabra Jurisdiction 原则的总结如下：

"*(1) The Chabra jurisdiction may be exercised where there is good reason to suppose that assets held in the name of a defendant against whom the claimant asserts no cause of action (the NCAD) would be amenable to some process, ultimately enforceable by the courts, by which the assets would be available to satisfy a judgment against a defendant whom the claimant asserts to be liable upon his substantive claim (the CAD).*[97]

(2) The test of 'good reason to suppose' is to be equated with a good arguable case, that is to say one which is more than barely capable of serious argument, but yet not necessarily one

[97] Popplewell 大法官将在实质争议中的原告根据有关的诉因起诉的被告简称为 CAD（即 Cause of Action Defendant），而对于实质案件的第三方、原告没有诉因起诉的、被告拥有的公司简称为 NCAD（即 Non Cause of Action Defendan）。而"Chabra Jurisdiction"就是只要有"良好的猜测理由"（"good reason to suppose"），NCAD 的资产实际会是最终执行的对象，法院就有管辖权针对 NCAD 作出冻结令。

which the Judge believes to have a better than 50% chance of success.[98]

(3) In such cases the jurisdiction will be exercised where it is just and convenient to do so. The jurisdiction is exceptional and should be exercised with caution, taking care that it should not operate oppressively to innocent third parties who are not substantive defendants and have not acted to frustrate the administration of justice.[99]

(4) A common example of assets falling within the Chabra jurisdiction is where there is good reason to suppose that the assets in the name of the NCAD are in truth the assets of the CAD. Such assets will be treated as in truth the assets of the CAD if they are held as nominee or trustee for the CAD as the ultimate beneficial owner.

(5) Substantial control by the CAD over the assets in the name of the NCAD is often a relevant consideration, but substantial control is not the test for the existence and exercise of the Chabra jurisdiction. Establishing such substantial control will not necessarily justify the freezing of the assets in the hands of the NCAD. Substantial control may be relevant in two ways. First, evidence that the CAD exercises substantial control over the assets may be evidence from which the Court will infer that the assets are held as nominee or trustee for the NCAD as the ultimate beneficial owner. Secondly, such evidence may establish that there is a real risk of dissipation of the assets in the absence of a freezing order, which the claimant will have to establish in order for it to be just and convenient to make the order. But the establishment of substantial control over the assets by the CAD will not necessarily be sufficient: a parent company may exercise substantial control over a wholly owned subsidiary, but the principles of separate corporate personality require the assets to be treated as those of the subsidiary not the parent. The ultimate test is always whether there is good reason to suppose that the assets would be amenable to execution of a judgment obtained against the CAD.[100]"

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98 "良好的猜测理由"实际上等同于"良好论据的案件"（good arguable case），即不能仅仅是可以说的过去的论点，但也不必要一定超过 50%的胜诉机会。

99 "Chabra Jurisdiction"只有在例外案件中，才会被法院非常小心地行使，毕竟要针对的是与案件当事人无关的第三方。

100 被申请人对第三方名下资产的实际控制通常是有关的考虑因素，但这并不是 Chabra Jurisdiction 存在与运行的测试标准，即使是证明了被申请人实际控制了第三方名下的资产，也不因此就肯定能冻结第三方名下的资产。实际控制需要被考虑，一个原因是因为如果证明了被申请人实际控制了第三方名下资产时，有可能可以让法院就此推断被申请人是资产的实益利益所有人，因此这些资产会在胜诉判决中被执行。实际控制还需要被考虑的原因是，可以通过被申请人的实际控制来显示资产确实有流失风险，因此法院才可以公正与方便地作出冻结令。不妨举例来说，在 TSB Private Bank International SA v. Chabra (1992) 1 WLR 231 先例中公司的实际控制人 Chabra 先生有 90%的股份，再加上 10%股份由 Chabra 妻子持有等，法院就认定 Chabra 先生是实益利益所有人（但如果该 10%股份由完全不相关的第三方，例如是其他稍有名气与独立的英国公司或是其他美国公司持有，法院就很可能不会作出这样的认定）；而 Chabra 先生没有应诉，已经离开英国回到印度，没有想回到英国的迹象，再加上其他因素导致法院认定这笔由 Chabra 先生作为实益利益所有人的资产可能会流失，因此将第三方公司也作为冻结令的共同被申请人。对资产的实际控制并不必然导致针对第三方资产的冻结令，还很显然的例子就是母公司对子公司有实际控制，但母公司与子公司分别都是独立的法人，而且双方的资产也是各自持有，母公司虽然在子公司中有股权，但在母公司作为冻结令被申请人时，子公司的资产并不必然能成为冻结令针对的对象，这在本章之 1.7.3.4 段介绍 Lakatamia Shipping Co Ltd v. Su (2014) EWCA Civ 636 上诉庭先例时还会进一步明确。可以引入 Chabra Jurisdiction 的最终测试，还是要看第三方名下的资产是否属于申请人对被申请人胜诉后的可执行资产（当然具体是否作出冻结令针对第三方还要看法院是否认定诉讼至可执行期间，资产会由于被申请人/被告的控制而流失）。

以上主要是根据《Senior Courts Act1981》之 Section 37 下作出冻结令的总结，可以看到法院不断提到针对第三方作出冻结令等禁令要小心与谨慎。可以想得到，“单方面”（*ex parte* / without notice）申请下，由于法官事实上只是听取“一面之词”，要丑化被申请人与说服法官认可第三方资产实际相当于被申请人所有、而且存在流失风险，并不算太困难。在英国法院的部分法官看来，由于部分公司是中资又作出他们不认同的言行（例如是面对外国原告提起的仲裁不予理睬等），会觉得这些中资公司“贼眉鼠眼”，而这些公司的子公司（特别是 BVI 公司或甚至是没有什么商业活动的香港公司）都有可能成为禁令的被申请人。

在本章之 1.5.1.2 段也提到了在《Arbitration Act 1996》之 Section 44 下，法院还可以帮助仲裁程序颁布/作出包括冻结令在内的中间禁令（interlocutory 或 interim injunction），但在这种情况下作出的冻结令是无法将没有诉因的第三方列为共同被申请人/被告的，正如《Russell on Arbitration》（2015 年，第 24 版）之 7-196 段说：

“*There is arguably conflicting authority on whether s.44 relief can be granted against a third party who is not subject to the arbitration agreement. The better view as expressed in Cruz City 1 Mauritus Holdings v. Unitech Ltd*[101] *is that s.44 does not allow relief to be granted against a non-party. This view is to be contrasted with Tedcom Finance Ltd v. Vetabet Holdings Ltd*[102] *where the Court of Appeal found that there was an arguable case that the Court had jurisdiction to grant leave to serve on a non-party out of the jurisdiction under CPR r.62.5(1)(b), the service gateway applicable to s.44. It is submitted that the indications suggesting that s.44 does not apply to non-parties set out in Cruz City… are correct.* ***Assuming this is the position, injunctive relief against a third party connected with an arbitration would need to be sought under s.37 of the Senior Courts Act.***”（加黑部分是笔者的强调）

1.7.3.4 被申请人不得令独资公司资产流失与法人独立地位的矛盾

公司是“独立法人”（legal person），所有资产独立于其股东（即使是独资公司的股东）的资产。在英国法下，这早在 Salomon v. A Salomon & Co Ltd (1897) AC 22 先例中就予以明确，在近期的 Prest v. Petrodel Resources Limited (2013) UKSC 34 最高院先例中还得到了再次确认：“*A legally incorporated company must be treated like any other independent person with its rights and liabilities appropriate to itself, whatever may have been the ideas or schemes of those who brought it into existence.*”

在近期的 Lakatamia Shipping Co Ltd v. Su (2014) EWCA Civ 636 上诉庭先例中，考虑了被申请人作为控股股东的公司所拥有的资产，是否属于冻结令下所称“资产”（assets），这个与公司法人的独立地位产生一定冲突的问题。

在 Lakatamia Shipping Co Ltd v. Su 先例中，冻结令的申请人/原告（Lakatamia Shipping Co Ltd）在“远期运费协议”（Forward Freight Agreement，或简称“FFA”）向冻结令的被申请人/

[101] Cruz City 1 Mauritius Holdings v. Unitech Ltd (2014) EWHC 3704 (Comm)先例。
[102] Tedcom Finance Ltd v. Vetabet Holdings Ltd (2011) EWCA Civ 191 先例。

被告（Nobu Su 先生[103]）索赔 48,824,440.24 美元，原告之后向法院申请并成功获得法院作出针对被告的全球冻结令，有关针对的资产的措辞/文字，相比于刚刚提到 JSC BTA Bank v. Ablyazov 先例中的冻结令措辞/文字，只是少了"*and whether or not the respondent asserts a beneficial interest in them*"或者是"*… whether they are solely or jointly owned and whether the respondent is interested in them legally, beneficially or otherwise*"。

在此先例中的争议焦点是，被告作为直接或间接的独资股东实际控制了数个独资公司（这些公司是 FFA 争议的第三方，也并非冻结令针对的对象），这些独资公司控制、拥有的资产是否属于针对被告的全球冻结令中的"资产"？具体而言，被告在这些独资公司之间转移资产，用一家公司的资产帮助另一家公司偿还债务（这与欠债的独资公司支付正常业务上的债务有所不同）。例如是一家独资公司出售一艘名下的船舶之后，将金钱通过借贷等方式转移给另一家欠下债务的独资公司，以帮助欠下债务的独资公司偿还债务。

在一审（[2013] EWHC 1814）中 Burton 大法官判被告作为这些公司的独资股东/控股股东，可以通过各种手段实际控制独资公司资产，因此这些独资公司的资产也属于冻结令所针对的资产："*… the owner of a company can, by resolution at the general meeting or otherwise, particularly if he is also the sole or controlling director by reference to decisions at board meetings or otherwise, access and direct the fate of the assets of the companies which he thus owns or controls.*"也因此 Burton 大法官作出的命令是，被告如果想要对公司资产采取超出本章之 1.4.3 段介绍的一般生意往来、支付"生意上债务"（trade debts）等行为，也需要先作出通知。

在上诉庭则是以不同的理由作出了同样的判决。Tomlinson 大法官首先不同意一审中 Burton 大法官对独资公司资产属于冻结令针对资产的认定，换句话说即使是被告作为独资股东完全控制的独资公司资产，也并非直接受到冻结令针对的资产，仍然可以照常营运。但是被告毕竟有这些公司完全的股份，由于被告不得采取任何行为使自己的资产贬值、流失，因此被告不能采取在独资公司之间转移资产以偿还债务的行为。不妨节录 Tomlinson 大法官所说：

"*I do consider that we should take the opportunity to say that the reasoning in paragraph 16 of the judge's judgment cannot be supported… I agree with Mr Jarvis (被告的代表律师) that it is not correct to say that the vessel and the shares in Vantage[104] …（独资公司名下的资产） are*

[103] Nobu Su 先生，中文名为苏信吉，出生于中国台湾家庭，妈妈与太太均为日裔，控制有 TMT 集团等公司。苏信吉先生曾经在航运市场"呼风唤雨"，控制运费走势。也因此在 FFA 合约中一度赚取天文数字的利润。但 2008 航运市场剧烈波动与下滑后，于 2013 年也陷入严重的经济危机濒临破产。

[104] Vantage Drilling 是一家开曼群岛注册的公司，它的背后是风投公司。Nobu Su 先生曾经是 Vantage Drilling 的董事之一，他的公司 TMT 在韩国建造了两艘深海钻探船（drilling ship），然后通过 Vantage Drilling 长期租给巴西国家石油公司。但这个宏图计划因为 2008 年金融海啸石油价格大跌而告吹，这也导致 Vantage Drilling 根据它们之间的联营协议起诉 Nobu Su 先生。而 TMT 的倒闭估计导致 Vantage Drilling 将索赔目标转向巴西国家石油公司，因为巴西国家石油公司在 2015 年终止了租约。巴西国家石油公司终止租约的理由是 Vantage Drilling（Nobu Su 先生有参与）是通过贿赂巴西国家石油公司的前董事才获得的合约。双方在美国开始仲裁，仲裁庭的多数意见判巴西石油公司没有足够有说服力的证据证明 Vantage Drilling 知道存在贿赂行为，并且巴西国家石油公司在发现贿赂行为后仍然同意修改原合约等于追认（ratified）了合约的存在。所以仲裁庭的多数意见判巴西国家石油公司因违约/毁约而败诉，要赔偿 Vantage 高达 622,000,000 美元的损失再加上利息。巴西国家石油公司以仲裁庭忽视了有关贿赂的证据与共同仲裁员在开庭时显示出明显敌意为由，要求美国法院撤销裁决书，但被美国法院拒绝。这是国际仲裁界 2019 上半年的一个知名大新闻。最终巴西国

plainly and intendedly within the definition of assets in paragraph 3 of the Order（有关的全球冻结令）. They are not. They are 'covered by' the Order because dealing with them has the potential to diminish the value of the shareholdings of Mr Su in F3, F5, Great Elephant and TMT Energy（F3, F5, Great Elephant, TMT Energy 均为独资公司）.

There is therefore no basis upon which it can be asserted that the language of paragraph 6 of the standard form freezing order, whether with or without the Commercial Court words（指的在《Commercial Court Guide》[2017 年，第 10 版]中可选择加入的有关"beneficial interest"的措辞/文字：见本章之 1.7.3 段）, is either intended to have the effect or does have the effect of bringing within the definition of a defendant's assets the assets of a company which he controls, and such assets are not 'directly affected' by such an order. It can no doubt be both surprising and unsettling to be reminded of these first principles. For the reasons I have already given however the assets of such a company will ordinarily be indirectly affected by the Order because of the effect of disposition upon the value of the defendant's assets consisting in his direct or indirect shareholding in the relevant company."

类似地也可见 Rix 大法官所说："*… even under the order's existing wording, a company owner will not be permitted to deplete the assets of his companies, thereby diminishing the value of his own assets in the form of his shareholdings, unless he can bring such dispositions within an order's exception for the ordinary course of business. It is unlikely however to be within the ordinary course of business for a shareholder to act so as to diminish the value of his shareholdings. In case of doubt, the matter can of course be debated before the court.*"

换句话说，在这样的判法下，由于一贯以来公司法人的独立地位，独资公司名下的资产并不属于冻结令针对的资产范畴。但是被申请人/被告在营运独资公司的过程中，除非是正常的生意上债务或正常生活支出，否则不得采取任何会导致独资公司资产流失的行为。如果有任何疑虑看来就需要向法院申请，否则届时如果被法院认定属于违反冻结令，就可能构成藐视法院了。这也从一定程度上来说是绕开了公司法人独立地位的限制（要"揭开公司面纱"[pierce the veil of incorporation]并不容易[105]），也无须建立"Chabra jurisdiction"将独资公司作为冻结令的共同被申请人，就可以间接对独资公司的管理和营运产生影响。

在笔者看来，一般来说在普通情况下只针对被申请人的冻结令就已经足够了，也不需要依赖"Chabra Jurisdiction"专门针对公司，只要公司资产流失，被申请人就会是违反冻结令。说到底此先例中冻结令的措辞/文字并不足够包括这些"资产"在内。当然这在每一个案件中都有不同的案情与变数，此先例中 Nobu Su 先生及其公司都不在英国境内。而在 TSB Private

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家石油公司还是在 2019 年 6 月底在裁决书下支付了超过 7 亿美元。

[105] 在 Hashen v. Ali Shayif (2008) EWHC 2380 (Fam)先例中，总结了揭开公司面纱的几个原则："*In the first place, ownership and control of a company are not of themselves sufficient to justify piercing the veil… Secondly, the court cannot pierce the corporate veil, even where there is no unconnected third party involved, merely because it is thought to be necessary in the interests of justice…Thirdly, the corporate veil can be pierced only if there is some 'impropriety'… Fourthly, the court cannot, on the other hand, pierce the corporate veil merely because the company is involved in some impropriety. The impropriety must be linked to the use of the company structure to avoid or conceal liability…Fifthly, it follows from all this that if the court is to pierce the veil it is necessary to show both control of the company by the wrongdoer(s) and impropriety, that is, (mis)use of the company by them as a device or façade to conceal their wrongdoing… Finally, and flowing from all this, a company can be a façade even though it was not originally incorporated with any deceptive intent.*"

Bank International SA v. Chabra (1992) 1 WLR 231 先例中，在 Chabra 先生已经离开英国、只有公司在英国境内的情况下，用“Chabra Jurisdiction”的措辞/文字针对这家英国公司会使得冻结令更加有效。

1.7.3.5 作为“信托受托人”（trustee）持有的第三方资产根据措辞/文字可能属于冻结令针对的资产

在本章上一段已经提到了，在今天冻结令的标准措辞中，都有如下措辞/文字：“*Paragraph 5 applies to all the Freezing Respondent's assets whether or not they are in its own name and whether they are solely or jointly owned and* ***whether the Respondent is interested in them legally, beneficially or otherwise.***”（加黑部分是笔者的强调）

这措辞/文字也是最新版的《Commercial Court Guide》（2017 年，第 10 版）中提供的冻结令的范本。在 JSC BTA Bank v. Solodchenko (2010) EWCA Civ 1436 上诉庭先例中，就有关于冻结令的被申请人作为信托“受托人”（trustee）[106]持有的第三方资产是否属于有此措辞/文字的冻结令所针对的“资产”的疑问。

在此先例中，JSC BTA Bank 是一家在哈萨克斯坦注册的“合股公司”（joint stock company），之后由于发现董事、股东存在欺诈银行的行为，导致银行处于经济崩溃边缘，因此哈萨克斯坦政府于 2009 年通过收购股权等方式将银行收归国有，之后则开始了针对这些董事、股东的诉讼。

此先例中的第一被告 Solodchenko 先生（以下简称 S 先生）是银行原管理委员会的主席，也是董事会成员之一。在此诉讼时早已离开祖国哈萨克斯坦，已经居住于伦敦。银行指称 S 先生在任职期间策划了一些针对银行的欺诈行为，从银行挪用了 300,000,000 美元的资金转入了 5 间 BVI 公司（这些公司也被列为第四到第八被告），并在之后被进一步汇出给其他公司（这些公司被列为第九到第十二被告）。第二被告 Kythreotis 先生（以下简称 K 先生）是第四被告与第十一被告的董事，第三被告 Hercules 先生（以下简称 H 先生）是第八被告的董事。K 先生与 H 先生被银行指称不诚实地与 S 先生合谋、帮助 S 先生开展对银行的欺诈行为。

K 先生是居住在塞浦路斯的英国公民，拥有与经营名为 Starport 的集团公司。H 先生与 K 先生共同合作，并在 Starport 集团公司中任职。

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[106] “信托”（trust）是持有及管理资产的一种协议。一般指资产所有权人或“信托人”/“委托人”（trustor/settlor）把资产委托他人信托保管，以利第三方，即“受益人”（beneficiary）。信托关系的法律主要是衡平法。信托“受托人”（trustee）的责任重大，权力也大，任务在于尽忠职守为受益人的利益服务。受托人不得依赖信托资产为自己谋利。普通法下的信托可以通过签订信托契约成立，由遗嘱设立，或者由法律本身实施“推定信托”存在。房地产信托必须以书面契约成立，但在特别案件中，法庭也可以推定口头信托有效。在信托关系中，受托人是资产“法律意义上的所有人”（legal owner），受益人是获得信托真正利益的、衡平法的“实益所有人”（beneficialy owner）。在《中华人民共和国信托法》之第二条中对信托的定义是：“*本法所称信托，是指委托人基于对受托人的信任，将其财产权委托给受托人，由受托人按委托人的意愿以自己的名义，为受益人的利益或者特定目的，进行管理或者处分的行为。*”

由于在之前第三方披露令（Norwich Pharmacal Order）下披露的文件中，发现第四到第八被告、以及第九到第十二被告的公司资产归属非常不明确，有资产可能是为他人代管的信托资产，因此银行向法院申请对 K 先生、H 先生等作出冻结令与附属的资产披露令，并获得法院作出了包括以下标准措辞/文字的冻结令与附属的资产披露令："*… the Freezing Respondent must within 7 working days of service of this order and to the best of its ability after making all reasonable enquiries: (a) inform the Applicant's solicitors in writing of all of its assets worldwide exceeding in value £10,000, whether in its own name or not and whether solely or jointly owned and whether the Respondent is interested in them legally, beneficially or otherwise, giving the value, location and details of all such assets. For the purpose of this order the Freezing Respondent's assets include any asset which it has the power, directly or indirectly, to dispose of or deal with as if it were its own. The Freezing Respondent is to be regarded as having such power if a third party holds or controls the asset in accordance with its direct or indirect instructions; …*"

但是在对文件披露中，K 先生提出他在法院命令下无需披露他作为受托人或"代名人"（nominee）为第三方持有而他自己不是实益所有人的资产（"*that he was not required by the order to disclose property which he held as a trustee or nominee for a third party and in which he had no beneficial interest*"），并拒绝提供有关文件。[107]之后争议焦点也就变成了被申请人/被告是否对这些资产有法律或实益利益（"*whether the Respondent is interested in them legally, beneficially or otherwise*"）。换句话说，作为被申请人的 K 先生只是信托受托人或代名人，为其他人代管的财产中，K 先生自己实际上并没有"实益权益"（beneficial interest），最多只是一位作为资产名义上的拥有者的代名人，是否仍然属于"interested in… legally, beneficially or otherwise"？如果答案是肯定的话，那么 K 先生拒绝提供文件的行为就显然是违反冻结令，可能被法院处以罚款、监禁等惩罚了。

上诉庭的 Patten 大法官对法院冻结令的措辞/文字演变历史进行了回顾。首先是在曾经的 1997 年版本 CPR PD 25A 附上的冻结令范本中第 5 段（Paragraph 5）与第 6 段（Paragraph 6）的措辞/文字："*5… his assets … 6… whether in his own name or not and whether solely or jointly owned.*"在 Federal Bank of the Middle East v. Hadkinson (2000) 1 WLR 1695 先例中，上诉庭判这样的措辞/文字并不足够包括被申请人作为信托受托人持有的第三方资产，Patten 大法官也对此进行简单小结："*the decision in Hadkinson settled the construction of the words 'his assets' in the then standard form of freezing order including the phrase 'whether in his own name or not' and recognised that an order in this form would include assets belonging beneficially to the defendant but held in the name of some other entity on his behalf.* ***The key criterion was beneficial ownership****. The decision is also significant insofar as it recognised the possibility of including trust assets belonging beneficially to a third party as an exceptional form of order subject to the inclusion of additional express words such as 'whether held for his own benefit or for the benefit of others' or the like. The issue on this appeal is whether either of the subsequent changes in the standard form of order contain words…*"（加黑部分是笔者的强调）

换句话说，在第 5 段的措辞/文字下，即使是被第三方持有，只要被申请人是"实益所有人"（beneficial ownership），也属于被申请人的资产；但是被申请人持有、第三方才是真正

[107] 笔者估计此先例中的 K 先生（第二被告）拒绝披露文件、信息的原因，会是可能披露出来的文件显示了此先例中的 S 先生（第一被告）其实是信托下的受益人。

实益所有人的资产，并不在这措辞/文字下，因为关键是实益所有。同时上诉庭也指出了如果冻结令有额外的措辞/文字，是可能包括这些被申请人持有的第三方资产的，例如“*whether held for his own benefit or for the benefit of others*”

在 2001 年前后，英国法院收到很多针对被申请人“虚假信托”（sham trust）资产的冻结令申请。即资产实际上由被申请人所有与控制，但是通过虚假信托的方式在名义上是代第三方持有。在这些冻结令申请中，有很多不同的向法院建议加入的措辞/文字。但是法院对于这些措辞/文字可能影响到第三方的不良后果表示非常担忧，因为在单方面申请的情况下作出的冻结令可能事后被证明是错误的，即有关信托并非虚假信托而是真正的信托。因此之后 2002 年版本的 CPR PD 25A 附上的冻结令范本在第 6 段中增加了后两句：“*6. … For the purpose of this order the Respondent's assets include any asset which he has the power, directly or indirectly, to dispose of or deal with* ***as if it were his own****. The Respondent is to be regarded as having such power if a third party holds or controls the asset in accordance with his direct or indirect instructions.*”（加黑部分是笔者的强调）。

Patten 大法官指出，新的第 6 段仍然没有包括被申请人持有的第三方资产。毕竟受托人、代名人处置资产是依据信托人的指示，并非是当作自己的资产进行处置，也因此并不是冻结令里所指的“资产”。可以部分节录 Patten 大法官的判词：“*The two following sentences（第六段中新增的两句措辞/文字）are still in terms concerned with 'the Respondent's assets' but go on to include an asset which he has power, directly or indirectly, to dispose of or deal with as if it were his own. That would be both an odd and an inaccurate way in which to describe a trustee's power to deal with trust assets given his fiduciary obligations to the beneficiaries but it also ignores the last sentence of paragraph 6. This makes it clear that the power to deal with or dispose of the asset as if it were his own is a reference to a case where the legal owner is not the defendant but a third party yet it is the defendant who retains the power to direct how the asset should be dealt with. This is not, in my view, a partial definition of the preceding words. It is a comprehensive one. And it makes it clear that 'the Respondent's assets' can include assets held by a foreign trust or a Liechtenstein Anstalt when the defendant retains beneficial ownership or effective control of the asset. It does not extend to assets of which the defendant remains the legal owner but holds for the benefit of someone else… the change was designed to preserve the ruling in Hadkinson but to make it clear that 'his assets' include assets held by a third party in respect of which the defendant retains beneficial ownership or control… the language of paragraph 6 is, as a matter of construction, plain and does not include assets held by a defendant in which he retains no beneficial interest.*”

也就是第 6 段实际上是对第 5 段的进一步解释，并没有括大到被申请人持有的第三方资产上。尽管如此，由于在前述第 5 段、新第 6 段之后，此先例中还有“*whether the Respondent is interested in them legally, beneficially or otherwise*”的措辞/文字，被上诉庭认定是符合 Federal Bank of the Middle East v. Hadkinson 先例中指出的额外的措辞/文字，足够将被申请人持有的第三方财产包括在内。主要理由是在这段措辞/文字中，明确区分了法律名义上的利益、实益利益与其他利益。也节录 Patten 大法官的判词（上诉庭的 Aikens 大法官与 Longmore 大法官均同意此判法）如下：

“*A description of assets held 'legally, beneficially or otherwise' does draw a distinction*

between assets held legally and those held beneficially. As the judge put it, the words are disjunctive. That is only a meaningful distinction if legal ownership means something different from beneficial ownership. By the same token, there is a meaningful distinction of the same kind between assets held beneficially and those held otherwise than beneficially which are all within the new words. I do not accept Mr Stanley's（被申请人/被告的代表大律师） submission that one can read all three categories as forms of beneficial ownership even though I accept that the inclusion of the words where they are is a potential source of confusion. If the new words were intended only to confirm that the order includes assets held by the defendant legally (and beneficially) as well as only beneficially then they were unnecessary because the opening words of paragraph 6 ('whether or not they are in its own name') have precisely that effect. Any assets owned both legally and beneficially will be held by the defendant in his own name. Therefore, assuming as I do that the new words were added for a purpose, I can only conclude that paragraph 6 effects an expansion of the type of asset which paragraph 5 of the order would otherwise include. ***Assets held by the defendant as a trustee or nominee for a third party are included by an order which contains the new words.***"（加黑部分是笔者的强调）

因此，在此先例中由于有这额外的措辞/文字，K 先生名义上持有的所有财产，即使实益利益属于第三方、K 先生也披露了自己只不过是信托受托人等，也仍然属于冻结令所针对的资产。这样的措辞/文字将实际属于第三方的资产也纳入在冻结令针对的资产内，也会需要额外的考量与顾虑。因此在今天《Commercial Court Guide》（2017 年，第 10 版）之中，虽然将此措辞/文字加入了冻结令的范本，但只是作为可选择的选项。这方面的顾虑在本章稍后的 1.7.3.8.2 段会进一步介绍。

1.7.3.6 被申请人作为全权信托的受益人之一时全权信托的其他资产

在 JSC Mezhdunarodniy Promyshlenniy Bank v. Pugachev (2015) EWCA Civ 139 上诉庭先例中，进一步涉及了"全权信托"（discretionary trust）的问题。

此先例中 Pugachev 先生（以下简称"P 先生"）在 1990 年代于俄罗斯创办了 JSC Mezhdunarodniy Promyshlenniy Bank（以下简称"银行"），在 2010 年俄罗斯中央银行（Russia Central Bank）取消了银行的经营执照。之后于 2010 年末俄罗斯法院宣告银行进入破产程序、临时破产管理，俄罗斯法院委任了 Deposit Insurance Agency (以下简称"the DIA"，俄罗斯政府机构，向俄罗斯中央银行负责)作为银行的"清算人"/"清盘人"（liquidator）。P 先生在 2011 年初离开俄罗斯并居住于伦敦，估计不会回到祖国俄罗斯了。

DIA 在俄罗斯向 P 先生提起诉讼，指称在 2008 年末俄罗斯中央银行向银行注资后，P 先生暗中转移了超过 2,000,000,000 美元的资金挪作 P 先生自己、以及 P 先生控制的公司所用。这些指称不论是真是假或是有真有假，都被 P 先生否认。

而此先例是破产清算的银行与 DIA 作为申请人/原告向法院申请针对 P 先生的冻结令，以对俄罗斯的诉讼程序予以支援（冻结令在今天是独立的程序，可以对境外诉讼进行支援，这在本章之 1.5.1 段已经介绍过，不在此重复）。之后法院也确实作出全球冻结令（WFO），冻结了 P 先生 1,000,000,000 美元上限的资产。对资产的定义包括了本章之 1.7.3.5 段介绍的

第 5 段、新第 6 段的全部措辞/文字。同时还特别加入了以下措辞/文字："*7. This prohibition includes the following assets in particular: … (c) any interest under any trust or similar entity including any interest which may arise by virtue of the exercise of any power of appointment, discretion or otherwise howsoever… "*以及有如下的披露要求："*(1) … the Respondent must … inform the Applicants' solicitors of his assets worldwide exceeding £10,000 in value as at the time this order is served whether in his own name or not and whether solely or jointly owned, giving the value, location and details of all such assets.*"

之后 P 先生在前述资产披露令之下，披露了自己是多个新西兰信托的"全权信托受益人"（discretionary benificiaries），但只披露了这些信托的名字没有进一步信息。在银行与 DIA 的申请下，法院作出进一步资产披露令，要求 P 先生："*swear… an affidavit setting out to the best of his ability (i) the identity of the trustee(s), settlor(s), any protector(s), and the beneficiaries of, and any other person carrying on some or all of the functions of a protector or trustee under another title in relation to the trusts referred to in paragraphs 43.1 to 43.5 of the schedule of assets … and (ii) details of the assets which were subject to those trusts at as … 14 July 2014 (including their value and location).*"

这被多个信托的"受托人"（trustee）们以及 P 先生反对。因此在此先例中，上诉庭被要求考虑根据原冻结令的措辞/文字，在 P 先生只是全权信托受益人（是否有利益与/或利益有多少由信托受托人来决定）的情况下，是否需要披露所有信托的具体信息的问题。

所谓的"全权信托"，产生于 19 世纪早期，目的是为了对受益人以及信托资产提供多重保护。信托利益是可以被拥有利益的受益人抵押、出售，或是由于受益人破产导致成为被清算的对象。因此为了保护信托资产，免于受到潜在买家、抵押人、债权人的影响，就可以设定全权信托，由信托受托人根据信托人、委托人的明示意愿，根据事先明示设定的情况分配在不同受益人之间利益的比例与/或选择向某些受益人分配利益。与一般固定分配信托而言，全权信托中，在受托人实际对信托利益进行分配之前，在理论上很难说受益人对多少信托利益拥有产权或实益利益。这样即使某一个受益人要抵押、出售自己在信托下的利益、或者面临破产，可以通过受托人对信托利益的自由分配，避免导致信托利益被交到第三方手中（这是委托人不想见到的情况）。之后曾经在 20 世纪由于遗产税、财产税的高涨，全权信托还被广泛用于合法避税。在今天有不少其他用途，例如是用来管教、控制年幼的受益人（子女）的"不争气"行为等。

在此先例中，上诉庭的 Lewison 大法官对全权信托下受益人所拥有的利益也进行简单介绍，不妨节录如下：

"*A beneficiary under a discretionary trust has a right to be considered as a potential recipient of benefit by the trustees. That is an interest which equity will protect. The trustees must apply some objective criterion in deciding whether or not to exercise their discretion in favour of a particular beneficiary; so that each beneficiary has more than a mere hope. But that right is not a proprietary interest in the assets held by the trustees, although it can be described as an interest of sorts: Gartside v IRC [1968] AC 553... In some areas of the law, such as matrimonial finance, legislation is drawn widely enough to enable the court to take into account the likelihood that trustees will exercise their discretion in favour of a particular beneficiary in deciding what*

provision to make for a former spouse on divorce: Whaley v Whaley [2011] EWCA Civ 611 . But even then the trust assets are not owned by the beneficiary spouse.

…

On the face of it assets held by the trustees of a discretionary trust would not be amenable to execution if judgment is entered against one of the class of potential beneficiaries at the suit of a third party. The trustees might in such circumstances decide to confer a benefit on the beneficiary to save him from bankruptcy; but that would be a matter for them. If they did exercise their discretion in favour of a particular beneficiary the amount of the benefit would thereupon cease to be a trust asset and would become the asset of the beneficiary. It would then truly be his asset."

