No.

IN THE
Supreme Court of the United States

WORLD PROGRAMMING LIMITED,
Petitioner,

v.

SAS INSTITUTE, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Federal Rule of Civil Procedure 69 addresses the enforcement of federal money judgments. It provides that "[t]he procedure on execution * * * must accord with the procedure of the state where the court is located, but a federal statute governs to the extent it applies." Fed. R. Civ. P. 69(a)(1). The All Writs Act, 28 U.S.C. § 1651(a), provides that courts "may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." The questions presented are:

1. Whether the All Writs Act or Rule 69 permits federal courts to fashion novel remedies to enforce federal money judgments, such as an injunction that forbids the judgment debtor from licensing its software for use in the U.S. until the judgment is paid, to "incentivize" payment.

2. Whether and under what circumstances federal courts may invoke the All Writs Act to enjoin enforcement of a foreign money judgment, even within the nation that issued the judgment.

PARTIES TO THE PROCEEDINGS BELOW

World Programming Limited was the defendant in the district court and appellant in the court of appeals. SAS Institute, Inc., was the plaintiff in the district court and the appellee in the court of appeals.

CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rule 29.6, World Programming Limited states that it has no parent corporation. World Programming Limited further states that no publicly held company owns 10% or more of its stock.

STATEMENT OF RELATED PROCEEDINGS

The proceedings directly related to this petition within the meaning of Rule 14.1(b)(iii) are:

- *SAS Institute, Inc.* v. *World Programming Limited*, No. 5:10-cv-00025-FL (E.D.N.C.), judgments entered on March 22, 2011; October 16, 2015; July 15, 2016; December 8, 2017; May 3, 2018; and March 18, 2019;
- *SAS Institute, Inc.* v. *World Programming Limited*, No. 11-1783 (4th Cir.), judgment entered on February 16, 2012;
- *SAS Institute, Inc.* v. *World Programming Limited*, Nos. 16-1808, 16-1857 (4th Cir.), judgment entered on October 24, 2017;
- *World Programming Limited* v. *SAS Institute, Inc.*, No. 17-1459 (U.S.), certiorari denied on October 1, 2018; and
- *SAS Institute, Inc.* v. *World Programming Limited*, Nos. 19-1290, 19-1300 (4th Cir.), judgment entered on March 12, 2020.

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PETITION FOR A WRIT OF CERTIORARI

World Programming Limited ("WPL") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The court of appeals' opinion (App., *infra*, 1a-30a) is reported at 952 F.3d 513. The district court's opinion and orders granting a permanent injunction (App., *infra*, 31a-81a) are unreported.[1]

[1] The district court released both sealed and public versions of its opinion. The appendix contains the public version, which redacts confidential material. The court of appeals cited to the public version, and the redacted information is not relevant to this petition.

STATEMENT OF JURISDICTION

The court of appeals entered judgment on March 12, 2020, App., *infra*, 1a, and denied rehearing and rehearing en banc on April 7, 2020, *id.* at 82a-83a. On March 19, 2020, by general order, the Court extended the time to file this petition to September 4, 2020. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The All Writs Act, 28 U.S.C. § 1651(a), provides:

> The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

Federal Rule of Civil Procedure 69 provides in relevant part:

> (a) IN GENERAL.
>
> (1) *Money Judgment; Applicable Procedure.* A money judgment is enforced by a writ of execution, unless the court directs otherwise. The procedure on execution—and in proceedings supplementary to and in aid of judgment or execution—must accord with the procedure of the state where the court is located, but a federal statute governs to the extent it applies.

PRELIMINARY STATEMENT

The decision below creates multiple conflicts over the scope of federal judicial authority under the All Writs Act, 28 U.S.C. § 1651(a). Seeking to "incentivize" WPL to pay a U.S. money judgment, the Fourth Circuit invoked the Act to forbid WPL from selling software for U.S. use until the judgment is paid. That decision squarely conflicts with other appellate decisions, which foreclose the

unprecedented relief of shutting the borders to commerce to compel payment of a judgment. Because enforcement of money judgments is governed by Federal Rule of Civil Procedure 69 and state law, courts may not evade the limitations those place on enforcement by creating novel mechanisms under the All Writs Act.

The court of appeals also upheld an injunction under the All Writs Act prohibiting WPL from enforcing a foreign money judgment it holds. Without applying the recognized tests for antisuit injunctions, the Fourth Circuit barred WPL from enforcing an English money judgment even in England. Other courts, by contrast, have recognized the need for greater restraint given the serious cross-border conflicts that injunctions against foreign proceedings create.

STATEMENT

I. LEGAL FRAMEWORK

A. The All Writs Act

Originally enacted in the Judiciary Act of 1789, the All Writs Act empowers courts to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. §1651(a). That statute "confine[s]" courts to issuing processes "in aid of" their lawful jurisdiction, *Clinton* v. *Goldsmith*, 526 U.S. 529, 534, 537 (1999), or "previously issued" orders, *United States* v. *N.Y. Tel. Co.*, 434 U.S. 159, 172 (1977). Orders issued under the Act also must conform to the historic "'usage[s]'" and "'principles of equity.'" *Grupo Mexicano de Desarrollo, S.A.* v. *All. Bond Fund, Inc.*, 527 U.S. 308, 326 n.8 (1999). The "powers conferred by the Judiciary Act of 1789 did not include the power to create remedies previously unknown to equity jurisprudence." *Id.* at 332.

The All Writs Act, moreover, "'is a residual source of authority.'" *Carlisle* v. *United States*, 517 U.S. 416, 429 (1996). Where a rule or "'statute specifically addresses the particular issue at hand, it is that authority, and not the All Writs Act, that is controlling.'" *Ibid.* Courts are not "authorize[d] * * * to issue ad hoc writs whenever compliance with statutory procedures appears inconvenient or less appropriate." *Pa. Bureau of Corr.* v. *U.S. Marshals Serv.*, 474 U.S. 34, 43 (1985).

B. Enforcement of Money Judgments

Federal law addresses procedures for collecting on unpaid federal money judgments. The judgment creditor first registers its judgment with a district court. 28 U.S.C. §1963. Once registered, a "money judgment is enforced by a writ of execution" in "accord[ance] with the procedure of the state where the court is located." Fed. R. Civ. P. 69(a)(1).

Rule 69 "defers to state law to provide methods for collecting judgments." *Mackey* v. *Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 834 (1988). The only exception is that a "federal statute governs to the extent it applies." Fed. R. Civ. P. 69(a)(1). Rule 69 thus "limit[s]" the mechanisms for enforcing an unpaid judgment "to those generally provided by state law." *United States* v. *Yazell*, 382 U.S. 341, 355 (1966).

II. Prior Proceedings

This petition arises from a decade of English and U.S. proceedings between SAS Institute, Inc. ("SAS") and WPL that have produced conflicting judgments.

A. The Conflicting Merits Judgments

1. *WPL Prevails in English Courts*

SAS, a North Carolina company, produces statistical-analysis software that runs user-written programs. *SAS*

Inst., Inc. v. *World Programming Ltd.*, 874 F.3d 370, 375-376 (4th Cir. 2017). WPL, a small U.K. company, offers a competing software product. *Ibid.* WPL obtained a copy of SAS's software and studied it in the U.K., as permitted by U.K. and E.U. law, to ensure WPL's product generated compatible outputs. *Id.* at 376. WPL did not examine or copy any software code. C.A.App. 246-247, 300.

In 2009, SAS sued WPL in England for copyright infringement and for breaching a license in the software that allegedly precluded study of its functionalities. *SAS*, 874 F.3d at 376. WPL prevailed. *Id.* at 376-377. The English courts found no copyright infringement because, under E.U. and U.K. law, functionalities of a computer program cannot be copyrighted. *Ibid.* The courts also held that the same principle rendered any contrary license terms "null and void." C.A.App. 410.

2. *SAS Obtains a Contrary U.S. Judgment*

In 2010, SAS sued WPL in North Carolina for the same conduct, asserting copyright, contract, and tort claims. *SAS*, 874 F.3d at 376. The district court rejected SAS's copyright claims, but denied the prior English judgment preclusive effect on SAS's state-law claims. *Id.* at 376-377. A trial resulted in a $26.4 million verdict for breaching the license and allegedly agreeing to the license terms—null and void in England—without intending to abide by them. *Id.* at 377. That award was trebled to $79.1 million. *Ibid.* The court denied SAS's request for an injunction prohibiting WPL from licensing its software for U.S. use. *Ibid.*

The Fourth Circuit affirmed in relevant part. *SAS*, 874 F.3d at 378. It upheld the money judgment against WPL, declining to give the prior English judgment preclusive effect given conflicts between English and North

Carolina public policy. *Id.* at 378-384. The court also upheld the denial of injunctive relief, explaining that all four "traditional equitable factors" weighed "strongly" against it. *Id.* at 384-389. In arguing for injunctive relief, SAS had cited figures showing WPL lacked sufficient assets to satisfy even a fraction of the judgment. See SAS Br. 2, 41 & n.8, *SAS Inst., Inc.* v. *World Programming Ltd.*, Nos. 16-1808, 16-1857 (4th Cir.). But the court rejected arguments that damages were "inadequate" due to "potential difficulties in collecting." *SAS*, 874 F.3d at 386-387. A ban on selling software, the court observed, would "frustrate, rather than facilitate, WPL's ability to pay damages." *Id.* at 387. The court also held that failure to receive treble damages would not render the judgment "at all 'deficient.'" *Ibid.* Compensatory damages alone would "place SAS 'in the same position [it] would have occupied if there had been no breach.'" *Ibid.*

B. SAS Initiates Enforcement Proceedings

After the Fourth Circuit issued its mandate in 2017, WPL offered to place all receipts from U.S. customers in a U.S. bank account for SAS to collect. C.A.App. 860-861, 899-900. SAS pursued judicial relief instead.

1. *The English Courts Refuse Enforcement*

U.S. "courts generally lack authority * * * to execute against property in other countries." *Republic of Argentina* v. *NML Capital, Ltd.*, 573 U.S. 134, 144 (2014). Enforcing a judgment in a foreign nation requires recognition of the judgment in that nation's courts. See *Hilton* v. *Guyot*, 159 U.S. 113, 163 (1895). Foreign nations have "no obligation" to recognize a U.S. judgment. *Id.* at 166.

SAS sought recognition and enforcement of its judgment in England, where WPL is located. App., *infra*, 5a-6a. WPL counterclaimed under the U.K. Protection of

Trading Interests Act ("PTIA"), which authorizes an action to recover, on multiple damages awards, sums that exceed the amount attributable to compensation. *Id.* at 6a. In December 2018, the English High Court of Justice ruled that SAS could not enforce its U.S. judgment in England. C.A. App. 966, 997, 1013. It explained that the prior English judgment against SAS precluded enforcement under estoppel principles and that recognizing the U.S. judgment would be contrary to the English public policies underlying the English judgment. *Ibid.* The High Court also granted WPL's counterclaim, rendering SAS liable in England for collection amounts attributable to non-compensatory damages. *Id.* at 1028.

2. *SAS Seeks California Enforcement Orders*

After seeking recognition in the U.K., SAS registered its judgment in California and obtained a writ of execution. App., *infra*, 6a. Invoking a provision of California law that authorizes a court to "order the judgment debtor to assign" its "right[s] to payment" to "the judgment creditor," Cal. Civ. Proc. Code § 708.510(a), SAS asked the district court to assign to it sums owed to WPL by customers around the globe, App., *infra*, 6a.

In September 2018, the district court "assign[ed] to SAS WPL's right to payments" from numerous customers. App., *infra*, 34a. Its order authorized SAS's counsel to contact WPL's customers for payment "directly," but did not require WPL to act. C.A. App. 3135. After WPL appealed, the district court indicated that it would be inclined to modify its order in the event of a limited remand. *Id.* at 961, 3194, 3309. The court cited concerns that it lacked authority to "directly" assign payment rights, and was limited to issuing an *in personam* order "directing WPL to assign the right[s]." *Id.* at 961.

SAS then sought an order under California law that would require WPL to turn over various assets—including money in bank accounts in England, where the U.S. judgment had been held unenforceable. App., *infra*, 6a. The district court denied SAS's application for lack of jurisdiction, but stated that it would issue the order if the court of appeals entered a limited remand. *Ibid.* SAS sought limited remands to permit entry of a turnover order and modified assignment order. *Ibid.*

3. *The English High Court Enjoins Efforts to Enforce the U.S. Judgment in the U.K.*

Shortly thereafter, the English High Court temporarily enjoined SAS from pursuing relief that would require WPL to effectuate the U.S. judgment in the U.K. App., *infra*, 84a-94a. Among other things, the court enjoined SAS from pursuing *in personam* orders in California that would require WPL in England to assign or turn over assets. *Id.* at 86a-87a. It also enjoined SAS from further pursuing the limited-remand motions. *Ibid.* The High Court, however, permitted SAS to "pursu[e]" other enforcement measures, including the U.S. collection of the debts assigned to SAS in the original California assignment order. *Id.* at 87a.

III. THE DECISIONS BELOW

SAS returned to the district court in North Carolina, seeking an injunction to bar WPL from selling software for U.S. use until the U.S. judgment is paid. The court granted the injunction—and more.

A. The District Court Enjoins WPL from Licensing Software to New Customers for U.S. Use Until the Judgment Is Satisfied

In January 2019, SAS obtained an *ex parte* injunction from the district court under the All Writs Act, 28 U.S.C.

§ 1651(a). App., *infra*, 80a. The court prohibited WPL from licensing its software to any "new customer" for "use within the United States" until the judgment against it is satisfied. *Id.* at 81a. When WPL moved for dissolution of the *ex parte* injunction, the court replaced it with an identical preliminary injunction. *Id.* at 78a-79a. It deferred a decision on permanent injunctive relief pending further submissions. *Id.* at 79a.

In March 2019, the district court issued a permanent injunction under the All Writs Act barring WPL from licensing its software to new customers for U.S. use until the U.S. money judgment is satisfied. App., *infra*, 53a-61a. In the court's view, both "the UK judgment" of non-recognition and related "UK injunction" had subjected the U.S. judgment to "collateral attack." *Ibid.* The court made no findings that WPL had attempted to evade enforcement of the U.S. judgment or of the existing assignment order; it acknowledged "evidence" that WPL had "not taken such actions." *Id.* at 55a-56a. Nor did the court deny that SAS had collected $6 million toward the U.S. judgment, see *id.* at 14a—a lot from a small company like WPL. And the court acknowledged that its injunction would reduce WPL's revenues. *Id.* at 67a-68a. "However," the court responded, "there must be some degree of impact upon WPL's operations for it to have any practical coercive effect." *Id.* at 63a. The court reasoned that such "coercive measures * * * to compel relief from WPL" were needed because the U.K. injunction "prevents SAS from seeking the full panoply of judgment collection tools." *Id.* at 54a, 67a.[2]

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[2] The district court separately held that Federal Rule of Civil Procedure 60(b)(6) permitted the injunctive relief. App., *infra*, 64a-65a. The court of appeals, however, did not address that ground, *id.* at 8a

B. The District Court Enjoins WPL from Enforcing Its English Judgment

As noted above, when SAS sought to enforce its treble damages judgment in England, the English court awarded damages to WPL under the U.K.'s PTIA. See pp. 6-7, *supra*. In February 2019, at a hearing on SAS's request for an injunction on software licensing, the district court *sua sponte* entered an order directed at the PTIA: "[N]o sum previously collected or to be collected by the judgment creditor in the United States is subject to payment to the judgment debtor on the basis of [PTIA]." App., *infra*, 74a. The court stated an opinion would follow. *Ibid.*

The district court's March 2019 opinion memorialized its rationales for that *sua sponte* order. Again invoking the All Writs Act, the court ruled that the PTIA had "frustrate[d]" its "orders and judgment." App., *infra*, 50a. "United States law," the court observed, does not provide "for return to a judgment debtor of two-thirds (2/3) of any sum because damages were trebled." *Id.* at 51a.

C. The Fourth Circuit's Decision

WPL appealed, and the Fourth Circuit affirmed. App., *infra*, 1a-30a.

1. While WPL's appeal was pending, the English High Court ruled that its prior injunction should be dissolved. App., *infra*, 95a-157a. The court recognized that the orders SAS had sought in California could "cut across" its prior ruling that the U.S. judgment was not enforceable in England. *Id.* at 154a-155a. Those orders, for example, might require "WPL to pay over funds" the English court had decided were not subject to payment.

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n.1, and this Court need not address it either, *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005).

Id. at 155a. Were the situation reversed, the English court stated, it "would not order a party resident in the USA to take such steps." *Id.* at 154a. But respect for international comity persuaded the High Court to dissolve its injunction, with the hope that U.S. courts might similarly consider comity. *Id.* at 142a, 155a. The High Court temporarily continued its injunction pending further review. *Id.* at 159a.

2. Despite that ruling, the Fourth Circuit held that the All Writs Act authorized the district court to enforce SAS's money judgment by prohibiting WPL from selling its software to new customers for U.S. use. App., *infra*, 19a-22a. Characterizing WPL's litigation in England as "evasion" of the U.S. judgment, the Fourth Circuit reasoned that the licensing ban "was necessary to incentivize WPL to satisfy, rather than evade, its judgment." *Id.* at 11a-13a, 19a-20a. The Fourth Circuit identified no precedent that supported imposing an injunction with onerous restrictions on licensing to "incentivize" payment. But the court pronounced the U.S. licensing ban "consistent with the historical practice of allowing equitable relief necessary to protect 'a creditor.'" *Id.* at 21a.