回到此先例中的问题，首先需要区分的是此先例中的措辞/文字与本章之 1.7.3.5 段介绍的 2002 年 CPR PD 25A 附上的冻结令的范本的措辞/文字、新增的"*whether the Respondent is interested in them legally, beneficially or otherwise*"以外，在前文中已经提到还额外添加了第 7 段，针对了特定的资产或利益："*… (c)* ***any interest under any trust*** *or similar entity including any interest which may arise* ***by virtue of the exercise of any power of*** *appointment,* ***discretion*** *or otherwise howsoever…*"（加黑部分是笔者的强调，看来是较为明确地针对了全权信托的情况。也因此上诉庭明确指出 P 先生在全权信托下的利益属于此先例中冻结令针对的"资产"。）

但此先例中，P 先生也确实披露了自己属于 5 个新西兰全权信托的受益人。焦点在于这里的措辞/文字是否会导致在资产披露令下可以更进一步，要求披露全权信托资产的具体信息呢？毕竟在全权信托的安排下，受托人才是资产的"法律所有权人"（legal owner），在资产被分配给受益人以前，受益人对全权信托的资产也称不上是"实益所有权人"（beneficiary owner），除非是该信托属于"虚假信托"（sham trust），或者是实际上受托人完全是根据受益人的指示行事。正如 Lewison 大法官所说："*Unless it can be said either that (a) the discretionary trusts are shams or (b) in practice at least the trustees do whatever Mr Pugachev asks them to, he cannot be regarded as the owner, either legally or beneficially, of any of the trust assets themselves.*"

但上诉庭指出难以根据 P 先生、信托受托人等多方当事人提供的证据（文书证据、证人证言等）等判定此先例中的全权信托实际上是听从 P 先生的命令行事，此先例中的信托也并非是虚假信托。换句话说在这样的判法下，也就是全权信托资产并不属于此先例冻结令的措辞/文字下的"资产"。更不用说是不包括第 7 段的《Commercial Court Guide》（2017 年，第 10 版）中的范本措辞/文字了。

当然这并不意味着冻结令就不能针对这些全权信托的资产。Lewison 大法官指出："*So far as judicial precedent is concerned we can say with some confidence that the jurisdiction to make a freezing order also carries with it the power to make whatever ancillary orders are necessary to make the freezing order effective: AJ Bekhor & Co v Bilton [1981] 1 QB 923. This power also extends to the making of mandatory orders requiring a defendant to exercise powers, such as a power to revoke trusts: TMSF v Merrill Lynch Bank & Trust Co (Cayman) Ltd [2011] UKPC 17... We were not shown any authority which places explicit limits on that power.*"

在 CPR Rule 25.1(1)(g)下法院可以作出附属的资产披露令（Assets Disclosure Order）去特定针对有关的全权信托："*… an order directing a party to provide information about the location of relevant property or assets or to provide information about relevant property or assets which are or may be the subject of an application for a freezing injunction.*"

至于在什么时候法院可以作出类似的附属资产披露令，在 Parker v. CS Structured Credit Fund Ltd (2003) EWHC 391 (Ch)先例中提到了"一些可信的材料"（"*some credible material*"）的说法。在 Lichter v. Rubin (2008) EWHC 450 (Ch)先例中提到这比本章之 1.7.3.3 段介绍过的 Chabra Jurisdiction 中的"良好的猜测理由"（"*good reason to suppose*"）的证明程度要低。此先例中的上诉庭也认可了这些判法。这也是可以理解的，毕竟披露信息可能导致的后果，与冻结资产所导致的后果相比，是轻微得多，只需要被申请人/被告坦白披露。而且此先例中是要求被申请人/被告 P 先生披露自己所知道的所有有关全权信托资产的信息，而不是要求全权信托的受托人披露信息。这就像是诉讼中，当事人获得的第三方文件，即使第三方声称这些文件有机密性，但这是不足以拒绝披露的。再进一步说，即使有关信息与文件属于第三方，法院也有广泛的权力要求第三方披露信息。

也因此在此先例中一审法院作出的命令是要求 P 先生对全权信托资产的信息作出披露，这被上诉庭认为是一审法院行使了自己的裁量，并没有不妥，也因此拒绝对改变一审法院的决定。

1.7.3.7 提取贷款的权利与贷款合约下的收益

"权利动产"（chose in action）在早期先例中就被认为属于冻结令的一般措辞/文字中提到的"资产"（assets）。例如在 CBS United Kingdom v. Lambert (1983) Ch 37 先例中就指出："*… there are no limitations put upon **the word 'assets'**, from which it follows that this word **includes** chattels such as motor vehicles, jewellery, objets d'art and other valuables as well as **choses in action**.*"（加黑部分是笔者的强调）

在本章之 1.7.3.2 段提到的 Templeton Insurance Ltd v. Thomas (2013) EWCA Civ 35 上诉庭先例中，在判"商誉"（goodwill）也属于资产时也提到："*It seems obvious that goodwill is among the most important intangible assets of a business. The fact that goodwill is an intangible makes it **no less an asset than other intangibles, such as choses in action.***"（加黑部分是笔者的强调）

但这也带来了疑问，毕竟权利动产本质上非常广泛，而在这些先例的判法下，是否意味着被申请人所有的权利动产都属于冻结令所针对的"资产"呢？

这个问题在 JSC BTA Bank v. Ablyazov (2015) UKSC 64 最高院先例中就被考虑，而涉及的权利动产是被申请人/被告从银行借贷的权利。此先例实际上是与本章之 1.7.3.5 段介绍的 JSC BTA Bank v. Solodchenko (2010) EWCA Civ 1436 上诉庭先例属于同系列案件，均为原告银行在 2009 年 2 月被哈萨克斯坦政府收归国有后，指称过往的高管、董事等涉嫌欺诈等手段将银行的财产挪为己用。此先例中针对的被告（Ablyazov 先生，以下简称 A 先生）曾经在 2005 年到 2009 年初期任职原告银行的董事长，也是银行的主要股东。银行指称 A 先生挪用了超过 100 亿美元的银行资产，开始了多个针对 A 先生的诉讼。在此先例时，已经成功获得了

其中 4 个诉讼的胜诉，胜诉金额超过 44 亿美元。但 A 先生未能对这些判决债务（judgment debts）进行支付。法院也委任了接管人（receiver），并正在销售 A 先生的财产以支付判决债务。银行也获得了针对 A 先生的全球冻结令（WFO），有关冻结令的条文也已经在本章之 1.7.3 段节录，不在此重复。

此先例中涉及的问题是，A 先生与一些 BVI 注册的公司签订了有效的贷款协议（loan facility agreement），可贷款金额达到四千万英镑。在此先例时，A 先生希望提取贷款用以支付自己律师的律师费用、公司的开支、其他系列案件被告的律师费等。但作为申请人/原告的银行对此表示反对，指出如果这些贷款协议确实有效，A 先生提取的金钱也只能根据冻结令的措辞/文字使用，包括只能支付自己的"合理律师费用"（reasonable legal expenses），特定上限的"个人生活开支"（individual ordinary living expenses）等，而其他任何开支都要先向法院申请并获得允许才能处置。因此银行向法院作出反对申请，其中与本段课题有关的是，银行要求法院确认 A 先生在贷款协议下可以提取贷款的权利属于冻结令针对的资产（"*the respondent's rights thereunder were assets for the purposes of the Freezing Order*"）。

一审法院的判法（[2012] EWHC 1819 (Comm)）是，虽然完全认同"权力动产"（chose in action）可以属于一般冻结令措辞/文字的"资产"，但是此先例中 A 先生根据贷款协议提取贷款的权利并不属于所谓的"资产"。案件被上诉，上诉庭的判决（[2013] EWCA Civ 928）中仍然没有支持银行的看法。不妨节录最高院的判词中对上诉庭判决的小结，如下：

"*Beatson LJ（上诉庭给出主要判词的大法官） identified three principles as of particular relevance. They were* ***(i) the enforcement principle****, namely that 'the purpose of a freezing order is to stop the injuncted defendant dissipating or disposing of property which could be the subject of enforcement if the claimant goes on to win the case it has brought, and not to give the claimant security for his claim' …;* ***(ii) the flexibility principle****, namely that 'the jurisdiction to make a freezing order should be exercised in a flexible and adaptable manner so as to be able to deal with new situations and new ways used by sophisticated and wily operators to make themselves immune to the courts' orders or deliberately to thwart the effective enforcement of those orders' … ; and* ***(iii) the strict construction principle****, namely that, because the consequences of breach are serious, injunctions must be 'clear and unequivocal' and 'strictly construed' in favour of the addressee... Beatson LJ held that there were tensions between his three principles… he discussed the question whether there was a principled objection to the recognition of the rights under the loan facility agreements as assets for the purposes of a freezing injunction and concluded that the answer was no… he considered (a) whether the terms of the current standard Commercial Court form of freezing order make choses in action such as those under the Loan Agreements 'assets' within the order and (b) if so, whether drawing down a loan amounts to disposing of, dealing with or diminishing the value of the assets. Beatson LJ concluded that the answer to both questions was no and that the appeal should be dismissed.*"

以上所讲是上诉庭 Beatson 大法官的判法中对目前冻结令的做法，总结了三点原则：（1）"执行原则"：冻结令的目的不是帮助申请人/原告为其索赔提供保全，而是为了防止被申请人/被告处置资产，使得可能将来执行的资产流失；（2）"弹性原则"，法院作出冻结令需要有弹性，以应对千变万化的不同情况与/或诡计多端的被申请人，防止他们通过各种方式使得自己的资产不受制于法院命令，逃避对这些命令的执行；（3）"严格解释原则"，未履行、

违反冻结令后果是十分严重的，因此冻结令的措辞/文字需要是明确无误的，在收到对被申请人[108]未履行、违反冻结令指控的时候，对冻结令的措辞/文字要作出有利于被申请人的严格解释，这也才是对被申请人公平的对待。

银行指称提取贷款的权利属于冻结令针对的“资产”，主要说法是提取贷款的权利显然属于权利动产，也就属于范本冻结令措辞/文字针对的对象。而替代说法是，贷款合约下的“收益”（proceeds）是由 A 先生自己所决定与控制的，因此属于 2002 年版 CPR PD 25A 中范本冻结令措辞/文字（见本章之 1.7.3.5 段）中的“*directly or indirectly, to dispose of, or deal with [the proceeds] as if they were his own.*”

首先对 Beatson 大法官提出的“弹性原则”，最高院的 Clarke 勋爵指出：“*In this appeal both Mr Smith for the Bank （银行的代表大律师）and Mr Crow, as advocate to the court（申请上诉的 A 先生之后缺席审判，Crow 先生受英国政府法务部门委任就此案件中的有关争议提供书面陈述）, agree that the Court of Appeal was wrong to have regard to what Beatson LJ described as the flexibility principle. It is agreed that, whatever the position might be if the court were construing a contract, the flexibility principle has no role in the construction of the Freezing Order as an order of the court. As Mr Crow colourfully put it,* ***the flexibility principle is that the court must be agile in this game of cat and mouse between claimants and defendants to make sure that it is making new orders to meet new avoidance measures, but that is not a justification for the expansive interpretation of an order which has already been made****. I agree.*”（加黑部分是笔者的强调）

换句话说尽管在对冻结令措辞/文字的拟定上要进行斟酌以避免被“诡计多端”的被申请人/被告逃避命令的执行，但是在冻结令作出之后，对于冻结令的措辞/文字不能进行扩大解释，毕竟这是法院命令。因此弹性原则实际上与已经生效的冻结令的措辞/文字的解释无关。

其次，对于如何解释的原则或方法，最高院认可了 Beatson 大法官提出的“严格解释原则”，Clarke 勋爵说：“ *I further agree that orders of this kind are to be restrictively construed in accordance with Beatson LJ's strict construction principle… He added … that strict construction is also an aspect of the 'great circumspection' with which Lord Mustill, in Mercedes Benz AG v Leiduck [1996] AC 284… stated that the jurisdiction should be exercised. I agree. One of the reasons for this principle, as I see it, is the risk of oppression.*”

接着 Clarke 勋爵还认可了在 JSC BTA Bank v. Solodchenko (2010) EWCA Civ 1436 上诉庭先例中 Patten 大法官对于类似的问题需要结合措辞/文字的历史演变进行整体解释的说法：“*… Thus, as it seems to me, the decision in Hadkinson supports the conclusion that the context of a freezing order has been of particular importance in determining its true construction in a particular case. In my opinion, that is a sensible approach which we should not reverse. It is supported in a number of types of case, as is demonstrated by the judgments in Solodchenko.*”

接下去 Clarke 勋爵也指出 Beatson 大法官所说的“执行原则”，确实与冻结令的目的相符合。换句话说，冻结令是为了让日后胜诉时，被申请人/被告的资产不会流失殆尽使得判决

[108] 同样包括受到影响的第三方，例如被申请人有存款的银行。

书/裁决书变成一纸空文。如果A先生提取贷款的权力实际上是会使得A先生获得更多金钱，即使是因此负上更多债务，但是新产生的债权人如何与被申请人厘清债务的问题毕竟与冻结令无关，冻结令不是为了给申请人提供财产保全（见本章之 1.4 段），因此这提取贷款的权力看来并不受到冻结令针对。

一些权威书籍中也有类似说法。例如在《Freezing and Search Orders》（2006 年，第 4 版）一书之 4.28 段，说：*"The test must be whether the assets will be available on execution of a judgment and if they are they can be the subject of the order, as its purpose is to aid the court's process. It would otherwise be illogical to include them in the order."*

在《Commercial Injunctions》（2004 年，第 5 版）一书之 3.015 段，说：*"A freezing order … provides a fund from which the applicant's claim may ultimately be paid in competition with other unsecured creditors of the respondent."*

此外 Clarke 勋爵还提到了在《Freezing and Search Orders: Mareva and Anton Piller Orders》（2008 年，第 2 版）一书之 1.12(e)段说："*… usual terms do not prevent the respondent borrowing money thereby increasing the total indebtedness.*"

针对此先例中针对的从银行提取贷款的权利，最高院还考虑了类似的涉及"借款"（borrowings）的先例，看来在过往先例中，例如在 Cantor Index Ltd v. Lister (2002) CP Rep 25 先例中，冻结令的被申请人的借款行为虽然增加了自己的负债，但是法院判这并非是处置资产、使自己资产贬值，从而违反冻结令的行为："*… the court held that a defendant who borrows money increases his indebtedness but does not dispose of, deal with or diminish the value of his "assets" within the meaning of the then standard form of freezing order.*"换句话说，被申请人借款后，事实上是使得其控制的财产有所增加的，虽然也同时多增加了债务，但不能说是资产流失。

Clarke 勋爵也提到《White Book》也是类似地位："*Both the 2013 and the current edition of the White Book say that a freezing order restrains the respondent from dealing with his assets but does not prevent him from borrowing money, thereby increasing his overall indebtedness. They both cite two decisions of Neuberger J at first instance, namely Cantor Index Ltd v Lister [2002] CP Rep 25 and Anglo Eastern Trust Ltd v Kermanshahgi [2002] EWHC 1702 (Ch).*"

因此，在此先例中冻结令的措辞/文字（实际上也就是今天《Commercial Court Guide》[2017 年，第 10 版]加上了可选择插入措辞/文字的冻结令范本），最高院在综合了背景文件的前提下，给出的解释是提取贷款的权利本身并不属于冻结令针对的资产："*I would hold that the respondent's right to draw down under the Loan Agreements does not qualify as an 'asset' within the meaning of the Freezing Order if it is construed without reference to the extended definition in the second sentence of paragraph 5…*"

但是如果 A 先生行使了此项权利，即向银行提取贷款，贷款合约下的"收益"（proceeds）就会属于冻结令针对的"资产"。也因此如果 A 先生要将这笔收益挪作其他用途，只要不是用来支付正常生意上债务或者是日常生活开支等例外，都要向法院先申请。正如 Clarke 勋爵所判："*I would hold that the proceeds of the Loan Agreements were 'assets' within the meaning*

of the extended definition in paragraph 5 of the Freezing Order in this case and would allow the appeal on this ground."

在此先例中 A 先生想要提取贷款，直接要求银行支付给第三方，换句话说这笔金钱可能从未真正到 A 先生的手中。但仍然会被此先例冻结令措辞/文字中的"*For the purpose of this Order the respondents' assets include any asset which they have power, directly or indirectly, to dispose of, or deal with as if it were their own. The respondents are to be regarded as having such power if a third party holds or controls the assets in accordance with their direct or indirect instructions*"（此先例中冻结令第 5 段之后两句，在 2002 年版 CPR PD 25A 中则是第 6 段之后两句）所包括。Clarke 勋爵针对冻结令的措辞/文字解释说：

"*Assets which the respondent owned beneficially were caught by the original word 'assets'. Assets which the respondent owned legally but not beneficially were caught by the Commercial Court extended definition (but not otherwise, according to the Court of Appeal)*[109]*.* ***The last two sentences of paragraph 5 are designed to catch assets which are not owned legally or beneficially, but over which the defendant (here the respondent) has control.***[110]

The whole focus of the second and third sentences of the paragraph is the respondent's power to deal with the lender's assets as if they were his own. It follows that ***the focus of the second sentence of paragraph 5 is not on assets which the respondent owns (whether legally or beneficially) but on assets which he does not own but which he has power to dispose of or deal with as if he did.*** *Further, as I see it, the fact that he incurs a liability at some stage to reimburse the lender is immaterial. Finally, I do not read the last sentence of paragraph 5 as a restriction on the scope of the second sentence but (as Lord Hodge*[111] *suggested in the course of the argument) as expansionary.*"（加黑部分是笔者的强调）

以上节录段落是说，这两句措辞/文字的意义在于，不论财产是否由被申请人法律名义所有、实益所有，而只要对财产有"控制"（control），都属于被冻结令针对的"资产"。关键就是看被申请人是否可以将这些资产当作自己的资产予以处置。尤其是其中"*any asset which they have power, directly or indirectly, to dispose of, or deal with as if it were their own*"一句，显示了针对被申请人既非资产的法律所有人，亦非实益所有人的情况下，但有权利直接或间接将资产作为自己的资产一样予以处置。之后的"*The respondents are to be regarded as having such power if a third party holds or controls the assets in accordance with their direct or indirect instructions*"这一句，也不是对前一句的范围进行限制与限定（即针对第三方持有或控制的

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109 被申请人"实益所有"（beneficialy own）的财产，都属于 2002 年版本 CPR PD 25A 之冻结令范本措辞/文字所针对的"资产"，而如果加上了《Commercial Court Guide》（2017 年，第 10 版）中可选择加入的措辞/文字（"*and whether the Respondent is interested in them legally, beneficially or otherwise*"），就还会包括被申请人并非实益所有人（beneficial owner），但"法律所有"（legally own）的资产：见本章之 1.7.3.8.3 段介绍的 JSC BTA Bank v. Solodchenko (2010) EWCA Civ 1436 上诉庭先例。

110 此先例中冻结令第 5 段后两句即是："*For the purpose of this Order the respondents' assets include any asset which they have power, directly or indirectly, to dispose of, or deal with as if it were their own. The respondents are to be regarded as having such power if a third party holds or controls the assets in accordance with their direct or indirect instructions.*"这措辞/文字不论被申请人是否法律所有、实益所有，而只要对财产有"控制"（control）就已经是被包括在内。

111 除了 Clarke 勋爵外，此先例中最高院作出审理的其他大法官包括 Neuberger 勋爵，Mance 勋爵，Kerr 勋爵以及 Hodge 勋爵，他们都同意了 Clarke 勋爵的判词。

资产），而是对前一句范围的进一步扩大。

不妨简单小结此段内容，此最高院先例的判法中有以下几点值得注意：

（1）法院在对被申请人的行为进行认定与解释是否符合冻结令的措辞/文字时，会采取“严格解释”，以及结合事实背景与冻结令的演变历史进行解释。

（2）冻结令的目的与 Beatson 大法官阐述的“执行原则”是一致的，在具体解读某些资产是否属于冻结令的措辞/文字所针对的“资产”时，要结合冻结令的目的进行考虑。

（3）权利动产当然可以属于资产的一部分，也因此属于冻结令所针对的“资产”。但是并非所有权利动产均为如此，需要结合前述两点进行解释。而从银行提取贷款的权利本身看来并不属于冻结令针对的“资产”，但是贷款合约下的收益会受到冻结令针对。

（4）2002 年版 CPR PD 25A 附上的冻结令范本中的措辞文字是：“*For the purpose of this Order the respondents' assets include any asset which they have power, directly or indirectly, to dispose of, or deal with as if it were their own. The respondents are to be regarded as having such power if a third party holds or controls the assets in accordance with their direct or indirect instructions.*”这会延伸到被申请人可以实际作为自己资产一样直接或间接控制的资产。

最高院的这个判法看来进一步扩大了冻结令可以针对的资产范畴，毕竟在过往先例中至少也需要被申请人对财产“所有或拥有”（own），无论是法律所有还是实益所有，才会导致财产属于冻结令针对的资产。

1.7.3.8 冻结令所针对资产的措辞/文字之演变与扩张

在本章之 1.7.3.7 段介绍 JSC BTA Bank v. Ablyazov (2015) UKSC 64 最高院先例时已经提到了，对冻结令措辞/文字的解释要结合有关的历史演变。正如本章之 1.7.3.5 段介绍的 JSC BTA Bank v. Solodchenko (2010) EWCA Civ 1436 上诉庭先例的做法一样，在该先例中上诉庭的 Patten 大法官对法院作出冻结令的措辞/文字演变历史作出回顾。尤其是在近年来，英国法院作出的冻结令措辞/文字在针对的“资产”（assets）方面整体呈现了扩大/延伸的趋势，正如在 JSC BTA Bank v. Ablyazov 最高院先例中 Clarke 勋爵还指出：“*The approach of the courts has thus been to approach the language of the forms of order cautiously but to recognise that the forms have gradually been extended.*”

在这里不妨重新简单小结，可以说今天冻结令针对的对象远不只是被申请人名下拥有的资产，而是可以延伸至任何与被申请人沾得上边的资产。针对非债务人名下的资产，传统的执行判决债务（胜诉的法院判决/仲裁裁决）的做法是通过“揭开公司面纱”（Pierce corporate veil）去成功执行。不过这种传统做法相比单方面（*ex parte* / without notice）申请冻结令去针对所有被申请人直接或间接拥有、自己名下与/或第三方持有的资产是更加困难与耗时。看来，冻结令在今天的威力与对被申请人的毁灭性力量（destruction power）比 Donaldson 大法官在 1985 年就称冻结令为“核武器”时又大大增强。

1.7.3.8.1 从 The “Mareva”到 1997 年版 CPR PD 25A

在早期的冻结令申请中，会针对特定的资产（银行账户、汽车、飞机等财产）作出冻结。例如在 The “Mareva” (1975) 2 Lloyd’s Rep 509 先例中冻结的是被申请人/被告的银行账户，对银行账户的冻结也往往要求具体到是哪一间银行有账户，法院才会作出冻结令。又例如在 CBS United Kingdom v. Lambert (1983) Ch 37 先例中要求被申请人将汽车的车钥匙等交出给律师等。也有一些开始针对较为广泛的被告资产，例如在 Johnson v. L & A Philatelics Ltd (1981) FSR 286 先例中的冻结令针对的资产是如下措辞/文字：“*any stamps, cars, furniture, cheques or other property belonging to the defendants or in which the defendants have any interest save insofar as the value of such property exceeds £22,000…*”

而在近年来的冻结令，往往会针对被申请人的“任何资产”（any assets），尤其是在 1997 年 CPR PD 25A 中就附上冻结令范本，在之后法院出具的冻结令中被广泛适用。其中第 5 段（Paragraph 5）与第 6 段（Paragraph 6）的措辞/文字就针对了哪些资产属于冻结令针对的对象，第 5 段中指出冻结的被申请人的“任何资产”：*“5… any of his assets …”*[112]而冻结令范本第 6 段则对第 5 段中的“任何资产”进行阐述：*“ 6… whether in his own name or not and whether solely or jointly owned…”*这包括被申请人/被告名下非常广泛的资产，即无论是单独所有还是共同所有的任何资产都会属于冻结令针对的资产。[113]

1.7.3.8.2 2002 年版 CPR PD 25A 针对信托财产与《Commercial Court Guide》

针对冻结令的措辞/文字第一次进行解释的是 Federal Bank of the Middle East v. Hadkinson (2000) 1 WLR 1695 先例，争议是第三方名下的资产是否属于冻结令针对的“资产”。上诉庭判关键是看第三方名下资产的“实益所有人”（beneficial ownership）是谁，只有在被申请人是实益所有人时，该资产才会属于冻结令针对的 “资产”。上诉庭还指出如果有恰当的“额外措辞/文字”，会可能包括更多的资产，甚至是被申请人持有、第三方才是实益所有人的资产。

在 2001 年前后，有很多冻结令申请涉及被申请人“虚假信托”（sham trust）资产，为了规范与指引有关冻结令的措辞/文字，防止对第三方造成的不良后果，在 2002 年版本的 CPR PD 25A 附上的冻结令范本，在第 6 段中增加了后两句：*“6. … For the purpose of this order the Respondent’s assets include any asset which he has the power, directly or indirectly, to dispose of or deal with **as if it were his own**. The Respondent is to be regarded as having such power if a*

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[112] 当然具体的措辞/文字根据针对的是一般冻结令还是全球冻结令有所不同。针对一般冻结令的是：*“Until the return date or further order of the court, the Respondent must not remove from England and Wales or in any way dispose of, deal with or diminish the value of any of his assets which are in England and Wales up to the value of £(金额上限).”*针对全球冻结令的是：*“Until the return date or further order of the court, the Respondent must not – (1) remove from England and Wales any of his assets which are in England and Wales up to the value of £(金额上限) ; or (2) in any way dispose of, deal with or diminish the value of any of his assets whether they are in or outside England and Wales up to the same value.”*

[113] 见 Z Ltd v. A-Z and AA-LL (1982) 1 Lloyd’s Rep 240 先例。

third party holds or controls the asset in accordance with his direct or indirect instructions."（加黑部分是笔者的强调）。这新增部分的主要作用仍然是对前几句进行解释，尤其是对 Federal Bank of the Middle East v. Hadkinson 先例，解释了什么情况下认定实益所有人等。但这不包括被申请人持有的第三方资产。

在 JSC BTA Bank v. Solodchenko (2010) EWCA Civ 1436 先例中还有"*whether the Respondent is interested in them legally, beneficially or otherwise*"的措辞/文字，这被上诉庭判是符合 Federal Bank of the Middle East v. Hadkinson 先例中提到的"额外措辞/文字"，尤其是区分了法律上的利益、实益利益与其他利益。因此根据 JSC BTA Bank v. Solodchenko 先例的判法，如果加上了这段措辞/文字，即使是被申请人作为信托受托人持有的第三方资产（第三方才是实益所有人）也属于冻结令针对的"资产"，要作出披露以及在法院没有更改冻结令之前不能转移与/或流失。

在 JSC BTA Bank v. Solodchenko 先例的判法下，冻结令的措辞/文字看来就会分成两类，一类是 2002 年版 CPR PD 25A 附上的范本的措辞/文字（这不会包括被申请人持有但属于第三方的资产），另一类是额外加上了"*whether the Respondent is interested in them legally, beneficially or otherwise*"的措辞/文字。

但对于信托来说，由于大量涉及证券等金融产品交易，一旦被冻结令冻结而难以正常操作，例如无法在市场剧烈波动的情况下及时抛售，会导致巨额的损失。因此如果允许被申请人所持有但实益权益属于第三方的资产也被包括在内的话，届时实际蒙受巨额损失的会是第三方。而值得注意的是申请人提供的保护措施、提供的交叉担保（Cross-undertaking，见本章之 1.7.5 段）并不能对第三方的损失提供保障。正如 JSC BTA Bank v. Solodchenko 先例中 Patten 大法官提到：*"… Where the trust assets include shares and other quoted securities which form part of a managed portfolio the inability of a trustee to dispose of shares at the time of his choosing could have disastrous financial consequences in a changing market. The cross-undertaking in damages gives the beneficiary no direct rights of recovery against the claimant in these circumstances and the ability of the defendant as trustee to obtain compensation on the beneficiary's behalf will depend on the court deciding that the injunction was wrongly granted…"*

因此 Patten 大法官强调了是否要加上"*whether the Respondent is interested in them legally, beneficially or otherwise*"的措辞/文字需要结合个案的具体案件事实进行判断，最关键的就是防止被申请人/被告资产的流失。唯一适合加上这样措辞/文字的情况是申请人提供了恰当证据令法院相信被申请人作为受托人、代名人管理第三方信托实际上只不过是另一层伪装，资产实际上属于被申请人所有的资产，即属于被冻结的资产。同时如果法院决定需要加上这样的措辞/文字的话，也要在申请人提供的交叉担保的措辞/文字中进行相应变动，以应对在一个真正的信托下可能对无辜第三方造成的严重损失。另是如果被申请人收到的冻结令中包括"*whether the Respondent is interested in them legally, beneficially or otherwise*"的措辞/文字，并且他/她名下有代第三方持有的真正的信托资产，应立即向法院提供足够的证据以改变冻结令的措辞/文字。

由于信托法律以及冻结令有关法律在近年来发展非常迅速，有不少的变化，因此 Patten 大法官没有给出明确的如何适用的指引，而是只列出了几个原则，可以节录如下：

"*(1) Nothing in this judgment is intended to cast any doubt upon the established principles which underlie the grant of all freezing orders. I refer in particular to the fact that the only purpose of such an injunction is to prevent the dissipation of assets which would otherwise be available to meet a judgment.* ***The inclusion of trust assets is therefore only justifiable if there are proper grounds for believing that assets ostensibly held by the defendant on trust or as a nominee for a third party in fact belong to him (or to another person whose assets are also frozen)****. Absent such circumstances, I can see no possible justification for including in the order assets which belong beneficially to a third party and are not therefore the property of the defendant;*[114]

(2) A judge who is asked to grant an injunction in this form should be concerned to ***minimise the impact of the order on third party beneficiaries under genuine trusts****. This will* ***require expedition in resolving any issues of title on an application by a defendant or beneficiary to vary the order*** *and active consideration being given to the form of the cross-undertaking. It will usually be* ***appropriate for the cross-undertaking to be extended in terms to cover the purported beneficiary for any loss which is caused by an injunction*** *which is subsequently varied or discharged in respect of the trust assets;*[115]

(3) The authors of the Commercial Court Guide should make it clear in the Guide that the effect of the current form of order is to include trust assets. There should also be active consideration as to whether it is appropriate for the specimen CPR freezing order and the Commercial Court Guide form of order to remain materially different;

(4) I also venture to suggest that if the standard form of Commercial Court order is to continue to include trust assets it should be re-drafted so as to make it absolutely clear to any reader that it does extend to assets held by the defendant as a trustee or nominee for a third party."（加黑部分是笔者的强调）

在最新版的《Commercial Court Guide》（2017年，第10版）中，"*and whether the Respondent is interested in them legally, beneficially or otherwise*"的措辞/文字是以可选择的形式插入，而且加上脚注标注这措辞/文字需要根据每个个案的不同情况视乎是否应当被加入。

[114] 此先例中上诉庭的判法并不是想超越现有的有关冻结令的原则。冻结令的目的是为了防止被申请人的资产流失。唯一可以允许冻结第三方信托资产的情况，是有恰当理由怀疑被申请人作为受托人、代名人管理第三方信托资产实际上只是伪装，最终资产应属于被冻结资产的情况。

[115] 在考虑申请人要求在禁令中加上针对第三方信托资产的措辞/文字时，需要尽量减少对真正第三方信托的影响。这包括在收到被申请人/被告，或者是信托受益人（第三方）变更命令的申请时尽快采取行动解决产权到底属谁的问题，以及主动考虑申请人如何提供恰当的交叉担保。要求申请人对受益人就信托资产的损失提供交叉担保往往是恰当的做法。

1.7.3.8.3 JSC BTA Bank v. Ablyazov 最高院先例：无论是否法律所有或实益所有

而在本章之 1.7.3.7 段已经介绍过，在 JSC BTA Bank v. Ablyazov (2015) UKSC 64 最高院先例还解释了 2002 年版 CPR PD 25A 附上的冻结令范本与《Commercial Court Guide》（2017 年，第 10 版）的冻结令范本均包括的如下措辞/文字：

"*For the purpose of this Order the respondents' assets include any asset which they have power, directly or indirectly, to dispose of, or deal with as if it were their own. The respondents are to be regarded as having such power if a third party holds or controls the assets in accordance with their direct or indirect instructions.*"

最高院的看法是，根据这措辞/文字，如果被申请人可以将一份资产"当作自己财产一样"（"*as if it were their own*"），可以"控制"（control）与处置这份资产，那么即使被申请人对这些资产既没有"法律所有"（legally own）、也没有"实益所有"（beneficially own），这份资产仍然会属于冻结令针对的"资产"。

在这样的判法下，冻结令措辞/文字能够针对的资产看来会有所扩大/延伸。但具体能够包括的范围看来还没有太多先例予以针对。在 JSC BTA Bank v. Ablyazov 最高院先例中，涉及的则是被申请人在与第三方的贷款协议下有权提取贷款，被申请人直接向银行指示将这笔可以提取的贷款支付给其他第三方，这就被最高院判属于以上措辞/文字针对的资产。

1.7.3.8.4 针对特定资产的措辞/文字

除了本章前几段提到的冻结令范本措辞/文字外，为了能够更好地、有实际效果地冻结被申请人资产，申请人可以要求对措辞/文字进行一定更改以针对特定资产（specific assets），适应每一个案件的具体案情。例如在 JSC Mezhdunarodniy Promyshlenniy Bank v. Pugachev (2015) EWCA Civ 139 上诉庭先例中，申请人看来是知道被申请人有许多信托资产，因此申请的冻结令在《Commercial Court Guide》（2017 年，第 10 版）的冻结令范本外，还额外有第 7 段："*… (c) any interest under any trust or similar entity including any interest which may arise by virtue of the exercise of any power of appointment, discretion or otherwise howsoever…*"这看来就是专门用来针对被申请人所有的信托资产了。

而如果申请人发现被申请人任何特定资产有流失嫌疑，还可以特别针对这些特定的资产。例如是在 Lakatamia Shipping Co Ltd v. Su (2014) EWCA Civ 636 上诉庭先例中，在申请人的申请下，法院作出命令冻结 Nobu Su 先生持有的特定船舶与一些公司股份等资产："…2 *MV Iron Monger 3（船舶）* may not be disposed of, charged or otherwise dealt with by Iron Monger Three Co Ltd without 14 days' notice being given to the solicitors for the Claimant… 3 The 200,000 shares in Star Bulk Carriers Corporation owned by F5 Capital (and which were pledged to RBS) may not be disposed of, charged or otherwise dealt with by F5 Capital without 14 days' notice being given to the solicitors for the Claimant."

在今天 2002 版本 CPR PD 25A 附上的冻结令范本（《Commercial Court Guide》也是一样）中也有措辞/文字对此类特定财产进行针对，不妨节录如下：

"*7. This prohibition includes the following assets in particular –*

(a) the property known as [有关资产的所有权/所在地] or the net sale money after payment of any mortgages if it has been sold;

(b) the property and assets of the Respondent's business [有关业务或公司的名字] [业务或公司地址] or the sale money if any of them have been sold; and

(c) any money standing to the credit of any bank account including the amount of any cheque drawn on such account which has not been cleared.

[For injunction limited to assets in England and Wales]（以下针对英国境内的资产）

8. If the total value free of charges or other securities ('unencumbered value') of the Respondent's assets in England and Wales exceeds £[上限金额] , the Respondent may remove any of those assets from England and Wales or may dispose of or deal with them so long as the total unencumbered value of his assets still in England and Wales remains above £[上限金额] .

[For worldwide injunction]（以下针对全球冻结令）

8.(1) If the total value free of charges or other securities ('unencumbered value') of the Respondent's assets in England and Wales exceeds £[上限金额] , the Respondent may remove any of those assets from England and Wales or may dispose of or deal with them so long as the total unencumbered value of the Respondent's assets still in England and Wales remains above £[上限金额] .

(2) If the total unencumbered value of the Respondent's assets in England and Wales does not exceed £[上限金额] , the Respondent must not remove any of those assets from England and Wales and must not dispose of or deal with any of them. If the Respondent has other assets outside England and Wales, he may dispose of or deal with those assets outside England and Wales so long as the total unencumbered value of all his assets whether in or outside England and Wales remains above £[上限金额] ."

1.7.4 指引四：资产是否有被转移与/或流失的风险

对财产/资产（property/asset）是否可以成功申请冻结令，关键的要件（fundamental requirement）是这些资产是否会有"转移"（remove）、"处置"（dispose）与/或"流失"（dissipate）的风险，导致诉讼的判决/裁决花费了高昂的费用，但在胜诉后无法实际执行。这类似本书第二章之 3 段介绍的申请搜查令（Search Orders）需要满足的关键要件（即文件/材料有被销毁、隐藏的危险，正常的诉讼程序中无法获得对方披露这些文件/材料），只有在被申请人

有这些倾向的时候才能成功申请。针对大型公司，不要说是世界 500 强公司，就是没有丑闻的上市公司，或者是历史悠久的公司，在面对正常业务上的诉讼、索赔时，也不会有面对冻结令的危险。

1.7.4.1 提供证据“丑化”被申请人以说服法院有此风险

作为冻结令的申请人，需要通过”誓章/誓词”（affidavit / affirmation）作出“全面与坦率的披露”（full and frank disclosure)，并提出证据证明资产有“流失”的风险：

- 如 The “Niedersachsen” (1983) 2 Lloyd's Rep 600 先例中 Mustill 大法官所采用的措辞/文字是“*solid evidence*”。

- 较近期的先例如 Thane Investments Ltd v. Tomlinson (2003) EWCA Civ 1272 先例中 Peter Gibson 大法官也说：“*…it is important that there be solid evidence adduced to the court of the likelihood of dissipation.*”

- 在 TTMI Ltd v. ASM Shipping Ltd (2006) 1 Lloyd’s Rep 401 先例中引用了 Chitel v. Robart (1982) 39 OR (2d) 513 加拿大上诉庭先例的说法：“*The applicant must persuade the court by his material that the defendant is removing or there is a real risk that he is about to remove his assets from the jurisdiction to avoid the possibility of judgment, or that the defendant is otherwise dissipating or disposing of its assets, in a manner clearly distinct from his usual or ordinary course of business or living, so as to render the possibility of future tracing of the assets remote, if not impossible in fact or in law*.”