The Fourth Circuit rejected WPL's argument that the All Writs Act cannot be used to create remedies unavailable under Rule 69 and state law. App., *infra*, 26a-28a. Neither the district court nor the parties had identified any provision of North Carolina law on execution that would authorize a ban on licensing software to coerce payment. See C.A. Reply 6. But the Fourth Circuit held that the All Writs Act authorized the ban regardless. App., *infra*, 27a. Because Rule 69 states that "'a federal statute governs [collection] to the extent it applies,'" the Fourth Circuit reasoned, courts may "'fashion extraordinary remedies [under the Act] when the need arises.'"

Ibid. (emphasis omitted). The Fourth Circuit also read Rule 69 to authorize the use of state procedures unrelated to execution, such as the general authority to issue preliminary injunctions. *Id.* at 26a-27a. It did not mention that state courts had held the statute cited inapplicable in execution proceedings. See *Harris* v. *Pinewood Dev. Corp.*, 627 S.E.2d 639, 642 (N.C. Ct. App. 2006).

3. The Fourth Circuit upheld the "injunction" against WPL's English PTIA judgment. App., *infra*, 15a-18a. The All Writs Act, the court held, authorized the injunction "'to protect'" the "'outstanding [U.S. money] judgment.'" *Id.* at 16a. In the Fourth Circuit's view, international comity considerations did not foreclose an injunction that would prohibit WPL from enforcing its English PTIA judgment even in England. *Id.* at 16a-18a. The Fourth Circuit viewed WPL's "actions" and the English judgment granting WPL relief as an "affront to comity" because they "frustrate[d]" North Carolina's policy of awarding treble damages. *Id.* at 17a. The Fourth Circuit did not mention that the North Carolina judgment contradicted an *earlier* English judgment.

4. The Fourth Circuit denied rehearing and rehearing en banc on April 7, 2020. App., *infra*, 82a-83a.

D. The English Court of Appeal's Ruling

Shortly thereafter, the English Court of Appeal reversed the High Court in part. App, *infra*, 158a-222a. It held that SAS's efforts to obtain orders under California law requiring WPL to assign or turn over English assets (*e.g.*, money in English bank accounts) "infring[ed] the sovereignty of the United Kingdom." *Id.* at 188a. Under principles "recognised internationally," the court explained, "the enforcement of judgments is territorial." *Id.* at 183a. A "court in State A" cannot "enforce its judgment against assets in State B" without "interfer[ing]

with [State B's] sovereignty." *Ibid.* The English court viewed it as "inconsistent with comity" for a court "to interfere with assets situated" in another country. *Id.* at 211a; see *id.* at 183a. The court therefore enjoined SAS from seeking relief against WPL assets sited in England, *id.* at 221a, without foreclosing enforcement against assets in other countries, *id.* at 218a.

REASONS FOR GRANTING THE PETITION

The courts of appeals are squarely divided on the scope of judicial authority under the All Writs Act, 28 U.S.C. §1651(a). Decisions from at least two courts of appeals foreclose judgment creditors from invoking the Act to obtain novel mechanisms for enforcing money judgments. The First Circuit holds that money judgments must be enforced under Federal Rule of Civil Procedure 69; courts cannot evade the limits that rule imposes on enforcement through the All Writs Act. The Sixth Circuit, too, recognizes that federal courts lack authority to devise novel remedies, such as injunctions banning the importation of otherwise lawful foreign products. The decision below conflicts with those holdings. Federal courts, the Fourth Circuit held, may use the All Writs Act to ban foreign judgment debtors from making otherwise lawful sales of software in the U.S. until a money judgment is paid to "incentivize" payment.

The decision below dramatically expands federal judicial authority, both to enforce judgments and to devise novel injunctions. Nowhere did the Fourth Circuit cite any prior case holding that federal courts may use the All Writs Act to coerce payment of a judgment by imposing onerous conditions on a debtor until the judgment is paid. The court dispensed with any requirement that injunctive relief accord with historic usages and practices. That ruling alone justifies review.

The decision below, however, also exacerbates a second conflict over the All Writs Act's scope: whether U.S. courts should prohibit a party holding a foreign money judgment from enforcing it, even in foreign courts. The courts are now deeply split over the weight to give international comity in deciding whether to enjoin foreign proceedings. As other courts have recognized, the Fourth Circuit's decision to prohibit the enforcement of an English money judgment, even in England, raises grave foreign-policy concerns. Review is warranted.

I. Review Is Warranted To Resolve Whether The All Writs Act Permits Courts To Fashion Novel Remedies To Enforce Money Judgments

This Court has repeatedly held that the All Writs Act, 28 U.S.C. §1651(a), is a "'residual'" source of authority constrained by historic usages and principles of equity. *Carlisle* v. *United States*, 517 U.S. 416, 429 (1996). That statute does not empower federal courts "to create remedies previously unknown to equity jurisprudence." *Grupo Mexicano de Desarrollo, S.A.* v. *All. Bond Fund, Inc.*, 527 U.S. 308, 332 (1999); see *id.* at 326 n.8. Nor does it "authorize * * * ad hoc writs whenever compliance with statutory procedures appears inconvenient or less appropriate." *Pa. Bureau of Corr.* v. *U.S. Marshals Serv.*, 474 U.S. 34, 43 (1985). Where a rule or "'a statute specifically addresses the particular issue at hand, it is that authority, and not the All Writs Act, that is controlling.'" *Carlisle*, 517 U.S. at 429.

Notwithstanding those constraints, the court of appeals upheld the use of the All Writs Act to create a novel judgment-enforcement mechanism—a ban on licensing software until a money judgment is paid to "incentivize" payment of that judgment. App., *infra*, 19a-20a. In doing so, the Fourth Circuit set itself in conflict with the

First Circuit by holding that the All Writs Act permits courts to provide enforcement mechanisms that Rule 69 withholds whenever "'the need arises.'" *Id.* at 27a (emphasis omitted). The Fourth Circuit then went further—and set itself in conflict with the Sixth Circuit—by reading the All Writs Act to authorize even unprecedented types of injunctions, so long as they are deemed "necessary to protect 'a creditor.'" *Id.* at 21a.

That decision not only spawns circuit conflicts. It defies the limits this Court has imposed on the All Writs Act, transforming it into a general-purpose statute for enforcing money judgments whenever state procedures do not yield desired results. Review is warranted.

A. The Decision Below Spawns Circuit Conflicts

The decision below spawns multiple circuit conflicts regarding the scope of federal court authority to enforce money judgments using the All Writs Act.

1. Although the All Writs Act provides federal courts with authority to protect their jurisdiction and prior orders, it does not "authorize * * * ad hoc writs whenever" courts find statutory mechanisms "inconvenient or less appropriate." *Pa. Bureau*, 474 U.S. at 43. Instead, when the Federal Rules or federal statutes address an issue, courts are confined to the mechanisms they provide: "'Where a statute specifically addresses the particular issue at hand, it is that authority, and not the All Writs Act, that is controlling.'" *Carlisle*, 517 U.S. at 429.

As a result, the First Circuit recognizes that federal courts cannot create new mechanisms for enforcing money judgments under the All Writs Act. See *Aetna Cas. & Surety Co.* v. *Markarian*, 114 F.3d 346, 349-350 (1st Cir. 1997). Instead, federal courts are confined to the mechanisms provided under Federal Rule of Civil Procedure 69

and state law. See *ibid.* Rule 69 addresses enforcement of money judgments, declaring that collection procedures "must accord with the procedure of the [forum] state." Fed. R. Civ. P. 69(a)(1). Absent a controlling federal statute, Rule 69 "'limit[s] all federal process on money judgments to the type of process available under state law.'" *Markarian*, 114 F.3d at 350.

Because Rule 69 makes state law the "exclusive route" for enforcing federal money judgments, the First Circuit holds that the All Writs Act does not authorize the creation of different collection mechanisms "'in disregard of the state law incorporated by * * * Rule [69].'" *Markarian*, 114 F.3d at 350. That conclusion flows from the residual nature of the Act. Under this Court's precedent, where "a statutory procedure * * * 'specifically addresses the particular issue at hand, it is that authority, and not the All Writs Act, that is controlling.'" *Ibid.* (quoting *Pa. Bureau*, 474 U.S. at 43). Consequently, "where 'the courts have consistently read Rule 69(a) as limiting *all* federal process on money judgments to the type of process available under state law,'" "there is every reason *not* to reach to find the All Writs Act applicable." *Ibid.* (emphasis added).

The Fourth Circuit took the opposite view below, construing the All Writs Act to authorize judgment-enforcement remedies not available under Rule 69 and state law. App., *infra*, 27a-28a. To "incentivize[] WPL to satisfy the U.S. judgment," the Fourth Circuit ruled, the district court could enter an All Writs Act injunction barring WPL from selling software for U.S. use "until the judgment is satisfied." *Id.* at 20a, 24a. That injunction, the Fourth Circuit stated, would "create the right payment conditions." *Id.* at 20a. At no point did the district court, the parties, or the court of appeals identify a state law

that would authorize such an injunction in judgment-enforcement proceedings. See C.A. Reply 6; p. 18, *infra*. The Fourth Circuit, however, nonetheless declared that the All Writs Act "'empowers [courts] to fashion extraordinary remedies when the need arises.'" App., *infra*, 27a (emphasis omitted).

That ruling does not merely create a circuit conflict; it authorizes courts to create judgment-enforcement remedies of stunning scope. Under it, courts may invoke the All Writs Act to impose onerous conditions—barring foreign companies from doing legitimate business in the U.S. or banning their officers from travelling here—as a means of "incentiviz[ing]" payment of judgments. But Rule 69 does not authorize such measures. And the First Circuit could not be clearer in rejecting that approach. Whereas the decision below announces that the All Writs Act is "'a federal statute'" that "'governs'" collection within the meaning of Rule 69, App., *infra*, 27a, the First Circuit rejects efforts to "reach to find the All Writs Act applicable" to enforcement because Rule 69(a) "'limit[s] all federal process * * * to the type of process available under state law,'" *Markarian*, 114 F.3d at 350.

2. The Fourth Circuit's reliance on the fact that "North Carolina law authorizes injunctive relief" *generally*, App., *infra*, 26a-27a (citing N.C. Gen. Stat. §1-485), only reinforces the circuit conflict. Other courts of appeals have held that Rule 69 incorporates only state remedies "that deal *specifically with enforcement of judgments* rather than general state procedural provisions." 12 Charles A. Wright et al., *Federal Practice and Procedure* §3012 (3d ed. 2020) (emphasis added); see *In re Clerici*, 481 F.3d 1324, 1336 n.17 (11th Cir. 2007) ("Rule 69(a) * * * mandates adherence to state-law execution procedures for levying on or seizing control of assets.");

Hilao v. *Estate of Marcos*, 95 F.3d 848, 853 (9th Cir. 1996) ("'Rule 69(a) contemplates application of state statutes that deal specifically with enforcement of judgments.'"); *Rumsey* v. *George E. Failing Co.*, 333 F.2d 960, 962 (10th Cir. 1964) (Rule 69(a) requires the application of "statutes regulating practice and procedure peculiarly applicable to garnishments or other supplementary proceedings."). For example, in *Markarian*, the First Circuit held that Rule 69 forbids enforcement of money judgments using general state contempt procedures. 114 F.3d at 349. Because Rule 69 requires adherence to state "'procedure[s] *on execution*,'" other state-law remedies cannot be used. *Ibid.* (emphasis added).

By contrast, the Fourth Circuit's decision below read Rule 69 to authorize enforcement of money judgments using *any* state-law remedy. Like the district court and the parties, the Fourth Circuit could not identify any provision of the state code governing "[e]xecution," N.C. Gen. Stat. ch. 1, subch. X, that would authorize an injunction against licensing to "incentivize" a party "to pay" a judgment. The Fourth Circuit instead invoked (App., *infra*, 27a) a general civil procedure statute addressing "preliminary injunction[s]," N.C. Gen. Stat. §1-485, that is *not* applicable in postjudgment execution proceedings, see *Harris* v. *Pinewood Dev. Corp.*, 627 S.E.2d 639, 642 (N.C. Ct. App. 2006). That ruling cannot be reconciled with other decisions holding that Rule 69 incorporates only state-law provisions directed specifically to money-judgment enforcement. And it underscores the expansiveness of the Fourth Circuit's ruling: It permits federal courts to impose coercive conditions to "incentivize" payment of judgments so long as States authorize injunctions for some purpose—which they all do.

3. The decision below creates a square conflict with the Sixth Circuit. This Court has explained that relief under the All Writs Act must conform to the historic "'usage[s]'" and "'principles of equity.'" *Grupo Mexicano*, 527 U.S. at 326 n.8. The relief must be of the "type" "'traditionally accorded by courts of equity'" circa 1789. *Id.* at 318, 321. Applying that requirement, the Sixth Circuit has held that federal courts generally lack authority to "enjoin the importation of foreign goods into the United States." *Wheeling-Pittsburgh Steel Corp.* v. *Mitsui & Co.*, 221 F.3d 924, 927 (6th Cir. 2000). Upon examining historic usages, the court was "unable to find * * * any evidence" that courts of equity traditionally banned "the importation of foreign goods." *Ibid.* It thus held that federal courts do not possess the inherent equitable power to do so now. *Ibid.*

The Fourth Circuit approved precisely the All Writs Act remedy the Sixth Circuit found unavailable: It upheld an injunction that bars WPL, an English company, from licensing its software to new customers for U.S. use. App., *infra*, 19a-21a. In upholding that U.S. licensing ban, the Fourth Circuit took a starkly different view of courts' power to fashion novel remedies. Unlike the Sixth Circuit, the Fourth Circuit did not ask whether the "type" of relief was available in 1789. The court cited no evidence that any court had ever banned the sale or licensing of a product to "incentivize" payment. Rather, the Fourth Circuit read *Grupo Mexicano* to authorize whatever relief is deemed "necessary to protect 'a creditor.'" *Id.* at 21a; see *ibid.* ("'The essence of equity'" is to "'mould each decree to the necessities of the particular case.'"). Those diametrically contrary approaches—one that looks to historic practice, and the other to the supposed "necessities" of a case—call out for review.

B. The Decision Below Is Wrong

The Fourth Circuit's decision is impossible to reconcile with principle or precedent. It removes any meaningful constraint on courts' power to fashion novel remedies. And it contravenes the express language of Rule 69.

1. As this Court has repeatedly reminded, the All Writs Act "'is a residual source of authority to issue writs that are not otherwise covered by statute'" or rule. *Carlisle*, 517 U.S. at 429; see *Syngenta Crop Prot., Inc.* v. *Henson*, 537 U.S. 28, 32-33 (2002). Where a statute or rule "specifically addresses the particular issue at hand, it is that authority, and not the All Writs Act, that is controlling." *Pa. Bureau*, 474 U.S. at 43. Thus, in *Carlisle*, this Court held that a judgment of acquittal could not be entered under the Act because Federal Rule of Criminal Procedure 29 spoke to that issue. 517 U.S. at 428-429.

For the same reason, the All Writs Act does not authorize a ban on U.S. licensing as a means of coercing or "incentiviz[ing]" payment. App., *infra*, 20a-21a, 24a. Federal Rule of Civil Procedure 69(a) "specifically addresses" the enforcement of money judgments. *Pa. Bureau*, 474 U.S. at 43. It directs that enforcement procedures "must accord with [state] procedure[s]." Fed. R. Civ. P. 69(a)(1). Because Rule 69 "provides the applicable law," it is "'that authority, and not the All Writs Act, that is controlling.'" *Carlisle*, 517 U.S. at 429. The All Writs Act cannot be used to fashion different remedies.

This Court's decision in *Fink* v. *O'Neil*, 106 U.S. 272 (1882), confirms as much. There, the Court rejected the argument that the All Writs Act's predecessor, Revised Statute Section 716, could be used to reach assets not attainable under state law. See *id.* at 277-279. Because Congress had required federal judgments to be enforced in accordance with state law, the Court explained, Sec-

tion 716 "must be construed as subject to the same limitations." *Id.* at 279. The same goes for the All Writs Act.[3] It "'does not create a general power'" to fashion ad hoc remedies "'in disregard of the state law incorporated by * * * Rule [69].'" *Markarian*, 114 F.3d at 350.[4]

The Fourth Circuit's suggestion that Rule 69 authorizes resort to the All Writs Act, App., *infra*, 27a, defies the rule's text. Rule 69 states that "a federal statute governs to the extent it applies," Fed. R. Civ. P. 69(a)(1), but that language plainly refers to "federal statutes *expressly governing execution*," *Resolution Tr. Corp.* v. *Ruggiero*, 994 F.2d 1221, 1226 (7th Cir. 1993); see Fed. R. Civ. P. 69 advisory committee's note to 1937 rule (listing examples). The All Writs Act does not govern execution. "It would require an absurd interpretation of Rule 69" to hold that a general statute which—like the All Writs Act—makes a "specific exception" for situations addressed in the Federal Rules nonetheless "'governs' over" Rule 69. *Apostolic Pentecostal Church* v. *Colbert*, 169 F.3d 409, 415 (6th Cir. 1999) (emphasis omitted).

Construing the All Writs Act to authorize the creation of new enforcement mechanisms when "'the need arises'" also tears a gaping hole in Rule 69. App., *infra*, 27a (emphasis omitted). While the Fourth Circuit labeled the circumstances here "extraordinary," *ibid.*, the situation was that a foreign judgment blocked execution against a debtor's *foreign* assets. Trouble reaching a foreign debtor's non-U.S. assets is not unusual. See *Republic of Ar-*

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[3] The slight variations between the statutes amount to mere "'changes in phraseology.'" *Pa. Bureau*, 474 U.S. at 41-42.

[4] While courts may have power under the All Writs Act to issue orders that secure existing state-law remedies by freezing the status quo, see *Grupo Mexicano*, 527 U.S. at 324-325, it is altogether different for federal courts to make up their own substantive remedies.

gentina v. *NML Capital, Ltd.*, 573 U.S. 134, 144 (2014); App., *infra*, 183a ("the enforcement of judgments is territorial" under principles "recognised internationally"). And such a barrier is particularly unsurprising in a case where the judgment creditor, SAS, twice initiated English legal proceedings and lost. See pp. 4-7, *supra*. The English courts enjoined SAS from executing on English assets simply to prevent it from circumventing their own prior judgments, contravening U.K. public policy, and "infringing [English] sovereignty." App., *infra*, 188a.

Nor is it unusual that a debtor might be unable to satisfy a large money judgment. Rule 69 is "only needed if the judgment debtor" is unable or unwilling to pay "voluntarily." 2 Steven S. Gensler & Lumen N. Mulligan, *Federal Rules of Civil Procedure, Rules and Commentary, Rule 69* (Feb. 2020). Courts often confront debtors who attempt to flee or conceal assets, see, *e.g.*, *Markarian*, 114 F.3d at 348, 350—circumstances far more egregious than here, where the barriers to executing on non-U.S. assets arise from conflicting U.S. and English judgments and public policies, see App., *infra*, 96a.[5] If a mere showing of "need" suffices to authorize exotic remedies under the All Writs Act, it will become an oft-used tool.

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[5] The Fourth Circuit's opinion repeats SAS's accusations that WPL took other actions to evade the judgment, such as writing customers about the assignment order. *E.g.*, App., *infra*, 11a. But the district court's opinion contains no such factual findings—indeed, that opinion cited "evidence that [WPL] has not taken such actions." *Id.* at 55a-56a. Record evidence and party concessions contradict the Fourth Circuit's statements. See C.A. Reh'g Pet. 14-17. Regardless, that supposed conduct does not differentiate this case from many others arising under Rule 69 or justify novel remedies. See *In re Fredeman Litig.*, 843 F.2d 821, 826-828 (5th Cir. 1988). The licensing ban also does not redress the conduct. It retaliates.

Finally, the decision below allows courts to rewrite unpaid judgments. Courts' authority under the All Writs Act is "confine[d]" to issuing orders "'in aid of'" jurisdiction, *Clinton* v. *Goldsmith*, 526 U.S. 529, 534 (1999), and to "effectuate and prevent the frustration of orders * * * previously issued," *United States* v. *N.Y. Tel. Co.*, 434 U.S. 159, 172 (1977). The Fourth Circuit did not suggest its licensing injunction protects federal jurisdiction; lawful software sales pose no threat to the judicial power. Nor does the injunction effectuate a prior judgment. The prior North Carolina judgment being enforced *denied an injunction* against software licensing and awarded only damages. See *SAS Inst., Inc.* v. *World Programming Ltd.*, 874 F.3d 370, 386-387 (4th Cir. 2017). Indeed, the Fourth Circuit previously recognized that an injunction against selling software would be counterproductive by "frustrat[ing], rather than facilitat[ing], WPL's ability to pay damages." *Id.* at 387. The decision below reverses the prior denial of injunctive relief. The All Writs Act should not be construed so broadly as to allow courts to rewrite damages judgments under the guise of enforcing them.

2. The Fourth Circuit's suggestion that the U.S. licensing ban can be sustained under Rule 69—because of a state "preliminary injunction" provision that is unavailable in state execution proceedings, p. 18, *supra*—fares worse still. By its terms, Rule 69 requires federal procedures to conform to state procedures "*on execution*." Fed. R. Civ. P. 69(a)(1) (emphasis added). The rule "defers" to the limits that state law sets on "methods for collecting judgments." *Mackey* v. *Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 834 (1988).

The decision below erases the limits Rule 69 sets. It disregards Rule 69's plain import that federal collection

procedures follow state procedures "on execution." It also overrides considered legislative judgments about which collection mechanisms to provide and withhold. The decision below invoked a state "preliminary injunction" statute that state courts have held inapplicable in execution proceedings because the legislature provided "[o]ther remedies" for "address[ing] problems with execution." *Harris*, 627 S.E.2d at 642; see, *e.g.*, N.C. Gen. Stat. §1-324.1 (specifying methods of enforcing unpaid judgments against corporations). That disregard for legislative choices that Rule 69 adopts cannot be justified.

3. The Fourth Circuit also erred in reading the All Writs Act to authorize unprecedented relief merely because the court thought it "necessary to protect 'a creditor.'" App., *infra*, 21a. Orders under the All Writs Act must conform to the historic "'usage[s]'" and "'principles of equity.'" *Grupo Mexicano*, 527 U.S. at 326 n.8 (quoting *De Beers Consol. Mines, Ltd.*, v. *United States*, 325 U.S. 212, 219 (1945)). Courts "must ask, therefore, whether the relief" awarded under the All Writs Act "was traditionally accorded by courts of equity." *Id.* at 319. The "equitable powers conferred by the Judiciary Act of 1789 did not include the power to create remedies previously unknown to equity jurisprudence." *Id.* at 332.

The Fourth Circuit upheld just such a remedy here. Courts have enforced money judgments for hundreds of years. But no one—not the Fourth Circuit, not the district court, and not the parties—identified a single instance in which a court has ever enjoined the sale or licensing of a product to "incentivize" payment of a money judgment. App., *infra*, 19a-21a. There is, moreover, no evidence that courts traditionally "enjoin[ed] the importation of foreign goods into the United States," *Wheeling-Pittsburgh*, 221 F.3d at 927, much less did so to enforce

money judgments. The Fourth Circuit's decision to authorize a remedy "previously unknown to equity jurisprudence" is forbidden by binding precedent.

Indeed, in *Grupo Mexicano*, this Court rejected the rationales the decision below adopted. It held that federal courts cannot issue preliminary injunctions barring the transfer of unencumbered assets that might later be needed to satisfy a money judgment. 527 U.S. at 333. That specific "type of provisional relief" had not been traditionally awarded in equity. *Id.* at 319-321. The Court did not dispute that equity practice is "flexible." *Id.* at 322. Nor did it dispute that the injunction sought could be a "powerful tool for general creditors." *Id.* at 329-331. But the Court found those sorts of considerations insufficient. *Id.* at 322, 329-332. "To accord a type of relief that has never been available before," the Court warned, is to invoke a rule "not of flexibility but of omnipotence." *Id.* at 322.

The Fourth Circuit never asked whether courts had traditionally awarded the specific "type of relief" imposed here. Rather, it appealed to the flexible nature of equity and the supposed "necessity for the * * * injunction." App., *infra*, 21a. In short, it adopted the sort of rationales *Grupo Mexicano* found insufficient.

C. The Issue Is Important

1. As Rule 69 and the many federal statutes addressing execution attest, enforcing money judgments is a central task of federal courts. See, *e.g.*, 28 U.S.C. §2710 *et seq.*; 28 U.S.C. §3001 *et seq.*; 33 U.S.C. §918. Rulings that alter or expand the enforcement mechanisms available to judgment creditors have inherent importance for large numbers of cases. This Court regularly addresses questions regarding the remedies available to judgment creditors. See, *e.g.*, *Bank Markazi* v. *Peterson*, 136 S. Ct.

1310 (2016); *NML Capital*, 573 U.S. 134; *Grupo Mexicano*, 527 U.S. 308; *Mackey*, 486 U.S. 825.

This case implicates fundamental questions of judgment enforcement. Under the Fourth Circuit's holding, federal courts are now authorized to fashion novel remedies under the All Writs Act whenever "'the need arises.'" App., *infra*, 27a-28a (emphasis omitted). Nothing in its decision precludes courts from imposing whatever onerous conditions on a judgment debtor they dream up—from barring foreign travel to closing down a business—if deemed necessary to "incentivize" payment. The decision below also dramatically expands the state remedies available to courts under Rule 69, allowing courts to enforce judgments using any available state legal process, even ones that cannot be used under state law to execute on judgments. Circuit splits that implicate such "important feature[s]" of "day-to-day" judicial activities warrant review. *Maryland* v. *King*, 567 U.S. 1301, 1302 (2012) (Roberts, C.J., in chambers).

2. The Fourth Circuit's decision threatens havoc in other contexts beyond judgment enforcement. The All Writs Act can be invoked in innumerable contexts—criminal and civil. See, *e.g.*, *Syngenta*, 537 U.S. 28 (removal); *Carlisle*, 517 U.S. 416 (acquittal judgment); *Clinton*, 526 U.S. 529 (military discharge); *Pa. Bureau*, 474 U.S. 34 (prisoner transfer). If the Act authorizes remedies even where another federal statute or rule specifically addresses an issue, it will loom over every dispute.

The court of appeals' loose reading of *Grupo Mexicano* exacerbates that mischief. *Grupo Mexicano* admonishes that federal courts may not award "type[s]" of relief "previously unknown to equity jurisprudence." 527 U.S. at 322, 332. But the court of appeals upheld an unprecedented type of creditors' remedy. Citing the flexi-

ble nature of equity, the court reasoned that any relief deemed "necessary to protect 'a creditor'" is warranted. App., *infra*, 21a. It embraced the sort of ahistorical analysis that this Court perceived as a dangerous claim to "omnipotence." *Grupo Mexicano*, 527 U.S. at 322.

In "our democracy," debates about whether to create novel types of relief "belong * * * in the Congress" and state legislatures. *Grupo Mexicano*, 527 U.S. at 333. Those are the bodies that have both the warrant and competence to "design the appropriate remed[ies]." *Id.* at 322. That is particularly true in cases, like this one, where the newly devised remedies have far-reaching impacts. The licensing injunction here prevents SAS's principal competitor from selling legitimate (non-infringing) software for U.S. use, depriving American consumers of choice. Devising novel remedies to coerce foreign debtors to pay judgments more quickly—such as by banning the importation of a foreign good—also can have "serious foreign policy consequences." *Kiobel* v. *Royal Dutch Petroleum Co.*, 569 U.S. 108, 124 (2013). The decision to risk such consequences belongs to the "political branches," not the courts. *Ibid.*

II. Review Is Warranted To Determine When Courts May Enjoin Enforcement Of Foreign Judgments

The Fourth Circuit also upheld an injunction that prohibits WPL from enforcing an English money judgment against SAS *in England*. Such antisuit injunctions can threaten international comity—the principle that "each nation state" should respect the "'independence and dignity of every other.'" *Bolivarian Republic of Venezuela* v. *Helmerich & Payne Int'l Drilling Co.*, 137 S. Ct. 1312, 1319 (2017). The courts are divided over the standard for determining when such injunctions are permissible.

This issue is important. The Fourth Circuit's decision to enjoin enforcement of a foreign judgment within the country that issued it could result in similar treatment of U.S. judgments by foreign courts. The Fourth Circuit's aggressive decision to preclude the U.K. from creating an enforceable *debt* (which requires no U.S. action) in the U.K. is difficult to reconcile with basic norms of territorial sovereignty. It also threatens to entangle the judiciary in matters of foreign policy better addressed by other branches. Review is warranted.

A. The Courts of Appeals Are Divided

There is an open and acknowledged circuit conflict on the standard for issuing foreign antisuit injunctions—in particular, the "circuits are split * * * on the level of deference afforded to international comity." *Goss Int'l Corp.* v. *Man Roland Druckmaschinen Aktiengesellschaft*, 491 F.3d 355, 359 (8th Cir. 2007); see *Gen. Elec. Co.* v. *Deutz AG*, 270 F.3d 144, 160 (3d Cir. 2001) ("The federal Courts of Appeals have not established a uniform rule for determining when injunctions on foreign litigation are justified.").

Some courts, including the Third, Sixth, and Eighth Circuits, apply a "conservative approach" that gives comity significant weight. *Goss*, 491 F.3d at 359. Under that test, foreign antisuit injunctions may issue only when (1) "an action in the foreign jurisdiction prevents United States jurisdiction or threatens a vital United States policy," and (2) "domestic interests outweigh concerns of international comity." *Id.* at 359, 361 n.4; see *Gen. Elec. Co.*, 270 F.3d at 160-161; *Gau Shan Co.* v. *Bankers Tr. Co.*, 956 F.2d 1349, 1353 (6th Cir. 1992). The First, Second, and D.C. Circuits apply a similar test, but will also consider "the equitable considerations surrounding each request for an injunction." *Quaak* v. *Klynveld Peat Mar-*

wick Goerdeler Bedrijfsrevisoren, 361 F.3d 11, 18 (1st Cir. 2004); see *Chevron Corp.* v. *Naranjo*, 667 F.3d 232, 243 (2d Cir. 2012); *Laker Airways Ltd.* v. *Sabena, Belgian World Airlines*, 731 F.2d 909, 927 (D.C. Cir. 1984). Those equitable considerations, however, must be balanced against the "salient interest in international comity." *Quaak*, 361 F.3d at 19.

Other courts, including the Fifth, Seventh, and Ninth Circuits, apply a "laxer standard" that does not "presume a threat to international comity whenever an injunction is sought against litigating in a foreign court," focusing instead on whether a foreign proceeding is "gratuitously duplicative" or "'vexatious and oppressive.'" *Allendale Mut. Ins. Co.* v. *Bull Data Sys., Inc.*, 10 F.3d 425, 431 (7th Cir. 1993); see *Kaepa, Inc.* v. *Achilles Corp.*, 76 F.3d 624, 627 (5th Cir. 1996); *Seattle Totems Hockey Club, Inc.* v. *Nat'l Hockey League*, 652 F.2d 852, 855-856 (9th Cir. 1981). These cases do not "deny that comity could be impaired by such an injunction," but they "demand evidence," such as a statement from a foreign government, "that comity is likely to be impaired in *this* case." *Allendale*, 10 F.3d at 431.

The decision below—without mentioning any test—applies a laxer standard still. The Fourth Circuit did not deny that, even under the "laxer standard," ample evidence showed that "comity is likely to be impaired in *this* case." *Allendale*, 10 F.3d at 431. It admitted that comity is not "advanced when one country enjoins legitimate collection efforts in another country." App., *infra*, 18a. But the Fourth Circuit upheld an injunction that prohibited the enforcement of an English judgment in England. There also was clear evidence that the injunction undermined the English courts' "need to implement their mandatory legislative policy" in England. *Laker*, 731 F.2d at

946. The English judgment enjoined here reflects the English public policy, codified in the PTIA, of limiting plaintiffs subject to English jurisdiction to compensatory (as opposed to multiple) damages. C.A. App. 1026. The Fourth Circuit, however, prevented English courts from giving effect to that policy *within England*, without discussing English national interests. See App., *infra*, 17a-18a. The decision below so singularly pursued a domestic policy of affording treble damages that it made no allowance for a contrary policy to exist outside U.S. borders.

Instead, the Fourth Circuit reasoned that WPL's "actions" of seeking relief in England justified an injunction against the PTIA because, without them, "'[t]here never would have been any situation in which comity or forbearance would have become an issue.'" App., *infra*, 17a-18a. But the actions of individual litigants do not determine whether international comity should be extended. Comity concerns the respect "each nation state" owes to the "'independence and dignity of every other'"—not to litigants. *Helmerich*, 137 S. Ct. at 1319; see *Hilton* v. *Guyot*, 159 U.S. 113, 163 (1895). Besides, the English judgment enjoined was awarded by an English court, under English law, in a case that SAS itself had initiated. The Fourth Circuit's focus on the actions of individual litigants suggests foreign antisuit injunctions are permitted in *any* case where U.S. and foreign law diverge.

The stark contrast with the D.C. Circuit's *Laker Airways* decision illustrates the impact of the Fourth Circuit's approach. In that case, the D.C. Circuit distinguished between foreign actions that would deprive U.S. courts of jurisdiction—*i.e.*, "close a courthouse door that Congress * * * has opened"—and those that merely impose consequences under foreign law in foreign courts. 731 F.2d at 936. The former may be enjoined. But the

latter typically are not enjoined *because* they allow foreign courts to effectuate their own policies "without interfering with the autonomy of [a] foreign judiciary" over "foreign proceeding[s]." *Id.* at 943. Under principles of territorial jurisdiction, the D.C. Circuit explained, the U.K. may "punish its corporations for walking through [the American] courthouse door" so long as it does not "close" the door. *Id.* at 936. *Laker Airways* specifically identified requiring "repayment of * * * [punitive] damages" under the PTIA as a permissible "postjudgment" sanction. *Id.* at 933 n.81; see *id.* at 943. Here, however, the Fourth Circuit enjoined enforcement of what the D.C. Circuit identified as a permissible means of accommodating competing national interests.[6]

B. The Issue Warrants Review

The issuance of injunctions against foreign judgments has serious foreign-policy implications. In the international system, treatment of judgments tends to be "reciprocal"—U.S. courts can expect U.S. judgments to be treated as they treat foreign judgments. *Hilton*, 159 U.S. at 192. Consequently, "grave[ ]" concerns arise when U.S. courts attempt "to preclude the courts of every other nation from ever" enforcing foreign damages judgments within their respective national borders. *Chevron*, 667 F.3d at 244. Such actions invite foreign nations to enjoin enforcement of U.S. judgments—even in the U.S.

This case illustrates the risk. The Fourth Circuit condemned the PTIA judgment as "fundamentally alter-

[6] That does not mean U.S. courts must enforce the English judgment in the U.S. See *Hilton*, 159 U.S. at 165-166. The PTIA is effective only insofar as defendants are subject to English jurisdiction—which SAS accepted—and have English assets. See Paul B. Stephan, *Courts on Courts: Contracting for Engagement and Indifference in International Judicial Encounters*, 100 Va. L. Rev. 17, 101 (2014).