- 类似的说法也可见 Alternative Investment Solutions (General) Ltd v. Valle De Uco Resort & Spa SA (2013) EWHC 333 (QB)先例中，Cranston 大法官所说：“*… for a freezing injunction to be justified there must be a real risk of the dissipation of assets such that there is a real risk of a judgment in the claimant's favour going unsatisfied if the injunction is not granted.*”

而申请人提出的证明必须是针对客观事实上的转移与/或流失风险，而且不能只是自己的臆测（speculation）：

- 在 Chandris Shipping Corporation v. Unimarine SA (1979) QB 645 先例中 Lawton 大法官说: “*affidavits asserting belief in, or the fear of, likely default have no probative value unless the sources and grounds thereof are set out…*”

- 近期的 CEF Holdings Ltd v. City Electrical Factors Ltd (2012) EWHC 1524 (QB) 先例中 Silber 大法官也指出：*“Any application for an injunction must be based on facts and as Tugendhat J said in the Caterpillar case [2011] EWHC QB 3154 ‘mere suspicion is not enough’.*”

而什么时候才会导致财产有转移与/或流失风险，在近期先例中认为关键是向法院说明

被申请人行为不当（unjustified）、足以让法院假设与相信存在此风险（有关如何丑化被申请人，指称有财产流失风险的问题可见《禁令》一书第四章之 4.2.2 段）：

- 在 Alternative Investment Solutions (General) Ltd v. Valle De Uco Resort & Spa SA 先例中，Cranston 大法官说："*There is **no need for a claimant to show an intention to dissipate assets, nor dishonesty or fraud.** Where there is a good arguable case of dishonesty or fraud the risk of dissipation may speak for itself. **The conduct giving rise to a real risk of dissipation must not be capable of justification.***"（加黑部分是笔者的强调）

- L v. K (2013) EWHC 1735 (Fam)先例对 Cranston 大法官的上述说法进行解释说："*This (Cranston 大法官的说法) would suggest that proof of a nefarious intent is not needed, but **that proof of unjustified conduct will suffice**. I consider that there is no real difference between the two. It may be that Cranston J was drawing a distinction between **express and inferred intentions**. In my opinion if someone is doing something unjustified with his assets then it surely follows as night follows day that he must (in a non-innocent way) be intending to do so.*"（加黑部分是笔者的强调）

- 仅仅是被申请人拥有海外资产本身并没有任何"不当"之处，毕竟将资产故意留在海外会出于一些完全合理合法的理由，如合法避税等。这可见 Wade v. Wade (2003) EWHC 773 (QB)先例所说："*… The fact that the defendant placed his shares in offshore trusts does not give rise to a suspicion. The claimant's own evidence is that this has been done to minimise his tax liability. There is no evidence or suggestion that the defendant has ever failed to pay a debt due from him … **Given the lack of any evidence of past impropriety on the part of the defendant, I would hold that the evidence does not establish a sufficient risk of dissipation of assets to justify interim relief.***"（加黑部分是笔者的强调）

还可以在此节录 National Bank Trust v. Yurov (2016) EWHC 1913 (Comm)先例中，Males 大法官对如何证明财产有流失风险问题的小结：

"*(a) The claimant must demonstrate a real risk that a judgment against the defendant may not be satisfied as a result of unjustified dealing with a defendant's assets. (b) That risk can only be demonstrated with solid evidence; mere inference or generalised assertion is not sufficient. (c) It is not enough to rely solely on allegations that a defendant has been dishonest; rather it is necessary to scrutinise the evidence to see whether the dishonesty in question does justify a conclusion that assets are likely to be dissipated. (d) The relevant inquiry is whether there is a current risk of dissipation; past events may be evidentially relevant, but only if they serve to demonstrate a current risk of dissipation of the assets now held. (e) The nature, location and liquidity of the defendant's assets are important considerations. (f) Whether or to what extent the assets are already secured or incapable of being dealt with is also relevant. (g) So too is the defendant's behaviour in response to the claim or anticipated claim.*"

具体而言，希望"丑化"（并提供证据证明）被申请人，显示资产有转移与/或流失风险

时，可以考虑以下因素：

（1）资产的性质。越是容易处置的资产，就越是容易向法院说明有流失风险。例如是银行账户内的存款或是现金，就属于非常容易处置的资产，而相比之下土地、房屋等不动产就难以处置得多了。

（2）被申请人生意的性质与经济情况。这会是包括被申请人的公司年报、注册等信息，要是发现有年报迟迟未交等问题就很理想了。时间与情况允许，还可以委任调查人员（如私家侦探等）前往被申请人的公司进行调查，发掘一些有关的事实，例如被申请人经营地址常年铁将军把门，或是常年员工只有 1、2 个人等。

（3）被申请人的业务持续时间。一般而言，历史悠久、声名显著的老字号相比于刚刚建立没多久的无名公司而言，更难被丑化，也需要更多、更强的证据才能说服法院。

（4）被申请人的住址、营业地址等。如果被申请人是 BVI、巴拿马等离岸公司，或者是其他“最不发达国家”（Least Developed Country）的公司，更容易让法院相信资产有被转移与/或流失风险。

（5）被申请人过去或现在的信用记录。显然如果找出被申请人在信用记录上有任何严重问题，是资产有被转移与/或流失风险的很好的证明。其中最容易证明信用记录差就是被申请人已经在一个诉讼/仲裁败诉，但拒绝支付判决债务。例如很多国际知名的投资仲裁案件，刚果、阿根廷、委内瑞拉等发展中国家在败诉后不作出支付（估计也没有钱支付）。于是债权人（包括胜诉方或收购了债权的第三方资助基金公司）就在全球寻找这些国家的资产。一找到就会立刻申请冻结令，在这种情况下，估计根本不用花太多心思证明该资产会流失。

（6）被申请人表达过处置资产的意愿。被申请人如果曾经说过要处置资产，或是在电邮、短信中提到将会如何处置，使得申请人即使胜诉也无法取回金钱。这即使是为了威吓作为原告的申请人不要追债追得太紧，也会是很好的证明。

（7）被申请人与其他曾经不履行判决书/裁决书公司的关系。例如被申请人有其他关联公司或子公司，曾经对判决书/裁决书拒不支付与严抗执行等。

（8）在此案件中被申请人的过往行为，包括被申请人始终采取回避、不愿意参与诉讼的态度，或者根本是缺席诉讼等。例如在仲裁中被申请人从来不作出任何回复，也不根据仲裁协议委任仲裁员等。

（9）其他方面也会是千变万化，例如案件本身是一个刚被揭发的国际著名欺诈案件，作为受害人之一的申请人向法院申请冻结令时，估计就不必花太多心思举证以“丑化”表面看来是一个国际骗子的被申请人就足以说服法院了。

接下去会重点针对经常与资产有否流失风险串在一起的两方面说法：（一）申请人延误申请冻结令；（二）之前也已经提到这一点，即涉及欺诈与不诚实的案件，是否可以推定有资产流失的风险，毕竟江山易改，本性难移？

1.7.4.2 申请人延误申请冻结令是否可以推断资产没有流失风险?

如果申请人/原告真的是关心被告的资产会被处置与流失，情况紧迫，就会在第一时间向法院申请冻结令。反之，也表示申请人不是真正关心资产的流失，而会有其他背后不可告人的意图去慢慢申请冻结令，如觉得这样做可以向被申请人/被告施加压力迫使其让步或投降。毕竟，针对中间禁令/命令（interim injunction/order）这种衡平法的救济（equitable relief/remedy），向法院申请都需要尽量快捷，冻结令更是如此。早在 Milward v. Earl of Thanet (1801) 5 Ves 720n 先例，就有说到这种申请必须是 "准备就绪、希望、动作快捷与渴望"（ready, desirous, prompt and eager）。

上述只是从一般性的常理去简单推算，不一定是个别案件的现实情况。例如，笔者就见过不少涉及中国公司的案件是因为有关人士不懂国际上的一套游戏规则，往往被国际骗子或不诚实的外商骗走了一大笔钱，但不知所措，只是内部大家怪来怪去或不断开会但没有决定。例如，在本章之 1.12.1 段就提到了笔者曾经在两三年前遇过深圳一家中资公司在香港被冻结了几亿人民币款项，不知道如何应对，找律师也不知道该找谁，只是到处在问人，问了又不相信（毕竟要找对了懂行的律师也需要自己有一定的判断力）。当笔者首次听到这一件事，也好像其他的正常人士一样马上假设该深圳的中资公司可能"心里有鬼"，比如说这笔款项的来路不正，所以不敢出面"申张权利/主张正义"，直到进一步查询有关案件才感觉不是这么一回事。所以笔者认为现实中（特别是冻结令的对象一般是一些弱小的公司，包括在发展中国家的公司），延误往往问题是出在对国际法律的知识水平不够与不知道怎么应对。但这种真正造成延误采取行动的原因并不是法律可以接受的原因，否则做错任何事情就说是因为自己不懂就能解释得过去，也会变了是"无法无天"，再也不必去追究真正的原因了。

当然，尽快去向法院申请冻结令防止被告资产的流失也不代表在法院诉讼或仲裁一开始（甚至还没开始但有了诉因[cause of action]）就要行动，毕竟委任懂行的律师去向英国法院（或其他适合的法院）申请冻结令，加上可预计到被申请人在收到通知后会做出的回应，表示会涉及高昂的诉讼费用。所以，原告作为申请人要谨慎行事是说完全说得通。但如果真是有了延误，就需要有合情合理的理由说服法院，在每个案件不同的情况下，有关申请人/原告并非不关心资产的流失或是"怠慢"（laches）。例如一开始的时候，被告的经济状况不像是太坏，不值得花钱去申请冻结令。但诉讼后期，胜诉在望，被告开始有丑闻或赖债的言行出现，导致申请人/原告下决心申请冻结令等等。

以上是笔者简单的解释，也可举一些权威与较近期的先例说明针对这方面（原告作为申请人延误作出冻结令申请）的考虑。首先是在英国的 Madoff Securities International Ltd v. Raven (2011) EWHC 3102 (Comm)先例中，Flaux 大法官说：

"It seems to me that the following principles relevant to the present application can be discerned from those two cases:

(1) ***the mere fact of delay in bringing an application for a freezing injunction or that it has first been heard inter partes, does not, without more, mean there is no risk of dissipation****. If the court is satisfied on other evidence that there is a risk of dissipation, the court should grant the order, despite the delay, even if only limited assets are ultimately frozen by it;*

(2) the rationale for a freezing injunction is the risk that a judgment will remain unsatisfied or be difficult to enforce by virtue of dissipation or disposal of assets (see further the citation from The 'Nicholas M' [2008] 2 Lloyd's Rep. 602 below). In that context, the order for disclosure of assets normally made as an adjunct to a freezing injunction is an important aspect of the relief sought, in determining whether assets have been dissipated, and, if so, what has become of them, aiding subsequent enforcement of any judgment;

(3) ***even if delay in bringing the application demonstrates that the claimant does not consider there is a risk of dissipation, that is only one factor to be weighed in the balance in considering whether or not to grant the injunction sought****."*（加黑部分是笔者的强调）

另一个是在本章多处如 1.6.3 段与下一小段介绍 Yves Charles Edgar Bouvier v. Accent Delight International Ltd (2015) SGCA 45 新加坡上诉庭先例中，Sundaresh Menan 首席大法官说：

"*A plaintiff who is genuinely concerned that the defendant will dissipate his assets would be expected to act with urgency in seeking Mareva relief. Of course, delay by itself will not be dispositive of the plaintiff's application for such relief. The length of the delay and any explanations for it should be considered against all the circumstances of the case."*

1.7.4.3 案件涉及不诚实或欺诈行为是否就可以推断资产流失风险？

如果已经向法院显示有一个良好论据的案件（good arguable case），其中被申请人涉及不诚实（dishonesty）或欺诈（fraudulent）行为，此时是否不需要其他额外证据就足够推断资产有流失风险？在英国、澳大利亚、新加坡等普通法法院都有不少这类先例，但对这个问题的回答并不肯定。

第一个涉及此问题的英国上诉庭先例是 Grupo Torras SA, Torra Hostench London Limited v. Sheikh Fahad Mohammed Al Sabah and others (unreported, 21 March 1997)先例。此先例中的原告指称被告诈骗导致 3 亿美元损失。Saville 大法官（其他法官也同意）指出由于此先例中指称的国际金融欺诈导致很有理由担心资产有流失风险（"a strong fear of dissipation"），也因此支持一审法院颁布/作出冻结令。可以节录 Saville 大法官所说如下：

"*What is clear from the judgment is that the judge took the view that there was a good arguable case that Mr Dawson was knowingly implicated in the fraud; and that the nature of the allegations was such that there was a strong fear of dissipation. Since it is part of Mr Dawson's own case that he was expert in the sort of intricate, sophisticated and international financial transactions which feature in this case, and since the plaintiffs had established a good arguable case that Mr Dawson had used his expertise for dishonest purposes, I am not in the least surprised that the judge reached the conclusion that he did. In short I remain wholly unpersuaded that the judge so erred in his assessment of the risk of dissipation that it would be right for this*

court to interfere."

还可见 Peter Gibson 大法官在 Thane Investments Ltd v. Tomlinson (2003) EWCA Civ 1272 上诉庭先例中弹性处理的说法（Anthony Evans 大法官也同意这个说法）：

"… I regret that I do not see that the judgment [in the earlier proceedings] does support a conclusion that in the particular circumstances of Mr Tomlinson and Reyall there was a real risk of assets being dissipated. （申请人代表大律师） submitted that it has ***now become the practice for parties to bring ex parte applications seeking a freezing order by pointing to some dishonesty, and that ... is sufficient to enable this court to make a freezing order****. I have to say that, if that has become the practice, then the practice should be reconsidered.* ***It is appropriate in each case for the court to scrutinise with care whether what is alleged to have been the dishonesty of the person against whom the order is sought in itself really justifies the inference that that person has assets which he is likely to dissipate unless restricted."***（加黑部分是笔者的强调）

在许多英国先例中，还可以再介绍一个上诉庭的 VTB Capital plc v. Nutritek International Corporation and others (2012) 2 Lloyd's Rep 313 先例。此先例中原告（"VTB"）是一个注册在伦敦的银行，借贷了超过 2.2 亿美元给一个俄罗斯公司（"RAP"），让 RAP 得以从一个 BVI 公司（"Nutritek"）手中收购一个俄罗斯的乳业农场。之后 RAP 未能偿还贷款，VTB 只追回了 4 千多万美元。事后 VTB 得到爆料或内幕消息，RAP、Nutritek 以及 Nutritek 的母公司（包括一个 BVI 公司"Marcap BVI"以及一个俄罗斯公司 Marcap Moscow）实际上都是同一个人（Konstantin Malofeev 先生）所控制。因此 VTB 以串谋（conspiracy）以及联合欺骗（joint liability for deceit）为由起诉 RAP、Nutritek 、Nutritek 的母公司以及 Malofeev 先生。VTB 也成功申请到法院颁布/作出针对 Malofeev 先生的全球冻结令。

但在英国高院，Arnold 大法官指出虽然 Malofeev 先生是被指称涉及严重欺诈（serious fraud），而且操纵着复杂的公司网络（"complex web of companies"），但这并不足够显示有真正的资产流失风险。在国际商贸社会中任何公司采用离岸公司的做法来经营是很常见的，这会是为了避税或者其他理由，并没有充分指向财产流失风险（"not a strong pointer towards a risk of dissipation"）。

但是上诉庭在同样案情下（显示有一个涉及严重欺诈的良好论据案件），针对资产流失风险的问题持有不同看法，认为是足够推定与假设被申请人的资产有流失风险。Lloyd 大法官说：

"*If the question [of the Mareva injunction] had arisen, it would have been on the footing that* ***VTB has a seriously arguable case for saying that Mr Malofeev had been engaged in a major fraud against VTB****, by which VTB was persuaded to lend RAP US$220 million to fund what was represented as a sale of assets worth substantially more than that amount, whereas in fact, first, the assets were worth a great deal less, and secondly the transaction was not a true sale, and moreover a substantial part of the proceeds of the loan (it can be assumed) disappeared into the complex web of corporate entities in various jurisdictions, including several offshore, for the benefit of Mr Malofeev, and maybe for that of others involved. Furthermore, not only was the use*

of that web of corporate entities a significant part of the means whereby the fraud was committed, by concealing the true ownership of RAP, but it would also make it difficult for VTB to enforce any judgment that it was able to obtain. …

*It seems to us that these propositions would have provided a strong starting point for a case in favour of the grant of a [全球冻结令]. **It could be inferred that a wealthy individual who uses such methods to defraud a bank in this way and on this scale might readily resort to similar methods to render his major assets proof against enforcement in response to proceedings being taken against him, at any rate if he had reason to fear that the proceedings might be pursued effectively….***

*Given that there is (as the judge held) **a good arguable case against Mr Malofeev on an allegation of fraudulent misrepresentation** used to procure a loan of US$220 million against wholly inadequate (and itself misrepresented) security**, on the part of a businessman with international connections and assets, using offshore companies in many parts of the world, it might not be difficult to suppose that, if Mr Malofeev thought he was at risk of having his assets seized to answer a judgment against him, he would dispose of those assets, or move them into a situation in which it would be difficult or impossible for the claimant to reach them**."*
（加黑部分是笔者的强调）

也可节录 Yves Charles Edgar Bouvier v. Accent Delight International Ltd (2015) SGCA 45 新加坡上诉庭先例中，Sundaresh Menan 首席大法官所说（也是笔者十分认同的说法/看法）：

"*In our judgment, if there is **a unifying principle** that can adequately rationalise and explain the circumstances in **which a court may legitimately infer a real risk of dissipation from nothing more than a good arguable case of dishonesty, it is this – the alleged dishonesty must be of such a nature that it has a real and material bearing on the risk of dissipation**.[116] It will be evident from our analysis of the cases that it is in such circumstances that the courts have been willing to draw the necessary inference. This is sensible because whether or not such an inference may be drawn is ultimately a question of fact. In assessing whether the inference is warranted as a matter of fact, it is appropriate, in our judgment, for the court to segregate the two questions (ie, whether there is a good arguable case on the merits of the plaintiff's claim and whether it has been shown that there is a real risk of dissipation) and answer them separately.[117] We accept that the evidence relied on to answer the first question may be the same as that relied on to answer the second. But, once the inquiries are segregated, it will be clear that whether the evidence pertinent to the first stage of the inquiry is sufficient also for the purposes of the second*

[116] 如果有一个统一的原则是法院可以在一个涉及不诚实指控的良好论据的案件中合法推算（infer）资产无可避免会有真正的流失风险，那么该指控的不诚实行为必须是本质上也是难免会带来资产流失的真正与重大的风险。一个例子是被申请人对配偶有不诚实行为，如果是在家事纠纷中配偶申请冻结令，那么就可以说该不诚实行为的本质会带来资产流失的真正与重大风险。但是如果是第三方与他的公司的商业纠纷申请冻结令，这种对配偶的不诚实行为的本质就谈不上会带来资产流失的风险。

[117] Menan 大法官是说法院作出分析时，最好是分开前后两个不同步骤考虑并作出独立的决定。首先考虑申请人对案件本身的指控，是否能够成立是一个有良好论据的案件，并且案情显示有涉及不诚实行为与/或欺诈。再在第二步考虑这一个有良好论据案件中的特定不诚实行为与/或欺诈是否会带来资产流失的风险？

stage is an assessment that cannot – and emphatically must not – be made mechanistically;[118] *and in that context, if an allegation of dishonesty is all that is relied on, that llegation must be such as to say enough about a real risk of dissipation in the circumstances.*

In our judgment, a well-substantiated allegation that a defendant has acted dishonestly can and often will, as we have said, be relevant to whether there is a real risk that the defendant may dissipate his assets. But, we reiterate that in each case, it is incumbent on the court to examine the precise nature of the dishonesty that is alleged and the strength of the evidence relied on in support of the allegation,[119] *keeping fully in mind that the proceedings are only at an interlocutory stage and assessing, in that light, whether there is sufficient basis to find a real risk of dissipation. That alone is the justification which lies at the heart of the court's jurisdiction to grant Mareva injunctions. An allegation of dishonesty does not in itself form a substitute for an examination of the degree of risk of dissipation unless, as we have said, that allegation is of a nature or characteristic that sufficiently bears upon the risk of dissipation.*[120]"

以上的判词以及笔者加上的中文脚注，可以简单指出一般社会人士根据常识（common sense）会作出的判断，即如果见到一个曾经以不诚实与欺诈性行为牟取利益的人，特别是刚发生不久，就会很容易推算（infer）他/她在往后的行为也会是不诚实与欺诈性。一贯的说法就是"江山易改，本性难移"。但如果法院这样不分皂白地推算，甚至作出严肃的决定，就会有危险了。

笔者也想到另一种在法治社会经常会发生的、可以相提并论的情况。即在刑事案件，嫌疑人（suspect）在候审期间向法院申请批准让他/她在提供担保的条件下，在家中候审。法院在这种申请与在双方的争辩下会面对同样的犹疑，就是如果批准嫌疑人回家候审，会否有他/她在开庭审判前弃保潜逃的风险？法院显然要综合考虑许多有关的事实与证据并权衡轻重。一个主要的考虑是涉及怎样的刑事案件。如果是杀人放火甚至是叛国罪，定罪后会判的刑罚可以是死刑或至少是长期甚至终身监禁。这显然与一些比较轻微的犯罪，即使定罪的量刑也只是一年或几个月的监禁，有极大的不同。另也会有很多其他方面的事实会加以考虑。比如是嫌疑人的年龄、健康状况、社会背景、与可能会潜逃的外国是否有联系、经济状况、家庭状况等等。法院最后的决定仍是看审理该嫌疑人申请的法官，行使他/她的裁量权（discretion）作出。

虽然根据个别法官裁量权作出的决定难免会有不肯定。法院在考量个别案件中可能曾经涉及不诚实与欺诈性行为的被申请人/被告，是否会在候审期间使他/她的资产流失时，也是

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118 虽然去考虑这两个前后步骤所依赖的证据（主要是申请人代表律师的誓章/誓词与作为附件的文件证据）会是一模一样，但只要分开考虑与查询，法院就有可能在前后的步骤作出不同的结论与决定。主要还是不要一旦接受是一个会有不诚实行为与/或欺诈的良好论据的案件，就"机械式"地认定被申请人的资产有流失风险。

119 虽然如果案件显示被申请人/被告有不诚实行为，与被申请人会事后导致资产流失的风险有关，但法院还是要根据每一个案件的不同案情去考虑。包括到底是怎样的不诚实行为（例如是"杀人放火"，还是"小偷小摸"）、支持誓章/誓词的附件文件证据所显示出来的强弱等。也要考虑在申请冻结令时，即使是被申请人有机会出庭对抗，往往也是诉讼或仲裁程序的早期，考量会是片面与不太准确。

120 最后一句话是重复说，一个不诚实行为的指控不能用来替代法院对个别案件中资产流失风险的程度的审核，除非是指控本身（而且是满足了"有良好论据案件"的分水岭）的本质与类别是一个非常严重的不诚实行为与/或欺诈，足够去推算有资产流失的风险。

只能让个别法官根据有关的大原则行使裁量权作出决定。但由于法院有严格的制度规定要公开审理[121]，任何说得出理由有利益冲突的法官必须回避，法官在决定前必须先要聆听双方全面的争辩与证据（即使在初步只能是听单方面申请的冻结令），法官的判决必须有全面的原因与必须公开，再加上上诉制度监督（虽然在一审没有原则性错误的情况下，上诉庭是极不愿意干扰一审法官的裁量权），并且一审法官必须跟从不少先例在方方面面已经作出的指引或原则等，可以说已经想尽办法将法院在自由裁量权下作出决定的不肯定性减到最低了。

最后，笔者可以介绍与节录一个十分近期的 National Bank Trust v. Yurov (2016) EWHC 1913 (Comm)先例。该先例中，Males 大法官接受了被申请人代表律师所提出的七个观点或原则，说：

"As has been said many times, the purpose of a freezing order is not to provide the claimant with security but to restrain a defendant from evading justice by disposing of assets otherwise than in the ordinary course of business in a way which will have the effect of making itself judgment proof. It is that concept which is referred to by the label 'risk of dissipation'. I was referred to a number of statements of principle to this effect, including Thane Investments Ltd v Tomlinson [2003] EWCA Civ 1272 at [21] and [28]; TTMI Ltd v ASM Shipping Ltd [2005] EWHC 2666 (Comm), [2006] 1 Lloyd's Rep 401 at [24] to [27]; and Congentra AG v Sixteen Thirteen Marine SA [2008] EWHC 1615 (Comm), [2008] 2 Lloyd's Rep 602 at [49].

Based on these authorities, the defendants advance seven propositions which the bank does not dispute and which I accept. They were as follows:

a. The claimant must demonstrate a real risk that a judgment against the defendant may not be satisfied as a result of unjustified dealing with the defendant's assets.

b. That risk can only be demonstrated with solid evidence; mere inference or generalised assertion is not sufficient.

c. It is not enough to rely solely on allegations that a defendant has been dishonest; rather it is necessary to scrutinise the evidence to see whether the dishonesty in question does justify a conclusion that assets are likely to be dissipated.

d. The relevant inquiry is whether there is a current risk of dissipation; past events may be evidentially relevant, but only if they serve to demonstrate a current risk of dissipation of the assets now held.

e. The nature, location and liquidity of the defendant's assets are important considerations.

f. Whether or to what extent the assets are already secured or incapable of being dealt with is also relevant.

[121] 见本书第四章。

g. So too is the defendant's behaviour in response to the claim or anticipated claim."

也就是：

(a) 申请人/原告必须显示有一个真正的风险是被告将来不会支付胜诉的判决，因为在期间他已经处理或转移了他的资产。

(b) 这一个风险必须以强而有力的证据支持，只是通过推算或泛泛的指控是不足够的。笔者（杨良宜）在仲裁中会时不时见到这种情况，就是双方或其中一方代表律师（包括中国内地律师）去"讲故事"，凭想象出来的阴谋论相互指控对方有不诚实与欺诈性行为，但没有提供任何证据。笔者只想说这种好像一些没有受过教育的人士冲动地吵架，在一个正规的国际仲裁是仲裁员根本也应该"不屑一顾"的。

(c) 只依赖被告有不诚实行为的指控并不足够，而是要根据证据的看到底有关的不诚实行为可否合理推算被告的资产会流失。

(d) 考虑是否颁布/作出冻结令的关键问题是目前会否有资产流失的风险。而过去的事实（即有过不诚实与欺诈性行为的指控与证据）会是有关，但必须也能够同时显示目前资产有流失的风险。

(e) /(f) 被告资产的本质、所在地与流通性是重要的考虑。另是资产是否有抵押/质押，或不是太容易去处置掉也是有关的考虑。

(g) 被告面对申请人/原告所提起的损失索赔有什么反应与采取的态度也是重要的考虑。这也是常识的判断或推算。如果被告在法院诉讼或仲裁中积极面对原告的索赔，委任有水平的律师抗辩，就容易判断被告即使最后败诉也会是认命赔钱，毕竟花费高昂的律师费也在所不惜。也不用说在一个正常的诉讼，只要有水平的律师在代表被告，在面对有败诉可能性（特别是高的情况下），律师会建议客户在适当机会试图庭外和解。现实中也有不少民事诉讼是在诉讼或仲裁半途和解结案。

但相反如果被告对原告的索赔是不理不睬，就容易判断被告不可能会在败诉后（被告不出庭抗辩就几乎肯定会败诉）认命去赔付"判决债务"（judgment debts）。如果被告真是"认命"，也会在原告一开始提起索赔就赔钱，不会要原告去花律师费通过诉讼或仲裁后才支付一笔更大的损失金额。所以这一个会"扯皮"与资产会流失的结论就很容易得出，也正是冻结令要去针对的"完美案件"（perfect case）。

在笔者看来，有一些中国公司就是采取这种反应与态度。这看来是莫名其妙，但很容易解释什么会出现这种情况。就是，这些公司的领导与员工对国际法律与实务不了解，也很少人关注他们在这方面的水平与经验是否能够在这一个法律风险极大的国际商业环境中"胜任"。这些公司很少会成为原告（或冻结令的申请人），因为它们不知道自己的法律地位，不警觉有了一个可以向外国公司索赔大量金钱的好机会。它们通常只会成为被告，因为精明的外国公司可不会错过索赔金钱的好机会，特别是在知道对手好欺负的情况下。而这些中国公司面对索赔，会以不是理由的"理由"，例如是不想花律师费或肯花也不知道应该相信与委任谁，不去应讯。接下来的法律行动可以想象到，就是外国公司作为申请人向适当的法院（如

香港特区、新加坡、英国等）申请冻结令，也可以估计到多数会成功。

事实上，这些不去应诉的中国公司也的确是在想败诉后不会去“认命”赔钱，而是能赖就赖，能拖就拖。它们通常也会想歪了，例如想依赖中国法院在执行外国仲裁裁决的时候对它们作出“保护”，这在今天的现实是完全不可能的。笔者经历过不少的缺席（default）仲裁案件涉及的是国企，在笔者看来这些公司根本没有条件去“赖皮”或“拖时间”，因为是赖不掉的。光明正大与长远的道路就是中国公司的从业人员（与律师团队）尽快熟悉这套国际商业游戏规则，这一来普通法的冻结令（与附属的资产披露令）也就没有什么可怕了，中国公司根本可以倒过来去大量使用在对付外国不规矩的公司，避免损失。

1.7.5 指引五：申请人要向法院提供交叉担保

作为核武器（nuclear weapon）的冻结令一旦引爆后，会对被申请人/被告造成很多方面的不利与损失。另也会对其他无辜第三方造成一定的损失，例如有关的银行就会需要去内部调查被申请人到底有什么资产在银行。如果是全球冻结令（WFO）的话，更是要向全球的银行分支全部去小心/仔细做出内部调查。这些工作都会涉及高昂的费用，另加上如果需要，有关银行也会要支付咨询与代表银行出庭的律师费。对无辜的银行而言，任何言行可能与藐视法院的刑事罪行沾上边都要小心。

所以英国法院在颁布/作出冻结令时，都要考虑一些保护措施（safeguards）去降低会对被申请人或无辜第三方造成的损害，与/或真的造成了损失的话，他们（特别是无辜的第三方）会获得申请人的赔偿。在本段介绍的“指引五”下，法院基本上都要求申请人/原告提供担保才会作出冻结令，尤其是在单方面（*ex parte* / without notice）的申请。这交叉担保是不需要法院向申请人清楚说明，因为这是一个默示责任（implied obligation）。正如 Cheltenham & Gloucester Building Society v. Rickeets (1993) 1 WLR 1545 先例所说，这是申请人要付出的代价（“*the price which the person asking for a (Mareva) injunction has to pay for its grant*”）。

只有在极少数的案件，让法院认为是申请人“错不了”的情况下，会可能不要求申请人提供担保。例如在 Banco Nacional de Comercio Exterior SNC v. Empresa de Telecommmunicaciones de Cuba SA (2008) 1 WLR 1936 先例，涉及了在意大利法院胜诉后在英国法院申请冻结令协助执行（execution of judgment debts），由于胜负已明确，所以法院不要求胜诉方的申请提供担保。

这一个担保可能是不需要申请人在申请的时候去承担真正的支出或代价。在本章之 1.7.1.6 段已有提到，申请人代表律师会在誓章/誓词（affidavit/affirmation）中的全面与坦率披露责任下说明了申请人有足够的财政与经济能力去面对将来会来自被申请人（与/或无辜第三方）的估计损失索赔。而如果申请人代表律师没有去这样做，在这个默示责任下，也会被法院视为是没有不利之处需要向法院去披露。但如果后来并非是这个事实，例如申请人要做赔偿的时候显示是“光棍”一名，而申请人代表律师也应该或可以知道，律师就会受到法院的惩罚：见 Schmitten v. Faulks (1893) WN 64 等先例。

如果申请人代表律师一开始就在誓章/誓词中披露了申请人的财力不足，法院就已经会要求申请人为担保“加固”（fortify）。例如，法院在考虑了申请人/原告是一家巴拿马公司，

而想冻结被申请人的资产又会是造成损失风险特别大的类别，就会要求申请人为担保加固，否则就不会颁布/作出冻结令。但一般情况会是在被申请人/被告在收到冻结令的通知后出庭抗拒，在双方或多方（*inter partes*）的争辩与举证中才去决定。申请人会提出证据显示申请人的财力不足，法院如果持续冻结令的有效性就要考虑要求申请人/原告为交叉担保加固，那就是将款项存入法院（payment into court）或其他法院可以接受的担保。正如 Hirst 大法官在 The "Mito" (1987) 2 Lloyd's Rep 197 先例说：

"*If the court considers that the cross-undertaker, usually the (申请人/原告), might not be worth powder and shot if it be held that he is obliged to fulfil his cross-undertaking, the Court can strengthen the undertaking by requiring some sort of security.*"

去总结，向法院申请冻结令就会有一个自动提供交叉担保的默示责任的 3 个主要目的是：

（一）如果被申请人/被告事后证明这一个冻结令本来就不应该作出（wrongly granted），这会是在最后的诉讼或仲裁原告败诉。法院就可以依赖这一个担保下令赔偿被申请人/被告所有因为资产被冻结所导致的损失。

（二）无辜第三方的损失是无论如何必须要申请人支付或赔偿。

（三）这也表示原告在作出冻结令申请这一个"严厉措施"（Draconian measure）之前要小心想清楚与谨慎处事。这方面已在本章之 1.7.4.2 段在提到延误作出申请的课题时简单提到过。当然合理的延误可以推说是谨慎处事，但过度的延误/怠慢又会是另外一个考虑了。

1.7.5.1 针对要为被申请人提供"保护措施"的权威说法

虽然在上一小段已经有简单但应该是十分清楚介绍过英国法律/法院要求申请人提供"交叉担保"（cross-undertaking）的原因与理由，但笔者仍想详尽节录一些权威先例的说法，特别是一些近期先例更是十分详细地提到这方面与法院的一些想法/做法。

首先是在 La Roche & Co AG v. Secretary of State for Trade and Industry (1975) AC 295 先例中，Diplock 勋爵清楚地解释了申请人申请中间禁令需要向法院提供交叉担保的历史，不妨节录判词如下：

"*The practice of exacting an undertaking as to damages from a plaintiff to whom an interim injunction is granted originated during the Vice Chancellorship of Sir James Knight Bruce who held that office from 1841 to 1851. At first it applied only to injunctions granted ex parte but after 1860 the practice was extended to all interlocutory injunctions. By the end of the century the insertion of such an undertaking in all orders for interim injunctions granted in litigation between subject and subject had become a matter of course.*[122]

[122] 此段介绍了在单方面申请的中间禁令中，申请人要对可能需要赔偿被申请人的损失提供担保的习惯做法与历史。这个做法在后来被延伸到所有的中间禁令，无论是否单方面申请。

The advantages of this practice in any suit for the protection or enforcement of personal or proprietary rights are plain enough. An interim injunction is a temporary and exceptional remedy which is available before the rights of the parties have been finally determined and, in the case of an ex parte injunction, even before the court has been apprised of the nature of the defendant's case.[123] *To justify the grant of such a remedy the plaintiff must satisfy the court, first, that there is a strong prima facie case that he will be entitled to a final order restraining the defendant from doing what he is threatening to do,*[124] *and, secondly, that he will suffer irreparable injury which cannot be compensated by a subsequent award of damages in the action if the defendant is not prevented from doing it between the date of the application for the interim injunction and the date of the final order made on trial of the action.*[125] *Nevertheless, at the time of the application it is not possible for the court to be absolutely certain that the plaintiff will succeed at the trial in establishing his legal right to restrain the defendant from doing what he is threatening to do. If he should fail to do so the defendant may have suffered loss as a result of having been prevented from doing it while the interim injunction was in force; and any loss is likely to be damnum absque injuria for which he could not recover damages from the plaintiff at common law.*[126] *So unless some other means is provided in this event for compensating the defendant for his loss there is a risk that injustice may be done.*[127]

It is to mitigate this risk that the court refuses to grant an interim injunction unless the plaintiff is willing to furnish an undertaking by himself or by some other willing and responsible person 'to abide by any order the court may make as to damages in case the court shall hereafter be of opinion that the defendant shall have sustained any damages by reason of this order '(sc., the interim injunction)' which the plaintiff ought to pay.'[128]

The court has no power to compel an applicant for an interim injunction to furnish an undertaking as to damages. All it can do is to refuse the application if he declines to do so.[129] *The undertaking is not given to the defendant but to the court itself. Non-performance of it is contempt of court, not breach of contract, and attracts the remedies available for contempts, but the court exacts the undertaking for the defendant's benefit.*[130] *It retains a discretion not to*

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123 中间禁令是在当事人之间的权利划分、谁对谁错没有作出最后决定时，临时性与例外性的救济手段。而单方面申请的中间禁令，更是在法院都没有机会了解与考虑被申请人可能有的争辩时作出。

124 要获取这样的救济，申请人就必须向法院证明，首先有很强的表面良好的案件显示申请人将会在最后的命令中也获得同样的永久救济，也就是胜诉。

125 申请人还需要向法院证明，如果中间禁令未获批准，那么在申请之日起直到最后有可执行的判决/裁决之日之间会蒙受损害，难以通过金钱弥补。

126 在申请人提出申请时，法院毕竟无法绝对肯定申请人会在经过全面审理后最终胜诉并被认定有权利禁止被申请人（针对冻结令而言就是禁止处置资产）。一旦在最后审理中申请人败诉，被申请人就会由于在中间禁令生效期间被禁止从而蒙受损害。由于这是“无过错损害”（*damnum absque injuria*），毕竟申请人申请冻结令时完全满足了法院的要求，符合法律要求，因此在普通法下没有赔偿责任，被申请人要想从申请人处直接获得损失赔偿存在难度。

127 正因此需要额外的手段，在申请人败诉的时候要对被申请人的损失进行补偿、赔付，以避免被申请人的损害无法获得赔偿的风险。

128 减少这个风险的做法，是除非申请人对被申请人可能蒙受的损害提供担保，否则法院不予作出中间禁令。

129 法院并没有权力强制要求申请人提供担保，但是有权力在申请人拒绝为可能的损害提供担保时，根据自己的裁量权拒绝作出中间禁令。

130 申请人的交叉担保是提供给法院而不是被申请人，与一般的担保合约不同。将来不履行担保可能带来的是藐视法院的刑事责任，而非对被申请人的民事违约责任。例如在 Emanuel v. Emanuel (1982) 1 WLR 669 先

enforce the undertaking if it considers that the conduct of the defendant in relation to the obtaining or continuing of the injunction or the enforcement of the undertaking makes it inequitable to do so[131]*…*"