[ing]" the U.S. judgment by "lowering" the damages "by two-thirds." App., *infra*, 12a, 15a. But the Fourth Circuit overlooked that the U.S. damages judgment had the same effect on a *prior* English judgment. SAS sued WPL for the same conduct in England *first* and lost, resulting in a take-nothing judgment. C.A. App. 997, 1003. The later U.S. damages judgment thus had the effect of "fundamentally alter[ing]" the English judgment, converting a take-nothing judgment into a punitive award of more than $79 million. For that reason (among others), the English courts refused to recognize the U.S. judgment under English law. *Ibid.*

If the Fourth Circuit's approach of enjoining enforcement of foreign judgments in foreign countries were the norm, then English courts should have enjoined SAS from enforcing its U.S. judgment in the U.S. because it "fundamentally altered" the prior English take-nothing award.[7] It is precisely to avoid such "harsh" outcomes that courts should tolerate less severe alternatives—such as decisions that decline to recognize a U.S. judgment abroad or that require partial repayment—that allow different nations to effectuate different national policies within their borders. *Laker Airways*, 731 F.2d at 933 n.81. The repercussions for "foreign affairs" and reciprocity warrant review. *Christopher* v. *Harbury*, 536 U.S. 403, 412 (2002).

At the very least, the Court should seek the United States's views. International policy conflicts are the do-

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[7] The English Court of Appeals enjoined SAS from seeking *extraterritorial* relief affecting assets *in England*, where the U.S. judgment is not recognized. App., *infra*, 176a, 187a-188a, 221a. That decision, however, respects territorial boundaries: It does nothing to prohibit the enforcement of a U.S. judgment *in the U.S. or other countries*. *Id.* at 216a, 218a.

main of "the United States Executive and Legislative Branches, not the Judiciary." *Goss*, 491 F.3d at 367-368; see *Kiobel*, 569 U.S. at 124. The Fourth Circuit's refusal to recognize an earlier U.K. judgment, *SAS*, 874 F.3d at 378-380, has already generated enforcement actions that one of our closest allies found to "infring[e] the sovereignty of the United Kingdom," App., *infra*, 188a; see *id.* at 154a-155a. The Fourth Circuit's further decision to enjoin enforcement of a U.K. judgment in the U.K.—and to shut an English company out of the U.S. until it pays up—threatens to exacerbate those already-inflamed tensions.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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SEPTEMBER 2020

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NO. 19-1290

SAS INSTITUTE, INC.,

Plaintiff-Appellee,

v.

WORLD PROGRAMMING LIMITED,

Defendant-Appellant,

NO. 19-1300

SAS INSTITUTE, INC.,

Plaintiff-Appellee,

v.

WORLD PROGRAMMING LIMITED,

Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh. Louise W. Flanagan, District Judge. (5:10-cv-00025-FL)

OPINION

Argued: January 31, 2020

Decided: March 12, 2020

Before WILKINSON, AGEE, and THACKER, Circuit Judges.

Affirmed by published opinion. Judge Wilkinson wrote the opinion, in which Judge Agee and Judge Thacker joined.

ARGUED: Jeffrey A. Lamken, MOLOLAMKEN LLP, Washington, D.C., for Appellant. Pressly McAuley Millen, WOMBLE BOND DICKINSON (US) LLP, Raleigh, North Carolina, For Appellee. **ON BRIEF**: Michael G. Pattillo, Jr., James A. Barta, Caleb Hayes-Deats, MOLOLAMKEN LLP, Washington, D.C., for Appellant. Raymond M. Bennett, Samuel B. Hartzell, WOMBLE BOND DICKINSON (US) LLP, Raleigh, North Carolina, for Appellee.

WILKINSON, Circuit Judge:

In this appeal, we affirm the district court's grant of two complementary injunctions issued pursuant to its All Writs Act authority. While we take the occasion to express our respect for the judicial system and judges of the United Kingdom, the district court here needed to ensure that a money judgment reached in an American court under American law—based on damages incurred in America—was not rendered meaningless. The court chose to enforce its judgment in the most measured terms, concentrating on the litigants' U.S. conduct and collection efforts. Failing to take even these modest steps would have encouraged any foreign company and country to undermine the finality of a U.S. judgment.

I.

Litigation between WPL and SAS, stemming from conduct dating back to 2003, has stretched on for over a decade. It has spanned courts in England, North Carolina, and California. Twice before, in 2012 and 2017, the parties have come before this court. *SAS Inst., Inc.* v. *World Programming Ltd.*, 874 F.3d 370 (4th Cir. 2017) [hereinafter *SAS-2017*]; *SAS Inst., Inc.* v. *World Programming Ltd.*, 468 F. App'x 264 (4th Cir. 2012) (per curiam). Given this case's extensive history, only facts relevant to this appeal are set forth below.

A.

World Programming Limited (WPL), a U.K. company, and SAS Institute, a U.S. company, are software developers that compete in the market for statistical analysis software. Each company's software works by running applications that users have written in a computer programming language developed by SAS.

SAS has offered an integrated system of software products for decades. In 2003, newly formed WPL decided to launch a competing product, which it called "World Programming System" or "WPS." To aid development, WPL acquired copies of SAS software and studied how it functioned. Specifically, "[d]evelopers at WPL ran SAS programs through both [SAS software] and WPS, and then modified WPS's code to make the two achieve more similar outputs." *SAS-2017*, 874 F.3d at 376. When WPL installed the SAS software, it had clicked "Yes" to indicate it would comply with SAS's license agreement prohibiting "reverse engineering" and allowing only "non-production" use of the software. *Id.*

B.

In September 2009, SAS filed suit against WPL in the U.K. High Court of Justice. SAS brought claims for breach of contract, based on WPL's alleged violation of its software license agreement, and for copyright infringement of its software. The U.K. High Court ruled in WPL's favor. It rejected SAS's copyright claim because, under the European Union Software Directive, functionalities of a computer program cannot be copyrighted. And, relying on the same Directive, it dismissed SAS's breach of contract claim because "a licensee is entitled . . . to determine the ideas and principles which underlie any element of the program" and any contrary license provisions are nullified. *SAS-2017*, 874 F.3d at 376-77; see also J.A. 382-83, 397. The Court of Appeal of England and Wales affirmed, and the U.K. judgment became final in July 2014.

In January 2010, several months after initiating the U.K. litigation, SAS filed suit against WPL in the Eastern District of North Carolina. As in the U.K. litigation, SAS brought claims for breach of contract and copyright infringement. In addition, it asserted claims against WPL for fraudulent inducement in obtaining SAS software, tortious interference with contract, tortious interference with prospective business advantage, and violation of the North Carolina Unfair and Deceptive Trade Practices Act (UDTPA). After cross-cutting motions for summary judgment, the trial court dismissed SAS's copyright and tortious interference claims but found WPL liable for breach of contract. Further, the court held that the U.K. litigation did not have a preclusive effect upon the U.S. litigation.

In September 2015, the U.S. litigation proceeded to trial on SAS's remaining claims for fraudulent induce-

ment and violation of the UDTPA, and for the calculation of damages from WPL's breach of the license agreement. A jury found WPL guilty of both fraudulent inducement and violating the UDTPA. It awarded SAS compensatory damages of $26.4 million, which were trebled under the UDTPA, resulting in total damages of $79.1 million. The compensatory damage figure included both realized lost profits—based on specific U.S. customers who switched from SAS to WPL before trial—and expected lost future profits stemming from those same customers. The following year, the trial court denied a motion by SAS seeking a permanent injunction "barring the continuing marketing, selling, or licensing" of WPS "for use in the United States." J.A. 488-89 (quotation omitted).

Both parties appealed to this court. Relevant here, WPL appealed the trial court's holding that the U.S. litigation was not precluded by the U.K. litigation, while SAS appealed the court's denial of injunctive relief. We affirmed the trial court on these claims. We agreed that the U.K. litigation did not have a preclusive effect, given the "many legal and factual differences between the U.K. litigation and the present [U.S.] suit." *SAS-2017*, 874 F.3d at 378-79.

In addition, we affirmed the trial court's denial of a permanent injunction. In doing so, we rejected SAS's concerns about the judgment's collectability as speculative. At that point, there was no reason to believe that a $79 million monetary judgment in SAS's favor was an inadequate remedy for harm suffered. We also expressed concern that the requested injunction would lower WPL's sales and thus "frustrate, rather than facilitate, [its] ability to pay damages." *SAS-2017*, 874 F.3d at 387.

C.

After this court's decision was handed down, SAS sought enforcement of the compensatory portion of the U.S. judgment in the U.K. WPL opposed enforcement and brought counterclaims under the United Kingdom Protection of Trading Interests Act (the "PTIA") to recover any sums SAS collected tied to non-compensatory damages.

Soon after SAS initiated the U.K. enforcement proceedings, it brought additional enforcement proceedings in the Central District of California. The California district court granted an order "providing for direct assignment to SAS of rights to payment from specified WPL customers located anywhere in the world, except in the United Kingdom, until [the U.S.] judgment is satisfied," (the "assignment order"). *SAS Inst., Inc.* v. *World Programming Ltd.*, No. 5:10-CV-25-FL, 2019 WL 1447472, at *2 (E.D.N.C. Mar. 18, 2019) [hereinafter *SAS-2019*]; see also J.A. 3135. WPL appealed the assignment order to the Ninth Circuit.

Meanwhile, SAS filed in California district court another motion for a new order obligating "WPL to turn over all income received from customers located worldwide, except in the United Kingdom," (the "turnover order"). *SAS-2019*, 2019 WL 1447472, at *3. The district court lacked jurisdiction to enter the order due to WPL's appeal, but stated it would do so if the Ninth Circuit allowed limited remand. SAS moved for limited remand, but, before the Ninth Circuit responded, a U.K. court issued a judgment in favor of WPL.

The U.K. court declined to enforce any portion of the U.S. judgment. Further, the court ordered that WPL could recover two-thirds of any amount it paid towards the U.S. judgment, corresponding to the non-compensa-

tory portion of damages (the "U.K. clawback order"). Clawback could occur even though SAS had "not yet recovered more than the compensatory damages awarded." J.A. 1030.

The week after the U.K. court issued its judgment, it entered an anti-suit injunction requiring SAS to take certain actions in the United States but forbidding others (the "U.K. injunction"). For instance, the U.K. court ordered SAS to "take all reasonable steps" to prevent entry of the turnover order in California. J.A. 1035. It forbade SAS from seeking—in the United States—an anti-anti-suit injunction or similar relief designed to protect the U.S. judgment and the California collection proceedings. The injunction threatened criminal sanctions if SAS disobeyed:

> **PENAL NOTICE**
>
> **IF YOU, SAS INSTITUTE INC., DISOBEY THIS ORDER YOU MAY BE HELD TO BE IN CONTEMPT OF COURT AND YOU MAY BE FINED AND HAVE YOUR ASSETS SEIZED AND ANY OF YOUR DIRECTORS, OFFICERS, EMPLOYEES, REPRESENTATIVES OR AGENTS MAY BE IMPRISONED, FINED OR HAVE THEIR ASSETS SEIZED.**

J.A. 1031. SAS stayed its motion to the Ninth Circuit to comply with the U.K. injunction.

In January 2019, soon after the U.K. injunction was issued, SAS filed an emergency motion for injunctive relief in the Eastern District of North Carolina. SAS requested that the district court enjoin WPL from licensing its software for use in the U.S. until monetary damages were paid. Alternatively, SAS requested a narrower injunction preventing WPL from licensing its software *to*

new customers for use in the U.S. until the judgment was satisfied. The district court granted SAS's emergency motion and temporarily issued the narrower injunction prohibiting licensing to new customers.

WPL moved to have the injunction lifted. At a February 2019 hearing with the parties to discuss injunctive relief, the district court stated *sua sponte* that "no money collected in the United States or originating in the United States is subject to the claw back." J.A. 1238. Later that day, it reiterated in an order "that no sum previously collected or to be collected by [SAS] in the United States is subject to payment to [WPL] on the basis of the [PTIA]," (the "anti-clawback injunction"). J.A. 1184-85. Further, the court declined to lift the injunctive relief prohibiting WPL from licensing its product to new customers for U.S. use.

In March 2019, after an additional hearing, the district court issued a permanent injunction prohibiting WPL "from licensing WPS to any new customer for use within the United States," (the "U.S. expansion injunction"). *SAS-2019*, 2019 WL 1447472, at *18 (internal quotation marks omitted). This injunction would lift automatically once WPL satisfied the money judgment. The court held that the All Writs Act (the "AWA") and Rule 60(b) of the Federal Rules of Civil Procedure provided alternate bases for its relief.[1]

Relying on the AWA, the district court found that—in light of WPL's actions in the English courts—the U.S. expansion injunction was necessary to protect the U.S. judgment. First, WPL's seeking the U.K. clawback or-

[1] Because we hold that the U.S. expansion injunction was authorized under the district court's AWA authority, we do not reach or discuss its alternate holding that Rule 60 provides grounds for relief.

der was an "affront" to the U.S. judgment, amounting to a collateral attack on the total monetary damage figure when SAS had not received "even a fraction of compensatory damages due." *SAS-2019*, 2019 WL 1447472, at *13. Second, the U.K. injunction obtained by WPL undermined enforcement of the U.S. judgment by "reach[ing] directly into proceedings in the United States" and "prevent[ing] SAS from seeking the full panoply of judgment collection tools" available. *Id.* at *10-11. Given WPL's actions, the court held that failing to provide injunctive relief would not "effectuate [its] judgment or promote the interests of justice." *Id.* at *14.

In its holding, the district court reiterated that the anti-clawback injunction remained in effect as necessary AWA relief that would "serve to enforce aspects of th[e] court's judgment and orders in favor of [SAS]." *SAS-2019*, 2019 WL 1447472, at *9. The grounds for this relief were similar to the grounds for the U.S. expansion injunction. The court noted WPL's attempts to frustrate its judgment by seeking U.K. clawbacks of U.S. collections, while simultaneously limiting SAS's ability to access the U.S. courts. Further, it found that WPL's actions conflicted with its earlier representation that it would hand over 100% of revenues from U.S.-based customers to SAS.

WPL appeals the district court's grant of the U.S. expansion injunction and anti-clawback injunction.

II.

This court previously declined to issue an injunction impacting WPL's United States licensing, based on an expectation that WPL would devote some portion of its revenues to satisfaction of the U.S. judgment. *SAS-2017*, 874 F.3d at 386-88. In a way, we cut WPL a break; the absence of an injunction was intended to help WPL earn

additional revenues from U.S. operations that it could use towards the judgment. Things did not go as planned. Since the case was last before this court, WPL has tried to evade, in every way and at every turn, using any revenues for satisfaction of the U.S. judgment. This left the district court with limited options—but options it needed to exercise in order to prevent its judgment from being rendered completely hollow.

A.

The All Writs Act grants federal courts the authority to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a). Of particular relevance in the case at hand, a court may rely on the AWA to issue injunctions designed to prevent "collateral attack of its judgments," *In re March*, 988 F.2d 498, 500 (4th Cir. 1993), and "frustration of orders it has previously issued," *United States* v. *N.Y. Tel. Co.*, 434 U.S. 159, 172 (1977).

The rationale behind the AWA's broad grant of authority is clear. "[The AWA] is a codification of the federal courts' traditional, inherent power to protect the jurisdiction they already have." *Klay* v. *United Healthgroup, Inc.*, 376 F.3d 1092, 1099-1100 (11th Cir. 2004). If courts lacked the ability to enforce their judgments, "the judicial power would be incomplete and entirely inadequate to the purposes for which it was conferred by the Constitution." *Peacock* v. *Thomas*, 516 U.S. 349, 356 (1996) (quotation omitted).

B.

Despite a complicated procedural history stemming from years of litigation, the case before us is straightforward. WPL, a foreign company doing business in the

United States, has attempted to evade a U.S. judgment. Instead of making a good-faith effort to pay up, WPL has repeatedly engaged in collateral attacks on the district court's judgment by calling upon the U.K. court system. So far, its tactics have been successful. To date, WPL has only paid a small fraction of the judgment, and it is attempting to undo even that much.

The district court could not allow WPL's evasion to continue. One need look no further than the extensiveness of WPL's attack on the U.S. judgment to see why the court's two injunctions were necessary.

Although founded in the U.K., WPL is a company "doing business in America" subject to "American law in American courts." *Laker Airways Ltd.* v. *Sabena, Belgian World Airlines*, 731 F.2d 909, 940 (D.C. Cir. 1984). WPL violated North Carolina law by using SAS software to create a competing product in breach of a license agreement. A jury in North Carolina set compensatory damages at $26.4 million, based solely on harm SAS incurred from lost U.S. customers and revenues. Under North Carolina law, these compensatory damages were trebled to total damages of $79.1 million.

After obtaining the U.S. judgment, SAS set about to collect on it—as it had every right to do. SAS commenced an enforcement action in the Central District of California and received the assignment order assigning to SAS "WPL's right to payments from" specified non-U.K. customers "until such a time as the North Carolina judgment in the amount of $79,129,905.00 is fully satisfied." J.A. 3135; see also *SAS-2019*, 2019 WL 1447472, at *2.

Unhappy with the pace of collections and possessing evidence to suggest that WPL instructed customers to disregard the assignment order, SAS moved for entry of

the turnover order obligating WPL to deliver to SAS "all income received from customers located worldwide, except in the United Kingdom." *SAS-2019*, 2019 WL 1447472, at *3. Rather than challenge SAS's efforts in the Ninth Circuit, WPL turned to the English courts and engaged in a two-pronged attack on the U.S. judgment.

First, WPL attacked the U.S. judgment by requesting to claw back two-thirds of SAS's collections—corresponding to the non-compensatory portion of damages. A U.K. court granted this relief under the PTIA, even though WPL had "not yet paid sums exceeding the value of the compensatory part of the [U.S.] judgment." J.A. 1026-30; see also *SAS-2019*, 2019 WL 1447472, at *4. By seeking and receiving the U.K. clawback order, WPL fundamentally altered the U.S. judgment. Practically speaking, WPL relitigated the U.S. damage amount, lowering it by two-thirds. What's more, SAS would need to collect the full $79 million to retain the $26 million in compensatory damages.