近期先例中，则可见 Laddie 大法官在 The Bank v. A Ltd & Ors (2000) EWHC J0517–13 先例中指出的，法院在谨慎处理冻结令申请时要考虑 6 个的保护措施（safeguards）：

"*Even so, Anton Piller and Mareva orders have rightly been described as the nuclear weapons in the court's armoury*[132] *and as being at the very extremity of the court's powers. To reduce the risk of abuse, stringent safeguards have been put in place to protect, as far as possible, the interests of the absent respondent. It is worth remembering what some of those safeguards are.* ***First****, an order will not be made unless the applicant produces evidence which shows that he has a very strong case.* ***Second****, the evidence must be served on the respondent with the order.* ***Third****, the order always includes a cross-undertaking in damages.* ***Fourth****, the order includes an express right to the respondent to apply to discharge on short notice.* ***Fifth****, the order must included a return date so that the issue can be brought back for review inter partes as soon as possible.* ***Sixth****, in Mareva orders there is an explicit provision allowing the respondent access to sufficient of his funds to pay his reasonable legal expenses—a provision which ensures that he has the financial resources available to fight for the discharge or modification of the order. All of these are intended to offer some, albeit imperfect, protection to the respondent.*"（加黑部分是笔者的强调）

也可见 Fourice v. Le Roux (2007) UKHL 1 贵族院先例中，Bingham 勋爵所说："*In recognition of the severe effect which such an injunction may have on a defendant, the procedure for seeking and making Mareva injunctions has over the last three decades become closely regulated. I regard that regulation as beneficial and would not wish to weaken it in any way. The procedure incorporates important safeguards for the defendant.*"

最后以 L v. K (2013) EWHC 1735 (Fam)先例，Mostyn 大法官针对冻结令申请中对被申请人/被告的保护措施的说法作为总结：

"*The relevant principles and safeguards may be summarised as follows:*

i) The court has a general power to preserve specific tangible assets in specie where they are the subject matter of the claim. Such an order does not necessarily require application of all the freezing order principles and safeguards, although it is open to

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例中，申请人/原告由于没有履行担保而带来了 6 周的牢狱之灾。法院是在为了被申请人的利益根据担保命令申请人作出补偿与赔付。

131 法院在这方面有裁量权。如果法院认为被申请人在抗拒中间禁令的申请、延续或在禁令执行中的行为有问题（例如是自己犹豫不决才造成主要损失），也可以不执行申请人提供的担保。

132 在 Bank Mellat v. Nippour (1985) FSR 87 先例中，Donaldson 大法官首先将这两种禁令称为是法院的核武器。

the court to impose them.[133]

ii) *For a freezing order in a sum of money which is capable of embracing all of the respondent's assets up to the specified figure it is essential that all the principles and safeguards are scrupulously applied.*[134]

iii) *Whether the application is made under the 1981 Act or the 1973 Act the applicant must show, by reference to clear evidence, an unjustified dealing with assets (which would include threats) by the respondent giving rise to the conclusion that there is a solid risk of dissipation of assets to the applicant's prejudice.* [135] *Such an unjustified dealing will normally give rise to the inference that it is done with the intention to defeat the applicant's claim (and such an intention is presumed in the case of an application under the 1973 Act).*

iv) *The evidence in support of the application must depose to clear facts. The sources of information and belief must be clearly set out.*[136]

v) *Where the application for a freezing order is made ex parte the applicant has to show that the matter is one of exceptional urgency. Short informal notice must be given to the respondent unless it is essential that he is not made aware of the application. No notice at all would only be justified where there is powerful evidence that the giving of any notice would likely lead the respondent to take steps to defeat the purpose of the injunction, or where there is literally no time to give any notice before the order is required to prevent the threatened wrongful act. Cases where no notice at all can be justified are very rare indeed. The order of the court should record on its face the reason why it was satisfied that no or short notice was given.*[137]

vi) *Where no notice, or short informal notice, is given the applicant is fixed with a high duty of candour. Breach of that duty will likely lead to a discharge of the order.*[138] *The applicable principles on the re-grant of the order after discharge are set out in*

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133 法院有广泛的作出保全特定有形资产的权力。例如命令将文件交出给律师（order to deliver up）：见 CBS United Kingdom v. Lambert (1983) Ch 37 等先例，不必作出冻结令。

134 如果冻结令针对的是被申请人的所有资产，直至特定的上限金额（通常是索赔金额，但法院会根据具体案件强弱认定公平与方便的金额[实际上会较低]），就需要特别小心，尽可能应用所有的原则与保护措施。商业法院范本措辞/文字针对的就是被申请人的“任何资产”（any asset）。在全球冻结令中由于无法确定被申请人的特定有形或无形资产，也只能针对所有资产/任何资产。

135 有关丑化被申请人，指出财产流失风险的问题见本章之 1.7.4.1 段。

136 申请人在申请中必须对所有事实提供证据。任何信息与确信（如指称被申请人在另一个判决/裁决中回避支付与执行）必须清楚说明来源，让法院可以衡量其可靠程度。

137 有关单方面申请的问题见本章之 1.6 段。法院在作出冻结令时需要在命令中说明为什么允许单方面申请。

138 在单方面申请（或临时通知）申请中，申请人必须高度坦率（主要是全面披露事实以便法院了解情况），一旦违背就会导致冻结令被解除/撤销。

Arena Corporation v Schroeder at para 213.[139]

vii) *Where no notice, or short informal notice, is given the safeguards assume critical importance. The safeguards are set out in the standard examples for freezing and search orders. If an applicant seeks to dis-apply any safeguard the court must be made unambiguously aware of this and the departure must be clearly justified. The giving of an undertaking in damages, whether to the respondent or to an affected third party, is an almost invariable requirement; release of this must be clearly justified.*[140]"

1.7.5.2 对交叉担保的执行

作出冻结令、搜查令等"中间禁令"（interim injunctions）时，申请人必须提供"交叉担保"（cross-undertaking），这已经是标准做法。毕竟冻结令会带来很严重的后果，又常常是由申请人单方面（*ex parte*/without notice）作出。正如 Cheltenham & Gloucester Building Society v. Rickeets (1993) 1 WLR 1545 先例与 Hone v. Abbey Forwarding Ltd (2014) EWCA Civ 711 等先例中都提到，冻结令会摧毁一个正在蓬勃发展的业务（"*ruin a thriving business*"）。一旦冻结令被解除/撤销（例如是在被申请人指称申请人的披露不全面与坦率之下被解除/撤销），又或是冻结了大笔资产但申请人在诉讼中最后败诉，就会带来大量损失。正如 Donaldson 大法官在 Bank Mellat v. Nippour (1985) FSR 87 先例中所说这是"核武器"，冻结令一旦执行就会带来严重后果，就像是核武器被使用后的"核战余生"/"核冬天"一样。在笔者的《禁令》一书中就建议申请人尽量针对不会造成严重后果的资产进行冻结。一般而言，生产工具、船舶、飞机[141]等资产被冻结往往更可能造成巨大、相对明确与容易证明的损失，而冻结银行账户相对而言造成的损失小一些。在 Rasu v. Pertamina (1977) 2 Lloyd's Rep 397 先例中，Denning 勋爵说："*Money at bank is a very good thing to attach. It can be identified precisely and attached as a rule without doing much damage to the defendant.*"

但现在许多冻结令再也不是局限在特定资产，而是针对直到特定金额上限的、被申请人的所有资产，因此前述选择并不完全正确：见稍后介绍的 Fiona Trust v. Privalov (2016) EWHC 2163 (Comm)先例与经过上诉后的 SCF Tanker v. Privalov (2017) EWCA Civ 1877 上诉庭先例。

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139 即使由于申请人没有作出全面与坦率的披露，导致冻结令被解除/撤销，也不代表申请人不能再重新申请，法院也可能重新作出冻结令。

140 在单方面（或临时通知）申请中，保护措施就显得尤其重要。冻结令与搜查令的范本措辞/文字中都设定了保护措施，例如 CPR PD 25A 附上的冻结令范本中提到申请人要向法院提供一定金额的交叉担保，要及时将文书送达被申请人，（如果还没开始诉讼的话）要已经备妥准备开始诉讼等。如果申请人要对任何保护措施有所偏离（如自己的经济存在问题，有针对自己的破产申请；无法找到被申请人、只能对被申请人的近亲属送达有关文书；需要一定时间后才能开始诉讼等），必须向法院清楚地进行解释说明，与有明确的正当理由。对被申请人或受影响的第三方（如本章之 1.7.3.5 段介绍的信托"受托人"[trustee]持有的第三方资产，这些第三方并非冻结令的被申请人）提供损失担保是一贯的要求，也只有在有明确的正当理由时法院才能予以准许偏离。

141 如 Allen v. Jambo Holdings (1980) 1 WLR 1252 先例中，原告的丈夫在登机前被飞机螺旋桨绞入致死，因此向作为被告的尼日利亚飞机公司与机师索赔。被告在英国只有这架飞机作为财产，而且即将飞回尼日利亚，因此原告申请冻结了被告的这架飞机。被告就声称这是一架 1978 年美国出口的新飞机，价值 50 万英镑，而且一旦这架飞机被冻结在英国，被告在尼日利亚为了营运将每年要额外支付 100 万英镑的固定成本。在那个年代这是一笔巨大的金额，尤其是冻结时间长的话这笔金额将会是很可观的。

近年来知悉有不少被申请人由于冻结令造成损失，希望法院要申请人作出赔付/补偿的情况，因此哪些损失可以在冻结令的担保下被赔付/补偿也成了热点话题，在近期有了一些重要先例。

在损失计算方面，曾经在 La Roche & Co AG v. Secretary of State for Trade and Industry (1975) AC 295 先例中，Diplock 勋爵就指出在是否就禁令（此先例中并不是冻结令，而只是一般的中间禁令）要求申请人赔付/补偿损失的问题上，法院有裁量权，需要根据每个案件中的公平合理、申请人的行为是否合理、被申请人的行为是否存在不当等以决定是否要求申请人作出赔付/补偿。显然可以想到的是如果在冻结令的申请中涉及原告的誓章/誓词有不诚实、不全面之处等，法院更容易要求原告作出损失赔付/补偿。同时对于损失的计算方式，与合约法下损失计算方式是一致的。不妨节录 Diplock 勋爵所说如下：

"It retains a discretion not to enforce the undertaking if it considers that the conduct of the defendant in relation to the obtaining or continuing of the injunction or the enforcement of the undertaking makes it inequitable to do so[142], but if the undertaking is enforced the measure of the damages payable under it is not discretionary[143]. It is assessed on an inquiry into damages at which principles to be applied are fixed and clear. The assessment is made upon the same basis as that upon which damages for breach of contract would be assessed if the undertaking had been a contract between the plaintiff and the defendant[144] that the plaintiff would not prevent the defendant from doing that which he was restrained from doing by the terms of the injunction[145]…"

在近期则有 Fiona Trust v. Privalov/SCF Tanker v. Privalov 先例（SCF Tanker 即为原来的 Fiona Trust，以下只以 Fiona Trust 称呼）。此先例背景是著名的俄罗斯最大的油轮与其他商业船舶的船东（以及其一系列的子公司）作为原告指控作为被告的 Yuri Nikitin 先生（以下简称 N 先生）（及其控制的子公司）有贿赂、欺诈等行为，造成 577,000,000 美元损失的案件。[146]

Fiona Trust 作为申请人先后两次申请并获得法院作出针对被告的冻结令。第一次是在 2005 年冻结 N 先生及其子公司全球共 225,000,000 美元的资产，虽然冻结令中说明不禁止日常业务营运[147]，但明确写明买卖船舶[148]不属于正常业务营运的范畴，说："*… This order does*

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142 如果法院认为被申请人/被告抗拒冻结令的申请、延期或是禁令执行中的行为，导致要求申请人/原告履行向法院作出的担保不公平，法院有裁量权不要求申请人作出赔付/补偿。

143 但是如果申请人被要求履行担保、作出赔付/补偿，对于损失的具体金额法院并没有裁量权。

144 损失的具体金额，就类同于将这份交叉担保视作申请人/原告与被申请人/被告之间的合约，按照违约损失计算的原则对损失进行核算。有关损失计算的原则可见笔者的《损失赔偿与救济》一书。

145 将被申请人的地位恢复到如同没有作出过这个禁令的地位一样。

146 "Fiona Trust"系列案件有非常多被报道、针对不同问题的先例。例如在《仲裁法——从开庭审理到裁决书的作出与执行》（2010 年）一书多处（例如第六章之 3.1.5.3 段，第十一章之 6 段），以及《提单与其他付运单证》（2016 年）一书 2.7.2 段中都介绍了有关仲裁条文管辖权的 The "Fiona Trust" (2007) UKHL 40 先例，判虽然有指控与争议合约涉及贿赂等不法行为，合约仲裁条文并不会因此无效与没有约束力。

147 见本章之 1.4.3 段。

148 N 先生自己全资拥有的公司在当时从事经纪人与航运有关业务，主要是在航运市场看涨时向船厂订造船舶，并在船舶建造的数年内（交船前）出售船舶，以赚取差价。这可以避免在船舶建造完成后被迫先接收船舶（因为需要雇佣船员与寻求船舶管理人的帮助营运船舶）、之后再转售。造船合约中的订购船舶的人士通常写为"'船舶买方'或 '提名人'"（buyers or nominee）（在此先例中 N 先生的公司就是船舶买方），如果转售时间早，就干脆向作为卖方的船厂宣告转售的买方作为"提名人"，让转售买方与船厂有直接合约关系，这样 N 先生的公司可以就此脱身。如果转售时间晚（这会是由于市场价格不如意、谈判拖延了转售等原因）

not prohibit Standard Maritime or any of its subsidiaries, from dealing with or disposing of any of its assets in the ordinary and proper course of business. For the avoidance of doubt, for the purpose of this Order, the sale and purchase of vessels (including vessels under construction), the sale and purchase of shares in any company or corporation and the grant of any security over vessels or shares are not in the ordinary and proper course of business."

之后经过 N 先生及其控制的子公司提供款项（共 208,500,000 美元）缴存于第三方（实际上是被告的律师）账户、N 先生以自己的房屋作为"押记"（charge）作为替代担保的前提下替代了被冻结的资产。N 先生及其控制的子公司还要求更改原冻结令中的要求（即改为允许被告将资金用于一般与合适的用途["*ordinary and proper purpose*"]），但这被法院拒绝，这笔替代资金也被要求除非向法院申请并获得法院允许，否则不得被用作任何用途（无论是否一般与合适的用途），相应地作为申请人的 Fiona Trust 也向法院、对被申请人（N 先生）会造成的损失提供了"交叉担保"（cross undertakings）："*If the court later finds that this order has caused loss to the respondent, and decides that the respondent should be compensated for that loss, the applicants will comply with any order the court may make.*"

第二次是在 2007 年，冻结令针对了 N 先生公司的银行账户内 377,000,000 美元的资产。在冻结令的申请中，Fiona Trust 也向英国法院提供了担保。

在 2010 年高院作出了有关责任的一审判决。最后经过上诉庭在 2013 年的判决，Fiona Trust 最后的胜诉金额只有 16,000,000 美元，这远远低于被冻结的资产（相差几十倍），而且这些资产甚至已经被冻结了很多年。同时法院还认定 Fiona Trust 在冻结令申请中没有作出全面与坦率的披露（full and frank disclosure），包括是在誓章/誓词中遗漏了重要事实没有披露，以及有违法方式获取的证据但没有进行说明（见本章之 1.7.1.4 段）。

在冻结令方面，2010 年责任的一审判决作出后，2005 年与 2007 年作出的冻结令均被解除。在 2014 年高院还作出命令要求 Fiona Trust 赔付/补偿因冻结令造成 N 先生及其控制的公司的损失。Fiona Trust 要求高院撤销此命令，也导致了此先例的产生。

高院的 Males 大法官总结了过往先例的说法，确认了法院会评估 N 先生及其控制的公司的行为如何，以考虑是否执行 Fiona Trust 向法院作出的交叉担保，要求 Fiona Trust 承担冻结令对 N 先生及其控制的公司造成的损失。而如果决定了要求 Fiona Trust 承担损失的话，对于损失的计算则要遵循以下计算原则：

"*… the defendants（N 先生及其控制的公司） are entitled to recover damages for the losses suffered by them as a result of the freezing orders (not as a result of the litigation), assessed by reference to* ***ordinary contractual principles****, including principles of causation, mitigation and remoteness, although these principles may need to be applied with some flexibility to take account of the fact that the analogy with breach of contract is not exact … Thus, in summary, the freezing order need not be the sole or exclusive cause of the loss in question, but must be an*

的话，船舶买方（即 N 先生的公司）需要自己成立单船公司作为"提名人"接收船舶，之后转售的话就要将单船公司的所有股份转让给转售的买方，以实际转售船舶。

effective cause[149]*; the burden is on the party who obtained the freezing order to demonstrate a failure to* ***mitigate***[150]*; and the type of loss…*"（加黑部分是笔者的强调）

换句话说，主要是与违约一样的损失计算方式，即考虑冻结令与损失之间的遥远性（remoteness），包括冻结令与损失之间的因果关系（causation）、损失的可预见性（forseeability）等，还要考虑 N 先生及其控制的公司是否履行了减损义务（mitigation）等。有关违约的损失计算方式在笔者的《损失赔偿与救济》一书中有详细讨论，不在此赘述。

Males 大法官也认可了在计算冻结令的损失时，也适用"宽松核算"（liberal assessment）[151]的做法。这并不是说 N 先生及其控制的公司可以获得虚构与/或与冻结令无关的损失，而是说蒙受损失的 N 先生及其控制的公司一般都无法准确说明如果资产没有被冻结、将会如何被运用、会带来估计多少的利润等，对于没发生的事实只不过是估计而已不可能有明确证明，最多是像对将来利润损失（loss of profit）的预计一样委任专家证人给出专家报告以冀得出较为专业与客观的估计或预计，因此法院不应当过于严苛的要求 N 先生及其控制的公司准确地证明自己的损失以及满足各种考验，特别是因果关系，如损失的遥远性、可预见性等。不妨也节录 Males 大法官在这方面的说法如下：

"*Nevertheless I consider that a* ***liberal assessment*** *of the defendants' damages should be adopted, provided that it is clear what this means. It does not mean that a defendant should be treated generously in the sense of being awarded damages which it has not suffered. It does mean, however, that* ***the court must recognise that the assessment of damages suffered as a result of a freezing order will often be inherently imprecise****, for example because the defendant cannot say precisely what it would have done with its funds but for the freezing order; that this problem has been created by the claimant's obtaining of an injunction to which it was not entitled; that in the light of these factors the kind of over eager scrutiny of a defendant's evidence and minute criticism of its methodology … will not be appropriate; and that it is not an answer for a claimant（即Fiona Trust）to say that damages cannot be awarded because the defendant's（即 N 先生及其控制的公司）business venture was to some extent speculative and might have resulted in a loss. Thus the defendant is not absolved from proving its damages, but these factors must be borne in mind in determining whether it has succeeded in doing so.*"

N 先生及其控制的公司的主要索赔（还有一些其他替代索赔，不在此赘述），是指称 2005 年冻结令下的资金（以及一部分 2007 年冻结令下的资金），本用来在 2005 年第四季度订造新船（4 艘"Suezmax"型油轮与 2 艘 VLCC），预计正好能够在 2008 年春天船价处于最高点时得以转卖这些船舶。即使在 2008 年底航运市场崩溃后，之前卖船所得"收益"（proceeds）可以继续进行其他非航运投资，会持续获取更大利润。具体而言，预期收益包括转售新船收益 221,600,000 美元，（直到冻结令被解除前的）后续非航运投资收益 229,830,000 美元。这些预期收益再扣除这些资产实际在账户中产生的利息收益，一共要求 Fiona Trust 赔付/补偿

[149] "effective cause"请见笔者《损失赔偿与救济》一书第四章，其中介绍了因果关系的考验。
[150] "减损"（mitigation）请见笔者《损失赔偿与救济》一书第五章。
[151] 这是在 General Tire & Rubber Co Ltd v. Firestone Tyre & Rubber Co Ltd (No.2) (1975) 1 WLR 819 先例中所说："*There are two essential principles in valuing the claim: first, that the plaintiffs have the burden of proving their loss; second, that the defendants being wrongdoers, damages should be* ***liberally assessed*** *but that the object is to compensate the plaintiffs and not to punish the defendants.*"（加黑部分是笔者的强调）

的损失为 387,000,000 美元。

对此，Fiona Trust 就提出强烈抗辩，认为 N 先生及其控制的公司所指称的自己通过投资能够获利，并非是真正的损失计算方式，投资完全可能导致损失而非利润。站在第三方角度也显然可以看到，在 2008 年底金融海啸后全球经济萧条，航运市场崩溃，无数船公司破产。现在 N 先生的指称完全是“事后诸葛亮”，认为自己真正会在 2008 年及时出售船舶而获得巨大收益，为何不会是自己期待市场进一步高涨而错过了 2008 年初的时机，因此蒙受巨大亏损呢？笔者看来，就像电影《回到未来》一样，N 先生想拿着一本记载了几十年所有事件的年鉴，意图回到过去时以这本年鉴为基准下赌注一样了。这实在是太过“投机性”（speculative）的说法，毕竟一般损失必须证明特定的损失以及证明超过“平衡的可能性”（balance of probability）才会被法院接受。

有关在大起大落、可赚可亏的市场中投资或投机，“机会损失”（loss of chance/opportunity）能否用来计算损失有一些针对性的先例。在 E Bailey & Co Ltd v. Balholm Securities Ltd (1973) 2 Lloyd's Rep 404 先例与 Ata v. American Express Bank Ltd (unreported, CA, 17 June 1988)先例中就涉及过这个问题。在有关商品买卖的 Ata v. American Express Bank Ltd 先例中，Kerr 大法官在“附带意见”（*obiter*）就曾经指出：

“*Mr Staughton （索赔方的代表大律师） contended that they were entitled to substantial damages on the ground that they had lost the chance of making a profit. He relied on cases such as Chaplin v Hicks [1911] 2 KB 786 which deal with the measure of damages for the loss of a chance. But those were all cases in which the plaintiff might or might not have obtained some pecuniary advantage or benefit and lost the chance of doing so as the result of the defendant's wrongful act.* ***He therefore lost the chance of being better off than he was, but he was not exposed to the risk of being worse off****. In cases like the present, on the other hand, a person who is prevented from speculating in cocoa or sugar futures may have lost the chance of making money or may have been saved from losing money.* ***A cynical view would be that there is an equal chance either way****. No doubt experience and skill play a large part, and to this extent there may be a better chance of winning than losing. But in my view this is not the kind of situation which the law should recognize as giving a right to damages for* ***the loss of a chance. Even though in law trading in commodity futures does not amount to gambling, the loss of a general opportunity to trade – as opposed to the loss of a particular bargain – is in my view much too speculative to be capable of having any monetary value placed upon it****.*”（加黑部分是笔者的强调）

也即在商品买卖中由于机会可能造成的是收益但也可能是损失，这与 Chaplin v. Hicks (1911) 2 KB 786 先例中无法参加选美比赛只会丧失利益的情况不同。因此无法参与投资/投机就要索赔金钱损失太过于投机性，法院难以允许对机会损失按比例作出金钱赔偿。

而刚刚提到的著名选美案件 Chaplin v. Hicks 先例，之后在 Allied Maples Group Ltd v. Simmons & Simmons (1995) 1 WLR 1602 上诉庭先例中被引申到其他类型的争议中。例如在 Allied Maples Group Ltd v. Simmons & Simmons 先例中涉及的是律师的职业疏忽造成客户错过索赔时效。但即使客户没有错过索赔时效，也只有一定的机会得到胜诉判决。因此损失也应按比例进行计算，而法院会根据具体的案情考虑如果没有丧失机会时的成功几率，尽量科学

地得出一个比例。这些内容在笔者的《损失赔偿与救济》一书第六章之 4 段有详细讨论，不在此展开。

在近期的 Parabola Investments Ltd v. Browallia Cal Ltd (2010) EWCA Civ 486 上诉庭先例进一步显示即使是可能造成收益也可能造成损失的机会损失案件中，法院也会愿意给予损失赔偿。该先例中原告指称被告剥夺了其买卖股票的机会，因此造成损失。一审（[2009] EWHC 901 (Comm)）的 Flaux 大法官拒绝适用 E Bailey & Co Ltd v. Balholm Securities Ltd 先例与 Ata v. American Express Bank Ltd 上诉庭先例中机会损失太过投机性的说法，说：

"*… neither case establishes that as a matter of law, loss of profits from CFD trading which would have taken place but for the tort are not recoverable, on the basis that they are always too speculative. Man's（被告） submission to that effect seems to me to confuse the element of speculation inevitably present in trading of this kind, with the separate question whether the prospects of making a profit trading those derivatives is so speculative that the court should regard that as not a recoverable loss. If, in an appropriate case, the court concludes that, on a balance of probabilities, the alternative trading in which the claimant would have engaged but for the tort would have been profitable overall, I see no reason in principle why the court should not award damages for such lost profits, albeit possibly with a discount for the possibility that some of the trading was loss making or less profitable… I do not see the fact that there is a risk of the claimant being worse off as a complete bar to recovery, if on a balance of probabilities the claimant would have been better off.*"

在 Fiona Trust v. Privalov 先例中，更是将机会损失引申到冻结令担保的执行中。根据 Parabola Investments Ltd v. Browallia Cal Ltd 先例的说法，Males 大法官在此先例中确认即使是有可能造成损失，也可以对机会损失作出损失赔偿的救济：

"*The true position is that in principle damages can be awarded for loss of profits even if a claimant might have made a loss. The approach which the court will adopt is to ask whether the claimant has* ***proved to a sufficient standard (which may be the balance of probabilities, or sometimes merely that there was a real and substantial chance as in loss of a chance cases)*** *that its trading would have been profitable. If so,* ***the court will make the best assessment*** *of the damages that it can,* ***applying if necessary a discount to reflect whatever uncertainty exists****, while recognising that a party seeking to show what might have happened is not required to perform an impossible task with unrealistic precision.*"（加黑部分是笔者的强调）

因此除非被告的指称达到了纯粹是凭空揣测的程度，否则仅仅说被告指称的损失太过投机性并不能说明什么问题。只要是能够证明估计或预计有"真正与实质的机会"（"*real and substantial chance*"）可能产生利润，法院就愿意要求原告赔偿损失。

而对于机会损失中具体如何计算损失，上诉庭给出的看法则是要根据事实，作出尽可能准确的推断与估计。正如 Parabola Investments Ltd v. Browallia Cal Ltd 先例中上诉庭的 Toulson 大法官所说："*The next task is to quantify the loss. Where that involves a hypothetical exercise, the court does not apply the same balance of probability approach as it would to the proof of past facts. Rather, it estimates the loss by making the best attempt it can to evaluate the chances,*

great or small (unless those chances amount to no more than remote speculation), taking all significant factors into account. … No method of assessment could be perfect, but the method of measurement accepted by the judge as a basis for estimating the lost profits was rational and supported by the opinion of an expert who impressed him. …"

在此先例中，Males 大法官在具体损失计算问题上跟从了 Toulson 大法官的判法，并继续说：

"*There is necessarily a degree of uncertainty in determining what Mr Nikitin would have done with his money if it had not been held in the Lawrence Graham account（这时 N 先生代表律师的账户，用来保存这笔 N 先生提供的高达 208,500,000 美元的担保） as security for the claimants' claims. Even if it can be said with reasonable confidence what he would have done or sought to do, for example that he would have sought to invest in a programme of newbuildings, there remains considerable uncertainty in assessing the financial outcome which would have resulted. However,* ***these uncertainties are not fatal to the defendants' claims****. What the defendants need to prove is that on the balance of probabilities they would have sought to invest in a way that had a real as distinct from fanciful chance of making a profit. If so, it will be necessary to make the best possible assessment of the profit which the defendants would have made, taking account of the uncertainties inherent in this exercise. In a case such as this where there are a number of such uncertainties, what needs to be assessed is the '****overall chance'*** *of the defendants making the profits in question.*

…

… Rather it is **necessary to evaluate 'the overall chances' of the defendants achieving the profit claimed**. Inevitably **this is a somewhat impressionistic assessment**, but I must do the best I can. My conclusion, taking account of all the uncertainties which I have mentioned, **is that the defendants had a 50% chance overall of achieving this profit** and that the damages should be calculated accordingly."（加黑部分是笔者的强调）

即 Males 大法官根据本案的案情（例如 N 先生的过往记录中有过类似的船舶买卖，而且 N 先生买卖船舶交易往往是即刻或很快转手、出售船舶，又例如在 2008 年后正常商人都不会再继续于航运市场中投入大量资金等）认定了一个"总概率"（"the overall chance"），认为被告的投资成功获取利润有 50%的可能性。当然 Males 大法官也指出这毕竟只是根据证据（包括 N 先生及其他证人声称自己会如何做的口头证据）进行的推测，完全可能更高或更低，因为事实并没有发生过。不同人的推测也会更乐观或是更悲观。Males 大法官说："*I have assessed the chance that the defendants would have achieved the figures claimed as being 50%. That is my best assessment, but if it is wrong it is just as likely to be too low as it is to be too high…They (被告) have been deprived of the opportunity to demonstrate that they could in fact have achieved the profits claimed.*"

最后法院根据 50%的比例，逐项考虑了被告的索赔申请，判原告应当支付约 59,800,000

美元的损失[152]，以及 110,400,000 美元的利息。

案件被上诉到上诉庭（SCF Tanker v. Privalov），Fiona Trust 的主要指称是 N 先生及其公司提供替代款项取代 2005 年冻结令冻结的资产时，法院命令是除非经过法院允许，否则替代款项不能被用于一般商业与合适的用途（包括新建船舶、买卖船舶），但 N 先生完全可以向法院申请将部分替代款项用于新建船舶、买卖船舶。而 N 先生从未提出这样的申请，这也就涉及了损失的因果关系以及没有合理减损。

Fiona Trust 的说法也被上诉庭所拒绝。上诉庭的 Beatson 大法官指出，N 先生的举证责任仅仅是提出初步（*prima facie*）证据以显示损失是由冻结令所造成。除非是有其他证据显示了不同情况，否则法院就可以由此推断损失满足了建立因果关系的测试：*"… once a party has established a prima facie case that the damage was caused by the order then, in the absence of other material to displace that prima facie case, the court can draw the inference that the damage would not have been sustained but for the order."*

而此先例中虽然法院允许 N 先生向法院申请使用替代款项，但这并不意味着 N 先生有责任证明自己如果提出申请会失败、因此才没有提出申请，这已经超出了初步证据的范畴。笔者也理解在当时船舶市场高涨的现实中，N 先生如果真的订船，会对签订造船合约增加难度，因为要加上只在成功申请到法院批准使用该笔替代款项合约才能生效的先决或后续条件。

从 Fiona Trust v. Privalov 先例中就可以看到这个血淋淋的教训。冻结令这种核武器不能轻易使用。如果是明显不过的欺诈案件，那么多半被申请人也不会作出抗辩。但在可争论的案件，例如是一般的商业纠纷中，就需要很多谨慎与仔细的考虑（事实上所有禁令的申请都应当如此）。例如需要非常小心谨慎地考虑案件争议的本质、金额大小，要了解自己案件的强弱、胜诉机会，也要考虑冻结的资产可能对被申请人造成什么样的影响、可能的损失情况等。这包括被申请人从事的是什么业务等，如果是被申请人从来没涉及过的业务就很难说有机会损失。例如在 JSC Mezhdunarodniy Promyshlenniy Bank v. Pugachev (2015) EWCA Civ 139 上诉庭先例中就涉及了被申请人的惯常生意往来是否由于冻结令而被影响、阻碍的争议（"*business dealings [had] been stifled, if not brought to a halt, by this freezing injunction*"）。而且同样重要的是要在冻结期间不断留心被申请人的业务与生活上的活动，合情合理地应对被申请人提出改变冻结令的要求，并小心谨慎地全面保留证据。

1.8 冻结令与接管人的关系

有关"接管人"（receiver）的课题可见《仲裁法——从开庭审理到裁决书的作出与执行》（2010 年）一书第十四章之 8.6 段的详细介绍，在这里只是简单一提有关接管人命令与冻结

[152] 在 2008 年航运市场崩溃后，破产的船东不计其数。而 N 先生是否真正能在 2008 年及时转售船舶根本是个未知数，例如船厂是否有延误，转售船舶的谈判是否有阻碍，在航运市场高涨的时候 N 先生是否会改变主意不选择马上出售船舶而是留待观望等，这些毕竟都是没有发生的事实，最后的几率纯粹是法院根据猜测作出。笔者没有此先例中全面的证据，但是根据笔者个人在此航运市场剧变时期的观察与经验，绝大部分的船东都是损失惨重，真正能够"独善其身"甚至是能赚点钱的都要十分的好运气，属于凤毛麟角的情况。也因此只是站在笔者较悲观的角度来看，N 先生能够及时转售船舶与远离航运市场的几率有 50%是稍微过高了。

令（freezing orders）之间的密切关系。毕竟在《Senior Courts Act 1981》立法之 Section 37(1)中，有并列提到这两个课题互为替代做法："The High Court may by order (whether interlocutory or final) grant an injunction or appoint a receiver in all cases in which it appears to the court to be just and convenient to do so." 有关接管人的做法也可见 CPR Rule 69，在 CPR PD 69 Paragraph 4.1 列明了向法院提出申请时需要提交的证据。

简单而言，接管人是由法院委任接管某些特定资产、也包括管理与处置这些资产的一位自然人。接管人是法院的仆人与官员（servant or officer of the court），并不向双方当事人（申请人或是被申请人）负责。法院有权终止委任，以及在接管期间作出有关资产的决定。

法院委任接管人的做法已经有很长的历史，但在 70 年代后期有了冻结令管辖权（Mareva jurisdiction），法院在做法上就有更多的弹性与选择余地。正如前文中节录的立法条文显示，只要法院认为是公平与方便（just and convenient）就可以颁布/作出命令，至于采用哪种做法（冻结令或委任接管人）有裁量权（discretion），可以根据特定案件予以判断。

所以在许多特征上委任接管人与冻结令完全一致，如：

- 委任接管人是一个中间命令（interlocutory order）与中间措施（interim measure）。

- 接管人命令也是对人管辖（*in personam* jurisdiction）。

- 接管人命令的做法也会通过藐视法院（contempt of court）予以保障与给予惩罚：见 Masri v. Consolidated Contractors International Co Sal (2007) EWHC 3010 (Comm); Cruz City 1 Mauritius Holdings v. Unitech Ltd (2015) EWHC 718 (Comm)等先例。

- 藐视法院的强制主要是针对被申请人，法院委任的接管人接管特定资产（或是接管一家在营运的公司）后，就像冻结令一样，被申请人不能处置（dispose）或流失（dissipate）该资产：见 Masri v. Consolidated Contractors International Co Sal 先例。

- 接管人命令像冻结令一样不带来优先权，不影响公司破产法（insolvency laws）中的优先受偿的顺序。例如申请人并不因为法院委任接管人就由无担保债权人变成有担保债权人（secured creditor）。

- 接管人命令与冻结令一样，可以在任何时间向法院申请，包括诉前、诉讼中或判决/裁决的执行（execution）阶段。

而在以下情况中，接管人命令会比冻结令更合适：

（1）在法院或仲裁庭审理与作出判决/裁决前，或成功执行判决/裁决前，资产有被处置或流失的风险，但冻结令看来并不完善与有保证的时候。例如被申请人/被告有可能不理会冻结令：见 JSC BTA Bank v. Ablyazov (2012) EWCA Civ 1411 先例；Lee Kuan Yew v. Tang Liang Hong (No.2)(1997) 2 SLR 833 新加坡先例（因为被申请人不遵守冻结令的附属披露令，法院委任了接管人）。

（2）针对的特定资产需要管理或需要做一些事情以保障价值。也就是资产的价值需要有人“盯着”，而冻结令是无法达到这个效果的。例如被申请人拥有一项专利权（patent）或一盘生意，必须保值才能满足申请人的索赔金额：见 P (Restraint Order: Sale of Assets), Re (2000) 1 WLR 473 先例。在 Parker v. Camden London Borough Council (1986) Ch 162 先例中，针对的不动产没有人维修保养因此向法院申请委任接管人。在 Masri v. Consolidated Contractors International Co Sal 先例，针对也门油田开采权的收益，因此委任接管人。在 Ka Wah International Merchant Finance Ltd v. Asean Resources (1986) 8 IPR 241 香港先例，针对在新加坡公司的股份，由于需要获得投票权（voting rights）去保障资产，因此香港高院颁布/作出委任接管人命令。

（3）被申请人的资产十分复杂并涉及海外的公司结构与组织（complex offshore structures）：见 International Credit and Investment Co (Overseas) Ltd v. Adham (unreported, 20 Nov 1996)等先例。可想到的一个重要原因是在这种复杂的情况中，往往也搞不清到底有什么资产，以及这些资产在名义上由谁拥有，因此全球冻结令（WFO）很难在措辞/文字上写得足够全面以应对各种变数。但委任接管人，可以由作为法院官员的接管人应对变数（甚至会取得法院的指示），针对性与有变通地颁布/作出命令。

至于针对海外资产（foreign/overseas assets），尤其是被申请人不在英国时，会有疑问是英国法院的接管人命令如何执行？这实际与全球冻结令的资产披露令（Assets Disclosure Order）是否会被严格遵守有同样的问题。有的外国法院可以承认与执行英国法院颁布/作出的接管人命令，例如是欧盟国家：见 Derby v. Weldon (No.3 and 4) (1990) Ch 65 先例。但如果外国法院是不会承认与执行英国法院的接管人命令，甚至是不熟悉接管人的做法时，英国法院可以命令被申请人把外国资产授权给接管人管理：见 Ras Al Khaimah Investment Authority v. Bestfort Development LLP (2015) EWHC 3383 (Ch)先例。

相比于冻结令，接管人命令对被申请人的产权（property rights）有更严重的侵犯，而且涉及高昂的费用，接管人的费用由法院厘定，但肯定不会便宜。接管人对接管的资产有留置权（lien），可获得优先支付自己的费用。再加上一旦法院颁布/作出接管人命令后，接管人在接管后是很难“回头”的，这与冻结令一旦撤销（discharge）就“回头”是不同的。

所以除非申请人能够说服法院相信没有其他更好保证被申请人资产不流失的方法，否则英国法院不愿意颁布/作出接管人命令。

而接管人在接管财产后必须理解有关资产的产权仍属于被申请人，应该予以尊重。所以除非是有特别的理由（例如有关的资产容易腐烂），否则不能随意处置（包括出售、转让、抵押、质押等）。接管人一旦需要处置资产，还是要先向法院取得指令再行事。

1.9 违反禁令/命令的后果：民事藐视法院

冻结令对被申请人会造成重大压力与伤害的一个原因，是因为很容易导致“民事藐视法院”（civil contempt of court），这甚至会带来刑事处罚的后果。

法院会根据申请人的单方面申请作出冻结令（以及稍后在本章之 2 段会详细介绍的附属

资产披露令），这冻结令（以及附属资产披露令）的措辞/文字会是非常广泛的，以至于被申请人甚至可能不小心就会未履行或违反冻结令。而一旦未严格履行或违反冻结令与任何其他法院禁令就会带来藐视法院的后果。

当然藐视法院的后果根据个案的情况与严重程度会有所不同。藐视法院的人士，可能被处以罚款、监禁[153]，在极端情况下法院甚至会作出通缉令（bench warranty）来确保对命令的履行：见 Zakharov v. White (2003) EWHC 2463 (Ch)先例。在处理藐视法院后果的时间上，除了在中间程序阶段就进行处理以外，法院也会延期到庭审中进行处理：见 Prest v Marc Rich & Co Investment AG (2006) EWHC 927 (Comm)先例。

在 Federal Bank of the Middle East v. Hadkinson (2000) 1 WLR 1695 上诉庭先例中，阐述了在民事诉讼中指控藐视法院行为的一般程序，不妨节录如下：

"*The court normally adjudicates on a charge of civil contempt on an application for an order to commit the person alleged to be in breach of the order. The application is made by the person to whom the order was granted. The application is served on the respondent in accordance with the rules. It is supported by affidavit evidence. The defendant is entitled to answer by affidavit evidence denying the contempt or showing that, if there was a contempt, it was not wilful and setting out the circumstances of the alleged breach and any matters relevant to the exercise of the court's discretion on punishment of any contempt which is established. If a wilful breach of the injunction is established beyond reasonable doubt the court has a very wide discretion in deciding how to treat the contempt. Like all judicial discretions it must be exercised fairly and reasonably in a principled way and having regard to all the relevant facts. The powers at the disposal of the court range from making orders as to costs to imprisonment and sequestration.*"

对于什么时候可以认定属于藐视法院的一般原则，不妨简单列举一些情况如下：

（1）指控对方藐视法院的指控人或禁令的申请人，对被申请人藐视法院的行为（或不作为）负有刑事案件的证明责任。

（2）必须证明被申请人：

（a）知道有关法院命令的措辞/文字；

（b）行为（或不作为）违反了有关命令

（c）知道自己的行为构成对命令的违反

（3）根据《欧洲人权公约》之 Article 6，指控藐视法院的程序应属于刑事（criminal）。但同时也也有民事程序性质：见 Masri v. Consolidated Contractors International Company SAL

[153] 在《Contempt of court Act 1981》之 Section 12 规定藐视法院可以处以最长 2 年的监禁。

(2011) EWHC 1024 先例，也因此传闻证据（hearsay evidence）[154]可以被采纳。

在很多先例中，可以挑选近期的 Gulf Azov Shipping Co Ltd v. Chief Idisi (No.1) (2001) EWCA Civ 21 先例进行介绍。在此先例中，Chief Idisi 是尼日利亚一间提供石油勘探以及与石油产品有关服务的公司的老板与董事，通过原告（Gulf Azov Shipping Co Ltd）的船舶从印度运输几架钻机前往尼日利亚，但在卸港发现钻机部件在海上运输过程中遗失，因此 Chief Idisi 及其公司在尼日利亚法院向原告（Gulf Azov Shipping Co Ltd）索赔 17,000,000 美元，但原告投保、也是协助原告参与诉讼的船东互保协会（P&I Club）认为此事件中的货损货差最多不超过 1,000,000 美元，索赔是严重夸大了。反正 Chief Idisi 及其公司即在尼日利亚扣船[155]为自己的索赔获得保全。直到 21 个月以后原告与其船东互保协会才不得不以向代管账户（escrow account）支付 3,000,000 美元为前提，换取了对船舶的释放。

船舶一经被释放，原告即刻向英国法院申请了对被告的“止诉禁令”（anti-suit injunction）。同时原告指称自己船舶被错误扣押导致了 9,000,000 美元的船期等损失、以及受 Chief Idisi（及其公司）“勒索”向代管账户中支付了 3,000,000 美元，因此向英国法院申请并获得法院作出了针对 Chief Idisi（及其公司）的全球冻结令（Worldwide Freezing Orders），以及附属的资产披露令（Assets Disclosure Order）。之后由于对 Chief Idisi（及其公司）披露的信息不满意还成功从法院申请到针对 Chief Idisi 及一些其他公司高管前往法院接受交叉盘问（cross-examination）的命令。而 Chief Idisi 之后还被发现从英国境内支付一笔 350,000 美元的金额前往境外，以及支付费用给英国律师，这可以构成违反冻结令。原告之后即在法院申请指称 Chief Idisi 涉嫌藐视法院（针对了 Chief Idisi 的一系列行为，包括继续在尼日利亚法院推进诉讼，试图将资产转移到境外，未依从法院命令接受交叉盘问等），要求对其处以监禁的惩罚。

双方争议的焦点在于构成藐视法院的主观意图要件，原告认为 Chief Idisi 被指控的行为均为“有意识的”（intentional）行为，这已经足够构成藐视法院。而 Chief Idisi 方则提出要构成藐视法院，必须涉及的是“故意”（deliberate）违反法院命令，即有违反法院命令的主观意图，是“明知故犯”。在案件一审（[2000] EWHC 201 [Comm]）中，Moore-Bick 大法官对过往有关藐视法院案件进行了总结：

- 针对 Stancombe v. Trowbridge Urban District Council (1910) 2 Ch 190 先例与 Heatons Transport (St. Helen's) Ltd v. Transport & General Workers Union (1973) AC 15 先例，Moore-Bick 大法官总结：“*a person is liable to process for contempt if he in fact does an act prohibited by the order of the court and that it is no answer to say that the act was not contumacious in the sense that in doing it he did not intend to disobey the order.*”

- Spectravest Inc v. Aperknit Ltd (1988) FSR 161 先例中，法院作出中间禁令禁止被告对原告的专利进行侵权，被告之后在做出另一行为前先咨询了专利代理人（patent

[154] 这课题在本书多处如第十二章之 4.3.2.2 段针对。

[155] 即使是轻微的货损货差案件，在一些西方人看来是蛮不讲理的港口，会作出扣押船舶的命令，并敲一笔钱，甚至逼迫当事人放弃伦敦仲裁的管辖权、承认当地法院的管辖权。这类案件非常多，可见笔者《提单与其他付运单证》（2016 年）一书第四章之 2.4.4 段介绍的 The “Kallang” (no.2) (2009) 1 Lloyd's Rep 124 等系列先例中塞内加尔收货人敲竹杠的做法等。

agent）[156]的意见后认为此行为不会对原告专利造成侵权，继续做出该行为。但事后被原告指控藐视法院。在这样的案情下，就很明显看到“有意识”与“故意”/“明知故犯”的不同。如果被告咨询专利代理人/律师，并被告知采取此行为会构成侵权、违反法院作出的中间禁令，但被告仍然采取此行为，这就是故意/明知故犯。

在 Spectravest Inc v. Aperknit Ltd 先例中，Millett 大法官跟从了 Heatons Transport (St. Helen's) Ltd v. Transport & General Workers Union 先例以及后来的 Mileage Conference Group of the Tyre Manufacturers' Conference Ltd's Agreement (1966) 1 WLR 1137 先例的判法，并指出：*"to establish a contempt of court it is sufficient to prove that the defendant's conduct was intentional and that he knew of all the facts which made it a breach of the order. It is not necessary to prove that he appreciated that it did breach the order."*也因此被告的行为被判足够构成藐视法院。

这个判法还在之后被 Director General of Fair Trading v. Pioneer Concrete (UK) Ltd (1995) 1 AC 456 先例以及 Adam Phones v. Goldschmidt (2000) FSR 163 先例中确认与跟从。

- 曾经在 Irtelli v. Squatriti (1993) QB 83 先例中，上诉庭考虑了被告是否“明知故犯”的问题，但这并没有改变前述过往先例中建立的规则。因此在之后的 Bird v. Hadkinson (unreported, 4 March 1999)先例，Adam Phones Ltd v. Gideon Goldschmidt 先例中都仍然依赖 Spectravest Inc v. Aperknit Ltd 先例与 Director General of Fair Trading v. Pioneer Concrete 先例等作为此问题的权威先例。

Moore-Bick 大法官也跟从了 Spectravest Inc v. Aperknit Ltd 先例与 Director General of Fair Trading v. Pioneer Concrete 先例等的判法，即是否构成民事藐视法院要看 Chief Idisi 的有意识的行为是否真正违反了包括全球冻结令在内的多项禁令，但无须考虑 Chief Idisi 主观意图上是否明知自己的行为会违反禁令、明知故犯。这看法也在之后被上诉庭支持。

还值得注意的是，此先例中还提到了公司在面对冻结令等禁令的时候，公司董事（directors）有责任为公司的行为负责，有义务采取合理手段确保公司履行法院作出的禁令，Moore-Bick 大法官说：

"As a director of Lonestar Chief Idisi also had a responsibility for the actions of the company. In Attorney-General for Tuvalu v Philatelic Distribution Corporation Ltd [1990] 1 W.L.R. 926 the Court of Appeal held that where a company is ordered not to do certain acts and a director of that company is aware of the order he is under a duty to take reasonable steps to ensure that the order is obeyed, and if he wilfully fails to take those steps and the order is breached he can be punished for contempt."

一旦清楚地证明了被申请人构成了藐视法院，法院就会再根据案件的具体情况作出具体的判罚。而在过往的先例中，有不少违反冻结令导致的藐视法院中，被申请人都被处以监禁

[156] 在今天《Legal Service Act 2007》下，专利代理人甚至可以提供有限的有关专利的法律服务。

的处罚[157]。例如是在 Gulf Azov Shipping Co Ltd v. Chief Idisi (No.1)先例中，被申请人被处以 3 个月的暂缓监禁（suspended sentence）；Shalson v. Russo (unreported, 9 July 2001)先例中处以 2 年监禁；IFC v. DNSL Offshore (2005) EWHC 534 先例中处以 12 个月监禁；Crystal Mews Limited v. Metterick (2006) EWHC 3087 (Ch)先例中处以 8 周监禁；Daniel v. Makki (2006) 1 WLR 2704 先例中处以 12 个月监禁；Lexi Holdings plc v. Shaid Luqman (2007) EWHC 1508 (Ch)先例中判处 18 个月监禁并之后（[2007] EWHC 2355 [Ch]）被延长为 2 年监禁；JSC BTA Bank v. Stepanov (2010) EWHC 794 (Ch)先例中处以 2 年监禁；Kythreotis (2011) EWCA Civ 1241 先例中处以 22 个月的监禁；JSC BTA Bank v. Shalabayev (2011) EWHC 2908 (Ch)先例中处以 18 个月监禁；JSC BTA Bank v. Ablyazov (2012) EWCA Civ 1411 先例中处以 22 个月监禁；在 JSC BTA Bank v. Solodchenko (2011) EWCA Civ 1241 先例中被申请人被处以 21 个月的监禁。在香港还可见近期的 La Dolce Vita Fine Dining Co Ltd v. Zhang Lan (2019) HKCFI 618 先例。

值得注意的是冻结令的错误申请造成的经济损失，可以通过申请人提供的交叉担保（Cross-undertaking）获得补偿或救济，这已经在本章之 1.7.5.2 段介绍。但是被申请人一开始未能完全履行、遵守冻结令（即使事后证明是错误申请），造成藐视法院就只是被申请人自己的问题，无从获得救济。毕竟法治的精神下，法院作出的命令无论对错，在被更改（vary）、解除/撤销（discharge）之前都必须被严格遵守，即使发现有问题也应该向法院申请解除/撤销或变更命令。

也因此在《Disclosure》（2017 年，第 5 版）一书之 17.31 段中就提到最多成功申请与成立藐视法院的案件就是对冻结令（或搜查令）中附属的资产披露令的不履行或违反：*"In practice most contempt applications are in relation to failures to comply with disclosure provisions in freezing and search order. In such cases the courts are willing to make findings of contempt and punish non-compliance accordingly. In general in such cases a custodial sentence is likely where there is a substantial breach of a freezing order…"*

这是可以理解的，相对来说冻结令因为涉及第三方（通常是金融机构、银行），因此即使被申请人不理会英国法院的冻结令，试图转移或提取存款，知道有冻结令的银行也不会允许与合作，所以资产不会被转移或流失。但资产披露令纯粹是要求被申请人自己披露，对绝大部分商业人士来说，有的资产信息甚至连配偶都要隐瞒，更不用说要全面与坦率披露，这比要了命还难受。因此有很大的诱因（temptation）不严格遵守资产披露令，甚至不予理会。这也是为什么违反禁令藐视法院最常见也是最多发生在对资产披露令的违反。

例如刚刚提到的 La Dolce Vita Fine Dining Co Ltd v. Zhang Lan 香港先例中，在 2008 年上市失败后，原俏江南董事长张兰与欧洲私募股权基金 CVC"联姻"，并向 CVC"贱卖"股权以及退出董事会。在 2015 年张兰与 CVC 之间关系破裂开始 CIETAC 仲裁，CVC 就在香港法院申请到冻结令命令张兰不得转移在香港的资产，而且有附属的全球资产披露令要求张兰披露价值超过 50 万美元的资产清单。据报道，张兰也披露了拥有 121.8 万美元存款、若干北京房产和两辆汽车等。但事后被发现瞒报资产，比如在拍卖行公开买下昂贵的艺术品（这很容易被查到，相当于睁着眼睛说瞎话，如果欺骗的对象是法院，后果就会相当严重了）。又未能

[157] 有关藐视法院的监禁惩罚，还可见近期 Mobile Telecommunications Co KSC v. HRH Prince Hussam bin Abdulaziz au Saud (2018) EWHC 3749 (Comm)先例中，认定沙特王子 Hussam bin Abdulaziz au Saud 行为违背禁诉令（anti-suit injunction），属于藐视法院，判处其监禁十二个月。

出庭或通过律师答辩，在 2019 年 3 月裁定藐视法院处以 12 个月监禁刑罚，还要向原告 CVC 支付诉讼费用等。

1.10 冻结令/全球冻结令与财产保全的比较

估计许多读者会觉得这两种做法看起来好像十分接近，而财产保全（attachment of property）的做法已经有很悠久的历史，包括在中国内地，相反冻结令的历史就短得多。但在本章已经多次提到两者之间有很基本的不同，这里不再重复，只简单总结它们之间主要的不同如下，希望读者会更容易理解本章所介绍的有关冻结令的其他方方面面。

（一）冻结令/全球冻结是一个“对人诉讼”（*in personam* action），但财产保全是一个“对物诉讼”（*in rem* action）。

（二）这就可以解释很多本章其他的内容。例如在对物诉讼，即使法院作出惩罚充其量也是没收有关财产，不会涉及到个别在背后的有关自然人或公司法人。但如果是对人诉讼中违反或不严格遵守法院命令，法院就可以判被告（不论是自然人或公司法人）做出了藐视法院的刑事罪行，并判处监禁与/或其他惩罚了。

（三）这样解释了为什么在 Angel Bill exception 下，法院要允许不断在冻结的钱中扣减生活费用与/或日常营业所需要的资金。法院即使同意为了一个可能会胜诉的索赔去颁布/作出冻结令，也不代表可以“逼死”被告。但在成功冻结金额不高的情况下，这些扣减会慢慢的严重腐蚀这笔钱，甚至到零。但对物保全下，即使被扣押的财产背后的有关人士急需财产释放来“救命”，也没有听说过可以因此作出扣减。

（四）对物诉讼通常管辖权是在财产的所在地，例如历史悠久的“诉船”，就必须是有关的船舶到了某一个国家的港口。这一来，才是给了该港口的法院管辖权（jurisdiction）处理“诉船”的诉讼行动，即使“诉因”（cause of action）是发生在公海或其他国家的水域。这也是现实，如果有关财产是在其他国家而不在英国，英国法院就是想管也管不到。例如如何对该财产作出扣押或没收？这一来，如果只依赖对物诉讼，英国法院恐怕也管不了与插手不了太多其他国家或全球的事情。毕竟，再也不是大英帝国的年代了。

（五）但对人诉讼的管辖权，英国法院只要有把握是可以管到并且有阻吓力可获得了执行与遵守，就可以看情况去延伸。例如在许多方面通过立法延伸至一些与英国无关，也不在英国发生的事情，例如是针对全球贪污的《Bribery Act》。另外已经在本章之 1.5.1.3 段提到，根据法院对《Senior Courts Act 1981》之 Section 37 的解释，在支持仲裁裁决的执行方面，即使仲裁败诉方在英国没有资产，只要案情与英国有真实连接点（connecting factors），就可以作出冻结令帮助执行。这种情况也适用在涉及与英国没有关系的国际欺诈、贪污受贿等重大案件。所以可以说这些年来，英国的长臂管辖权（long-arm jurisdiction）已经是越伸越远，对全球产生很大影响。毕竟属于对物诉讼的财产保全，虽然可能对个人或公司经济造成很大困难，但如果有关人士不理睬，最多就是放弃有关财产，不会引火烧身。而属于对人诉讼的冻结令，被申请人/被告就非要出面不可并且要应对得好，否则就可能涉及到刑事犯罪。如果对有关的冻结令与附属的资产披露令不理不睬或不严格执行，就会导致民事案件演变为刑事犯罪，这是财产保全不会发生的。

这也是为什么冻结令被称为是诉讼中的“核武器”，而历史悠久的财产保全则没有这种说法。这对发展中国家的人士是尤为苛刻，因为他们身处不同的社会环境，遇到这种情况也不容易找到适当（熟悉普通法）的律师指导。即使主观上没有违反法院命令的意图，实际上也做不到。

1.11 冻结令：法院的核武器

在本章之 1.7.1.7.1 段已经提到在 Bank Mellat v. Nippour (1985) FSR 87 先例中，Donaldson 大法官首先将搜查令（Search Order）与冻结令（Freezing Order）称为是法院的“核武器”（nuclear weapon）。这叫法或名称在后来诸多先例中也被提起，从中也可以看到冻结令（以及其他附属命令，例如资产披露令）是多么威力无穷，这些命令会对被申请人/被告造成极大的压力与伤害。

较近期的先例则可见 Fourice v. Le Roux (2007) UKHL 1 贵族院先例中，Scott 勋爵指出：“*Whenever an interlocutory injunction is applied for, the judge, if otherwise minded to make the order, should, as a matter of good practice, pay careful attention to the substantive relief that is, or will be, sought. The interlocutory injunction in aid of the substantive relief should not place a greater burden on the respondent than is necessary. The yardstick in section 37(1) of the 1981 Act, 'just and convenient', must be applied having regard to the interests not only of the claimant but also of the defendant. This is particularly so in the case of freezing orders applied for without notice. Assets of the defendant to which the claimant has no proprietary claim whatever are to be frozen so as to constitute a source from which the claimant can hope to satisfy the money judgment that, in the substantive proceedings, he hopes to obtain.* ***The frozen assets are removed for the time being from any beneficial use by their owner, the defendant. This is a draconian remedy and the strict rules relating to full disclosure by the claimant are recognition of the nature of the remedy and its potential for causing injustice to the defendant.***”（加黑部分是笔者的强调）

在以上节录段落中，可以看到冻结令本身就会对被申请人带来严重的影响，Scott 勋爵所采用的措辞/文字是“严厉”（draconian）与“严格”（strict）等。冻结令对被申请人的影响巨大也是完全想得到的。

对于自然人而言，所拥有的资产被冻结后，除非是日常生活开销[158]，否则任何处置都需要向法院申请。这就会导致很多麻烦，例如是为子女上学所存下的金钱无法及时用上等。

对于公司等法人而言，资产被冻结更是会造成同样或更大影响，毕竟在今天公司营运与业务，现金流、可随时支配的资产常常是至关重要。而且公司的资产被冻结，除了合理生意上正常债务其他行为都要向法院申请。这往往就会破坏进行中的交易，也妨碍公司进一步发展与缔结新的交易，毕竟向法院申请需要时间、能否成功也是未知数，很多交易都无法这样

[158] 见本章之 1.4.3 段。申请人在单方面申请冻结令时会填上允许被申请人合理日常开支的金额，但也能想到的是申请人会尽量压低这个金额，而被申请人如果认为该金额太低就要委任律师向法院申请以对这笔金额作出调整。

等待。从另一个角度来看，公司营运与经营业务常常会涉及银行融资、贷款。在贷款协议、船舶融资协议等金融合约中有"违约事项条文"（events of default clause），在违约事项条文中有时会针对债务人财产被扣押（attachment）或执行（execution）等情况的措辞/文字，并要求债务人在一定期限内对之予以解除/撤销，否则就可能属于违约。再加上这些金融合约中常见的"交叉违约条文"（cross default clause）[159]，只要在一个类似的金融合约下有此类违约，就会导致大量的金融合约全部违约，即使是在经济上完全健康的公司也会因此被摧毁。不少金融合约会要求债务人及时通知有关事件的发生，债权人（银行）自己也会紧密地跟进法院的信息，了解债务人是否存在违约事项。

这看来与国际政治也是有类似之处。在硬件方面，拥有核武器的西方国家坚决不允许其他国家拥有核武器（当然这也有道理，毕竟"核扩散"的风险是应该共同防范的）。在软件方面，西方国家也拥有了像核武器一样的全球冻结令（Worldwide Freezing Orders）及其附属命令。而且与硬件不同的是，禁令（冻结令、资产披露令、止诉禁令等）每天都在不断针对发展中国家（包括中国）的公司或自然人"引爆"并造成压力与伤害。硬件的核武器在二战中于日本使用后就再没有在战争中使用，这一方面要"谢天谢地"，另一方面与中国（以及前苏联/俄罗斯）也有毁灭性的反击核力量是有关系的。因此为了防止软件核武器的"核敲诈"，中国公司与自然人也必须尽快学会这一套保护自己，这唯一的途径的第一步就是要看好书。

1.12 面对单方面冻结令申请的中国公司

在本章之 1.6 段已经简单提到了，相比于多方（*inter parties*）或有通知（with notice）的冻结令申请而言，单方面（*ex parte*）或无通知（without notice）申请更容易成功。现实中主要对商业案件进行审判的高院也确实有很多单方面申请到的冻结令。正如在本章之 1.6.3 已经节录过的 O'Farrell v. O'Farrell (2013) 1 FLR 77 先例中，Tugendhat 大法官所说："*Like Mostyn J, I too have been shocked at the volume of spurious ex-parte applications that are made in the Queens Bench Division（处理商业案件的后座法庭）.*"

事实上有不少经由单方面申请作出的冻结令都本不应该作出，对于这些冻结令来说只要被申请人事后出庭回应/抗辩，就有很大机会解除/撤销冻结令。正如 Hope 勋爵在 Fourice v. Le Roux (2007) UKHL 1 贵族院先例中针对单方面申请带来的危险所说："*But litigants do from time to time persuade judges to make orders in their favour ex parte which on more mature reflection have no sound basis in law and must be set aside.*"

1.12.1 中国公司应对冻结令会遇到的困境

但是对于发展中国家的公司（例如是要走出去的中国公司）来说就存在很严重的不利之处。虽然这些单方面作出的冻结令会有很大机会可以申请解除/撤销，但是由于不了解有关法律，难以找到称职、懂行的律师，又担心律师费用问题，往往在面对冻结令这种核武器的

[159] 交叉违约条文指债务人对其他任何金融合约下的债务违约，也会构成对本债务的违约。这方面课题，可见笔者《船舶融资与抵押》一书第 378 页。

时候手足无措与延误作出应对而吃大亏。

这种公司在面对外国申请人申请到冻结令后，虚张声势地要求赔钱，也会由于担惊受怕而投降，愿意赔钱（实际上是被敲了一笔钱）。在 Camdex International Ltd v. Bank of Zambia (No.2) (1997) 1 WLR 632 上诉庭先例中就说：*"… the purpose of a Mareva injunction was to prevent the dissipation of assets available for execution and not to pressurise a defendant into paying part of the judgment debt…"* 因此申请人成功冻结资产后，向被申请人提出"只要你赔偿一半的金钱，我就放过你"，这就显然超出冻结令的本意，被申请人只凭这句话作为证明就可以成功申请对冻结令的解除/撤销。

面对这样的压力，水平不够的公司往往是一路拖延，要不就是干脆投降。笔者两三年前曾经在深圳进行讲座期间遇到有中国律师咨询与抱怨被香港法院不公平地对待其客户（一间深圳的中资公司），冻结了几亿人民币的资产无法使用。笔者多问了几句，才了解这笔资金已经被冻结了一段时间，但并没有委任香港律师，也没有采取任何行动。笔者自然的反映就是这笔资金可能来路不明，因此不敢采取行动。但继续问下去后，才知道并不是由于资金有非法等问题，而纯粹是外国公司单方面申请并由香港法院作出了针对中国公司的冻结令。在冻结令向中国公司送达后，中国公司没有在法院的规定时间内予以回应。之后中国公司想通过与银行沟通继续使用这笔资金，但被银行拒绝。据悉，期间外国公司也就此向中国公司施压要求支付部分金额换取对冻结令的解除。在这些交谈获取的信息中，笔者感觉有很大信心是有机会申请撤销冻结令（例如可以针对外国公司是否有作出全面与坦率的披露，再加上外国公司事后提出支付部分金额换取解除冻结令的要求，以及没有启动诉讼/仲裁等），因此建议正式委任香港律师在香港法院申请撤销冻结令。但接下来向笔者咨询了委任懂行的香港律师估计需要的费用等问题后，也就不了了之了。笔者怀疑之后中国公司决定息事宁人，很可能被外国公司敲一笔金钱了事。

1.12.2 冻结令的本意是为了防止资产流失而不是"核敲诈"

冻结令在生效后，等于是核武器爆炸，对被申请人（包括作为被申请人的中国公司）而言是晴天霹雳。但是在笔者看来，在今天频繁产生诉讼的国际商贸活动来看，这是时常发生的，也并非了不起的大事，只要从英国法院以及其他普通法法院申请与颁布/作出的冻结令（包括全球冻结令）的数量就可以知道这是普遍的做法。也有不少有水平、争勇好斗与精明的西方公司，很习惯与熟悉采用这种手法逼死对方（尤其是知道对方不懂国际法律，或者宁愿花这"救命钱"也不舍得花钱委任律师，或不知道谁才是可以胜任的律师），并从中获取极大的经济好处，逼迫对方签署城下之盟。

对法院而言，冻结令的本意只是为了在判决或裁决作出或被实际执行之前，防止资产的流失，并不是为了帮助申请人向被申请人施加压力，并获得经济与其他方面的好处。

虽然并非法律本意，但这往往变成现实的后果。因为冻结令不能被用来针对资本雄厚的公司，例如是世界 500 强公司（如果真的成功申请到针对它们的冻结令，也只会迎来更加严厉与可怕的反击）。冻结令针对的反而通常是一些发展中国家的公司或小公司，它们往往好欺负也不知道怎么应对。

可以部分节录 Steven Gee QC 的《Commercial Injunctions》（2016 年，第 6 版）一书之 3.001 段如下：

"The [Mareva] jurisdiction is not to be used for the purpose of putting pressure on the defendant to secure the claim. A distinction is to be drawn between what is the purpose of the court in granting an injunction, and what may be the consequences of the injunction being granted. It is no purpose of the court granting Mareva relief to put pressure on the defendant to grant security for the claim, or to facilitate the claimant in obtaining a favourable settlement, or to create commercial pressure, but it may be that a result of the injunction will be that the defendant chooses to provide security so as to get the injunction discharged, or even to settle the case. The fact that an injunction may have such consequence does not mean that the court in granting it, or the claimant in seeking it, has thus as an unarticulated and illegitimate aim. Nor does it follow necessarily that because the defendant may be disadvantaged in this foreseeable and undesirable way as a consequence of the granting of the relief, it is unfair to grant it. ... "

在冻结令（包括全球冻结令与资产披露令）生效后，对被申请人肯定会造成很大的压力。但只要合法，这个压力是在所难免的后果。如果申请人的言行"过火"，留下了自己乘机压迫被申请人投降或作出不合理的让步的证据，就会带来问题了。这会构成滥用司法程序（abuse of process），因为申请人取巧并非法院命令的本意，这也间接显示了申请人在申请冻结令的誓章/誓词（affidavit/affirmation）中担心被申请人/被告的资产流失而申请冻结令的理由站不住脚，实际上申请人背后有其他"不可告人"的原因，并没有坦率地作出披露。

这种申请人"过火"，向被申请人施加与申请冻结令本意不符的压力，在不同案件会有千变万化的情况。例如在冻结令生效后，申请人马上在通知被申请人的同时，急不及待通知所有与被申请人有联系的公司（包括被申请人的银行）或自然人进行大力宣扬。这就明显与冻结令的执行无关，只是为了给被申请人带来更大的压力。又或者明言告知被申请人"不光是要你的钱，还要你的命"等。作为被申请人的中国公司，如果遇到这种"穷凶极恶"的申请人，不妨由他/她多放点狠话并保留证据，这对之后向法院申请撤销冻结令是有很大帮助。

在 Camdex International Ltd v. Bank of Zambia (No.2) (1997) 1 WLR 632 上诉庭先例，就显示了冻结令不能被用来向被申请人施压。此先例中原告成功获得了针对被告的判决债务（judgment debt）。由于被告（Bank of Zambia，现名赞比亚国家银行）没有足够资金支付债务（欠下债务总金额超过 70 亿美元，但赞比亚国家银行自己的资产总额只有 1 亿多美元，还包括大量无法直接支配的资产，以及除了此先例原告以外的诸多债权人，还对"国际货币基金组织"[International Monetary Fund]、"世界银行"[World Bank]等负有重大债务），因此原告向法院申请、并成功获得法院作出了针对被告的全球冻结令。被告实际上是赞比亚的国家银行，承担了发行国内货币的权力与职责。当时赞比亚国内由于飞速的通货膨胀，导致需要大量的大额纸币，取代当时赞比亚国内仍然大量流通的小额纸币，否则看来对国内经济与人民生活都会造成很大影响。因此被告向著名的纸币生产商英国德拉鲁公司（De La Rue Plc）订购了大量纸币，纸币在生产完成后还没有运输出境离开英国。而在此先例中被告也承认这些纸币应属冻结令针对的资产，但申请法院对这些纸币等资产予以豁免，理由是这些纸币在被发行前事实上对于除了被告以外的其他人而言没有任何价值，而且这些纸币被运输前往赞比亚对于赞比亚的国家经济有重要影响。一审法院的判法是对于冻结令严格予以执行，拒绝对这笔纸币进行豁免。但上诉庭推翻了这个判决与撤销了冻结令，上诉庭指出的确在一般情

况下，判决债权人有权采取所有手段向判决债务人追讨债务，法院也一般愿意对判决债务的执行提供帮助，但这是法院的裁量权。而且冻结令的本意是为了防止资产的流失，此先例中的特别情况，这些纸币由于在流通之前没有任何价值，即使是离开英国也谈不上导致资产流失。上诉庭认定原告真正的目的是以冻结这笔纸币为手段，向被告施压以换取对债务的部分支付，这并非冻结令的本意。

而在较近期的 Yves Charles Edgar Bouvier v. Accent Delight International Ltd (2015) SGCA 45 新加坡上诉庭先例中，Sundaresh Menan 首席大法官说：

"*Mareva injunctions have been discharged where the applicants … used the Mareva injunction concerned to 'oppress the defendants' (see Meespierson NV v Industrial Commercial Bank of Vietnam [1998] 1 SLR(R) 287 at [29] per Judith Prakash J) in the sense of the injunction being 'calculated to pressurise the defendants and bring them to their knees' (see Art Trend Ltd v Blue Dolphin (Pte) Ltd and others [1981–1982] SLR(R) 633at [41]).*"

在该上诉庭先例，Sundaresh Menan 首席大法官也是同样的情况把高院颁布/作出的全球冻结令与资产披露令撤销（discharge），说：

"*In our judgment, the Mareva injunction obtained against Mr Bouvier（被申请人）in this case was an abuse of the court's process. The injunction was not obtained by the respondents to prevent the enforcement of an anticipated judgment from being frustrated. Instead, we are satisfied that it was deployed as an instrument of oppression to inflict commercial prejudice on Mr Bouvier. Four factors lead us to this conclusion:*

(a) The first is the respondents'（申请人） delay in making their application for a Mareva injunction and ancillary disclosure orders against Mr Bouvier. The lack of urgency in their application suggests that in fact, the respondents did not genuinely believe there was a real risk that Mr Bouvier would dissipate his assets.

(b) This shades into the second factor, which is the respondents' failure to comply with the Supreme Court Practice Directions ("the Practice Directions"). There was, in the present circumstances, no reason for the respondents to make their injunction application ex parte without giving Mr Bouvier notice.

(c) The third factor is the unjustifiable breadth of the Mareva injunction against Mr Bouvier. For no apparent reason, the respondents included the assets and bank accounts of 14 companies owned by Mr Bouvier (the 14 "affected companies") in the Mareva injunction as it was worded when it was granted by the Judge on 12 March 2015.

(d) The final factor is the respondents' conduct subsequent to their obtaining the Mareva injunction against Mr Bouvier."