Second, WPL sought relief designed to interfere with the California collection proceedings. Its efforts were successful. A U.K. court granted an injunction preventing SAS from pursuing normal collection efforts "in this country, the country of origin of the judgment at issue." *SAS-2019*, 2019 WL 1447472, at *11. The U.K. injunction forbade SAS from pursuing entry of the turnover order. It explicitly directed SAS not to file a brief with the Ninth Circuit due that very day. It limited SAS's ability to enforce aspects of the assignment order that WPL did not challenge. It broadly prohibited SAS from seeking an anti-anti-suit injunction or similar relief related to either the California or North Carolina proceedings. Finally, the U.K. injunction warned of criminal sanctions if SAS did not comply, a serious threat since SAS has

around 637 employees in the U.K., J.A. 2715, and "none of those employees wants to go to jail," J.A. 1257.

The U.K. injunction's impact on U.S. collections was immediate. SAS's already slow collection efforts were halted in their tracks. In the three months before the U.K. injunction was issued, SAS collected $623,886 under the assignment order. J.A. 2311-12. Over the following two months, collections dropped to under $40,000. J.A. 2311-12. Despite WPL's initial representations that the decrease was due to slow sales during a "quiet period," J.A. 1210-11, 1237, the district court discovered that WPL "got almost $600,000 during that period and kept it," J.A. 2849-51. WPL had simply stopped paying "amounts subject to unchallenged portions of the California court's assignment order." *SAS-2019*, 2019 WL 1447472, at *11.

As a result of the U.K. injunction, SAS was left with few options to collect on the U.S. judgment if WPL engaged in further evasive measures. As the district court noted:

> Indeed, prior to filing of the instant motion and imposition of AWA relief by this court, with the UK injunction in place, SAS had at its disposal no mechanism to prevent WPL from transferring sums received from United States-based customers to accounts in the United Kingdom, from altering licensing terms to direct payments to accounts in the United Kingdom, from communicating directly with customers special instructions for transmitting payments, or from taking any other actions in the United Kingdom to avoid paying sums to SAS.

SAS-2019, 2019 WL 1447472, at *11.

The combined impact of WPL's actions was particularly destructive. The U.K. injunction undermined SAS's ability to enforce the U.S. judgment, while the U.K. clawback order attempted to undo SAS's limited collection success. At the time the district court issued its injunctions, SAS had collected $6 million, the majority of which came from one-time court ordered payments rather than normal collection efforts. J.A. 962-63, 1270-73.[2] While not a small amount, $6 million represents only a fraction of the $79 million judgment. The district court calculated that, if nothing changed, it would take 36 years for WPL to satisfy the $79 million judgment. J.A. 2916-17. Further, if two-thirds of collections were subject to clawback in the U.K., it would take SAS 36 years to recover compensatory damages alone.

While the description above may not cover the entirety of WPL's evasive efforts, it demonstrates the situation facing the district court. Collections had all but stopped and were in danger of being undone. An immediate response was required, so the district court turned to the anti-clawback injunction and the U.S. expansion injunction. We examine each in turn.

III.

As noted above, the anti-clawback injunction provides that "no sum previously collected or to be collected by

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[2] WPL alleges that SAS has now collected $8 million of the judgment. Oral Argument Audio at 3:30-3:45, *SAS Inst., Inc.* v. *World Programming Ltd.*, Nos. 19-1290, 19-1300 (4th Cir. Jan. 31, 2020). Even if accurate, this updated figure does not alter our conclusion that the injunctions were, and are, sound. It still represents a small portion of the total damage figure, and it does not account for potential U.K. clawbacks. Further, to the extent collections have sped up in recent months, this seems primarily to indicate that the district court's injunctions are working as intended.

[SAS] in the United States is subject to payment to [WPL] on the basis of the [PTIA]." J.A. 1185. WPL argues that the anti-clawback injunction cannot stand because it exceeds the court's AWA authority, violates principles of comity, and suffers procedural flaws. We review the district court's issuance of this injunction for abuse of discretion. *In re March*, 988 F.2d 498, 499-500 (4th Cir. 1993). "A district court abuses its discretion if it relies on an error of law or a clearly erroneous factual finding." *SAS-2017*, 874 F.3d at 384 (quotation omitted). We conclude that no abuse of discretion occurred here. The anti-clawback injunction falls within the court's AWA authority, respects comity, and is procedurally sound.

A.

The district court was faced with a daunting situation: its judgment was under sustained collateral attack. WPL utilized the English courts to undermine SAS's ability to enforce the judgment in U.S. courts. It obtained authorization to claw back two-thirds of SAS's collections, effectively lowering the U.S. judgment and threatening to shift collections into reverse. Given this predicament, the district court was well within its rights to issue an injunction preventing U.K. clawbacks of U.S. collections. Consistent with the court's AWA authority, the injunction protects SAS's ability "to collect the entire amount of the [U.S.] judgment." *SAS-2019*, 2019 WL 1447472, at *9.

Although WPL raises several objections to the district court's issuance of the anti-clawback injunction, none are persuasive. To start, WPL attempts to characterize the seminal case *Laker Airways Ltd.* v. *Sabena, Belgian World Airlines*, 731 F.2d 909 (D.C. Cir. 1984), as mandating that U.S. courts tolerate PTIA clawbacks. *Laker Airways* requires no such thing. Although the court

there acknowledged that U.K. courts could order repayment of non-compensatory damages under the PTIA, a factual truism, it did not address whether a U.S. court could issue an anti-clawback injunction in response. Crucially, the district court's anti-clawback injunction is consistent with *Laker Airways*' holding that injunctive relief is appropriate when faced with attempts "to frustrate the enforcement of American law in American courts against companies doing business in America." 731 F.2d at 940.

Relatedly, WPL argues that it did not relitigate, attack, or alter the district court's judgment by seeking clawbacks in the U.K., but rather "took independent action under a U.K. statute that created a counterclaim in the U.K." Appellant's Reply Br. at 26 (quotation omitted). This argument quickly falters. As an initial matter, it strains logic to characterize a proceeding as "separate and independent" of a previous proceeding when its sole purpose is "to vitiate" the previous judgment. See *Karaha Bodas Co.*, v. *Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 500 F.3d 111, 122, 122 n.13 (2d Cir. 2007). The weakness of this argument is further underscored when the initial proceeding has not truly concluded because damages remain unpaid and, thus, the court has "an outstanding judgment to protect." See *Goss Int'l Corp.* v. *Man Roland Druckmaschinen Aktiengesellschaft*, 491 F.3d 355, 368 (8th Cir. 2007). Such is the case here: by seeking U.K. clawbacks, WPL attempted to undo two-thirds of a U.S. judgment it was not yet close to satisfying. The district court needed to protect its outstanding judgment.

B.

Comity does not prevent the district court's grant of the anti-clawback injunction, despite WPL's arguments to the contrary. "We approach [this] claim[ ] seriously,

recognizing that comity serves our international system like the mortar which cements together a brick house." *Laker Airways*, 731 F.2d at 937. Still, we recognize that "a domestic forum is not compelled to acquiesce in pre- or postjudgment conduct by litigants which frustrates the significant policies of the domestic forum." *Id.* at 915.

North Carolina, and the United States more generally, has a policy of allowing non-compensatory damages. North Carolina's UDTPA, which resulted in the trebled damages here, "has at least three major purposes":

> (1) to serve as an incentive for injured private individuals to ferret out fraudulent and deceptive trade practices, and by so doing, to assist the State in enforcing the act's prohibitions; (2) to provide a remedy for those injured by way of unfair and deceptive trade practices; and (3) to serve as a deterrent against future violations of the statute.

Caldwell v. *Smith*, 692 S.E.2d 483, 485 (2010) (quotation omitted). WPL undermined these policies when it used the English courts to impede U.S. collection efforts and obtain clawbacks of the largely unsatisfied U.S. judgment. "There never would have been any situation in which comity or forbearance would have become an issue if [WPL] had not gone into the English courts to generate interference with the American courts." *Laker Airways*, 731 F.2d at 939-40. Because WPL's actions frustrated U.S. and North Carolina policies, comity did not require that the district court surrender enforcement of its judgment.

There is an irony here. Rather than the district court's anti-clawback injunction being an affront to comity, actions by WPL have shown a lack of respect for American courts and American law. "The conflict . . . we confront today has been precipitated by the attempts of

another country to insulate its own business entities from the necessity of complying with legislation of our country designed to protect this country's domestic policies." *Laker Airways*, 731 F.2d at 955. Comity is not advanced when a foreign country condones an action brought solely to interfere with a final U.S. judgment. See *Paramedics Electromedicina Comercial, Ltda* v. *GE Med. Sys. Info. Techs., Inc.*, 369 F.3d 645, 654-55 (2d Cir. 2004); *Laker Airways*, 731 F.2d at 930. Nor is comity advanced when one country enjoins legitimate collection efforts in another country.

In contrast, the district court showed great respect for comity, limiting the impact of its anti-clawback injunction to sums collected in the U.S.—"monies without any nexus to any enforcement proceeding in the United Kingdom." *SAS-2019*, 2019 WL 1447472, at *9. Comity does not advise against such measured relief.

C.

WPL also argues that the anti-clawback injunction suffered procedural defects. We disagree. The district court complied with procedural requirements even when WPL's own actions made it difficult to do so.

Initially, WPL claims that it was not given the requisite "notice and an opportunity to be heard" before the district court issued the anti-clawback injunction *sua sponte* at a hearing. See *Cromer* v. *Kraft Foods N. Am., Inc.*, 390 F.3d 812, 819 (4th Cir. 2004). But the court issued the anti-clawback injunction *sua sponte* because, under the U.K. injunction, SAS was prevented "from seeking relief from [the district] court to preserve its ability to keep amounts collected under th[e] court's judgment." *SAS-2019*, 2019 WL 1447472, at *10.

We provide district courts with "broad discretion" to manage the timing of injunctive relief, "so long as the opposing party is given a reasonable opportunity, commensurate with the scarcity of time under the circumstances, to prepare a defense and advance reasons why the injunction should not issue." *Ciena Corp.* v. *Jarrard*, 203 F.3d 312, 319-20 (4th Cir. 2000). Here, the district court went out of its way to comply with this requirement. It issued the anti-clawback injunction at a hearing scheduled to address injunctive relief—after extensive discussion on the U.K. clawback order. It set another hearing for the following month. At the second hearing, the court discussed the anti-clawback injunction with WPL in some detail; WPL argued against the injunction but the court declined to lift it. Given WPL's attempts to frustrate the court's judgment, it can hardly claim it was without notice that the court would act to protect that judgment.

IV.

A.

WPL next argues that the district court exceeded its AWA authority by issuing the U.S. expansion injunction. As noted above, the injunction provides that:

> WPL is HEREBY ENJOINED from licensing WPS to any new customer for use within the United States. . . . This injunction expires automatically once defendant / judgment debtor has satisfied the judgment in this case.

SAS-2019, 2019 WL 1447472, at *18 (internal quotation marks omitted).

WPL alleges that "[t]he injunction . . . does not protect the money judgment this Court previously affirmed." Appellant's Opening Br. at 22. We disagree. Once again, we review the district court's grant of injunctive relief

pursuant to its AWA authority for abuse of discretion. *In re March*, 988 F.2d 498, 499-500 (4th Cir. 1993). And once more, we conclude that no abuse of discretion occurred. After observing WPL's collateral attack and frustration of the U.S. judgment, the district court sensibly concluded that this injunction was necessary to incentivize WPL to satisfy, rather than evade, its judgment.

As noted, we earlier affirmed the district court's denial of injunctive relief tied to WPL's U.S. licensing, expressing concern that such relief would frustrate WPL's ability to pay the money judgment. *SAS-2017*, 874 F.3d at 387. WPL took no heed of our forbearance. It collaterally attacked the judgment by obtaining clawbacks in the U.K. It interfered with U.S. collection proceedings and avoided collection efforts "with impunity" because there was no mechanism short of the previously denied injunctive relief by which the judgment could be meaningfully satisfied. *SAS-2019*, 2019 WL 1447472, at *11. Thus, the district court faced a very different situation than it did several years ago. Its concern was "no longer so much WPL's ability to pay damages but rather the conditions under which it will pay the damages." *Id.* at *16.

To create the right payment conditions, the court issued the U.S. expansion injunction. The injunction discourages WPL's evasion of the U.S. judgment by ensuring that its frustration strategies will no longer be painless. While WPL can continue licensing its software to existing customers for U.S. use, its U.S.-related operations cannot grow until the judgment is satisfied. People, and companies, respond to incentives. In the end, "there must be some degree of impact upon WPL's operations for [injunctive relief] to have any practical coercive effect. . . ." *SAS-2019*, 2019 WL 1447472, at *14.

The U.S. expansion injunction is narrow and carefully tailored. It is not intended to put WPL out of business. It does not affect WPL's current customers. It guards against double recovery, since "damages attributable to WPL customers engaged after trial in this matter [were] not incorporated into the . . . damages awarded at trial." *SAS-2019*, 2019 WL 1447472, at *16. It expires automatically once the U.S. judgment is satisfied. It does not foreclose the possibility of modification earlier if WPL makes good-faith payment efforts.

Moreover, consistent with "principles of international comity," the injunction "focuses on conduct in the United States and touching upon United States based transactions and commerce." *SAS-2019*, 2019 WL 1447472, at *13. Namely, it addresses only licensing for use within the U.S. Finally, the injunction is consistent with the historical practice of allowing equitable relief necessary to protect "a creditor who had already obtained a [money] judgment." *Grupo Mexicano de Desarrollo S.A.* v. *Alliance Bond Fund, Inc.*, 527 U.S. 308, 319-21 (1999).

As for the necessity for the U.S. expansion injunction, the court below explained it well:

> Where WPL has removed most tools available under US collection law, and where the UK judgment and injunction persist, SAS must resort to its own more extraordinary and coercive measures such as the instant injunction to compel relief from WPL.

SAS-2019, 2019 WL 1447472, at *16. "The essence of equity jurisdiction has been the power of the Chancellor . . . to mould each decree to the necessities of the particular case." *Hecht Co.* v. *Bowles*, 321 U.S. 321, 329 (1944). Because WPL "left SAS with few choices for asserting relief," it is unsurprising that SAS sought, and the district

court granted, one of the last remaining options. *SAS-2019*, 2019 WL 1447472, at *12.

Failing to act would have left the district court looking helpless. The court was "bound to implement" the "strongly mandated legislative policies" of the U.S. and North Carolina. *Laker Airways Ltd.* v. *Sabena, Belgian World Airlines*, 731 F.2d 909, 916 (D.C. Cir. 1984). Had the court not granted relief, its judgment would have become virtually meaningless, leaving SAS dependent on WPL's "voluntary acquiescence" to paying. *SAS-2019*, 2019 WL 1447472, at *14. The court rightly held that "voluntary cooperation . . ., all while [SAS] is severely restricted in the tools available to it to enforce this court's judgment," was no longer sufficient given WPL's evasive maneuvers. *Id.* The court did not abuse its discretion by issuing an injunction necessary to protect its judgment.

B.

The parties disagree on whether the U.S. expansion injunction, issued pursuant to the district court's AWA authority, must satisfy the four-factor test traditionally required for injunctive relief. While there is strong support for the view that these factors "are pertinent in assessing the propriety of any injunctive relief," including AWA relief, we need not settle this issue at present. See *Winter* v. *Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 32 (2008). If the traditional equitable analysis applies, it is satisfied.

Under the traditional equitable analysis, a plaintiff seeking injunctive relief must demonstrate:

> (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships

> between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.

eBay Inc. v. *MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006). In the case at hand, SAS has met this burden.

We noted in our previous opinion that "[s]atisfying these four factors is a high bar." *SAS-2017*, 874 F.3d at 385. That remains the case. Injunctive relief "does not follow from success on the merits as a matter of course." *Id.* (quotation omitted). Rather, it is "a drastic and extraordinary remedy" that should be used only when "essential in order effectually to protect property rights against injuries otherwise irremediable." *Id.* (quotation omitted). That being said, the *eBay* factors must be interpreted in light of the context to which they apply.

Here, the backdrop is, to repeat, that of a party who when faced with a lawful judgment under North Carolina law rendered in the Eastern District of North Carolina addressing the wrongful actions of WPL in North Carolina, and more broadly the United States, determined to dig in and use every possible means to avoid paying the judgment. Further, in 2017, we upheld the district court's denial of broad injunctive relief barring WPL *from all licensing* for U.S. use *permanently*; the present U.S. expansion injunction provides much narrower relief, impacting only licensing *to new customers* for U.S. use *while the money judgment is outstanding*. It is through the lens of WPL's determined effort to avoid the legal consequences stemming from the jury's verdict on its breach of contract and unfair trade practices claims, and the changed nature of the relief at issue, that we now apply the *eBay* criteria.

Viewed through this lens, SAS has demonstrated irreparable injury from WPL's actions. Although in pos-

session of a $79 million judgment, SAS has been able to collect little. Collections to date represent only a fraction of the compensatory damage award, much less the total damage award. At their current pace, collection efforts will take decades. Because "the unsatisfiability of a money judgment can constitute irreparable injury," this first factor is satisfied. *Hoxworth* v. *Blinder, Robinson & Co.*, 903 F.2d 186, 206 (3d Cir. 1990).

Second, SAS has shown that legal remedies, "such as monetary damages" alone, are inadequate. *eBay*, 547 U.S. at 391. When SAS was last before this court, it raised concerns about the U.S. judgment's collectability. While we noted that "[i]njunctions have . . . sometimes been deemed appropriate based on barriers to collectability after judgment," we determined that, at the time, "SAS ha[d] offered only vague concerns on this front." *SAS-2017*, 874 F.3d at 387.