1.12.3 冻结令下被申请人如何应对

看来，被申请人（今天会有不少冻结令针对中国公司）只要是案件站得住脚与懂得处理（其中主要一步就是委任有水平的律师），在很多情况下都可以更改、解除或撤销申请人单方面（*ex parte*）或无通知（without notice）申请取得的冻结令（或全球冻结令）与资产披露令（Assets Disclosure Order）。

现实中这种滥用（abuse）的情况是越来越多的，因为向英国法院单方面申请相对容易（因此对于要"走出去"的中国公司而言，今天的商业环境对这种情况避无可避），也可以马上为申请人带来很大的优势，甚至是对被申请人予取予求。这种"滥用"的申请也常常没有严格遵守申请冻结令的要件，例如没有对案情作出全面关与坦率的披露（full and frank disclosure）。笔者见过不少涉及中国公司的商业争议案件，在有能力的律师手中显示出是可争辩（arguable），甚至是有良好论据的案件（good arguable case）。而这些论据（无论是责任或赔偿金额）往往是申请人单方面申请时在誓章/誓词中没有披露（也无论是无意还是故意）。中国公司作为冻结令的被申请人，应根据个案情况向法院提出，会有机会更改或撤销冻结令。此外根据个案的情况不同，其他有机会申请更改或撤销的理由包括：（1）申请人不应该以单方面申请；（2）被申请人的资产没有流失（dissipate）风险；（3）申请人冻结令针对的范围太广也不必要；（4）申请人在冻结令生效前后的言行（例如向被申请人敲诈施压等）显示申请冻结令是有"不可告人"的理由或者"别有用心"（ulterior motive）。

此时被申请人一方面不要被吓坏，另一方面也要处理得好。申请人单方面取得冻结令固然相对容易，但事后被申请人撤销或更改冻结令也会是相对容易。毕竟英国法院也知道单方面申请的危险，在法官只能听取一面之词的情况下，有水平的律师很容易说服法官作出冻结令。而即使申请人技术上没有误导或隐瞒法院，他/她的代表律师调查的时间与能调查出来的事实也有限（这可能是借口也可能是事实）。所以被申请人一定要在收到冻结令后在法院规定的时间（return date，一般是 7-14 天，如果有需要可以申请延长）出庭抗拒冻结令，这是被申请人让法院知道双方的说法与全面真相（申请人不知道与没有向法院披露的部分事实）与为自己争取公道的唯一机会。而如果冻结令被撤销，申请人就要赔上为申请冻结令花费的昂贵律师费用（legal costs）。这一来在接下去的法院诉讼或仲裁，以及双方试图和解的谈判中，就变成被申请人占据优势了。

对于中国律师而言，要在第一线协助"走出去"的中国公司，也需要更好地掌握这方面知识与技巧，因为在国际商业争议中，冻结令与附属的禁令（资产披露令、搜查令、第三方披露令等）在今天是被经常使用的武器（核武器与常规武器）。

笔者（杨大明律师）可以坦诚地说，在大部分笔者碰到的中国公司被其他外国公司申请了全球冻结令的情况中，对方的誓章证据都是有瑕疵的。如果中国公司愿意投资一些律师费尝试撤销冻结令，在有经验与有水平的律师的律师的处理下其实成功机会相当高。但笔者发觉大部分中国公司对全球冻结令一无所知（除了听闻过这是外国公司使用的一件非常利害的武器），所以在突然收到冻结令时处于僵硬状态（shell shocked）。这些中国公司一般没有筹备足够法律资金去处理这些突发事件，觉得撤销程序昂贵且没有把握，认为这是外国法院的阴谋或偏见，所以在受委屈的情况下作出赔偿或与对手达成城下之盟。这不是健康的处理方法，笔者也建议中国公司在面对外国法院的冻结令时要冷静及要向有经验与有水平的律师咨

询可否撤销，否则只会鼓励更多外国公司利用中国公司的这种心理取巧，用这类型的手法逼迫中国公司速战速决。

1.12.4 以仲裁条文防范冻结令的作出

除了在冻结令作出后抗拒外，中国公司也可以考虑从合约订立时就主动防御。除了极少数的法院诉讼，“走出去”的中国公司更多涉及的是国际仲裁（包括英国或其他普通法国家/地区的仲裁）。在订立合约拟定仲裁协议时，就可以考虑主动排除冻结令的做法。中国公司在拟定仲裁协议时可以加上一条所谓的“Scott v Avery clause”，即约定在取得裁决书前，不能在法院进行有关双方争议的任何程序，英文写法可以是：“*… neither party would bring proceedings against the other in respect of any such dispute until it had first been heard and determined by the arbitrators, and that obtaining an award was condition precedent to the right of either party to bring any action or other legal proceedings against the other…*”

简单说，这个条文在《Arbitration Act 1950》立法有上诉庭先例判是只可以排除对实质争议的法院程序，但不能排除法院作出附属命令的程序：Toepfer v Cargill (1998) 1 Lloyd’s Rep 379 等先例。这方面在笔者《仲裁法——从 1996 年英国仲裁法到国际商务仲裁》（2006 年）一书第十章之 2.2.1.1 段有介绍。

《Arbitration Act 1996》生效后，针对法院作出中间命令/禁令协助仲裁的条文是 Section 44，可节录如下：

“***Court powers exercisable in support of arbitral proceedings.***

(1) Unless otherwise agreed by the parties, the court has for the purposes of and in relation to arbitral proceedings the same power of making orders about the matters listed below as it has for the purposes of and in relation to legal proceedings.

(2) Those matters are—

….

(e) the granting of an interim injunction or the appointment of a receiver.”

可以注意到 Section 44(1)一开始就说明了该立法条文可以双方同意排除，并非强制性适用。这也在笔者《仲裁法——从 1996 年英国仲裁法到国际商务仲裁》（2006 年）一书第四章之 2.2.9.3 段针对。其中提到在 Q’s Estate, Re (1999) 1 Lloyd’s Rep 931 先例，法院判必须有清楚无误的文字才能排除法院在 Section 44 下的权力。而此先例有关仲裁条文中的“to have exclusive jurisdiction”只是排除了法院对实质争议的管辖权，并非排除法院在 Section 44 下作出冻结令的权力。另在 A Meredith Jones & Co Ltd v JSC Innovatsia (unreported, 17 February 1999)先例，适用的仲裁规则不准当事人在法院采取行动，除了为了担保（other than to obtain security for a claim）。这一来，也明显是不足够排除法院在 Section 44 下的权力。

在近期的 B v. S (2011) EWHC 691 (Comm)先例，法院判 FOSFA 54 标准格式第 29 条，类似上述节录的 Scott v Avery clause 的写法，是足够排除法院在 Section 44 下的权力。该先例的案情涉及葵花籽油的买卖，买方索赔大约 300 万美元的损失并且单方面向法院申请冻结令，冻结了卖方 340 万美元的资产。卖方根据 FOSFA 54 标准格式第 29 条抗拒冻结令，这被英国高院支持。Flaux 大法官认为 FOSFA 54 标准格式第 29 条的写法足够清楚排除法院在 Section 44 下的权力，说：

"*Before considering the various authorities, I should say at the outset that, untrammelled by any authorities, I would be of the very firm view that the opening words of the second paragraph of clause 29: 'Neither party hereto, nor any persons claiming under either of them, shall bring any action or other legal proceedings against the other of them in respect of any such dispute until such dispute shall first have been heard and determined by the arbitrators, umpire or Board of Appeal…' were* ***clearly wide enough and did, on their true construction, exclude all proceedings anywhere, including in England, whether substantive or ancillary or … supportive of the arbitration in which the substantive dispute will be decided. It seems to me that it is clear that, as a matter of language****, proceedings are 'in respect of a dispute' not just when they seek to determine the substance of the dispute, but also when they are ancillary to the dispute or are seeking security for it.*"（加黑部分是笔者的强调）

中国公司如果不想面对冻结令与附属的资产披露令，就可以考虑在伦敦仲裁条文中加入类似的条文。笔者也想到如果是其他仲裁地（例如北京或斯德哥尔摩）的仲裁条文，为了辅助仲裁在英国法院申请冻结令，这一来《Arbitration Act 1996》立法就不适用。现在英国法院申请冻结令是独立（freestanding）的法律行动，法律依据应该是《Senior Courts Act 1981》与 CJJA 1982。但根据 B v. S 先例的判决，关键是 Scott v Avery clause 的措辞/用字足够清楚排除法院的作出冻结令的权力。所以法院在《Senior Courts Act 1981》下是否会选择漠视明确的明示条文，选择行使裁量权作出冻结令，笔者是持怀疑态度。这样看来，如果在本章之 1.9 段提到的 La Dolce Vita Fine Dining Co Ltd v. Zhang Lan (2019) HKCFI 618 先例中，张兰女士与 CVC 的 CIETAC 仲裁条文里包含一条明确的 Scott v Avery clause，那么笔者估计香港法院（一般会与英国法保持一致）就不会对张兰女士作出冻结令与资产披露令。

另外，香港[160]的仲裁员（包括香港国际仲裁中心委任的紧急仲裁员）在 Scott v. Avery clause 下可否作出冻结令的问题，目前还没看到先例针对，但笔者认为也是同样的答案。虽然理论上来说，申请人/原告没有开始一个新的法律行动，但是根据 B v. S 先例对 Scott v. Avery clause 的解释，条文是明示排除了仲裁庭对实质争议作出裁决前，任何支持仲裁的针对实质争议或附属性的其他法律行动。所以笔者认为，这个明示条文对仲裁庭也有同样的约束力，毕竟仲裁员或紧急仲裁员作出的冻结令与资产披露令也需要获得法院的许可才可以强制执行（在香港就是根据《仲裁条例》第 61 条）。

[160] 香港《仲裁条例》（第 609 章）与英国《Arbitration Act 1996》一个不同的地方是香港是给仲裁员（包括紧急仲裁员）作出中间禁令（interim injunction）的权力，包括第 37 条明示规定是可以接受单方面申请（without notice）。当然与此同时，根据《仲裁条例》第 45 条，法院也依然有辅助仲裁（不论是香港还是外地仲裁）作出中间禁令（包括冻结令）的权力。这是由当事人自己选择向法院或是仲裁员（特别是紧急仲裁员）申请。所以笔者觉得如果法院因为 Scott v. Avery clause 无法作出冻结令，而仲裁员不受影响可以作出冻结令，就有点说不通了。

当然 Scott v. Avery clause 对中国公司来说也是双刃剑，因为商业合约的相对方在仲裁有了决定之前被禁止申请冻结令的同时，中国公司自己也受到了同样的约束。但目前看来，中国公司相对来说在国际仲裁中是被告的比例更高，即使是作为原告，也普遍没有外国公司这么主动与“穷凶极恶”。所以从总体上来说，可以说有一条 Scott v Avery clause 对中国公司更有好处。但在一些特殊情况下，订立合约时就对合约相对方的信誉有所怀疑（但又不得不订立合约），担心将来有主动与紧急申请冻结令的必要，就不应该加入 Scott v Avery clause，以免作茧自缚。

1.12.5 中国公司主动利用冻结令保护权益

已经提到中国公司很少主动申请冻结令，因为会涉及昂贵的律师费用，也普遍判断不出谁才是适合处理有关申请的律师。毕竟从本章的内容可以看到要成功申请冻结令/全球冻结令是十分复杂的工作，一般来说需要委任有水平与有相关经验的国际律师，而不是随便找一位“万金油”律师就能胜任。

但笔者相信，最大的原因还是很多中国公司根本不知道有这样一套制度可以在很多情况下保护它们的权益。虽然在 20 年前笔者就已经在中国政法大学出版社出版了《禁令》一书，并以大量篇幅针对了冻结令，但直到今天笔者遇到的公司法务与职业律师都很少知道冻结令的做法，甚至没听说过冻结令。这显示笔者这本《禁令》的读者很少，据笔者所知这本书的销量确实不多。

实际上中国公司完全可以利用这套制度保护自己的权益，例如笔者的《禁令》一书第四章之 3.1.4 段就提到了一个上世纪 80 年代初笔者（杨良宜）处理的案件，可节录如下：

“如果船上一批货物估计属于被告，显然是 Mareva 禁令可去对付的资产。多年前，笔者记得为香港益丰公司（后来与中远合并）去向罗马尼亚（当时是尼古拉 •齐奥塞斯库统治）国营的 Mineralimportexport 追付一笔约 70 万美元的运费/滞期费。要知道，即使在伦敦仲裁胜诉(根据租约的仲裁条款)，也无法在罗马尼亚成功执行。故此，能去在罗马尼亚境外取得诉前保全十分重要。笔者根据租船市场消息，知悉 Mineralimportexport 租了一艘船在中国装港运 2 万多吨谷物回去罗马尼亚。再通过上海外代，知悉是一个 FOB 买卖(显然是，租船是买方，不是卖方)与下一港将停留新加坡加油。笔者就任命新加坡律师向法院申请一个 Mareva 禁令针对这批货物，并同时要求下令把它卸下以免流失，原告承担费用，以免船东以无辜受损受延误为由去插手。记得这禁令一生效，没几天，Mineralimportexport 马上付清欠下的约 70 万美元给益丰公司。”

另一个笔者（杨良宜）记得更清楚但不知道为何没在《禁令》一书提到的案件发生在上世纪 70 年代后期。当时英国已经开始有很多冻结令的申请，但据悉笔者处理的这件案件是香港第二或第三个冻结令申请。该案件涉及广州外贸局通过中间商向一家背后是印度人的香港公司以 CIF 价格购买约 1 万吨缅甸的一级烟草，价格大约六七百万美元，以信用证在香港支付，这在当时是很大一笔钱。但这家香港公司是骗子，伪造了假提单，实际上是租用了广远的船舶从印度装了一批劣质烟草到广州，广州外贸局在黄埔卸港发现后拒货。香港公司指令广远将烟草运回印度，广远之后要求该香港公司支付这笔约为 1 百万美元的回航运费，但香港公司不予理睬。广远找到笔者要求协助，笔者立刻前往这家香港公司在湾仔熙信大厦的

办公地址想要摸底。笔者发现该公司只有 2 个印度人与 1 个香港秘书，并且笔者一表明身份就被印度人非常粗暴地赶了出去。但匆忙中笔者在其中一张办公桌上看到了两个银行存折，由于当时英国的冻结令主要与海事争议有关，笔者也涉及了其中部分申请冻结令的案件，所以对这种救济方式十分警觉。于是笔者在广远同意或至少不反对的情况下马上委任了一位香港律师一起向香港法院申请冻结令，并提供了大量英国做法以说服法官行使裁量权去冻结这两间银行的户口中上限金额约为 1 百万美元的部分。在成功申请到冻结令后，香港公司马上支付了 1 百万美元的回航运费。

估计这个消息很快传到了广州外贸局，几天后广州外贸局就请笔者到广州，笔者这才知道回航运费背后的烟草交易的争议。笔者知道对付骗子或不诚实商人最好的办法是再次申请冻结令而不是启动诉讼。但是笔者同时也提醒广州外贸局，由于笔者已经申请了一次冻结令，香港公司已经有了警觉，很可能已经将存款转移，所以动作要快。果然，虽然笔者再次成功申请到了冻结令，但银行账户中已经只剩下了 1 百万美元以下的存款，最终这也是广州外贸局能追回的金额。只说，当时还没有全球冻结令的做法，如果这个争议发生在今天，在全球冻结令与辅助的资产披露令、搜查令、限制出境命令、第三方披露令（包括 Banker Trust Order）下，这笔钱即使被汇去了外国（该案件是瑞士与伦敦）也依然可以追踪到，很有可能除了律师费之外全数追回。

另在近期的 CMOC v. Persons Unknown (2018) EWHC 2230 (Comm)先例，案件涉及中国洛钼集团在美国的分公司 CMOC USA。CMOC USA 分管英国分公司 CMOC，也就是本先例的原告。CMOC USA 的负责人陈先生是被授权可以操作 CMOC 在伦敦的中国银行账户的人士之一。他的邮箱账户被黑客入侵，黑客伪造他的签字冒名向伦敦的中国银行作出虚假指示，将数百万英镑分开转入了全球多个银行账户。虽然 CMOC 不知道这些银行账户属于谁，但成功向英国法院单方面申请冻结这些“Persons Unknown”[161]的账户。这是英国法院第一次颁布/作出针对“Persons Unknown”的冻结令，有了冻结令的帮助下一步就是 CMOC 执行英国法院的胜诉判决，追回这笔高达 7 百万英镑的损失。

2. 资产披露令（Assets Disclosure Order）

2.1 为什么冻结令后需要资产披露令的辅助

已经在本章多处提到过，在法院作出冻结令（Mareva Injunction / Freezing Order）冻结被申请人资产时，往往会同时作出附属命令（ancillary order），要求被申请人/被告以誓章/誓词（affadavit / affimation）的方式披露有关资产信息（assets information）。如果事后发现被申请人没有或遗漏了任何资产的披露，被申请人（甚至被申请人的代表律师如果存在错误或疏忽也是一样）会可能被认定为藐视法院（contempt of court）并承担刑事后果。这种案件很多，例如 TDK Tape Distributor (UK) Ltd v. Videochoice Ltd (1986) 1 WLR 141 先例等。

资产披露令被称为是对冻结令的辅助（in aid），在冻结令（通常一开始会以非常广泛的措辞/文字针对被申请人的各种可能存在的资产以免造成遗漏）之后，根据被申请人在资产

[161] 有关针对“Persons Unknown”作出冻结令的课题也可见本章之 1.6.5 段。

披露令下披露的资产信息收窄范围到针对特定资产。例如可见 A v. C (1981) QB 959 先例（被告涉嫌欺诈），法院根据单方面（*ex parte* 或 without notice）申请作出冻结令，Goff 大法官就说：

"*There is no doubt that this jurisdiction*（冻结令的管辖权或权力） *is in a process of development; and that it is still in the course of throwing up problems which have yet to be solved. The customary form of order is in a very wide form; it restrains the defendant from removing from the jurisdiction or otherwise disposing of or dealing with any of his assets within the jurisdiction including and in particular [a certain specified asset] save as in so far such assets do not exceed in value the sum of [the plaintiff's claim]. …*

Now the exercise of this jurisdiction may lead to many problems. The defendant may have more than one asset within the jurisdiction - for example, he may have a number of bank accounts. The plaintiff does not know how much, if anything, is in any of them, nor does each of the defendant's bankers know what is in the other accounts.[162] *Without information about the state of each account it is difficult, if not impossible, to operate the Mareva jurisdiction properly; for example, if each banker prevents any drawing from his account to the limit of the sum claimed, the defendant will be treated oppressively, and the plaintiff may be held liable on his undertaking in damages*[163]*. Again, there may be a single claim against a number of defendants; in that event the same difficulties may arise.*[164] *Furthermore, the very generality of the order creates difficulty for the defendant's bankers, who may for example be unaware of the existence of other assets of the defendant within the jurisdiction;*[165] *indeed, if a more specific order is possible, it may give much needed protection for the defendant's bankers, who are after all simply the innocent holders of one form of the defendant's assets.*

That the Court has power to order discovery of particular documents and interrogatories[166] *at an early stage of proceedings is, I think, not in doubt. I refer in particular to RSC, O.24, r.7[1]*[167] *in relation to discovery of documents, and to the general terms of RSC, O.26, r.1[1] in relation to*

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162 但是冻结令如何实际被执行是有不少问题的。被申请人可能有很多不同的资产，这些资产加起来的总金额会远超出申请人的需求（也就是冻结令所冻结金额的上限），例如被申请人会有很多个不同的银行账户，而申请人一般不会知道被申请人有什么账户、每个账户中有多少资产，即使是被申请人的其中一个银行也不会知道其他银行账户中的情况。

163 如果缺少了这些被申请人账户信息的情况的话，是很难恰当地实施、执行冻结令的。反面的例子就会是如果被申请人拥有的银行账户背后的每一个银行都由于知悉冻结令内容但不知道被申请人在其他银行的账户，因此在每一个银行账户中都冻结了被申请人达到冻结令中冻结金额上限的金钱，这就实际上是造成了对被申请人的困难（hardship）、以及属于对被申请人的压迫（oppression），过度与不必要地冻结了被申请人的资产。而申请人根据自己对法院作出的交叉担保是需要承担这类损失的。冻结令事后被证明不当时，申请人的担保会被用来保证被申请人的损失得到赔偿，而这笔损失会是十分惊人的：见 Fiona Trust v. Privalov (2016) EWHC 2163 (Comm)先例。被冻结的金额越多，被申请人的损失也就会越大。能够尽快通过资产披露令了解被申请人的资产详情，例如在各个银行账户中分别有多少资产，就可以马上更改冻结令例如只是一个银行账户内的资产就已经足够满足冻结的金额上限要求，就可以取消冻结被申请人的其他银行账户，从而减少申请人可能会面对的损失赔偿。

164 除了单个被申请人拥有多项资产（如多个银行账户）外，也会有情况是同一个冻结令针对的是多个被申请人（会在诉讼中是共同被告）的特定金额资产，此时也会遇到同样的问题。

165 而且冻结令也会针对的是多种不同的资产，除了银行账户外也会有其他各类资产，此时也会由于银行并不知道被申请人有其他什么资产、价值是多少而导致同样问题产生。

166 法院在这方面的权力将在本书第七章进行讨论。

167 在新的 CPR 下是 CPR rule 18.1(1)与 rule 31.12。

interrogatories. If necessary, however, the Court's power to make an appropriate order in aid of a Mareva injunction can be derived from the power to make mandatory orders conferred on the Court by s.45 of the Judicature Act 1925, itself, sub-s.(1) of which provides: 'The High Court may grant a mandamus or an injunction or appoint a receicver by an interlocutory order in all cases in which it appears to the court to be just or convenient so to do.'.

If the Court were to deny itself the right to exercise this jurisdiction in aid of the Mareva injunction, it could prevent the Mareva jurisdiction from beign effective to achieve its purpose; for a plaintiff, faced with lack of knowledge of the value of a specified asset of a particular defendant, may, in the examples I have given, be deterred from giving his undertaking in damages with the result that he is unable to obtain the relief. *In any event, in the examples I have given, the information may be necessary in the interests of justice to ensure that the jurisdiction is properly exercised.*

I am not suggesting that it would be right to make general use of this power to enable the plaintiff to discovery whether the defendant has assets here.[168] *In order to establish his right to relief at all, the plaintiff has at least to give grounds for believing that the defendant has assets here;*[169] *but, having established that, it may be necessary of the proper exercise of the jurisdiction that the defendant should be required to give discovery, or provide information, about a particular asset – though, obviously, if the asset is worth more than the plaintiff's claim, he need do no more than establish that fact.*[170] *But, if the asset is a bank balance, the Court, if it holds that the plaintiff is entitled to discovery in respect of that balance*[171]*, may exercise its power under s.7 of the Bankers' Book Evidence Act, 1879, and order that the plaintiff be at liberty to inspect and take copies of any entries in the bankers' books.*"（加黑部分是笔者的强调）

可以简单总结与重复需要资产披露令辅助冻结令的原因如下：

（1）开始的冻结令通常是申请人单方面（*ex parte*）申请，命令本身的措辞/文字并不特别有针对性，会采用最广泛的措辞/文字，以避免遗漏任何被申请人可能会拥有（但申请人并不知悉，否则会写明在冻结令中）的资产。

（2）一旦被申请人拥有的特定资产信息被知悉，就可以将冻结令冻结的范围进行限定，针对性地冻结该资产中达到一定金额（这也就是申请冻结令的目的，要求在诉前或审前保证一定金额不会流失）的部分。

（3）这可以让被申请人不至于技术上来说所有资产都被冻结。被申请人的银行可以知

168 申请人不能在没有任何证据的情况下要求法院如此行使权力。法院的此项权力不是为了帮助原告向被告的资产"摸底"的"钓鱼取证"/"摸索证明"（fishing expedition）。

169 申请人必须至少要指出自己相信被申请人在英国有资产与申请人确信（belief）的理由。在此先例的年代，还没有发展出全球冻结令（Worldwide Freezing Order 或简称 WFO）的做法，以及也一般只针对特定的资产（在今天会针对泛泛的、在英国或全球的"任何资产"[any asset]，在通过资产披露令了解资产详情后，再更改让全球冻结令收窄与针对特定资产）。

170 被申请人只需要披露总价值达到设定标准（冻结金额上限）的足够资产即可，毕竟法院也应该尊重被申请人的隐私。

171 如果法院认定被申请人需要披露某银行账户的信息，被申请人就需要披露该账户中有多少存款。

道在该银行账户中是可以允许被申请人动用多少钱，而不用担心自己可能因协助（in aid of）被申请人违反法院命令而构成涉嫌藐视法院的风险。

（4）对申请人而言也有很多方面的好处。首先是申请人在申请冻结令时对法院作出过交叉担保（见本章之 1.7.5 段），如果冻结了过多的资产、对被申请人造成不必要的麻烦与困境，（一旦事后败诉）申请人可能需要承担更多的损失。这种损失会是很大，因此对申请人而言，能减少潜在损失、降低潜在责任的做法显然是好事：见本章之 1.7.5.2 段介绍 Fiona Trust v. Privalov (2016) EWHC 2163 (Comm)先例。其次能够确定被申请人有什么资产并肯定在判决或裁决前不会流失，这效果相等于已经获取足够的诉前或审前“担保”（security），也能使得申请人放心推进诉讼，不至于是竹篮打水一场空。

2.2 CPR 中的有关条文

在 CPR 之 Rule 25.1(1)(g)有针对性条文规定如下：

“*… an order directing a party to provide information about the location of relevant property or assets or to provide information about relevant property or assets which are or may be the subject of an application for a freezing injunction.*”

由于常在诉前申请冻结令，因此在冻结令中的资产披露令（Assets Disclosure Order）也属于“诉前披露”（pre-action disclosure）的一种做法，只是针对的信息与本书第二章之 2.2 段介绍的“诉前披露议定书”（Pre-action Disclosure Protocols）有不同的目的，即主要是为了获取被申请人资产信息（assets information）。往往只有在获取了被申请人的资产信息后，申请人才会启动诉讼，尤其是在涉及诈骗或向皮包公司索赔的商业案件中，贸贸然提起与推进昂贵的诉讼后才发现面对的是骗子与光棍，届时才是得不偿失，这也是典型的西方谚语所说：“*to throw good money after bad money*”。

资产披露令发展到今天，可节录 2002 年版 CPR PD 25A 附上的冻结令范本之措辞/文字如下：

“*PROVISION OF INFORMATION*

9. (1) Unless paragraph (2) applies, the Respondent must [immediately] [within hours of service of this order] and to the best of his ability inform the Applicant's solicitors of all his assets [in England and Wales][172] [worldwide][173] [exceeding £ in value] whether in his own name or not and whether solely or jointly owned[174], giving the value, location and details of all such assets.

(2) If the provision of any of this information is likely to incriminate the Respondent, he may be entitled to refuse to provide it, but is recommended to take legal advice before refusing to

172 针对只涉及英国本土资产的一般冻结令。
173 针对全球冻结令。
174 在有的资产披露令中，甚至是要求被申请人披露如配偶、家人的有关共同拥有资产信息。

provide the information. Wrongful refusal to provide the information is contempt of court and may render the Respondent liable to be imprisoned, fined or have his assets seized.[175]

10. Within [ ] working days after being served with this order, the Respondent must swear and serve on the Applicant's solicitors an affidavit setting out the above information."

可以从前述措辞/文字之第 9(1)段看到，被申请人需要在一定时间内披露在英国境内或（全球冻结令的情况下）全球的不超过冻结令要求的资产金额上限的资产信息，包括这些资产的价值、地点与有关的细节。如果针对的是银行账户的话，一般而言需要提供有关账户的开户人、账户号码、开户分行信息以及账户余额等。[176]

而在范本命令中还写到了有关获取到的资产信息的用途与对申请人的限制，除非事先获得法院的批准：

"*(9) The Applicant will not without the permission of the court use any information obtained as a result of this order for the purpose of any civil or criminal proceedings, either in England and Wales or in any other jurisdiction, other than this claim*

(10) The Applicant will not without the permission of the court seek to enforce this order in any country outside England and Wales [or seek an order of a similar nature including orders conferring a charge or other security against the Respondent or the Respondent's assets]. "

这课题在本章之 1.2 段有详述，背后的原因是为了避免对被申请人造成压迫。Dadourian Group International Inc v. Simms (2006) EWCA Civ 399 上诉庭先例所带来的"Dadourian Guidelines"要求申请人（i）不能在获得英国法院批准前，把这一个冻结令行动获取的信息（例如被申请人的资产）使用在英国或外国的其他民事或刑事程序；（ii）不能在获得英国法院批准前去外国执行被申请人的资产（或对特定资产向外国法院申请另一个冻结令或押记）。

在今天会与资产披露令有关的 CPR 条文，还包括了 CPR Part 18 有关诉讼中要求披露更多信息。这也是一般诉讼中的披露做法，但与资产信息会有重合的地方，也就是如果资产信息本就会与争议有关的话，那么披露的文件中也就会需要包括有关资产的信息。另外在今天，Thirwall 大法官还在 XYZ v. Various Companies (2013) EWHC 3643 (QB)先例中提到了有关案件管理（case management）的 CPR Rule 3.12(m)，也就是如果被申请人的资产情况会与案件管理有关的话，也会需要被法院纳入考虑。这方面问题将在本章之 2.3.2 段再进行讨论。

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[175] 涉及"自证其罪"（Self-incrimination）的信息可以不予披露，这课题可见本书第十三章之 10 段。但是在拒绝披露之前建议先咨询律师意见。同时如果被发现是谎称自证其罪信息拒绝披露的话，会触犯藐视法院的罪行，并可能受到监禁、罚款、没收资产等处罚。

[176] 在 Ausbro Forex Pty Ltd v. Mare (1986) 4 NSWLR 419 澳大利亚先例中就是这样判法。

2.3《Senior Courts Act 1981》下独立、非附属性的资产披露令

正如本章前文中的介绍，普通法下的资产披露令是辅助（in aid of）冻结令，也是附属（ancillary）于冻结令之下的做法。但是根据《Senior Courts Act 1981》之 Section 37(1)下赋予法院只要认为是公正与方便（"*just and convenient*"）的情况就可以颁布/作出禁令的权力，因此法院颁布/作出资产披露令（Assets Disclosure Order）的情况会得到很大扩张。在今天资产披露令也有时被描述为是独立（independent/freestanding）的命令。正如 Fox 大法官在 Bayer v. Winter (No. 3) (1986) FSR 357 先例中所说：

"*Bearing in mind we are exercising a jurisdiction which is statutory, and which is expressed in terms of considerable width, it seems to me that the court should not shrink, if it is of opinion tht an injunction is necessary for the proper protection of a party to the action, from granting relief, notwithstanding if may, in its terms, be of a novel character.*"

可以看到在立法下，独立、非附属性质的资产披露令完全可以单独被颁布/作出，而不必要是附属于、辅助冻结令的执行。在今天资产披露令针对的资产范围也未必要跟冻结令针对的金额上限与范围一致，例如是冻结的是被申请人在境内特定上限的资产，但资产披露令会要求被申请人披露全球范围内特定上限的资产（如果披露发现被申请人有资产没有被包括在冻结令中，也有机会是申请更改冻结令将这些资产也包括在内）。也有先例是还没有冻结令的时候就先申请了资产披露令，之后再申请冻结令的情况：见 JSC Mezhdunarodniy Promyshlenniy Bank v. Pugachev (2015) EWCA Civ 139 先例，Lichter v. Rubin (2008) EWHC 450 (Ch)先例等，还可见 Australian Copetition & Consumer Commission v. Top Snack Foods Pty Ltd (1997) FCA 380 澳大利亚先例。

也因此资产披露令在今天被用于许多不同的目的，这将在下文中进行一些讨论。

2.3.1 申请资产披露令目的之一：为了帮助执行法院判决或者是在世界范围执行仲裁裁决

资产披露令（也会是同时申请冻结令）会纯粹是为了帮助判决（judgment）或裁决书（award）的执行（enforcement and execution）而颁布/作出：见 Gidrxslme Shipping Co Ltd v. Tantomar Transportes Maritimos Lda (1995) 1 WLR 299 先例。要知道判决与裁决书的执行是一件大事，国际仲裁近几十年来变得这么兴旺，几乎在国际商业争议解决完全取代法院的主要原因之一也是因为有 1958 年的《纽约公约》帮助在全球执行仲裁裁决。

此先例中的原告是"Naftilos LS"轮的船东，而被告是期租了"Naftilos LS"轮的承租人，但欠下了租金未支付。原告因此开始了 2 个仲裁索赔租金并成功获得裁决书，因此欠下的租金

也就变成了判决债务[177]。为了执行裁决书，原告单方面（*ex parte*/without notice）申请并获得法院颁布/作出冻结令，冻结了被告在境内上限到 720,000 美元的资产。同时法院还颁布/作出资产披露令（Assets Disclosure Order），要求被告披露在全球范围（world wide）内拥有、租入、营运的船舶，以及所有与前述船舶有关酬金、收入有关的银行账户信息（"*the identities of all vessels owned, chartered or operated by them and information relating to any bank accounts into which remuneration in relation to any such vessel was paid*"）。这显然是要求十分广泛与大范围的资产披露令。

此先例中的争议就是，冻结令实际上只是针对了境内的资产，资产披露令是否可以有所不同、针对全球资产要求予以披露呢？法院给出的答案是肯定的，可以简单节录案件概要如下：

"*That although on the facts of a particular case it might be inappropriate to extend a Mareva injunction to assets outside the jurisdiction the court could nevertheless make a disclosure order in respect of worldwide assets[178]; that it was unnecessary when applying for a Mareva injunction in aid of execution of an award or judgment for the originating summons to refer to disclosure even though the injunction might be confined to assets within the jurisdiction and disclosure extended to assets outside the jurisdiction; that information acquired from a worldwide disclosure order was capable of being used in an action in a foreign jurisdiction without the leave of the court but only for the purposes of execution of an existing judgment or award and not to obtain attachment of assets overseas to secure a claim in a pending arbitration[179]; and that, accordingly, the order made on 19 April 1994 was within the court's jurisdiction and would be upheld subject to any minor amendments made necessary by the passage of time…*"

看来在做法上可在申请冻结令（尤其是全球冻结令）之前先申请资产披露令，有助于帮助申请人（也是裁决书中的胜诉方）获取被申请人（裁决书中的败诉方）的资产信息，以便在特定的（外国）法院申请针对被申请人的财产保全与执行。例如被申请人披露了有一笔存款。在一间马来西亚或日本的本土银行，那么申请人就要考虑去马来西亚或日本法院申请财产保全。但也会是这笔存款在（不论是马来西亚、日本或中国的）国际银行，此时申请人就会多了一个选择可以在英国法院申请追加全球冻结令针对该国际银行。在这种情况下，可以说冻结令实际上是附属于资产披露令的了，毕竟相对而言资产披露令对于申请人而言要更重要。

这方面课题在笔者的《仲裁法——从开庭审理到裁决书的作出与执行》（2010 年）一书

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177 原告之后又开始第 3 个仲裁索赔进一步欠下的租金以及被告对期租合约违约/毁约（repudiatory breach）的损失，但在此先例时还没有获得裁决。

178 即使是由于此先例中的各种原因，冻结令只能针对境内资产，仍然可以颁布/作出全球资产披露令。因为在这案件中资产披露令不是为了辅助冻结令的执行，而是为了裁决书的执行。

179 根据全球资产披露令（Worldwide Assets Disclosure Order）获悉的信息，无需获得英国法院的进一步批准就以用来帮助执行法院判决或仲裁裁决的，这包括去任何一个被告有资产的地方向外国法院申请承认与执行。但是如果针对的是还没有作出的判决或裁决，法院就不会允许了。毕竟双方胜负未分，如果双方都自信会是胜诉方，申请对方作出全球资产披露，这会带来对隐私权不必要的剥夺。也因此在此先例中针对前 2 个已经获得裁决书的判决债务（judgment debts），原告可以申请到冻结令以及全球资产披露令，但是对于当时还在进行的第 3 个仲裁是不会获得法院颁布/作出有关命令的。

第十四章之 8.3 段已有涉及。看来在英国发展起来的全球资产披露令（Worldwide Assets Disclosure Orders）与全球冻结令（Worldwide Freezing Orders），加上在 8.3.3 段介绍的美国全球第三债务人命令（worldwide turnover order），已经逐渐代替仲裁裁决书（arbitration award）能够在全球执行所依赖的 1958 年《纽约公约》。

2.3.2 申请资产披露令之二：为了争议本身或者是案件管理需要了解被申请人的资产情况

也会有情况是为了确定被申请人是否有资产，从而值得向被申请人起诉，不会在推进了一个昂贵的诉讼后才发觉是竹篮打水一场空。

在 Nigel Upchurch Associates v. Aldright Estates International Co Ltd (1993) 1 Lloyd's Rep 535 先例中，原告是一名濒临破产的建筑师，已经进入个人自愿债务重组（individual voluntary arrangement）程序，为了债权人的利益向被告提出索赔。但是在诉讼中，被告针对原告提出反索赔（看来会是指称原告存在职业疏忽），而且反索赔金额大大超出了索赔金额。被告为了不要最后竹篮打水一场空，在真正推进这个会是耗费时间与金钱的诉讼之前，急于找出原告是否背后有保险人（这会是原告投保了职业疏忽保险）的支持，以及有关保单承保金额到底是多少。如果保单承保金额足够赔付反索赔的话，被告就可以安心推进诉讼争取成功反索赔了。

但在此先例中被告是根据《Third Parties (Rights Against Insurers) Act 1930》之 Section 2 申请披露，被法院判在此立法下保险人与被保险人之间的保单信息并不满足 Section 2 的条件，法院没有管辖权[180]。

在今天 CPR 之后，是否可以针对被申请人背后是否有投保足够的保险支持作出赔偿作出资产披露令，也一度并不十分清楚。毕竟被申请人作为受保人的保单也会属于资产的一部分。而一贯以来的大原则，都是在诉讼还没有作出判决/裁决之前，被申请人/被告的资产都是个人的机密信息，除非是与案件实体争议有关否则不需要披露。只有在判决/裁决之后，败诉的被申请人/被告作为判决债务（judgment debt）的债务人（debtor），才会被法院强制披露资产信息。但在今天看来在 CPR 下的这个地位是有偏离的，即使是在判决/裁决作出之前，为了案件管理的目的法院也会可以要求被申请人/被告披露资产信息。

CPR 下这类案件的早期先例可见 Harcourt v. FEF Griffin (2007) EWHC 1500 (QB)先例。该先例涉及的是人身伤害案件而且被告已经在责任问题上作出让步，但是索赔 600 万到 750 万英镑损失以及已经产生了不少费用的原告担心自己胜诉后，被告是否有足够的资产以供执行。

[180] 但是有关此立法条文的判法在今天被 OT Computers Ltd, Re (2004) Ch 317 上诉庭先例被改判。但这个问题并非这里要讨论的重点，也因此不在此详细讨论。而且在今天也有《Senior Courts Act 1981》之 Section 37(1)，以及 CPR r3.1(m)，法院可以有广泛的管辖权作出命令。

但原告依赖的是 CPR Part 18[181]，在诉讼中要求被告披露是否背后有保险的支持。Irwin 大法官判此 CPR 条文下，只要是有助于当事人之间有效率、公正解决争议有关的信息（*"the information that the parties needed to deal efficiently and justly with the matters in dispute between them*"）都可以被命令披露，因此允许与颁布/作出了资产披露令。

但 Irwin 大法官的判法在稍后的另一个高院先例中被拒绝跟从：见 West London Pipeline & Storage Ltd v. Total UK Ltd (2008) EWHC 1296 (Comm)先例。West London Pipeline & Storage Ltd v. Total UK Ltd 先例的有关案情也可见本书第十章之 7.6.2 段，简单而言是在 Buncefield 油码头爆炸后，作为事故责任人的 Total 试图与第三方分摊责任与损失，因此关心第三方背后是否有保险人的支持，Total 于是也同样依赖 CPR Part 18 申请披露。但是此先例中 David Steel 大法官先认定了第三方背后是否有保险与案件争议（也就是是否要分摊与分摊的责任大小等）没有关联性。接着，David Steel 大法官在综合考虑后，认为不同意 Harcourt v. FEF Griffin 先例中 Irwin 大法官对 CPR Part 18 的解读，David Steel 大法官说如果被申请披露的信息与案件争议没有关联性，法院在 CPR Part 18 下是没有管辖权颁布/作出资产披露令的，即使这些信息的披露会帮助有效率的案件管理。

看来这两个先例的判法就有直接冲突。但是需要注意的是 West London Pipeline & Storage Ltd v. Total UK Ltd 先例的判决在更近期作出，而且是完全考虑了 Harcourt v. FEF Griffin 先例以及其他先例后作出的判决，因此除非是有明确理由相信判决有问题或者说不通，否则 West London Pipeline & Storage Ltd v. Total UK Ltd 先例的判法会是更有说服力。因此在更近期的 XYZ v. Various Companies (2013) EWHC 3643 (QB)先例中，Thirwall 大法官跟从的是 David Steel 大法官的判法，也就是在 CPR Part 18 下，与案件实质争议没有关联性的资产信息并不能以此立法条文命令披露。

但在 XYZ v. Various Companies 先例中，Thirwall 大法官还提到了 CPR Rule 3.1(m)。可以节录 CPR Rule 3.1(m)如下：*"(m) take any other step or make any other order for the purpose of managing the case and furthering the overriding objective, including hearing an Early Neutral Evaluation with the aim of helping the parties settle the case.*"

Thirwall 大法官说为了案件管理，法院是有权力要求披露有关保险的信息的，理由是被申请人是否有足够资金可以参与诉讼直到完成庭审，这对于法院在案件管理之下会作出什么命令、如何处理诉讼进程是有关系的。毕竟法院要为了节省费用、以更按比例合乎案件标的之方式处理案件。

这个问题还可见更近期的 Dowling v. Bennett Griffin (2014) EWCA Civ 1545 上诉庭先例。在此先例中，Dowling 作为客户（此先例中原告）与建筑师签订服务合约，并明示要求建筑师必须投保职业疏忽保险。虽然建筑师向客户索赔未支付的服务费用，客户委任了律师（此先例中被告）进行抗辩与反索赔。

在此先例中虽然建筑师被客户反索赔，但建筑师并没有按照与保险人之间保险合约

[181] 此条文是赋予法院要求当事人披露额外信息的权力。尤其是在 Rule 18.1 规定，法院在任何时候、也无论是否是在书面陈词/诉状（statement of case）中包括或提到的实质争议问题，都有权要求当事人提供额外信息。可以节录 Rule 18.1 如下："*The court may at any time order a party to … give additional information in relation to any such matter, whether or not the matter is contained or referred to in a statement of case.*"

（insurance contract）的规定及时通知（notify）自己的保险人。这可能会有很多原因，例如通知保险人之后，如果在诉讼中败诉导致保险人需要理赔后，在下一年保险人会提高建筑师需要缴纳的保费（insurance premium），如果建筑师对于诉讼很自信认为自己不太会败诉，或者是被索赔的金额较小时认为不需要/不值得寻求保险人的理赔与/或帮助，就会选择不通知保险人，也就不影响下一年保费的费率了。然而此先例中的建筑师最后在诉讼中败诉，就由于没有通知保险人导致保险人拒绝理赔（当然保险人拒绝理赔还有其他理由，包括是建筑师没有尽披露义务，建筑师有误述等），建筑师因此破产。

此先例中的问题在于建筑师破产，客户这才发现无法实际真正索赔到金钱。本以为建筑师背后怎样都会有保险人支持，但直到建筑师破产才发现这个问题。因此客户开始向律师启动职业疏忽的诉讼，指称在诉讼中律师应当注意到这个问题，在一开始就尽办法确认建筑师背后是否有保险人支持，也没有警示客户有法院判决金额无法实际执行到的风险。与本段要讨论的内容有关的是，客户指称律师应当向法院申请建筑师披露有关保险人与有关保单的命令。

针对这个问题，法院指出在 West London Pipeline & Storage Ltd v. Total UK Ltd 先例与 XYZ v. Various Companies 先例中，高院的法官、出庭律师、事务律师等都只在 CPR Part 18 下申请资产披露令，而且法院的判法都是这种情况下并不能以此条文获得法院颁布/作出的资产披露令。直到 XYZ v. Various Companies 先例中 Thirwall 大法官提出 CPR Rule 3.1(m)下法院有权力的说法前，在 CPR 下并没有其他条文可以依赖，在 West London Pipeline & Storage Ltd v. Total UK Ltd 先例中，David Steel 大法官甚至说 CPR Part 18 是唯一的方式（“*the only avenue*”）。因此在这个先例中的律师没有在诉讼中向法院申请资产披露令去要求建筑师披露背后是否有保险人的支持是可以理解的，并不算是律师的疏忽，因此客户败诉。

此先例中一审的 Thirwall 大法官就指出作为被告的建筑师是否有足够资金支持打这场诉讼是案件管理需要考虑的因素，因此建筑师背后是否有保险人支持会与案件管理有关联，法院在 CPR Rule 3.1(m)下可以延伸到在这种案件中也有管辖权。上诉庭的 Lewison 大法官也说：

“*What the claimants wanted to know was whether the defendant in question had sufficient insurance; (1) to fund its participation in litigation to the end of the trial, (2) to meet any order for damages and (3) to meet any order for costs. Thirwall J held that the first question related to case management because it might influence the case management directions that the court would make and made the order sought. However, she refused to order the second and third questions to be answered because they did not relate to case management. This is a very limited extension to the position as it appeared in 2008 following the decision of David Steel J.*”

不妨简单总结，在今天 CPR 下如果申请的有关资产信息是与当事人之间的实质争议（substantive dispute）有关联性，那么可以直接在 CPR Part 18 下申请披露有关资产的信息。但如果资产信息与实质争议本身没什么关联性，但会影响针对诉讼程序的案件管理，在 CPR Rule 3.1(m)下法院也会有管辖权。

而法院是否愿意颁布/作出资产披露令的裁量权（discretion）则会是根据《Senior Courts Act 1981》之 Section 37(1)中的公正与方便（“*just and convenient*”）。这就会需要根据案件事实进行考虑，例如是前文中提到的有关被申请人背后是否有保险资金支持的问题，如果是作

出资产披露令的话显然就会侵犯了这些信息的机密性（confidentiality），但如果是这信息与争议有关、或者是为了让冻结令真正有效、或者是为了案件管理的目的的话，机密性与特免权（privilege）不同，是不足以保护文件信息免于披露的[182]。

这方面内容可以最后节录 Steven Gee QC 的《Commercial Injunctions》（2016 年，第 6 版）一书之 23-008 段作为小结：

"It seems that court has jurisdiction under CPR r 3.1(m), provided that the assets are relevant to proper case management. It is also considered that the court under s. 37(1) can make a disclosure order so that in an appropriate case the court taking into account information about the defendant's assets or means of satisfying a judgment. Disclosure will not be available under CPR Pt 18 unless there is an issue in the proceedings about those assets. Although the court would have to bear in mind the principle that prior to judgment information about the defendant's assets is confidential and that he is not to be treated as a judgment debtor, the interests of justice[183] could require this to be overridden and that a disclosure order be made. The exercise of the jurisdiction under s. 37(1) should take into account the policy objectives of the CPR."

2.3.3 其他情况中申请资产披露令

当然除了以上提到的适用 CPR 的两种情况（本就与实质争议有关以及与案件管理有关的情况）以外，还有其他时候法院也会颁布/作出资产披露令。在《Commercial Injunction》（2016 年，第 6 版）一书之 23-025 段对涉及金钱索赔（proprietary claim）时法院有衡平法管辖权（equitable jurisdiction）可以颁布/作出资产披露令的情况有所小结，不妨节录如下：

"(1) an order requiring disclosure of information including documents based on the equitable jurisdiction of the court to safeguard trust assets;[184]

(2) an order based on the principle in Norwich Pharmacal v. Customs & Excise Commissioners[185];

(3) an order giving an interim remedy under CPR r.25.1(1) to which a disclosure order could

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182 有关文件机密性需要保护，但是不能抗拒披露的问题可见本书第一章与第九章多处提及。

183 在《Commercial Injunctions》（2016 年，第 6 版）一书之 23-007 段还提到如果被告没有可供被执行的资产（如果败诉的话），那么原告也就不会继续诉讼，这能够节约大量的当事人与法院的时间与金钱。而且能了解被告的资产情况，这也对当事人之间达成理智与公平的和解有帮助。这些都是对公共利益有益的地方。这是在判决还没有结果时，法院针对被告的资产（包括保险赔偿信息）、剥夺隐私时需要作出平衡考虑的。

184 在涉及收取贿赂（bribery）、秘密佣金（secret commission）等情况中，在英国法下收取的贿赂、秘密佣金会被认为是委托人的信托财产只是被代理人（也就是收取贿赂、秘密佣金的员工等）持有，此时向代理人有金钱索赔的委托人就可以向法院申请代理人披露资产。这类情况在本章之 2.5.1.1 段还会再做讨论。

185 有关 Norwich Pharmacal v. Customs & Excise Commissioners 先例以及带来的第三方披露令的问题会在本书第二章之 4 段讨论，不在这里重复。

be granted as ancillary under s. 37(1) of the Senior Courts Act 1981.[186]

(4) an order made for the pre-action disclosure of documents under CPR r.31.16[187] *and s. 33(2) of the Senior Courts Act 1981*[188]*."*

2.4确保披露的附属命令

被申请人在收到资产披露令后，需要以"誓章/誓词"（affidavit/affirmation）的方式作出回应。如果对被申请人的回复不满意，例如被申请人披露自己名下的公司信息不全面等，还可以进一步要求"更多更好"（further and better）的誓章/誓词，要求被申请人作出更全面的披露。而如果仍然对被申请人的回复不满意，如被申请人披露自己名下资产只有一间公司，实际上还是一间空壳公司，还可以要求被申请人在法官（或法院的"examiner"）面前接受"盘问"（examination）。即使被申请人是外国人士，也可以要求被申请人通过视频连线方式接受盘问。这一来如果没有完全遵从资产披露令的被申请人就可能触犯藐视法院（Contempt of Court）的罪行。这方面问题与自证其罪特免权（Self-incrimination Privilege）的问题还会稍后在本章之 2.5.1.2 段讨论。

更严重的情况则是，如果没有遵守资产披露令，甚至可能被扣留护照、限制出境（不论是否英国居民）。这来源于古老的英国《Debtors Act 1869》立法中对于欠下的民事债务可能有监禁的惩罚[189]，以及有关的"限制出境令状"（writ *ne exeat regno*）做法。在 Al Nahkel for Contracting v. Lowe (1986) QB 235 先例中，重新"复活"（revive）了这个古老做法，由于担心被告离境而且不准备再返回英国而导致法院的资产披露令失去实际意义，法院作出命令在被告履行资产披露令义务前扣押被告的护照。

之后在 Allied Arab Bank v. Hajjar (1988) QB 787 先例中对此有所解读。此先例中原告银行（Allied Arab）贷款给被告之一的借款人公司，而另一个被告约旦公民 Hajjar 先生是担保人。之后借款人公司破产清盘，Allied Arab 也已经在英国法院取得了针对包括借款人与担保人 Hajjar 先生在内多名被告的"简易判决"（summary judgment），但在执行程序中遇到了找不到资产/财产以供执行的困难。Allied Arab 知悉 Hajjar 先生会短暂前往英国，即成功向法院申请到了"保释金"（bail）金额为 36,000,000 英镑的限制出境令状，由于 Hajjar 先生未能筹得此笔款项，因此被逮捕。同时 Allied Arab 还成功说服法院有必要作出资产披露令（Assets Disclosure Order），而且 Hajjar 先生一旦离境返回约旦，就不会再理会此资产披露令了。之后，Hajjar 先生以签保 250,000 英镑、交出自己的护照等担保作为"保释保证"（bail bond）才被从监禁中释放。Hajjar 先生离开监禁后就向法院申请撤销限制出境令状。Leggatt 大法官指出，限制出境令状的古老做法有一些条件需要满足才能适用，其中一条是作出令状目的是为了"*prosecution of the action*"，但是此先例中的资产披露令只是为了追踪财产（assets tracing）

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[186] CPR Rule 25 是针对法院中间措施的条文，主要有关的会是 Rule 25.1(1)(c)，(d)(i)与(l)。CPR 之 Rule 25.1(1)(c)下法院可以颁布/作出扣押、检验、取样等针对财产的命令，这个课题可见本书第五章。CPR Rule 25.1(1)(d)下法院为了前述命令的执行可以命令允许进入被申请人的土地、房屋等。而 CPR Rule 25.1(1)(l)则是在当事人对某资金有争议的时候，可以要求该笔资金被存款到法院或以其他方式保全该笔资金不会流失。

[187] 有关 CPR Rule 31.16 与诉前披露的问题，以及 Black v. Sumitomo Corp (2001) EWCA Civ 1819 上诉庭先例等已经在本书第二章之 2.4 段有详细介绍，也就不在这里重复。

[188] 《Senior Courts Act 1981》之 Section 33(2)与诉前披露命令可见本书第二章之 2.7 段的介绍。

[189] 在今天《Debtor Act 1869》中的绝大部分条文都已经被废除。

以供简易判决的执行，这实际上与此目的无关因此不能作出限制出境令状。

在笔者看来，现代社会是越来越重视人权（这会包括自由出入境等），因此根据古老的立法限制没有犯法的外国自然人出境与现代环境是格格不入的。

但之后在 Bayer v. Winter (No. 1) (1986) 1 WLR 497 上诉庭先例中，申请人/原告（Bayer，著名的拜耳药厂）是当时非常有名的"Baygon"杀虫剂的生厂商，指称被申请人/被告在生产与销售假冒伪造的 Baygon 杀虫剂。之后成功在法院申请到了一系列中间禁令（interim injunctions），包括要求被告披露文件、冻结被告的资产、要求被告披露资产信息等。但是对于 Bayer 要求限制被告出境的禁令，在原审法院被拒绝，因此 Bayer 进行上诉。上诉庭的 Fox 大法官指出，在英国《Senior Courts Act1981》之 Section 37(1)[190]下法院有非常广泛的作出禁令的权力，只要是 "公平"（just）与"方便"（convenient），以及要跟从"已有的原则"（established principles）（例如是"*the court would grant injunctive relief if it was necessary to protect the plaintiffs' rights pending the hearing of the action*"，即法院可以作出保护原告在将来诉讼结果中可能获得的权利所必要的中间禁令），因此法院在情况适合的时候有作出限制出境命令的权力。而在此先例中，法院认定了如果允许被告出境，就可能导致资产披露令不被履行或遵守，因此会在保证资产披露令会被履行的必要限度（例如在期限的长短）上作出禁令禁止被告出境。不妨节录部分判词摘要如下：

"*… the wide discretion to grant injunctive relief, under section 37(1) of the Supreme Court Act 1981, in circumstances where it was just and convenient to do so had to be exercised in accordance with established principles; that, although* ***injunctions restraining the first defendant from leaving the country and requiring him to deliver up his passports were novel in character****, it was an established principle that the court would grant injunctive relief if it was necessary to protect the plaintiffs' rights pending the hearing of the action; and that, since there was a risk to the plaintiffs of not being able to obtain the information ordered to be disclosed unless the injunctions sought were granted, whereas any risk of hardship to the first defendant as a result of those injunctions could be remedied by his capacity to apply to the court to vary or discharge them,* ***the injunctions would be granted as being necessary and reasonable orders ancillary to the due performance of the court's functions but the injunction not to leave the country, being an interference with the liberty of the subject, should run only for so long as it was necessary to give effect to the judge's orders***"（加黑部分是笔者的强调）

换句话说，看来根据 Bayer v. Winter (No. 1)上诉庭先例的判法，由于在《Senior Courts Act1981》之 Section 37(1)下法院有非常广泛的权力作出禁令，因此法院可以作出附属性（ancillary）的限制出境命令。这一来就无须根据古老的《Debtor Act 1869》立法，也可以颁布/作出同样效力的禁令，来加强资产披露令的执行。

同时为了必要（necessary）与合理（reasonable），要考虑与权衡被申请人的利益与便利，限制出境只会是尽可能短的时间、让被申请人/被告履行资产披露令。具体而言，此先例中

[190] 《Senior Courts Act1981》之 Section 37(1): "*The High Court may by order (whether interlocutory or final) grant an injunction or appoint a receiver in all cases in which it appears to the court to be* ***just and convenient*** *to do so.*"（加黑部分是笔者的强调）

法院作出了限制出境命令，在命令送达被告后，没有法院的允许被告在 2 天内不得离开英国本土。另外还有附属性的“交出护照命令”（passport order），要求被告将护照交出，直到 2 天时间结束后再予以归还。上诉庭还提到了不希望给作为被申请人/被告的自然人带来过分的困难（hardship）与不便。看来也出于这个原因，在 2 天时间结束后，Bayer 仍然不满意被告披露的资产信息并要求对限制出境命令作出延期，但被法院拒绝，认为这会带来过份的压迫（oppressive）：Bayer v. Winter (No. 2) (1986) 1 WLR 540 先例。

这个问题在更近期的 Kuwait Airways Corp v. Iraqi Airways Co (2010) EWCA Civ 741 上诉庭先例中也有涉及，尤其是被限制出境的是并非诉讼当事人的第三方身上。此先例的背景是在 1991 年伊拉克萨达姆政权入侵科威特，并强占、盗取了此先例中申请人/原告（Kuwait Airways Corp，或简称“KAC”）的所有民用飞机。绝大部分的飞机与备件、零件都被即刻运送回伊拉克（有少部分留存于其他位置，例如有一部分在约旦等）交给伊拉克国有的航空公司，即此先例中的被告（Iraqi Airways Co，或简称“IAC”）。这些飞机与备件、零件在之后美国为首的国际联军的轰炸中被摧毁。之后 KAC 以“侵占”（conversion）等诉因开始了针对 IAC 的诉讼，索赔庞大金额的损失，并后来获得了一系列的针对 IAC 的“判决债权”（judgment debts）。虽然 IAC 已经陆续对部分债务作出支付，但在此禁令申请时仍然欠下 1,200,000,000 美元的判决债务及利息（还会随着时间积累而增加）。这也能想得到这段时期伊拉克、IAC 在经济上极度困难，想要“守信用”支付判决债务，也根本是力不从心。

KAC 及其律师团队常年在全球寻求 IAC 的资产以执行债务，包括知悉 IAC 在加拿大将有新建造的飞机，就前往加拿大申请执行等。而此冻结令的申请则是有新闻指出 IAC 可能即将恢复从巴格达往返伦敦的航线。虽然此航线的飞机应是从瑞典的某租赁公司租赁而来，但为了开通航线，IAC 必然在伦敦机场有一定数额的定金、保证金等，而且通过经营这样的航线业务 IAC 也会产生英国境内的现金收入。因此 KAC 经单方面（*ex parte*/ without notice）申请获得法院作出针对 IAC 的“全球冻结令”（Worldwide Freezing Order），包括针对 IAC 及其董事总经理（Captain Kifah）的附属资产披露令（Assets Disclosure Order）（包括但不限于给伦敦机场的定金与保证金有多少、日后经营的现金来往账户等）。之后 KAC 又单方面申请法院作出进一步命令，要求在 Captain Kifah 作出”誓章/誓词”履行资产披露令前限制 Captain Kifah 出境，并附属“交出护照命令”，以及“法警主任命令”（Tipstaff order）[191]让“法警主任”（Tipstaff）向 Captain Kifah 取得护照。

Captain Kifah 并非英国居民，前往英国只不过是为了公务短暂停留。虽然 IAC 曾经在过往的诉讼中有过不良行为（例如不严格遵守英国法院命令），但与 2006 才开始担任 IAC 的董事总经理的 Captain Kifah 没有关系。而且此先例与 Bayer v. Winter (No. 1)上诉庭先例有重要的不同，即 Captain Kifah 实际上并不是此先例中的被告，Captain Kifah 的身份原本最多只是事实证人。换句话说，并没有针对类似情况的过往先例可以参考。因此法院对于是否要作出限制出境命令，限制 Captain Kifah 的人身自由有非常大的疑虑。但尽管如此，上诉庭仍然作出了限制出境命令，但同时自圆其说地指出：*“I（上诉庭的 Rix 大法官） allow the appeal in large part because of the exceptional nature of the IAC litigation, which is quite unlike most commercial litigation.”*因此虽然在 Kuwait Airways Corp v. Iraqi Airways Co 先例中看来是扩大了对于限制出境命令的适用范围，可以包括并非诉讼当事人的第三方，这也只是显示了法院有

[191] 法警主任命令会包括允许法警主任搜索与进入 Captain Kifah 住所，以及在 Captain Kifah 可能违反禁令时进行逮捕的权力。

作出这样广泛命令的权力。但是在具体裁量权的行使上，这毕竟只是特殊的例外案件，在一般商业案件中也不应会出现。

违反资产披露令的另一个严重后果是构成“民事藐视法院”（Civil contempt of court）。大部分民事藐视法院的案件都是被申请人未履行、未遵守资产披露令，事后被发现与指控，其数量远超违反冻结令等法院命令。毕竟在冻结令下，即使被申请人自己想违反命令转移资产，金融机构也不会配合。但很多人视资产信息为绝对机密，即使连配偶也不会告诉，更不用说在公众面前披露，因此在资产披露令下也遮遮掩掩。这在本章之 1.9 段已经介绍，不在此重复。在近期的 Templeton Insurance Ltd v. Thomas (2013) EWCA Civ 35 上诉庭先例中，认可了过去 Light foot v. Light foot (1989) 1 FLR 414 上诉庭先例中 Jackson 大法官的说法，非常明确的是对于不履行、不遵守冻结令附上的资产披露令的后果，除了是“罚款”（fine）外，还甚至可能是判处“监禁”（prison sentence）的惩罚。不妨节录 Jackson 大法官的说法如下：

“*I shall not attempt to catalogue all these first instance decisions. What they* ***show collectively is that any deliberate and substantial breach of the restraint provisions or the disclosure provisions of a freezing order is a serious matter. Such a breach normally attracts an immediate custodial sentence which is measured in months rather than weeks and may well exceed a year****…*

From this review of authority I derive the following propositions concerning sentence for civil contempt, when such contempt consists of non-compliance with the disclosure provisions of a freezing order:

(i) Freezing orders are made for good reason and in order to prevent the dissipation or spiriting away of assets. Any substantial breach of such an order is a serious matter, which merits condign punishment.

(ii) Condign punishment for such contempt normally means a prison sentence. However, there may be circumstances in which a substantial fine is sufficient: for example, if the contempt has been purged and the relevant assets recovered.

(iii) ***Where there is a continuing failure to disclose relevant information, the court should consider imposing a long sentence, possibly even the maximum of two years****, in order to encourage future co-operation by the contemnor.*”（加黑部分是笔者的强调）

最后要重复的是，中国公司或自然人不要以为自己不在英国（或美国）的管辖范围内生活，就可以对英美法院命令置之不理。今天在英美合作下越来越严格的长臂管辖（long-arm jurisdiction）下，除非可以肯定余生都不会前往、或者是飞机经过英美（以及与他们关系密切的加拿大、澳大利亚、新西兰，也就是所谓的“五眼国家”）。近年来就有听到有头有脸的中国人（包括香港人）在短暂访问五眼国家时被扣押起来，这个风险也并非是“空穴来风”。

2.5资产披露令与自证其罪特免权（self-incrimination privilege）

会有一些情况中，虽然是附属（ancillary）于冻结令、或者是独立（freestanding）并非附属的情况下作出资产披露令，但是会要考虑自证其罪特免权（有关自证其罪特免权的课题会在本书第十三章之 10 段进行介绍）。在这里只重复这重要课题的简单道理/精神。

看过美国电影的都会知道警察在扣押前都要例行公事说："你有权保持沉默，否则你说的每一句话都可能被作为呈堂证供……"这是著名的米兰达警告（Miranda warning），也是美国宪法的要求。这个法律地位或"沉默的权利"（right to silence）在英国普通法早在 1568 年就已经存在：见 R v. Director of the Serious Fraud Office, Ex p. Smith (1993) AC 1 先例。也就是如果对一个问题的回答会被法院认为可能导致该人士自己提供可被刑事起诉、惩罚或罚没的证据，该人士就不能被强制回答这个问题："*No person can be forced to answer a question which would in the opinion of the court have a tendency to expose him to a criminal charge, penalty or forfeiture.*"这个道理/精神适用在所有的诉讼程序，不论是文件披露、质询（interrogation）与盘问等：见 AT &T Istel Ltd v. Tully (1993) AC 45 贵族院先例。在《Civil Evidence Act 1968》之 Section 14(1)也有立法规定如下：

"*(1)The right of a person in any legal proceedings other than criminal proceedings to refuse to answer any question or produce any document or thing if to do so would tend to expose that person to proceedings for an offence or for the recovery of a penalty: (a) shall apply only as regards criminal offences under the law of any part of the United Kingdom and penalties provided for by such law; and (b) shall include a like right to refuse to answer any question or produce any document or thing if to do so would tend to expose the [spouse or civil partner] of that person to proceedings for any such criminal offence or for the recovery of any such penalty.*"

看来，在《欧洲人权公约》（《European Human Rights Convention》或简称 ECHR）生效后，ECHR 之 Article 6 下的人权被视为默示或可以推断包括自证其罪特免权，也可见 Heany and McGuiness v. Ireland (2001) EHRR 12 欧洲人权法院先例。

由于民事诉讼下的资产披露令（Assets Disclosure Order）针对的只是被申请人的资产（assets），因此会涉及自证其罪特免权的刑事犯罪问题表面看来是有限的。然而如果披露会暴露犯罪行为（无论是在英国还是其他国家），在本质上仍然是与自证其罪有关系的。

首先可以分析一下民事诉讼与刑事诉讼之间的不同。在举证责任（burden of proof）方面，民事诉讼（civil litigation）中即使是涉及罪行或不法行为，仍然是根据平衡的可能性（balance of probability）来决定胜负。但刑事起诉（criminal prosecution）中，检方/检察院的举证责任要高得多，不排除合理可能性就无法成功检控与定罪。这一来有许多商业活动中的虚假伪造文件（例如倒签提单、阴阳合约等）或欺诈行为等，会有表面证据显示可能确实发生，在民事诉讼中也足以让作为原告的无辜方胜诉，但由于证据仍然存有疑点（即使这疑点也不过是 5%或 10%的可能性），在刑事指控中仍然不足以保证成功。然而一有了民事诉讼中的资产披露令，就会在部分案件中提供可被依赖在刑事指控中的额外与欠缺的证据

（missing piece of evidence）。例如公务员的雇佣合约（employment contract）下的民事诉讼，如果公务员被法院命令强制披露资产，一旦详尽作出回复与披露的话，会显示该公务员生活与收入不匹配，或者是有大量来源不明的收入。而且在法院命令下作出的披露会是连收入来源、后续支出都清清楚楚列明，要进行进一步调查也相对要容易许多。这一来就可能在法院被成功指控刑事犯罪，而此时该公务员应有自证其罪特免权的保护，作为民事诉讼的被申请人（也就是该公务员）可以合法拒绝根据法院命令作出披露。即使已经很有可能会有刑事指控，在披露后会给控方提供证据、提高控方胜诉的机会，这也是自证其罪。权威说法可见 Rank Film Distributors v. Video Information Centre (1982) AC 380 先例中的说法："*The test is 'a real and appreciable risk of criminal proceedings… being taken against the defendant'…*"

很容易想到的就是涉及资产的犯罪，例如是有关贿赂、欺骗、侵占、盗窃等犯罪。如果是一经资产披露，会显示被申请人有大量来源不明的资产[192]，这为被申请人的犯罪嫌疑提供了证据。又或者是已经发现被申请人有犯罪嫌疑，但是具体的犯罪涉案金额并不清楚，此时就需要了解被申请人的资产情况来确定涉案金额让原告在民事诉讼中计算所有损失（measure of damage）与追踪（tracing）财产等，但这一来也就容易跟进调查获取犯罪证据、甚至是其他犯罪（例如是还涉嫌洗钱等）的证据。另外还会涉及的犯罪则会是在本章之 1.9 段介绍过的违反冻结令（Freezing Order）及其附属命令（ancillary orders），可能会导致的藐视法院的罪行。

也因此自证其罪特免权会影响到资产披露令，一方面是如果涉及受到自证其罪特免权保护个人机密的问题，被申请人会可以拒绝提供有关资产信息。另一方面则是法院在颁布/作出资产披露令的时候就要考虑到可能涉及自证其罪特免权的问题，在命令中给予保护或者是有保护机密或沉默的机制，否则还会导致命令被上诉与被撤销等：见 Den Norske Bank ASA v. Antonatos (1999) QB 271 与 Memory Corp v. Sidhu (No. 2) (2000) Ch 645 等先例。

而且还要注意的是如果涉及的是在外国的犯罪嫌疑（世界各国刑法对于哪些属于刑事犯罪的规定与认定会是很不一样），虽然在英国法下无法享有自证其罪特免权的保护[193]，但是法院在行使裁量权考虑是否要颁布/作出资产披露令的时候，也会考虑是否会对被申请人造成不当影响的因素：见 Credit Suisse Fides Trust v. Cuoghi (1998) QB 818；JSC BTA Bank v. Ablyazov (2016) EWHC 112 (QB) 等先例。在 JSC BTA Bank v. Ablyazov 先例中，针对被申请人颁布/作出资产披露令的时候，就考虑到被申请人披露的信息可能会导致被申请人在外国法院被刑事起诉，因此虽然颁布/作出资产披露令，但是允许有机密会（confidential club）的做法保护有关信息，这将在本书第四章之 1.7.7 段与 1.7.8 段进行介绍。

这方面还需要考虑的是《欧洲人权公约》（ECHR）与人权的问题，有说法是如果可能被提起控告的外国法院采用 ECHR 的标准，而且对刑事审理也是公平程序的话，那么英国法院也不一定需要按照普通法下自证其罪特免权标准进行保护。不妨节录 Steven Gee QC 的《Commercial Injunctions》（2016 年，第 6 版）一书之 17-045 段对此问题的说法：

"*Where the relevant foreign country gives effect to art. 6 of the European Convention on*

[192] 例如 Attorney-General for Gibraltar v. May (1999) 1 WLR 998 先例。

[193] 见 Westinghouse Uranium Contract, Re (1978) AC 547; Attorney-General for Gibraltar v. May (1999) 1 WLR 998 等先例。

Human Rights this is relevant to the exercise of discretion because the question then becomes whether the English court, basing itself on the scope of the privilege at common law, should give a greater measure of protection to the defendant than is afforded by that convention…[194] *There is something unattractive about a court giving a defendant who is at risk of prosecution abroad a lesser protection against self-incrimination than is available to a defendant facing the risk of procecution in UK. On the other hand the common law privilege has been critised at the highest levels, and if the protection afforded by the foreign criminal procedure meets the European standard and is fair, then the English court could conclude that this is sufficient*[195]*."*

将会在下文中再对这些会涉及的罪行与资产披露令进行进一步介绍。

2.5.1 资产披露令与自证其罪直接冲突的例子

2.5.1.1 例子之一：针对不诚实行为诉讼中的资产披露令

民事诉讼（civil action）或商业诉讼可以粗略分成两种不同类型：一种类型就是没有指称不诚实（no dishonesty alleged）行为的诉讼，典型的就是合约的违约/毁约，对合约条文如何解释的争议等；而另一类就是涉及指称不诚实行为（dishonesty alleged）的诉讼，这包括雇主指称雇员涉嫌接受贿赂、秘密佣金等，又或者涉嫌针对财产（包括知识产权等）的盗窃、侵占、欺诈等行为。英国法下，必须有依据与详情（particulars）才能在文书请求（pleadings 或 statements of case）中提出不诚实行为的严重指称。如果在索赔请求（statement of claim）中泛泛地提出但没有详情，是会被法院撤销（strike-out）的。[196]此外英国法下，如果原告要通过提前披露才能为索赔请求提供足够详情，相当于指控没有事实的根据或依据，这是不会被允许的。这可见 Black v. Sumitomo Corp (2001) EWCA Civ 1819 先例中，上诉庭的 Rix 大法官所说如下：

"*Traditionally at any rate, English law has been cautious about the allegation of dishonesty. Thus … in this context on Hytrac Conveyors Ltd v Conveyors International Ltd [1983] 1 WLR 44, where the plaintiffs, who wished to advance a case of conspiracy to infringe their copyright, applied for an extension of time to serve their statement of claim pending the obtaining of interlocutory injunctions. This court, in refusing the application, said this, … 'It has to be remembered by all concerned that we do not have in this country an inquisitorial procedure for civil litigation.* ***Our procedure is accusatorial. Those who make charges must state right at the beginning what they are and what facts they are based upon. They must not use Anton Piller***

194 在《欧洲人权公约》（ECHR）下，在特免权的保护方面会是没有英国法下特免权保护得广泛与细致。例如是在 ECHR 下的特免权并没有绝对性权利的地位，在遇到与其他公共政策/利益冲突的时候需要进行权衡（balance），这方面问题可见本书第九章之 2.3.3.2 段的介绍。而且在英国法下对特免权问题的详细做法与原则，是在 ECHR 下所没有的。

195 该书作者提出的说法是，如果在外国法院针对刑事诉讼的做法符合《欧洲人权公约》（ECHR）的标准，而且也是正当公正的程序的话，英国法院就会认为是保护已经足够，会作出资产披露令要求披露。但法院一般也会在命令中给出保护措施（见本章之 2.5.2 段）保护被披露信息的机密性，以及不得在其他法律行动中使用这些信息。届时被申请人在外国法院被指控的时候就要依赖 ECHR 下的特免权保护。

196 见本书第六章之 4 段。

orders as a means of finding out what sort of charges they can make'

In RHM Foods v Bovril Ltd [1982] 1 WLR 661 the plaintiffs, in a passing off action, sought disclosure in advance of pleading their statement of claim. They alleged a deliberate intent to deceive the public. The judge acceded to the application. This court acknowledged the jurisdiction to make such an order, but considered that ***the exercise of that jurisdiction would require an exceptional case and that it would be unfair to the defendants to order disclosure against them before the plaintiffs had pleaded their serious allegations****."* （加黑部分是笔者的强调）

以上 Rix 大法官提到的两个先例，适用的都是 CPR 生效前的旧高院规则 RSC。第一个先例就是涉及一个指控说是被告串谋侵犯原告的版权，但原告需要通过搜查令看能找到什么证据才能对他的指控提供详情，所以需要向法院申请延期作出与送达索赔请求。但法院拒绝，说是在英国法院的对抗制诉讼下，任何人士作为原告开始提起诉讼时必须已经对被告有了一个法律权利与明确是根据什么事实。

第二个先例是说到法院在特殊的案件下，有要求被告先作出披露的权利。但总体在原告仍未能对这不诚实行为的严重指控与请求提供事实根据或依据时，要求被告先作出披露，对他/她是不公平。

但在千变万化的案件中，也会有情况是虽然可以证明存在不诚实行为与给出部分详情，但是不能给出所有不诚实行为的全部详情。例如在 Den Norske Bank ASA v. Antonatos (1999) QB 271 先例，原告是挪威的一间银行，被告则是原告的前经理，管理有关希腊航运金融业务。由于有证据显示被告在任职期间至少从四个银行客户手中收取了 10 笔总金额达到 70 万美元的贿赂，并因此造成 2 千 4 百多万美元的坏账，而且被告还额外从中获取了超过 1 百万美元的不法利润。因此原告针对被告提起诉讼与索赔损失。此先例中的原告通过内部调查已经获取了足够的表面证据[197]，因此原告也成功申请与获得法院颁布/作出了针对被告的冻结令与搜查令。