That is no longer the case. When the district court granted the U.S. expansion injunction, it found that:

> [T]he court now knows that WPL has sought and will continue to seek to clawback two-thirds of every dollar SAS collects. Furthermore, there is no clearer "barrier to collectability" than the UK injunction that has forced SAS under penalty of criminal contempt to bring a halt to judgment collection activity available in the California court.

SAS-2019, 2019 WL 1447472, at *16. We agree. Without injunctive relief incentivizing WPL to satisfy the judgment, SAS's money judgment would be rendered near "illusory." See *SAS-2017*, 874 F.3d at 387.

Third, the balance of hardships has shifted to support a grant of injunctive relief. Previously, we expressed concern that the broader injunction's impact on sales

might prove ruinous for WPL, when the company would "already face significant hardship based on the monetary damages it owes." *SAS-2017*, 874 F.3d at 387-88. Now, the narrowly tailored injunction granted by the district court encourages WPL to satisfy the judgment, while limiting any negative sales impact by allowing the company to continue serving existing customers. Thus, harm to WPL is lessened and our concern that an injunction "would frustrate, rather than facilitate, WPL's ability to pay damages" is lessened as well. *Id.* at 387.

WPL suggests the injunction is unnecessarily harsh because it prevents global licensing to new customers, even ones located outside the U.S. However, this feature was necessary to prevent easy circumvention of the injunction. Without it, WPL could "structure its customer relationships, licensing agreements, and invoicing practices, to allow or encourage new . . . licensing to global businesses for use in the US," and thus "engage countless new global company customers to undertake new substantial use of WPS products in the United States, without falling under the restriction." *SAS-2019*, 2019 WL 1447472, at *14.

Fourth, "the public interest factor has changed in light of WPL's activities in securing the UK injunction and judgment." *SAS-2019*, 2019 WL 1447472, at *17. Previously, we held that "abstract rule of law concerns" could not justify the broad injunction given concrete harms WPL customers would face in changing software. *SAS-2017*, 874 F.3d at 388. Now, under the district court's narrow injunction, WPL's customers are unimpacted.

In contrast, rule of law concerns are no longer abstract. They "have become paramount" where:

> The ability of US courts to enforce their own laws and to allow litigants to pursue freely rights ac-

> corded to them under US law have been significantly eroded through WPL's conduct in seeking the UK injunction and clawback relief in the UK judgment.

SAS-2019, 2019 WL 1447472, at *17. WPL alleges that this injunction will harm competition, by giving potential customers one less option. While protecting competition is of vital interest, SAS has many competitors in "the market for software used to manage and analyze large and complex datasets." *SAS-2017*, 874 F.3d at 375; see also J.A. 1467. Thus, rule of law concerns predominate at present. The final equitable factor is satisfied.

When denying broad injunctive relief several years ago, we noted that "the future sometimes declines stubbornly to be prophesied." *SAS-2017*, 874 F.3d at 385. At the time, we did not know that WPL would undermine U.S. collection proceedings at every turn and seek clawbacks in the U.K. Now we do. These changes in circumstance have made equitable relief essential.

C.

WPL next turns to procedural complaints, arguing that this injunction is not authorized by Rule 69 of the Federal Rules of Civil Procedure or by North Carolina law. Rule 69 directs that a federal "money judgment is enforced by a writ of execution, unless the court directs otherwise," and that, generally speaking, "[t]he procedure on execution—and in proceedings supplementary to and in aid of judgment or execution—must accord with the procedure of the state where the court is located." Fed. R. Civ. P. 69(a)(1). WPL alleges that no provision of North Carolina law authorizes this injunction.

As an initial matter, North Carolina law authorizes injunctive relief:

> When, during the litigation, it appears . . . that a party thereto is doing or threatens or is about to do, or is procuring or suffering some act to be done in violation of the rights of another party to the litigation respecting the subject of the action, and tending to render the judgment ineffectual.

N.C. Gen. Stat. §1-485. Here, WPL's interference with collection proceedings which SAS had a legal right to pursue—and its collateral attack by seeking clawbacks of funds SAS had a right to collect—undermined the effectiveness of the U.S. judgment.

Even if North Carolina law did not speak to the propriety of injunctive relief, the U.S. expansion injunction is consistent with Supreme Court precedent. Rule 69 specifies that, "a federal statute governs [collection proceedings] to the extent it applies." Fed. R. Civ. P. 69(a)(1). The district court issued the U.S. expansion injunction pursuant to the AWA, a federal statute. And, the Court has held that the AWA affords courts residual authority to issue necessary writs so long as no "statute specifically addresses the particular issue at hand." *Pa. Bureau of Correction* v. *U.S. Marshals Serv.*, 474 U.S. 34, 43 (1985).

The Court noted that, while the AWA "does not authorize [federal courts] to issue ad hoc writs whenever compliance with statutory procedures appears inconvenient or less appropriate," it "empowers them *to fashion extraordinary remedies when the need arises*." *Pa. Bureau*, 474 U.S. at 43 (emphasis added). We are faced here with the need for an extraordinary remedy. SAS, a litigant holding a U.S. judgment, attempted collection in California following Rule 69 and state procedures. Soon after, WPL obtained an injunction preventing "SAS from seeking the full panoply of judgment collection tools" available there. *SAS-2019*, 2019 WL 1447472, at *10. In

response to the "restraints that WPL has placed on SAS's ability to use the tools normally available . . . in United States courts, particularly in the California court[s]," SAS returned to North Carolina seeking the U.S. expansion injunction. *Id.* at *12.

Given these circumstances of WPL's own making, we cannot fault SAS or the district court for "resort[ing] to [their] own more extraordinary and coercive measures . . . to compel relief." *SAS-2019*, 2019 WL 1447472, at *16. After straightforward collection procedures were thwarted, the AWA and Rule 69 allowed for "extraordinary" relief. See *Pa. Bureau*, 474 U.S. at 43. Thus, the district court possessed authority to issue the U.S. expansion injunction.

V.

To recapitulate, WPL's main effort at frustration involved seeking an anti-suit injunction from the courts of the United Kingdom. The U.K. anti-suit injunction was not only an attempt to relitigate our holding that the original U.K. judgment, while effective in the U.K., had no preclusive effect upon a lawsuit brought under North Carolina law, given the "many legal and factual differences" between the U.K. litigation and the U.S. suit. *SAS-2017*, 874 F.3d at 378-80. The post-judgment anti-suit injunction issued by U.K. courts would prevent SAS from utilizing the laws of this country to satisfy a judgment rendered by courts of this country. Specifically, the injunction disrupted SAS's collection proceedings in the federal courts of California and sought to stop those proceedings in their tracks.

The district court naturally took steps not to leave its judgment defenseless. The court's U.S. expansion injunction and anti-clawback injunction work in tandem. The former incentivizes WPL to satisfy the U.S. judg-

ment, while the latter ensures that U.S. collections remain with SAS. WPL would prefer "to continue unfettered in licensing its product for use in the United States," all the while seeking clawbacks. *SAS-2019*, 2019 WL 1447472, at *14. In other words, WPL would like to have its cake and eat it too. It would like to operate in the U.S. but face limited consequences for its violations of U.S. law. To illustrate the fallacy of this position, it's helpful to recall how this case began—with WPL's breach of a license agreement.

SAS is "the world's largest privately-held software company." *SAS-2017*, 874 F.3d at 387. Since its formation in 1976, SAS has sought to improve its products, investing a sizable percentage of revenue into research and development. When WPL decided to offer a competing product, it took a short cut. In violation of a license agreement, WPL reverse engineered a SAS product to speed development of its own product. See *id.* at 376, 380-83. This is not the sort of "innovation" or "competition" encouraged by U.S. law. A federal jury found WPL liable for this behavior in federal district court and set damages based solely on the breach's impact in the U.S. Now, WPL seeks to avoid paying even those.

The situation before us did not have to come about. WPL could have proceeded differently at many points. It could have developed its product without violating SAS's license agreement. Or it could have declined to enter the U.S. market. But WPL cannot participate in the U.S. market, violate U.S. law, and expect to avoid the consequences of its conduct. "A foreign corporation doing business within the United States reasonably expects that its United States operations will be regulated by United States law." *Laker Airways Ltd.* v. *Sabena, Belgian World Airlines*, 731 F.2d 909, 923 (D.C. Cir. 1984).

The district court did not abuse its discretion by issuing the injunctions in this case. To have done nothing would invite foreign litigants to undermine the finality of many an American judgment and foreign countries to doubt the very efficacy of American law.

For the foregoing reasons, the judgment is affirmed.

AFFIRMED

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
NORTH CAROLINA
WESTERN DIVISION

NO. 5:10-CV-25-FL

SAS INSTITUTE, INC.,

Plaintiff / Judgment Creditor,

v.

WORLD PROGRAMMING LIMITED,

Defendant / Judgment Debtor.

MEMORANDUM OPINION AND ORDER
(XXXXXXXXXX)[1]

March 18, 2019

This matter returns to the court's attention on a number of motions including: 1) motion for relief under the All Writs Act, 28 U.S.C. § 1651, ("AWA") and Rule 60 of the Federal Rules of Civil Procedure (DE 809-5) by plaintiff and judgment creditor SAS Institute Inc.

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[1] The court's analysis relies, in part, on documents filed under seal. Within 14 days, the parties jointly shall return to the court by U.S. Mail, addressed to the case manager, a copy of this order marked to reflect any perceived necessary redactions. Upon the court's inspection and approval, a redacted copy of this sealed order will be made a part of the public record.

("SAS"); 2) oral motion for modification of injunction made in open court March 4, 2019, by defendant and judgment debtor World Programming Limited ("WPL'); and 3) unopposed motions to seal (DE 860, 868, 872) by WPL. For the following reasons, SAS's motion is granted, WPL's oral motion is denied as moot, and its motions to seal are granted. Reasoning for the court's February 15, 2019, order that no sum collected or to be collected by the judgment creditor in the United States is subject to payment to the judgment debtor on the basis of the United Kingdom Protection of Trading Interests Act 1980 ("PTIA"), also is set forth herein.

BACKGROUND

Reference is made to prior orders of this court and the opinion of the United States Court of Appeal for the Fourth Circuit in *SAS Inst., Inc.* v. *World Programming Ltd.*, 874 F.3d 370 (4th Cir. 2017), which detail the background and procedural history of this case up to this court's judgment entered July 15, 2016,[2] and appeal

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[2] All references herein to the "judgment" or "court's judgment," unless otherwise specified, are to the court's July 15, 2016, judgment, which amended and superseded a prior judgment entered October 16, 2015. The court's judgment also is incorporated by reference in amended judgment entered December 8, 2017, and second amended judgment entered May 3, 2018. Judgment is premised upon summary judgment rulings and jury verdict findings that WPL breached a license agreement for SAS's software product, the SAS Learning Edition License Agreement, by using it to produce and market a competing software product, World Programming System ("WPS"), resulting in compensatory damages in the amount of $26,376,635. The court also premised its judgment upon jury verdict finding that WPL fraudulently induced SAS to enter into the license agreement, and that this conduct violated the North Carolina Unfair and Deceptive Trade Practices Act ("UDPA"), resulting in the same compensatory damages, which was trebled to $79,129,905.00 in accordance with the UDPA. The court denied, in pertinent part, SAS's claims

therefrom. The court turns its attention more particularly below to the judgment creditor's efforts to enforce its judgment against the judgment debtor, WPL, a competitor of SAS, based in the United Kingdom. Judgment enforcement activities are complex. At present they involve this court and courts in California and the United Kingdom.

A. Judgment Enforcement

On November 9, 2016, this court granted WPL's emergency motion for temporary stay of execution of the court's judgment pending resolution of motion for stay pending appeal, premised in part upon WPL's deposit into an escrow account maintained in the United States of "80% of all revenues received by WPL in relation to licensing of WPS in the [US]." (DE 633-1; see Order (DE 668) at 2). On February 9, 2017, the court granted the judgment debtor's motion for stay of execution pending appeal, conditioned upon judgment debtor's filing of proof of supersedeas bond in the amount of $2,191,770.00, and continued maintenance of the aforementioned escrow account modified to accumulate 100% of revenues based on sales in the United States, estimated to total approximately [redacted] in a one-year period. (Order (DE 696) at 8-10). Upon conclusion of appeal activities in favor of the judgment creditor, the clerk of court released

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for copyright infringement and injunction. With respect to that denial, SAS had moved after the jury verdict to enjoin WPL permanently from "marketing, selling, or licensing (including renewal or relicensing) of WPL's World Programming System for use in the United States." (Mot. & Prop. Order (DE 536-1) at 2). This court's reasons for denial of SAS's motion for permanent injunction are set forth in memorandum opinion and order entered June 17, 2016. (See Order (DE 601) (Faber, J.)).

the escrow amount to SAS and the bond amount also was paid to the judgment creditor.

In December 2017, SAS commenced execution upon the judgment by initiating enforcement proceedings in California and the United Kingdom. The court highlights below activities in each forum and continuing developments impacting the case before this court.

1. California case

On December 28, 2017, SAS commenced a judgment enforcement action in the United States District Court for the Central District of California (hereinafter, the "California court"), by registering the judgment, and the California court thereafter issued a writ of execution against WPL. See *SAS Institute Inc.* v. *World Programming Ltd.*, 2:18-CV-603-VAP (C.D. Cal.) (hereinafter the "California case"). Upon renewed motion for assignment order filed by SAS, the California court entered order September 5, 2018, providing for direct assignment to SAS of rights to payment from specified WPL customers located anywhere in the world, except in the United Kingdom, until this court's judgment is satisfied. (California case, Docket 98 (hereinafter the "September 5, 2018, assignment order")). In particular, the California court ordered:

> The Court assigns to SAS WPL's right to payments from entities identified on SAS's Customer List, as supplemented by Hewitt's Schedule 1-1, as customers with accounts receivable, active customers, and customers with recently expired licenses. All of WPL's rights and interest, whether or not the right is conditioned on future developments, to payment due or to become due from these companies shall be and hereby are assigned to SAS until such a time as the North Carolina judgment in the amount of

> $79,129,905.00 is fully satisfied or until further order of the Court.
>
> The Court DENIES IN PART the Motion to the extent it seeks assignment of WPL's right to payments by resellers of its software and by "non-customers," i.e., the entities identified in paragraph 8 of the Robinson Declaration. As SAS withdrew its request for assignment of WPL's right to payments from customers located in the United Kingdom, those customers are excluded from this Order.

(*Id.* at 9) (emphasis added). The "Customer List" referenced in the September 5, 2018, assignment order includes 155 customers with billing addresses in the United States and 258 customers with billing addresses outside of both the United States and the United Kingdom (See California case, Docket 74-1 (Ex Parte) at 4-11 ("Schedule 1-1")).

On September 11, 2018, WPL filed notice of appeal of the September 5, 2018, assignment order to the United States Court of Appeals for the Ninth Circuit. In the California case, WPL also filed that day motion to stay that part of the assignment order pertaining to customers outside of both the United States and the United Kingdom. WPL filed a similar motion before this court to stay execution of the judgment for customers outside of both the United States and the United Kingdom pending completion of United Kingdom judgment-recognition proceedings.

Two days later, on September 13, 2018, the California court "defer[red] to the Eastern District of North Carolina to rule on this matter." (California case, Docket 111). This court denied WPL's motion to stay execution of the judgment holding: "[WPL] has not demonstrated a meritorious argument in support of stay of all non-[United

States] execution of the judgment pending [United Kingdom] judgment-recognition proceedings." (Order (DE 786)).[3]

On September 13, 2018, the California court entered an amended assignment order, directing WPL to assign its rights to payments to SAS from all customers worldwide, except those in the United Kingdom. (See California case, Docket 110, at 9). Seven days later, on September 20, 2018, the California court vacated its September 13, 2018, order and restored the September 5, 2018, assignment order, reasoning that it lacked jurisdiction to amend its order on appeal. However, in its September 20, 2018, order, the California court indicated it would be "inclined to issue" the September 13, 2018, order directing WPL to assign its rights to payments to SAS from all customers worldwide, except those in the United Kingdom if the court of appeals allowed a limited remand. (See California case, Docket 118).[4]

On October 12, 2018, the California court denied SAS's ex parte application for an order directing WPL to turn over all income received from customers located worldwide, except in the United Kingdom, due to lack of juris-

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[3] The court also stated: "Moreover, issues raised by those portions of the motion that concern the manner and form of demand plaintiff has made upon customers, as allowed by the September 5, 2018, order of the United States District Court for the Central District of California, including argument that plaintiff has exceeded the scope of that order, more properly are addressed by such court." (Order (DE 786)).

[4] Federal Rule of Civil Procedure 62.1 provides a mechanism for a district court to enter an "Indicative Ruling on a Motion for Relief That Is Barred by a Pending Appeal" where the district court states "that it would grant the motion if the court of appeals remands for that purpose."

diction pending appeal. (See California case, Docket 123). However, on November 14, 2018, the California court entered a second indicative ruling stating that it would grant SAS's ex parte application for a turn over order if the court of appeals allowed limited remand. (See California case, Docket 127).

SAS then moved for limited remand based upon the California court's two indicative rulings. Decision on that motion by the United States Court of Appeals for the Ninth Circuit was stayed upon request of SAS, acting at the command of the court in the United Kingdom upon penalty of fine, asset seizure, and/or arrest. SAS also was forbidden by the United Kingdom High Court of Justice, Business and Property Courts of England and Wales Commercial Court (QBD) (the "UK court") to communicate reason for its stay request. This is discussed more particularly below.

2. United Kingdom case

While the California enforcement proceedings were ongoing, United Kingdom enforcement proceedings initiated by SAS also were developing. As pertinent here, WPL defensively advanced several motions and positions in the United Kingdom enforcement proceedings to stop or limit judgment enforcement relief sought by SAS.

On January 31, 2018, WPL filed a defense and counterclaim in which it advanced that "SAS should not be permitted to 'enforce' its [United States] judgment," where "it would be contrary to public policy to permit enforcement" and "an abuse of process, inconsistent with earlier English judgments," and where "the [United

States] judgment is impeachable for lack of natural/substantial justice in the proceedings." (DE 747-3 at 2-3).[5]

On December 13, 2018, the UK court entered judgment in favor of WPL (hereinafter the "UK judgment"), "refus[ing] enforcement [of this court's judgment] on the grounds of public policy because of conflict with the [European Union] Software Directive." (UK judgment (DE 816-1) ¶190). The UK court also concluded that SAS's action in this court was a "collateral attack" on a prior "English judgment" in favor of WPL. (*Id.* ¶126). Furthermore, the UK court concluded that Section 5 of the PTIA prevented recovery on all parts of SAS's claim under the UDPA, not just the multiple damages portion. (*Id.* ¶244 ("If there is a judgment based upon multiplication, then no part of it may be enforced").

The UK judgment also granted relief to WPL on a counterclaim asserted under Section 6 of the PTIA to claw back two-thirds (2/3) of all amounts SAS collects in satisfaction of this court's judgment. The court held that the PTIA entitles WPL to recover against SAS "two-thirds of any amount which [WPL] may have paid," representing the multiple damages portion of the judgment. (*Id.* ¶267; see *id.* ¶¶250, 269-270) (quotations omitted). The court held that WPL was entitled to this clawback even "where it has not yet paid sums exceeding the value of the compensatory part of the judgment and interest thereon." (*Id.* ¶252). According to the UK court, the PTIA "assumes a pro rata recovery" of compensatory

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[5] Unless otherwise specified, page numbers in citations to documents filed in this court's Electronic Case Filing (ECF) system provide the page number as shown on the ECF system (e.g., DE 747-3 at 2-3) and not the page number showing on the face of the underlying document (e.g., page denominated "1" and "2" of the WPL defense and counterclaim).

and multiplied damages, and "satisfaction is plainly not a qualifying condition." (*Id.* ¶272).

The UK court noted the possibility that an appropriation could be "made at the time of payment" by a creditor, "so as to make the payment one in respect of the compensatory element only." (*Id.* ¶270). With respect to the escrow account and bond payments already disbursed in this case, however, the UK court rejected SAS's attempt to make an appropriation later through notice of partial satisfaction of judgment, on the basis that "it would seem inequitable to permit it to be made defensively." (*Id.*). Finally, the UK court rejected SAS's arguments for a set-off against the portion of the judgment that remains unpaid. (*Id.* ¶273).

a. Injunction

Eight days after entry of the UK judgment, on December 21, 2018, based upon an ex parte application of WPL, the UK court entered an ex parte injunction and order ("UK injunction") which commences with the following notice to SAS:

> **PENAL NOTICE**
>
> **IF YOU, SAS INSTITUTE INC., DISOBEY THIS ORDER YOU MAY BE HELD TO BE IN CONTEMPT OF COURT AND YOU MAY BE FINED AND HAVE YOUR ASSETS SEIZED AND ANY OF YOUR DIRECTORS, OFFICERS, EMPLOYEES, REPRESENTATIVES OR AGENTS MAY BE IMPRISONED, FINED OR HAVE THEIR ASSETS SEIZED.**

(UK injunction (DE 816-2 at 2)). Multiple prohibitions bar SAS from taking action in the United States including that SAS shall not:

1. "Pursue, continue, or take any further steps . . . for the purposes of seeking the *in personam* relief identified in the . . . First and Second Limited Remand Motions" that SAS had filed in the Ninth Circuit (*Id.* ¶3.a.);
2. "Seek to obtain from the [California court], or any other court of the USA (state or federal), the orders foreshadowed by and/or contemplated in (i) the [California court's indicative ruling 1] and (ii) the [California court's indicative ruling 2], or any similar orders." (*Id.* ¶3.b.);
3. "[C]ommence, bring, continue, pursue or take any steps in, any claims, proceedings, applications, or motions before any court of the USA (state or federal)" to seek:
    i. Relief of similar nature and/or effect [to items 1) and 2) above]
    ii. Relief which imposes (or purports to impose) . . . requirements on WPL to assign or transfer to SAS . . . any assets and/or receivables of WPL and/or any debts owed to WPL, and/or any assets, receivables or debts that may in the future be owed to WPL. . . .[or]
    iii. Relief which expands or amends or varies the In Rem Assignment Order to have in personam effects of the kinds identified [in the preceding subsection]. This encompasses adjustments or modifications to any prior order or ruling to impose such a requirement.

(*Id.* ¶3(c)).

4. "[C]ommence, bring, continue, pursue or take any steps in, any claims, proceedings, applications, or motions before any court of the USA (state or federal)"

to "[p]revent or restrain, or seek to prevent or restrain, WPL from:"

i. Pursuing, continuing, or taking steps in: this Anti-Suit Injunction Application, any related application before this Court, and/or this action;

ii. Commencing, bringing, continuing, pursuing, or taking any steps in, any further application or claim before this Court for anti-suit injunction relief or related relief, or damages or compensation, in relation to: (1) the California Enforcement Proceedings, applications or motions therein, (2) the North Carolina Liability Proceedings[6]; or (3) any other proceedings, applications or motions in the USA that are or may in the future be on foot arising out of the North Carolina Liability Proceedings, including efforts to enforce the North Carolina Money Judgment there, and/or the enforcement of judgments given therein.

(*Id.* ¶6.a.).

The UK injunction commanded SAS to take affirmative action to halt proceedings before the United States Court of Appeals for the Ninth Circuit and the California court. In particular, the UK court commanded SAS not to file a brief due that day in connection with SAS's motion to remand to the California court for entry of indicative ruling. (*Id.* ¶3(d)). It also commanded SAS to procure from the United States Court of Appeals for the

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[6] The UK injunction defines this term to include the instant case, and expressly includes applications for injunctive relief in relation to this court's March 2, 2018, discovery order "and any other similar orders." (UK Injunction (DE 816-2) ¶6.a. & Sched. B. ¶6.i.).

Ninth Circuit or the court below "a stay or stays" of certain pending motions, including motions relating to the September 5, 2018, assignment order and indicative rulings. (*Id.* ¶4). SAS has carefully complied with these directives. (See Millen Decl. (DE 809-8) ¶¶11-12).

The UK injunction provides for a "Return Date" at which the UK court "will consider whether [the UK injunction] shall be continued and/or what further order shall be made." (UK injunction (DE 816-2) ¶13). At present, the UK court is scheduled to reconvene proceedings March 22, 2019, for this purpose. A statement by WPL's United Kingdom counsel, Alexander Carter-Silk ("Carter-Silk"), filed in the UK court on January 14, 2019, recites that WPL seeks, in part, "a mandatory order that SAS withdraw the Turnover Order Application and the First and Second Limited Remand Motions," which motions presently are stayed in the California court and Ninth Circuit. (Fourth Witness Statement of Carter-Silk (DE 827-18) ¶28(a)) (emphasis in original).

3. North Carolina case

During the time enforcement proceedings as described were ongoing before the California and UK courts, the following additional activities were taking place before this court pertinent to the instant motions. On October 5, 2018, SAS filed a notice of partial satisfaction of judgment reporting that on January 5, 2018, SAS received $2,191,770.00, and on March 2, 2018, SAS received $2,110,144.00, which it applied to interest and compensatory damages awarded in the court's judgment. (Notice (DE 790) at 1-2). These amounts, which should have been credited earlier under applicable North Caro-

lina law,[7] correspond to the supersedeas bond and payment of escrow account funds paid into the court's registry as required by the court's February 9, 2017, order. WPL moved to strike the notice.

On January 11, 2019, SAS filed ex parte the instant motion for relief under the AWA and Rule 60 of the Federal Rules of Civil Procedure, for an order amending the judgment in this case to enjoin WPL from future sales of its software products for use within the United States until it satisfies the court's judgment. SAS requests, in the alternative, to enjoin WPL from future sales of its software products to new customers for use within the United States until it satisfies the court's judgment. (See Mem. (DE 809-6 at 28)). In support of its motion, SAS relies on declaration of its attorney, Pressly M. Millen ("Millen"), in conjunction with: 1) WPL's motion for stay of mandate filed in the court of appeals; 2) the September 5, 2018, assignment order; 3) the UK judgment and injunction; and 4) WPL's standard terms for license agreement prior to and after December 10, 2018, with redline comparison of the same.

The instant motion was accompanied by and contained within an ex parte motion to file motions under seal, (DE 809), along with an emergency motion under the AWA to preserve the court's jurisdiction, with reference to the

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[7] No prejudice was shown by the judgment debtor arising from delay. The applicable North Carolina statute incorporates no penalty for any late filing unless the judgment creditor fails to file notice of receipt of payment "within 30 days following written demand by the debtor." N.C. Gen. Stat. § 1-239(c). No demand was made by the judgment debtor. When brought to the court's attention, the court directed the judgment creditor immediately and in the future, to make certain that credits timely are made. This direction scrupulously has been adhered to.

declaration of Millen in support thereof (DE 809-1 to 809-4). That same day, the court entered an order granting SAS's emergency motion, providing:

> pending further order of the Court, "WPL" is HEREBY ENJOINED from licensing "WPS" to any "new customer" for use within the United States. For the purposes of this injunction, . . . a "new customer" is any person or entity that held no active license to WPS on 11 January 2019. This injunction expires automatically once World Programming Limited has satisfied the $79,129,905 judgment in this case.

(DE 810). WPL filed a memorandum in opposition to the instant motion, together with a motion for prompt dissolution of the ex parte injunction. WPL relies upon a declaration of its attorney, Wayne F. Dennison ("Dennison"), in conjunction with: 1) the UK judgment, injunction, and directions order; as well as 2) declaration of Oliver R. Robinson ("Robinson"), a company director of WPL.

On January 28, 2019, the court set a schedule for briefing and noticed hearing on the motions then pending for February 15, 2019.

SAS filed reply in support of the instant motion combined with a response to the motion for dissolution. In support thereof, SAS relies upon a second declaration of Millen, in conjunction with: 1) correspondence between WPL customers and Millen in September and October 2018; 2) correspondence between Millen and WPL counsel; 3) California case docket; 4) WPL filings and witness statements in the UK proceedings; and 5) excerpts of WPL's supplemental objections and responses to SAS's first post-judgment interrogatories.

WPL filed reply in support of its motion for prompt dissolution on February 6, 2019, accompanied by declaration of WPL counsel, James A. Barta ("Barta"), in conjunction with: 1) prior filings made in the instant case; 2) correspondence between counsel for SAS and WPL in 2017 and 2018; 3) declaration of WPL UK counsel, Carter-Silk; 4) declaration of WPL California counsel, Joel S. Miliband ("Miliband"), and correspondence between counsel attached thereto; and 5) filings made by SAS in UK proceedings in December 2017 and October 2018.

SAS filed notice on February 13, 2019, containing additional documents: 1) additional witness statements by Carter-Silk and Miliband filed in UK proceedings; 2) filings in the California case; and 3) a WPL press release, dated December 17, 2018.

With benefit of all these materials, the court held hearing February 15, 2019. Certain orders were made and supplemental submissions directed to be filed in advance of continued hearing set for March 4, 2019, as briefly summarized below:

1. The court held in abeyance SAS's instant motion, pending receipt of certain accounting information;
2. The court ordered WPL to file under seal an accounting of all sums received from and after September 5, 2018, from all customers, without geographical limitation, specifying the name and invoice address of each customer;[8]
3. The court ordered WPL to pay by February 22, 2019, to SAS all sums the judgment debtor had received

[8] WPL did so on February 22, 2019 (DE 852).

from customers invoiced in the United States from and after September 5, 2018;[9]

4. The court ordered SAS to timely file notice of receipt of any sum paid, to be credited to the judgment in accordance with North Carolina General Statute § 1-239(c);[10]
5. The court ordered that no sum previously collected or to be collected by SAS in the United States is subject to payment to WPL on the basis of the PTIA;[11]
6. The court denied the judgment debtor's motion to strike satisfaction of judgment (DE 791);[12] and
7. The court denied the judgment debtor's motion for prompt dissolution of ex parte injunction (DE 771).[13]

Supplemental filings have been made also to include, on behalf of SAS: 1) declaration of forensic accountant Samuel Hewitt ("Hewitt"), with attached schedules and

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[9] WPL did so on February 22, 2019, by paying [redacted] to SAS, as represented in its accounting. (See DE 852 and DE 853-1 at 32).

[10] SAS filed a notice of partial satisfaction of judgment (No. 2) on February 19, 2019, which states that additional payments (as of that date) were received by SAS in the amounts of $228,786.00 and $357,734.00 (totaling $586,520). SAS filed a further notice of partial satisfaction of judgment (No. 3) on March 1, 2019, which states that additional payments (as of that date) were received by SAS in the amount of $1,171,249.65.

[11] The court indicated memorandum opinion explaining the court's reasoning for its order in this part would follow separately.

[12] However, the court reserved for further consideration upon the appropriate motion judgment crediting processes.

[13] Written order was then entered in open court supplanting the court's January 11, 2019, emergency order, enjoining judgment debtor "from licensing 'WPS' to any 'new customer' for use within the United States," and explaining its reasons for doing so. (DE 846).

exhibits, 2) further declaration of Millen, and 3) declaration of John Boswell, Chief Legal Officer of SAS. WPL also relies upon declaration of Barta, in conjunction with: 1) declaration of Robinson; 2) Hewitt Schedule 1-1 filed in the California case; 3) December 13, 2018, order by the UK court entering judgment in favor of WPL on its counterclaim in the sum of $2,867,922.67, with 8% interest; 4) letter from WPL's UK counsel to SAS's counsel regarding the UK proceedings; and 5) UK civil procedure rules.

On March 3, 2019, WPL filed notice regarding inadvertent issuance of a license and free licenses, in violation of this court's injunction, and corrective measures taken and proposed. On March 4, 2019, the date of hearing, SAS filed notice containing customer invoices from WPL and a list of WPL's active software licenses as of February 25, 2019. That same date WPL filed notices containing: 1) WPL customer correspondence and invoices; 2) declaration of Robinson attaching charts showing US monthly receipts and revenues; 3) a March 2018 order of the UK court; and 4) letters from counsel for WPL to counsel for SAS dated March and April 2018.

With benefit of these additional materials, on March 4, 2019, the court heard further arguments of counsel. The judgment debtor made oral motion to modify the current injunction to state "no new licensing to U.S. customers," as opposed to enjoining licensing for use in the US. (Tr. (DE 874) at 93). The court took under advisement the oral motion and the instant motion.[14] This order now follows.

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[14] The court also heard from the judgment creditor on issue raised in the judgment debtor's notice March 3, 2019, concerning WPL's inadvertent issuance of free licenses. In light of the court's ruling and where SAS declines to permit any "carve-out" from the court's in-

COURT'S DISCUSSION

A. "Clawback"

The court memorializes here the reasoning for its February 15, 2019, order that "no sum previously collected or to be collected by the judgment creditor in the United States is subject to payment to the judgment debtor on the basis of the United Kingdom Protection of Trading Interests Act of 1980." (Order (DE 848) at 2).

1. The AWA

The AWA provides that "[t]he Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." "This Court has repeatedly recognized the power of a federal court to issue such commands under the All Writs Act as may be necessary or appropriate to effectuate and prevent the frustration of orders it has previously issued in its exercise of jurisdiction otherwise obtained." *United States* v. *New York Tel. Co.*, 434 U.S. 159, 172 (1977). The AWA is a "legislatively approved source of procedural instruments designed to achieve the rational ends of law." *Id.* (quotations omitted). "Unless appropriately confined by Congress, a federal court may avail itself of all auxiliary writs as aids in the performance of its duties, when the use of such historic aids is calculated in its sound judgment to achieve the ends of justice entrusted to it." *Id.* at 172-73 (quotations omitted).

In *In re March*, 988 F.2d 498, 500 (4th Cir. 1993), the United States Court of Appeals for the Fourth Circuit observed the AWA empowers a federal court to enjoin

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junction to allow any continued free use, as is its right, no free licenses shall be allowed.

parties before it from attempting to relitigate decided issues and to prevent collateral attack of its judgments." There, the court held that a creditor engaged in foreclosure proceedings, "Farmers Bank, wishing to complete its foreclosure on [certain] Virginia real estate," properly was granted a motion for injunction under the AWA "in the Virginia district court to enjoin [property owner] from proceeding with his complaint filed in New York and to enjoin both [property owner] and itself from participating in any further proceedings regarding that case." *Id.* at 499-500.

In *In re Am. Honda Motor Co., Inc., Dealerships Relations Litig.*, 315 F.3d 417 (4th Cir. 2003), the court of appeals held "we have no hesitancy in concluding that the [AWA] Injunction was necessary to prevent direct frustration of the district court's Settlement Approval Order, for which the district court undeniably possessed subject matter jurisdiction to issue." *Id.* at 438-39. "We also have no trouble in concluding that the Injunction was necessary to cure the injustices created by the Millers through their abuse of the MDL process." *Id.* at 439.

"Such authorization, however, does not control where a statute specifically addresses the particular issue at hand." *Id.* at 437 (quotations omitted). "For example, a party may not, by resorting to the All Writs Act, avoid complying with the statutory requirements for removal of a case in state court to federal court." *Id.* (citing *Syngenta Crop Protection, Inc.* v. *Henson*, 537 U.S. 28 (2002)).

In *Laker Airways Ltd.* v. *Sabena, Belgian World Airlines*, 731 F.2d 909, 914-15 (D.C. Cir. 1984), the United States Court of Appeals for the District of Columbia Circuit affirmed a district court injunction entered under the AWA, based upon its "power to conserve its adjudicatory

authority over a case properly filed with the court when, instead of actively raising all defensive claims in the federal court, the named defendants initiate suits in foreign tribunals for the sole purpose of terminating the federal court's adjudication of the litigation."