显然在上述这类案件，原告很想查清楚被告在职期间到底收受了哪些、多少贿赂等，这些有关的金钱现在都到了哪里。很简单的道理是，原告手上拿到、在文书请求中已经陈述、指称的 10 笔贿赂，可能只不过是被告非法行为中的一部分而已。而对于尚不知情的非法行为（例如根据在职的时间，推断甚至可能有另外 100 笔以上的贿赂），原告最多也只是猜测，无法在文书请求中进行恰当、有详情的指称。这在原告的角度上来看是不公平的，即使是最后成功证明被告的不诚实行为，现有能索赔到的损失，或者更正确的说法是能够取回的自己的财产[198]，可能也只是一部分而已（110 笔贿赂中，只成功收回 10 笔）。因此原告能做的只能是申请法院的资产披露令了解被告的资产情况。根据披露的资产情况才能够了解被告非法

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[197] 上诉庭在判词中说："*they had a strong prima facie case that D.A. had taken bribes and been a party to a fraud, and utilised front companies to disguise the whereabouts of the spoils…*" 原告银行已经获取的表面证据，包括个别行贿、给出秘密佣金的希腊船东的证言，被告发出给一位船东的电文（银行每融资 100 万，自己要收取 1%的秘密佣金），以及估计是被告成立的利比里亚公司收取秘密佣金。

[198] 作为代理人（雇员）违背诚信义务收受贿赂或秘密佣金的时候，法律地位实际上会认定是代委托人（雇主）信托持有这笔收受的贿赂或秘密佣金，委托人可以寻求救济，要求代理人交还这笔金钱（"*where an agent received a bribe or secret commission in breach of his fiduciary duty to his principal the bribe or commission was held by him on trust for his principal who accordingly had a proprietary remedy in respect of the bribe or commission.*"）：见 FHR Ventures v. Cedar Capital (2015) AC 250 最高院先例。

行为的程度以便修改自己的文书请求、索赔金额等，以及可以及时追踪赃款的去向。简单说，高院一审颁布/作出了针对被告的资产披露令，然而被上诉庭以其他原因（资产披露令被认为并没有提供保护自证其罪特免权的机制）推翻。但从这个先例可以看到申请人/原告是有以资产披露令来找出有不诚实行为的被申请人/被告的全面资产信息的需要，否则就无法在索赔请求中提供所有损失的详情，这显然对这类案件的原告很不公平。

即使是现在英国法院在《Senior Courts Act 1981》下有广泛地作出资产披露令的管辖权，可以想到被告在此时会有两个抗辩。第一个就是这会属于钓鱼取证/摸索证明（fishing expedition），毕竟即使是披露，也只是与文书请求（Statements of Case）中陈述的有关案情（例如是员工在职期间贪污受贿）才会属于有关联性与可以要求披露，也可见本书第七章之 7 段。而上一段的例子可能存在 110 笔贿赂但文中请求中只包括了 10 笔，所以其余不可以针对怀疑存在的 100 笔贿赂要求披露，因为谈不上有关联性。但这个抗辩在 1999 年生效的 CPR 下是比较容易绕开的，毕竟引入了诉前披露命令（Pre-action Disclosure Orders），法院可以同样的大道理与理念来处理：见本书第二章之 2 段。

更麻烦的，也是第二个抗辩就是自证其罪特免权（Self-incrimination Privilege）的问题。例如是原告掌握了被告有一次不法行为的表面证据，并针对这一次不法行为提起诉讼后向法院申请针对被告的资产披露令。这可以解释说是民事诉讼与刑事诉讼的证明标准不同（例如后者疑点利益归被告，所以民事诉讼有足够证据证明平衡的可能性是不够证明刑事犯罪，尤其严重的刑事犯罪），这里也针对的只是民事诉讼中的不法行为（unlawful conduct），未必涉及刑事诉讼犯罪后果。但资产披露令会是针对很广泛的内容，如果除了这一次不法行为，被告实际背后还有其他 100 次不法行为。这一来被告的广泛的资产信息一旦被披露，岂不是把这背后的其他的 100 次不法行为的情况都一并暴露出来？而这些广泛的资产信息的内容中有关这 100 次不法行为的部分有可能清楚证明了刑事犯罪行为，显然这本应是受到自证其罪特免权保护的。

以下会分段针对这两方面问题。

2.5.1.1.1 法院对需要进一步披露才能为不诚实行为案件的受害人索赔全部损失提供足够详情的态度改变

在 Internatiional Fund for Agricultural Development v. Jazayeri (unreported, 8 March 2001) 先例中，原告已经向法院显示了有良好的表面证据证明被告存在贿赂等问题，想要继续找出被告是否还有其他的贿赂，因此向法院申请资产披露令。但这被 Morison 大法官拒绝，理由就是这并非是针对已经在法院诉讼中的争议（没有在文书请求中作出陈述），而是想要找出被告是否有其他犯罪，这就会是在钓鱼取证/摸索证明（fishing expedition），也会与自证其罪特免权有冲突。

但在近期的 BDW Trading Ltd v. Fitzpatrick (2015) EWHC 3490 (Ch)先例中可以说对这个问题有所澄清，得出与 Internatiional Fund for Agricultural Development v. Jazayeri 先例的不同结论。此先例中作为原告的雇主属于大型建筑工程集团（英国最大的房屋建筑集团），而被告则是原告的前雇员，曾担任原告的采购部门经理。被告在职期间，还自己偷偷地作为独任董

事与唯一股东成立了另一间独立的公司（估计是皮包公司）。雇主就指称雇员在职期间（自己以及通过其公司）从雇主的分包商（sub-contractor）处收取秘密利益、贿赂，也提供证据显示这秘密利益、贿赂的总金额可能超过 100 万英镑，而且雇员日常开销明显是远大于雇员自己的收入（例如购买多辆名贵汽车、给家人提供巨额金钱等）的。雇主成功获得法院颁布/作出的针对雇员及其公司资产的冻结令，与附属的资产披露令要求雇员及其公司披露所拥有的财产与过去 12 个月的银行账单。根据法院命令，雇员披露出来的内容显示他与妻子共同拥有一幢物业，而银行账单虽然曾经收取过一笔分包商汇出的 1 百万英镑的汇款，但目前的个人积蓄以及公司账户中的余额都非常有限。雇主就接着进一步申请要求披露过去 5 年的银行账单记录等信息。这被雇员拒绝，指称这完全是雇主在钓鱼取证/摸索证明。

但雇员的说法被法院拒绝，Behrens 大法官指出现有的证据已经显示有很强的表面案件（strong *prima facie* case）显示雇员及其公司的确参与了实施不诚实计划（dishonest scheme），从雇主的分包商处获取秘密利益，而且在银行账户中也已经显示出有一笔雇员无法解释的来自于分包商的汇款，因此银行账户与此案件中的争议本身是有关联性的，雇员到底收取了多少秘密利益、不诚实行为到底有多严重在之后必然会需要雇员披露进一步的银行账户信息，这只不过是时间早晚问题。这是因为在此先例中的雇主申请披露过去 5 年的银行账单记录时间尚早，作为原告的雇主仍然没有作出与送达索赔请求（statement of claim）。而且对于雇主来说，只有依赖现在的披露了解详情（particulars），才能进一步采取行动。不妨节录 Behrens 大法官所说如下：

"*I do not regard the request for the bank statements as a 'fishing exercise'. The evidence … provides* ***a strong prima facie case*** *that Mr Fitzpatrick and TCS (雇员及其公司) have participated in a dishonest scheme to receive secret profits from BDW（雇主）'s subcontractors. Mr Fitzpatrick has chosen not to answer the allegations in any way other than a bare denial. Whilst it is true that there has been no detailed Particulars of Claim, the brief details of the claim are set out in the Claim Form and substantial circumstantial evidence is provided in … evidence. None of this has been answered. Furthermore, the bank statements already disclosed have revealed unexplained payments of over £1 million from BDW's subcontractors.*

In my view the bank statements will plainly be relevant and thus disclosable and thus the ***only question is whether to order disclosure at this early stage or leave the matter until after the close of pleadings in the ordinary way****.*

I agree with Mr Toledano QC（雇主的代表大律师）that it is appropriate to order immediate disclosure of the bank statements. I agree that ***BDW has no realistic other practical way of discovering the full extent of the scheme.*** *I also agree that* ***the sooner the order is made the more likely it is that BDW will be able to take appropriate action against other persons involved.***"（加黑部分是笔者的强调）

而在是否要行使裁量权（discretion）颁布/作出命令的问题上，法院也指出雇主的披露要求是合乎衡平法（equity）要求的，针对雇员违背诚信义务/忠实勤勉义务（fiduciary duty）的收受贿赂、秘密佣金等行为，雇主也可以获得经济上的救济，因此有必要尽可能早地[199]协

[199] 在 Bankers Trust v. Shapira (1980) 3 All ER 353 先例中，Waller 大法官就提到说，针对这种情况能够越早追

助雇主追踪资金、财产去向。由于银行账单是可以简单获得的，因此为了披露所花费的时间与费用也不存在不成比例（disproportionate）的问题。另外这并不算是钓鱼取证/摸索证明。

因此在此先例中就可以看出，由于已经有强有力的表面证据证明了雇员存在这些不诚实行为，因此要求资产披露并非是钓鱼取证。毕竟雇主指称雇员存在不诚实行为，是已经被纳入诉讼程序的争议，资产信息就会是有关联性因此需要披露，根据 CPR 之 Rule 31.12 本就可以要求披露。因此为了调查清楚这些非法行为的程度以及具体贿赂等行为的涉案金额，法院会颁布/作出资产披露令，让作为受害人的原告可以为全部的损失提供足够详情。但如果不诚实行为本身并非诉讼程序要解决的问题，又或者是资产信息与争议无关、并不属于披露内容，就不会颁布/作出资产披露令。

可以简单节录在《Commercial Injunctions》（2016 年，第 6 版）一书之 23-011 段作为此类指控不诚实行为但不知道严重性与/或全部损失的案件，可作出资产披露令的法律地位的小结：

"… historically the court has not allowed discovery in relation to allegations of dishonesty which were not pleaded; the court would not allow a plaintiff to fish for material on which to make an allegation of dishonesty because the civil process was accusatory（指对抗制的诉讼程序） and not inquisitorial. But this fails to distinglish between a case in which no allegation of dishonesty has been advanced and one in which the dishonesty is alleged, and is based on evidence. That each bribe or each theft give rise to a separate cause of action is descriptive of the legal mechanics, but it conceals that the real question is about the full extent of the dishonesty, which has been alleged, and quantum. It also overlooks the need for urgency in preserving dishonestly acquired assets; the process there is inquisitorial. Subject to the question of self-incrimination of the defendant, it would not be consistent with the doing of jusitice to allow the thief to keep a part of his ill-gotten gains, and to deny the victim an effective and full remedy. When proceedings are commenced claiming an account of bribes or secret profits specific disclosure can be ordered under CPR r. 31.12[200]. It is considered that for these reasons the view of the judge in International Fund for Agricultural Development v. Jazayeri was mistaken."

2.5.1.1.2 不诚实行为的民事诉讼的资产披露令针对自证其罪特免权的对应办法

根据 BDW Trading Ltd v. Fitzpatrick (2015) EWHC 3490 (Ch)先例的判法，只要是与不诚实行为的指控有关联性，法院都仍然会颁布/作出资产披露令。但法院会关心的是，被申请人/被告在面对这类资产披露令的时候不知道依赖自证其罪特免权拒绝披露信息，或者换句话说被申请人/被告不知道可以拒绝披露受保护文件而不会属于违反命令。因此在法院的资产披露令中，一般也会给予特别的机制予以保护，例如是会在命令中写明不允许将披露的信息用于此诉讼以外的其他任何用途等，这将在本章后文之 2.5.2 段进行介绍。被申请人/被告按照

踪到金钱去向越好（"*the sooner steps are taken to try and trace where it is the better*"）。

[200] 这也就是在诉讼中要求对方作出一般披露有关实质争议的信息、以及披露额外信息的有关 CPR 规则。

资产披露令进行披露的时候，即使是有部分资产信息在咨询过律师后，律师的法律意见是认为会受到自证其罪特免权保护（这也未必是与当前争议有关，例如有一笔金钱的来源非法[例如是伊朗、朝鲜被制裁期间，金钱来源于伊朗、朝鲜]），那么被申请人/被告大可以对这部分资产信息拒绝披露，例如是将要披露的银行账单记录中的有关部分内容进行遮盖（redaction）等。

在一些特定类别的案件中，已经专门有立法给予针对。例如涉及的是盗窃案件的话，根据《Theft Act 1968》之 Section 31(1)涉嫌此立法下盗窃犯罪的人不得依赖自证其罪特免权在民事诉讼拒绝向作为原告的受害人披露信息导致原告无法追回赃款与/或索赔所有损失，可节录如下：

*"A person shall not be excused, by reason that to do so may incriminate that person or the wife or husband of that person of an offence under this Act—(a) from answering any question put to that person in proceedings for the recovery or administration of any property, for the execution of any trust or for an account of any property or dealings with property; or (b) from complying with any order made in any such proceedings; b****ut no statement or admission made by a person in answering a question put or complying with an order made as aforesaid shall, in proceedings for an offence under this Act, be admissible in evidence against that person or (unless they married after the making of the statement or admission) against the wife or husband of that person.****"*

以上加黑的这句立法条文显示了对披露被盗窃财产去向的嫌疑人，这披露的信息不能在之后的刑事诉讼中被法院采纳作为证据，所以本质上仍然是尊重不得强制被告自证其罪的大精神。同样的立法也可见《Fraud Act 2006》之 Section 13。这些都是英国议会（Parliament）认为应该立法暂时排除自证其罪特免权，否则会对某些类型的民事案件中作为原告的无辜方造成更不公平的情况。

2.5.1.2 例子之二：冻结令与资产披露令下的藐视法院与对被申请人的盘问

在本章之 1.9 段已经介绍过，在冻结令下会有各种行为可能触犯藐视法院的罪行。这会包括是违反法院命令擅自处置资产、导致资产流失，而更常见的是违反法院的附属资产披露令，在向法院提交的誓章/誓词（Affidavit / Affirmation）中有虚假陈述或刻意遗漏等。

例如在 Memory Corp v. Sidhu (No. 2) (2000) Ch 645 先例中，原告在之前已经成功申请到法院颁布/作出针对被告的冻结令，命令还要求被告披露资产信息。相应地被告也向法院提交誓章/誓词。之后原告就申请命令要求被告在法院接受针对誓章/誓词及披露的资产信息的盘问（cross-examination）。此时被告就指出，自己如果接受盘问，给出的回答可能会被原告用来申请被告藐视法院的罪行。

有关针对被申请人提交的誓章/誓词，申请人可以要求被申请人在法院接受盘问已经在本章之 2.4 段简单提到。针对资产披露令，是否可以命令被申请人接受盘问的问题也曾经有

争议，例如在 Bayer v. Winter (No. 2) (1986) 1 WLR 540 先例中想要通过盘问显示被申请人没有遵守资产披露令，就被法院拒绝。Scott 大法官在判词中说："*Star Chamber interrogatory procedure has formed no part of the judicial process in this country for several centuries.*[201] *The proper function of a judge in civil litigation is to decide issues between parties. It is not, in my opinion, to preside over an interrogation. The police, charged with the upholding of the public law, cannot subject a citizen to cross-examination before a judge in order to discover the truth about the citizen's misdeeds.*[202] *How then, as a matter of discretion, can it be right in a civil case, in aid of rights which, however important, are merely private rights, to subject a citizen to such a cross-examination?*[203] *A fortiori it cannot be right to do so in a case where the plaintiff seeking the cross-examination of the defendant is holding itself free to use the defendant's answers for the purpose of an application to commit him to prison for contempt.*[204]"

在这个判法下，看来被申请人/被告对资产披露令的回复无论是否准确，都是没有申请到盘问被申请人的机会的。但后来有了 House of Spring Gardens Ltd v. Waite (1985) FSR 173 上诉庭先例进行澄清，还是可以盘问的（虽然盘问针对的问题是有限的）。

法院在《Senior Courts Act1981》之 Section 37 下有广泛的权力给出命令，关键仍然是法院根据公平（just）与方便（convenient）如何行使裁量权的问题。对被申请人/被告的盘问不能涉及当事人之间的待法院决定的争议，也不能是为了将来的案件审理提前获取被告的证据。一般案件中都是不会轻易允许提前披露的，毕竟在对抗制（adversial 或 accustory）诉讼中，让一方提前获取对方证据，是不公平地获得将来审理时的优势。显然也不能针对被告为什么没有严格遵守法院命令，允许这方面的盘问可能会导致被告自证藐视法院的问题，如质疑誓章/誓词中内容的正确性等。

正如 House of Spring Gardens Ltd v. Waite 先例中 Vos 大法官所说，对资产披露令的盘问是非常例外的情况，只有在说服法院通过盘问能够问出有关资产的细节、金钱流向时，法院才会行使裁量权允许对被申请人的盘问：

"*Against the background of those authorities and the submissions of the parties which were not much at odds as to the principles to be applied, it seems to me that the requirements for odering cross-examination in circumstances such as these may be summarised as follows: … (2) generally cross-examination in aid of an asset disclosure order will be very much the exception rather than the rule. (3) it will normally* ***only*** *be ordered where it is likely to further the proper purpose of the order by, for example, revealing further assets that might otherwise be dissipated so as to prevent an eventual judgment again the defendants going unsatisfied.*"

也可以简单解释为什么盘问会有效果。因为以誓章/誓词的方式披露资产信息的时候，

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201 "星室法庭"（Star Chamber）是英国国王亨利七世在 1487 年成立的法院，被认为是英国历史上最重要的专制机器，在今天代表了中世纪即抓即判（swift justice）、滥用司法的做法，也是漠视人权做法的代表。

202 即使是公法范畴，警察也不可以为了找出普通市民做了哪些错事，强制普通市民在法官面前接受盘问。

203 所以在民事诉讼中，原告的私人权力无论多重要，也不会足以说服法院行使裁量权，强制被告在法官面前接受盘问。

204 允许原告通过盘问被告以获取与自由使用（例如是将信息交给检察院/刑事检控机关等）可以指控被告藐视法院的信息的做法是不妥当的。

一方面是会有时间上的拖延，另一方面是靠文书进行这些披露是很难真正说清楚的。即使之后再追加要求更好的资产披露令，对于复杂资产披露的效果也是有限的。但是让被申请人在法官面前接受盘问的时候，不能不予回答（这会是藐视法院），又不能随意给错误答案（这会是伪证[perjury]）。而且给出一个回答的时候，盘问的律师会有进一步的一连串问题，例如回答说"这笔钱交给了我的母亲，我也不知道后续去向"，那律师就会继续追问例如是"你母亲的年龄、收入来源、日常开支"，"你母亲是否和你住在一起"，"你母亲是否有安排遗产、遗嘱等"等问题。

这也可以从另一个方面进行理解，因为资产披露令的目的是为了辅助法院命令（冻结令）的执行，又或者是为了帮助法院判决、仲裁裁决的执行，又或者是为了了解被申请人的背景有利于案件管理等。而至于被申请人是否在誓章/誓词中涉嫌虚假陈述、会属于藐视法院的问题，这并非资产披露令所针对的目标和目的，也因此有说法本就不应当把这两种不同目的混淆在一起（blend together）：见 Phillips v. Symes (2003) EWCA Civ 1769 先例。因此在前者的情况中，被申请人是可以依赖自证其罪特免权拒绝披露的。

也可以节录《Commercial Injunction》（2016 年，第 6 版）一书之 23-028 段对法院只允许有限度盘问的说法如下：

"*The proper purpose of such a cross-examination is to reveal further information about assets so that they can be located and preserved. Unless the claimant discharge the burden of showing there is some real prospect of achieving this by cross-examination, the court should decline to make an order. If there are already sufficient assets revealed, to meet the financial limit in a Mareva injunction and which will be available to satisfy a judgment, the court will not order cross-examination to see if there are further assets. An order may be made which is to take effect if a defendant continues not to provide disclosure of assets pursuant to an order.*"

可以在这里介绍 Access Bank Plc v. Rofos Navigation Ltd (2012) EWHC 4065 (Comm)先例。原告有 4 万吨石油产品在尼日利亚遭到被告（们）非法侵占，由于案件报道并不详细，因此并不清楚具体情况。但这类案件不少，最常见的会是无单放货，或者是被告以假提单将货物提走等。原告在英国起诉被告索赔 1 亿 3 千多万美元损失（主要是这批石油产品的损失）。原告成功申请并获得法院颁布/作出冻结令与全球资产披露令。在资产披露令中要求（部分）被告披露全球所有超过 5 万英镑价值的资产信息，也要求被告披露应属原告的石油产品之去向。

被告虽然委托了英国代表律师，但是没有及时作出披露。被告通过律师告知英国法院，自己已经被尼日利亚法院冻结了财产，公司高管等无法回到公司（甚至是住宅），但有关资产资料主要是存放在公司的，因此被告无法披露。被告也提出信息如果披露给英国法院，还会对自己在尼日利亚法院面对的诉讼有不利影响。

由于书面的资产披露令没有获得什么信息，因此原告申请对被告的盘问。英国法院的 Popplewell 大法官允许了盘问，还给出了最后命令（Unless Orders）。针对可能的不利影响，法院给出的保护措施是，命令原告所获得的信息只能用于英国诉讼，而且原告及其律师等都要对此作出个人担保。

在 Jenington International Inc v. Assaubayev (2010) EWHC 2351 (Ch)先例中，法院目前对什么时候适合要求被告接受盘问作出了详细的指引，这权威说法也被不少后续先例跟从与认可，不妨节录如下：

"*(i) The statutory jurisdiction discretion to order cross-examination is broad and unfettered. It may be ordered whenever the court considers it just and convenient to do so.*[205] *(ii) Generally, an order for cross-examination in aid of asset disclosure will be very much the exception rather than the rule.*[206] *(iii) It will normally only be ordered where it is likely to further a proper purpose of the order by, for example, revealing further assets that might otherwise be dissipated so as to prevent an eventual judgment against the defendants going unsatisfied.*[207] *(iv) It must be proportionate and just, in the sense that it must not be undertaken oppressively or for an ulterior purpose. Thus, it will not normally be ordered unless there are significant or serious deficiencies in the existing disclosure.*[208] *(v) Cross-examination can, in an appropriate case, be ordered where assets have already been disclosed in excess of the value of the claim against the defendants.*[209]"

上述的英国法律地位很容易会想到的问题是，如果被申请人/被告在誓章/誓词中有虚假陈述等内容，并且在接受盘问的时候不自觉地透露出来，被申请人会有很多的麻烦。毕竟哪些可以盘问、哪些不可以盘问，分水岭并不十分清楚，是存在灰色地带的[210]。虽然在法院接受盘问，不论是亲自前往还是通过视频连接，估计被申请人都会有律师陪同。但这也要依赖律师有很高的水平与高度警觉等。但大原则仍然是被申请人自己应该警觉，一旦对方的问题可能涉及针对自己违反法院资产披露令导致被认定藐视法院，或针对誓章/誓词中有虚假内容涉及伪证，就要依赖自证其罪特免权拒绝回答。有关先例可见 Memory Corp v. Sidhu (No. 2) (2000) Ch 645；Cobra Golf Inc v. Rata (1998) Ch 109 先例，Bhimji v. Chatwani (No.2) (1992) 1 WLR 1158 等先例。

对于申请人/原告来说，这些盘问也是很麻烦与昂贵的。时常面对被申请人/被告以自证其罪特免权拒绝回答。此时即使是由法官决定被申请人/被告是否要回答，这个决定也会被上诉。因此时常搞到盘问半途而废，草草了事。在 Accident Insurance Mutual Holdings Ltd v. McFadden (1993) 31 NSWLR 412 澳大利亚先例中，Kirby 大法官就说：

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205 法院在立法下颁布/作出命令，要求被申请人接受盘问的权力是很广泛、没有什么限制的。只要是法院认为是公正与方便（"*just and convenient*"）就可以。这也就是本章多处都介绍过的《Senior Courts Act 1981》之 Section 37(1)赋予法院的广泛的权力。也可见 Yukong Line Ltd of Korea v Rendsburg Investments Corporation of Liberia (1996) EWCA Civ 759 上诉庭先例中 Phillips 大法官所说，冻结令下的被申请人是否要接受盘问的测试标准就是考虑是否公平与方便："*the test is simply whether, in all the circumstances, it is both just and convenient to make the order.*"

206 但是为了资产披露，要求被申请人接受盘问应该是非常例外的少数情况。

207 通常只有当盘问有机会问出更多容易流失的资产，让申请人/原告可以申请将其包括在冻结令中或进行财产保全时，才会要求被申请人接受盘问。

208 必须是合比例与公平的，也不能是别有用心对被申请人造成过分压迫。除非是现有的披露中存在重大不妥、瑕疵，否则是不会颁布/作出这样的命令的。

209 在有的案件中，即使是被申请人已经披露了超过索赔金额的资产，但仍然可以要求被申请人接受盘问：见 Motorola Credit Corp v. Uzan (No.2) (2004) 1 WLR 113 先例。

210 例如是被申请人/被告有 40 万美元交给自己的母亲，因此盘问"这笔金钱来源"， 被申请人/被告回答"这是借贷得来"，再进一步盘问"是从谁哪里借贷来的"， 被申请人/被告就依赖自证其罪特免权拒绝回答。这些盘问的例子会是千变万化，有关分析哪些问题可以问、哪些不能问，或者是哪些即使问了也可以拒绝回答的可见 Den Norske Bank ASA v. Antonatos (1999) QB 271 先例，在其中举了很多例子。而该先例一审的判决也有很多被上诉庭改判，因此这方面是不稳定的。

"*a point will be reached in questioning where it will be unnecessary to persist with an entire cross-examination which is clearly futile by reason of the invocation of the privilege against self-incrimination. To demand a tedious repetition of questions, rebuffed every time by a claim of privilege which is upheld, would be pointless…*"

最后对于盘问中哪些情况可以依赖自证其罪特免权的法律地位，可以节录 Sociedade Nacionale de Combustiveis de Angola UEE v. Lundqvist (1991) 2 QB 310 先例中上诉庭的 Staughton 大法官所说如下：

"*The substance of the test is thus that there must be grounds to apprehend danger to the witness, and those grounds must be reasonable, rather than fanciful. Other points that emerge from the cases are these: (i) the affidavit claiming privilege is not conclusive: see Reg. v. Boyes, 1 B. & S. 311, Ex parte Reynolds, 20 Ch.D. 294 and Khan v. Khan [1982] 1 W.L.R. 513 ; (ii) the deponent is not bound to go into detail, if to do so would itself deprive him of protection: see Short v. Mercier (1851) 20 L.J.Ch. 289 , 292, and the Westinghouse case [1978] A.C. 547; (iii) 'if the fact of the witness being in danger be once made to appear, great latitude should be allowed to him in judging for himself of the effect of any particular question:' see Reg. v. Boyes, 1 B. & S. 311 , 330; the Westinghouse case [1978] A.C. 547 and Khan v. Khan [1982] 1 W.L.R. 513; (iv) the privilege is not available where the witness is already at risk, and the risk would not be increased if he were required to answer: see Brebner v. Perry [1961] S.A.S.R. 117 and the Westinghouse case; (v) 'if it is one step having a tendency to criminate him, he is not to be compelled to answer' (see Paxton v. Douglas (1809) 16 Ves. Jun. 239, 242) and 'as it is one link in the chain of proof:' Paxton v. Douglas (1812) 19 Ves. Jun. 225, 227. That last point recurs in other cases (e.g. the Westinghouse case), and may be important. I am inclined to think that it refers to any fact which a prosecutor would wish to prove in order to establish the guilt of the witness on a criminal charge. In the Rank Film Distributors case [1982] A.C. 380, 443, Lord Wilberforce said that disclosure: 'may set in train a process which may lead to incrimination or may lead to the discovery of real evidence of an incriminating character.' That may be thought to go rather further, and to protect a man from having to disclose the names of those who could give evidence against him—assuming that there was otherwise power to require that information: see also Short v. Mercier, 20 L.J.Ch. 289, 292—'how evidence can be got.' I am not presently convinced that the privilege, by virtue of the doctrine of links in a chain, extends as far as that. But the point need not be decided in this case.*"

2.5.2 在资产披露令中需要提供机制保护自证其罪特免权

在所有的单方面（*ex parte*/without notice）申请中，一般都需要提供保护自证其罪特免权的机制。在本书第二章之 3.3 段针对搜查令（Search Orders）与本章之 1.7.5.1 段针对冻结令（Freezing Order）时，都有提到这方面的保护机制。

针对资产披露令而言，如果是单方面申请的话，由于是听取一面之词，法官也不会知道双方的情况，因此只要是有针对案件本身的强有力的表面证据、能够在法院裁量权下说服法院的话，法院一般都会给出资产披露令。重要的是由申请人草拟的命令，在内容上需要提醒

被申请人有关自证其罪特免权的权利。可以节录 Tate Access Floors Inc v. Boswell (1991) Ch 512 先例中 Nicolas Browne-Wilkinson 大法官所说：

"*In the ordinary case, it is up to the defendant to put forward the claim to privilege. However the Rank Film case [1982] A.C. 380 establishes that, where an ex parte order is sought which might in practice preclude the defendant from raising the claim to privilege before the order is executed, the judge should not have made the ex parte order at all…*"

不妨节录《Commercial Injunctions》（2016 年，第 6 版）一书之 17-039 段对此问题的说法如下：

"*If an order sought ex parte could give rise to a claim of privilege against self-incrimination, the court will consider whether, objectively, there is a risk, and whether the case falls within a statutory exception. If a proposed order is to take effect after a short interval to enable the defendant to take legal advice*[211]*, and there is the possibility that the defendant might wish to claim privilege, the order should contain an express provision preserving the privilege and requiring the defendant to be informed of his right to take the point if he so chooses*[212]*. An order which is silent on these matters should not be made. It is not permissible to make a mandatory order for disclosure of the potentially incriminating materials leaving it to the respondent to disobey the order on the ground of self-incriminating.*

If a mandatory order for disclosure is to be made on a without notice application, and potentially it could include material for which the privilege might be available. The order itself must enable the respondent to claim the privilege without that being in breach of the order, and an unqualified mandatory order for disclosure can only be made when there is no possibility of the incriminating material being used by a prosecutor. The order must not provide that notwithstanding the claim to privilege the material must be handed over for safe keeping pending determination of the claim to privilege. This is because if the privilege applies the order for handing over the material would itself be inconsistent with the privilege. In Memory v. Sidhu… the order provided that if the defendant claimed to invoke the privilege he had to provide the information to the supervising solicitor '… who will hold such information to the order of the court'. The Court of Appeal had already critised this form of order as inadequate to safeguard the privilege, and the point that this was justifiable was not pursued on the appeal."

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211 因此在资产披露令中不能要求马上（immediately）、即刻（forthwith）就作出披露的措辞/文字，而是要现实要考虑被申请人作出资产信息披露所需要的时间，不至于让被申请人即使想要遵守法院命令也由于实际上做不到而违反命令。在 Oystertec Plc v. Davidson (No.1) (2004) EWHC 627 (Ch)先例中 Patten 大法官说："*… judges who are asked to make orders of this kind, particularly where they are made (as in most cases) on a without notice basis, need, in my judgment, to have firmly in mind what is a realistic timetable for compliance, having regard to the scope of the information and the range of documents which the respondent is required to produce. It is not satisfactory to impose an almost impossible deadline simply on the basis that the respondent, if in difficulties, can always apply to the Court for a variation of the order. Some respondents may not have immediate access to legal advice, and a failure to appreciate the implications of not complying within the time limits prescribed by the order may have extremely serious consequences.*"

212 在今天的资产披露令范本（见本章之 2.2 段）也有条文专门针对："*(2) If the provision of any of this information is likely to incriminate the Respondent, he may be entitled to refuse to provide it, but is recommended to take legal advice before refusing to provide the information. Wrongful refusal to provide the information is contempt of court and may render the Respondent liable to be imprisoned, fined or have his assets seized.*"

另一个机制，就是申请人要提供担保（Undertaking）。在本章之 2.2 段已经提到标准格式资产披露令中的条文，也可以再次节录有关部分如下：

"(9) The Applicant will not without the permission of the court use any information obtained as a result of this order for the purpose of any civil or criminal proceedings, either in England and Wales or in any other jurisdiction, other than this claim

(10) The Applicant will not without the permission of the court seek to enforce this order in any country outside England and Wales [or seek an order of a similar nature including orders conferring a charge or other security against the Respondent or the Respondent's assets]."

虽然法律默示诉讼方与其代表律师不能将诉讼中获得的文件用在其他用途，也就是所谓的"Raddick 原则"，但因为资产披露令可能产生的严重后果，所以应该在命令中明示说明。例如在上一小段介绍的 Access Bank Plc v. Rofos Navigation Ltd (2012) EWHC 4065 (Comm)先例中，原告及其律师都被命令对所获得的信息只能用于英国诉讼作出个人担保。在本章之 1.2 段介绍的上诉庭的 Arden 大法官 Dadourian Group International Inc v. Simms (2006) EWCA Civ 399 先例中给出的"Dadourian guidelines"中，也针对了同一个课题。

此外，法院提供的另一个保护机制是成立所谓的"机密会"（confidential club）[213]，即可能会导致被申请人/被告自证其罪的信息只让申请人/原告律师知道，这一来也就没有了自证其罪的危险：见 JSC BTA Bank v. Ablyazov (2016) EWHC 112 (QB)先例。

3. 笔者对冻结令与资产披露令的感想

总体来说，英国这几十年发展起来并延伸到所有普通法国家或地区的这套机制是完善的，站在英国法律的角度上看是在方方面面保证了公正。笔者也觉得这套机制十分有存在的必要，毕竟现在国际商业社会存在大量的诈骗案件，各个国家巨额贪污受贿的情况也屡见不鲜。如果没有这套机制帮助追回这些金钱，国际社会只会更加混乱。这些年来，中国的自然人与公司作为诈骗案件的受害人蒙受了大量损失[214]，外逃的红通人员也造成了大量国有资产流失，可以说中国在国际上冻结资产以保护自己的利益的需求比很多西方国家更大。虽然这套制度是由英国建立，但只要善用制度可以保护自己的利益又有何妨呢？所以，最关键的还是要传播这方面的知识，让更多商业人士、律师等知道存在这样的救济方式，然后懂得怎样善用。

但从另一个角度看，这套制度也有其对发展中国家非常不利的一面。一个十分现实的问题在于发展中国家并非处于英国的法律环境，自然人或公司法人知道与畏惧藐视法院的严重后果的恐怕也不多。加上在发展中国家的环境下，即使咨询了当地的律师又有多少律师知道这套复杂而精细的国际游戏规则呢？把英国这套制度强制适用在这些人士身上是不公平的。

特别是针对资产披露令，即使在相对透明的西方国家，对很多人来说披露资产也是要了他/她的命。而且除非是穷光蛋，否则全面的资产信息披露会是很困难与耗费时间、金钱的，

[213] 关于成立机密会保证信息的机密性可见本书第四章之 1.7.7 段与 1.7.8 段。
[214] 可见本章之 1.12.5 段。

也容易有错漏。在发展中国家的环境中，资产信息披露做法会是更加危险。在实践中，发展中国家的自然人与公司法人在面对这套英国制度时，即使不想犯法（英国刑法），往往也很难避免。因此，发展中国家的被申请人/被告面对英国法院命令，就只能是全面投降任人宰割，或是被逼上梁山（藐视法院）。

笔者认为无论这套制度对中国是利是弊，都在实际上帮助稳固了英美律师在国际上的垄断地位（这是现状）。另外，在今天英国（与美国的配合与类似做法）无远弗届的长臂管辖（long-arm jurisdiction）下，这是要“软性”统治世界，以另一种方式来恢复以前大英帝国的地位。在本章之 1.5.1.3 段提到的 Arcelor Mittal USA LLC v. Essar Steel Limited (2019) EWHC 724 (Comm)先例就是无数先例中的一个例子。

今天国际商业规则仍然是由英美法律主导（也难有同等水平的竞争者），发展中国家的公司如果要走出去，就难以避免面对这些困难。看来发展中国家（包括中国）仍然是要尽快提高自己的思维水平与掌握这套国际游戏，等到有大批人才建立同样的法律机制，才能与现在美国、英国的地位进行对抗。要知道这套规则是双刃剑，如果不了解，就只能任人宰割，伤到自己。但如果能够熟练掌握与应用，不仅可以保护自己的利益，还能向外发起“进攻”。