Based upon foregoing established law, the AWA provides authority for this court to enter an injunction "to effectuate and prevent the frustration of orders it has previously issued in its exercise of jurisdiction otherwise obtained." *New York Tel. Co.*, 434 U.S. at 172. Such an injunction will serve to enforce aspects of this court's judgment and orders in favor of the judgment creditor. The relief granted here under the AWA is beyond what is available through common law or statutory remedies, and WPL has acted in collateral proceedings to frustrate the orders and judgment of this court.

a. Frustration

In particular, WPL's advancement of a counterclaim in UK proceedings to claw back amounts already paid to SAS as part of supersedeas bond and escrow account directly frustrate the court's February 9, 2017, order. In setting bond and escrow amounts to be paid over to SAS upon successful appeal, the court addressed in detail evidence and arguments regarding WPL's ability to pay a bond and fund an escrow account. The court considered and relied upon, as part of its motion for stay pending appeal, WPL's representation that the judgment debtor would place "*all* anticipated U.S. revenues (anticipated to total [redacted]) into the escrow account it ha[d] already been maintaining in this litigation for purposes of the court's November 9, 2016, temporary stay of execution." (Order (DE 696) at 9) (emphasis added). WPL stated:

> WPL has . . . offered to deposit as security <u>all US</u>

> revenues it receives during the pendency of the appeal. . . . [Preservation of status quo] is achieved if whatever monies fall due from WPL's sale of goods and services in the US are retained in the US and therefore immediately available to SAS Institute should it prevail on appeal.

(Robinson Decl. (DE 673) ¶¶ 17-18) (emphasis added).

The clawback sought by WPL in proceedings in the United Kingdom also frustrates the court's orders and judgment in a broader sense. SAS, as creditor of a judgment entered in the United States District Court for the Eastern District of North Carolina, affirmed by the United States Court of Appeals for the Fourth Circuit, where the Supreme Court of the United States declined to consider WPL's petition for a writ of certiorari, is entitled to collect the entire amount of the judgment. There is no equivalent provision in United States law for return to a judgment debtor of two-thirds (2/3) of any sum because damages were trebled. See *Laker*, 731 F.2d at 936 & 945.

Thus, any action by WPL in the United Kingdom seeking relief in the form of a clawback is in direct contravention of this court's judgment and contrary to United States law governing enforcement. See *id.* at 935-36. Likewise, any action by WPL to seek enforcement in the United Kingdom of a UK judgment including a clawback provision also is in contravention of this court's judgment and contrary to United States law governing enforcement. Indeed, any action by WPL to collect from SAS anywhere any sums attributed to such clawback would be contrary to this court's judgment and United States law.

i. Sums collected in the United States

Justification for the court's clawback order is most acute where it relates to sums collected in the United States—circumstances currently before this court. Such circumstances relating to sums received to date originating in this country, and any future United State-originated revenues, involve monies without any nexus to any enforcement proceeding in the United Kingdom. Any action by WPL to pursue a clawback or judgment of clawback of such sums most directly controvert United States court orders requiring such sums to be paid in full to SAS. Such actions "frustrate the enforcement of American law in American courts against [the judgment debtor] doing business in America." *Id.* at 940.

b. Relief granted under the AWA is beyond what is available through common law or statutory remedies

WPL's actions in pursuing clawback in the United Kingdom also are in conflict with representations it has made to this court. At hearing on February 15, 2019, WPL represented that it would "hand[ ] over to [SAS] every dollar that comes between U.S. invoiced licensees" (Tr. (DE 850) at 27) (emphasis added). In accounting filed February 22, 2019, WPL represented that it had paid, without qualification, "sums received from U.S.-invoiced parties beginning on September 5, 2018," in order to comply with the court's February 15, 2019, order. (DE 852) (emphasis added). At hearing on March 4, 2019, WPL again suggested it had "made all of the payments" and would continue to pay to SAS all revenues derived from sales to US based customers going forward. (Tr. (DE 874) at 82) (emphasis added). However, in the same proceeding WPL refused to cease pursuit of a clawback in the UK. (*Id.* at 86).

The end result, as a practical matter, is that WPL represents that it has paid and will pay over 100 % of revenues derived from sales to United States based licensees, but in the same action represents that it can take two-thirds (2/3) of it back. At the same time, as discussed in more detail below, SAS is prevented by the UK injunction from seeking relief from this court to preserve its ability to keep amounts collected under this court's judgment.

There are not otherwise statutory or common law remedies available to SAS to obtain the relief granted by this court in the anti-clawback portion of its February 15, 2019, order.

Accordingly, for the foregoing reasons, "no sum previously collected or to be collected by the judgment creditor in the United States is subject to payment to the judgment debtor on the basis of the United Kingdom Protection of Trading Interests Act of 1980." (Order (DE 848) at 2).

B. Motion for Relief

Both the AWA and Rule 60, independently and in combination, authorize and compel issuance of the injunction SAS requests. The court sets forth herein the court's authority to issue an injunction under each basis in turn, including discussion of the nature and scope of the specific injunction and alternative injunction sought by SAS.

1. AWA

a. Court's authority

The AWA provides authority to the court to enter the requested injunction "to effectuate and prevent the frustration of orders it has previously issued in its exercise of jurisdiction otherwise obtained," "to achieve the rational

ends of law," and "to achieve the ends of justice entrusted to it." *New York Tel. Co.*, 434 U.S. at 172-73.

WPL has taken a variety of actions that "frustrate the enforcement of American law in American courts against [the judgment debtor] doing business in America." *Laker*, 731 F.2d at 940. Actions by WPL in seeking both the UK injunction and the UK judgment directly impact the United States and proceedings in United States courts.

i. UK injunction impacts

First and foremost, the UK injunction reaches directly into proceedings in the United States to prevent SAS from enforcing this court's judgment to the extent permitted by the laws of this country. It prevents SAS from seeking the full panoply of judgment collection tools, which the California court already has forecasted in indicative rulings are available to SAS, including:

1. "[T]he *in personam* relief identified in the . . . First and Second Limited Remand Motions" that SAS had filed in the United States Court of Appeals for the Ninth Circuit ((UK Injunction (DE 816-2) ¶3.a.);
2. "[O]rders foreshadowed by and/or contemplated in (i) the [California court's indicative ruling 1] and (ii) the [California court's indicative ruling 2], or any similar orders." (*Id.* ¶3.b.) (emphasis added);
3. Moving for or briefing relief raised in its remand motions before the court of appeals, as well as "[a]ny motion or request to the [California court] to make the order contemplated" in its indicative rulings. (*Id.* ¶4).

The UK injunction also prevents SAS from seeking from any United States court relief of "similar nature and/or effect" or relief that "purports to impose" any "requirements on WPL to assign or transfer to SAS" and receivables or sums. (*Id.* ¶3.c.).

The practical impact of these components of the UK injunction on collections in this country, the country of origin of the judgment at issue, is extraordinary. Indeed the UK injunction has already prevented SAS from seeking from this court the basic, reasonable, relief in the form of directing WPL to pay to SAS United States receivables that WPL had already received from United States-based customers, which sums include amounts subject to unchallenged portions of the California court's assignment order. At the time of February 15, 2019, hearing, WPL had not shown any justification as to why it had not already turned over such receivables already paid to WPL to SAS. It was only after this court, of its own initiative, compelled WPL so to do, that WPL turned over to SAS [redacted]. It is extraordinary that the UK injunction renders SAS powerless to enforce even those aspects of collections in the United Statesy that WPL does not directly oppose, but which WPL can ignore with impunity because there is no mechanism—short of the present requested injunction—by which SAS can seek to enforce them.

Indeed, prior to filing of the instant motion and imposition of AWA relief by this court, with the UK injunction in place, SAS had at its disposal no mechanism to prevent WPL from transferring sums received from United States-based customers to accounts in the United Kingdom, from altering licensing terms to direct payments to accounts in the United Kingdom, from communicating directly with customers special instructions for transmitting payments, or from taking any other actions in the United Kingdom to avoid paying sums to SAS. While WPL offers evidence that it has not taken such actions, as well as the good faith and word of its counsel that it will not take such actions in the future, these assurances

are beside the point.[15] It remains the case that, for as long as its draconian terms are in force, the UK injunction has prevented and will prevent SAS from seeking any direct order by this court to enforce that voluntary conduct by WPL.

The UK injunction also prevents SAS from obtaining the type of relief from United States courts that otherwise would be available to the judgment creditor to counteract the judgment debtor's efforts to "escape" enforcement of this court's judgment. It prevents SAS from seeking an injunction to stop the clawback provisions of the UK judgment, or even briefing this court on issues associated with such an injunction. (UK Injunction (DE 816-2) ¶6). While this court now has entered an order addressing the clawback provisions, of its own initiative, SAS has not been able to address the substance of that order or its effectiveness in light of the presence of its offices in the United Kingdom, as discussed below.

The UK injunction also prevents SAS from seeking an anti-anti-suit injunction against WPL to attempt to free up restraints that WPL has placed on SAS's ability to use the tools normally available to a judgment creditor in United States courts, particularly in the California court and the United States Court of Appeals for the Ninth Circuit. (UK Injunction (DE 816-2) ¶6). And the UK injunction, by design and effect, prevents SAS from seeking from this court the most direct form of AWA relief that would be appropriate under the circumstances of this case, in the form of an anti-anti-suit injunction to

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[15] At the most recent hearing, counsel for WPL recognized the possibility that his client may not even act in conformity with counsel's assurances to this court, despite counsel's statement that this "will not happen." (Tr. (DE 874) at pp. 81-82).

prevent all the aforementioned aspects of the UK injunction from paralyzing SAS's collection activities in the United States. See *Laker*, 731 F.2d at 940. By obtaining the UK injunction, WPL has left SAS with few choices for asserting relief normally entitled to it in United States courts, short of the explicit relief sought by SAS in the instant motion.

Finally, the UK injunction is an absolute interference with SAS's ability to seek appropriate judgment enforcement relief in United States courts because of the criminally punitive consequences it imposes upon SAS's officers, employees, and agents, many of whom work and reside in the United Kingdom. SAS has a substantial presence in the United Kingdom, with operations there since 1980, a "physical headquarters in Buckinghamshire," "637 employees," and "bank accounts" in the UK. (Boswell Decl. (DE 852-14) ¶¶2-3).

ii. UK judgment impacts

As an independent and additional ground for AWA relief, WPL is "attempting to relitigate decided issues" and engage in "collateral attack of [this court's] judgments" through its pursuit of the UK judgment. *In re March*, 988 F.2d at 500. A federal court has the "power to conserve its adjudicatory authority over a case properly filed with the court when, instead of actively raising all defensive claims in the federal court, the named defendants initiate suits in foreign tribunals for the sole purpose of terminating the federal court's adjudication of the litigation." *Laker*, 731 F.2d at 914-15.

Here, WPL raised as a defense to the breach of contract claim in this case that comity and collateral estoppel required this court to give "preclusive effect" to the earlier determination by the UK court that breached terms in the license agreement were void. *SAS Inst. Inc.* v.

World Programming Ltd., 64 F. Supp. 3d 755, 772 (E.D.N.C. 2014). This court rejected this argument, holding that "[w]here North Carolina law significantly differs from English law on the question of the validity of the contractual provisions purportedly breached, the court finds that this determination by the U.K. court is not entitled to preclusive effect." *Id.* at 774.

Before the United States Court of Appeals for the Fourth Circuit, WPL argued "that the proceedings below never should have moved forward, as this action was barred by res judicata due to the U.K. litigation." *SAS Inst., Inc.*, 874 F.3d at 378. The court of appeals exactly rejected that argument, reasoning in part that "[g]ranting the U.K. judgment preclusive effect would frustrate [North Carolina] policy goals by barring a North Carolina company from vindicating its rights under North Carolina law on the basis of the E.U.'s contrary policies." *Id.* at 379-80. "No principle of international comity requires this outcome." *Id.* at 380. The Supreme Court of the United States denied certiorari. See 139 S. Ct. 67 (2018).

WPL also sought to raise again before this court and the California court that "international comity considerations weigh in favor of a stay" of execution of the judgment on non-U.S. assets. (DE 784 at 9). WPL reasoned that "WPL has taken the position that the enforceability of the U.S. judgment outside of the United States is constrained by the prior judgment of the U.K. High Court," in turn providing a basis for moving to stay enforcement proceedings in the California court. (*Id.* at 7). This court, however, rejected this argument, holding that WPL "has not demonstrated a meritorious argument in support of stay of all non-U.S. execution of the judgment pending U.K. judgment-recognition proceedings." (Order (DE 786)).

Having failed to halt judgment enforcement activities in courts of this country, WPL turned to courts in its native land to achieve the same result. The UK court accepted the very arguments that courts in this country had rejected, holding that the "US Proceedings were put forwards as a collateral attack on the English judgment," where the UK court had "already determined the position [of SAS] as a matter of North Carolina law (subject to the overlay of the Software Directive)." (UK Judgment (DE 816-1) ¶126). The UK court thus concluded that SAS is "precluded by issue estoppel or by . . . abuse of process from enforcing the judgment on the Fraud Claim and the UDPA claim." (*Id.* ¶155).

In this respect, WPL has subjected both the court's judgment and enforcement thereof in the United States to collateral attack. For all the reasons discussed in memorandum opinion herein, the UK judgment is an affront to this court's judgment by clawing back bond and escrow account sums already disbursed in the United States in accordance with the court's judgment and February 9, 2017, order, and by inviting clawback of all sums to be collected before SAS has received even a fraction of compensatory damages due.

In such circumstances, injunctive relief under the AWA is necessary to protect the court's judgment and orders, and United States enforcement thereof, from collateral attack and frustration. See *New York Tel. Co.*, 434 U.S. at 172; *In re March*, 988 F.2d at 500; *Laker*, 731 F.2d at 940.

b. Scope of relief

As noted above, SAS moves to enjoin WPL from all future sales of its software products for use within the United States until it satisfies the court's judgment. SAS requests, in the alternative, to enjoin WPL from future

sales of its software products to "new customers" for use within the United States under the same condition. (See Mem. (DE 809-6 at 28)). This alternative request mirrors the relief that the court already granted preliminarily in its January 11, 2019, and February 15, 2019, orders.

Having determined that the court is authorized to issue an AWA injunction under present circumstances to protect this court's judgment and orders from frustration, the court turns now to considering the scope and nature of an injunction necessary to accomplish this objective. The most direct and proportional form of AWA injunction where foreign proceedings frustrate Unites States litigation is an anti-anti-suit injunction, which could command WPL to cease and undo its efforts in the United Kingdom to stay judgment enforcement proceedings in United States courts and thus allow the California court to command the execution relief it has forecasted in its indicative rulings. Cf. *Laker*, 731 F.2d at 915.

However, because of the breadth of the UK injunction, SAS has been unable to advance in arguments in this court in favor of such an anti-anti-suit injunction. Moreover, because of WPL's limited presence in the United States, on the one hand, and SAS's substantial presence, assets, and operations in the United Kingdom, on the other hand, it is doubtful that SAS would prevail in a protracted conflict between competing punitive injunctions issued by United States and United Kingdom courts. The practical outcome of an anti-anti-suit injunction is far from clear.

Moreover, the court finds more in keeping with its own jurisdiction and principles of international comity, as recognized by United States courts, to award injunctive relief that focuses on conduct in the United States and touching upon United States based transactions and

commerce, rather than an injunction that focuses on litigation activity in courts in the United Kingdom.

Due to all the circumstances addressed herein, including considerations discussed below with respect to Rule 60, the court determines that an injunction prohibiting future sales of WPL software products to new customers for use within the United States achieves the goals of preventing the frustration of this court's orders and ensuring the ends of justice in providing due relief to SAS for its claims under United States law.

In so holding, the court has considered WPL's argument that a more effective alternative to any injunction at this juncture is to allow WPL to continue unfettered in licensing its product for use in the United States, such that it can continue making payments from such revenues towards the court's judgment through collection efforts pursuant to the California court's September 5, 2018, assignment order. For all the reasons set forth herein, this alternative approach is unacceptable while all aspects of the UK judgment and UK injunction remain in force. At bottom, merely providing a means for the judgment creditor to continue collection on the judgment debtor's terms, in reliance upon voluntary acquiescence by the judgment debtor to refrain from taking evasive or counteractive measures, without giving the judgment creditor any avenue to assert its interests as a judgment creditor as allowed under United States law, does not effectuate this court's judgment or promote the interests of justice.

While the court has taken into account evidence offered by WPL at hearing that it is not presently taking measures to reduce customer license payments or otherwise shelter or reduce United States receivables, the court finds it more significant that WPL did not recog-

nize any amount of the judgment entered against it in the United States as due in its annual report, and it made no attempt to quantify the amount of revenues that it would be turning over to SAS in accordance with the judgment. (DE 853-4 at 5). Instead, it expressly noted the $2.6 million it was awarded as clawback recovery payable from SAS to WPL. (*Id.*). Under these circumstances, a "no injunction" alternative is unwarranted.

In the same vein, WPL suggests, and reiterates through its instant oral motion advanced at March 4, 2019, hearing, that the court should limit an injunction to provide for "no new licensing to U.S. customers," as opposed to enjoining licensing for use in the United States. (Tr. (DE 874) at 93) (emphasis added). But, as noted previously, the UK injunction leaves no mechanism for SAS to ensure that WPL does not structure its customer relationships, licensing agreements, and invoicing practices, to allow or encourage new and continued licensing to global businesses for use in the US. In such a scenario, WPL could engage countless new global company customers to undertake new substantial use of WPS products in the United States, without falling under the restriction of the injunction as proposed by WPL.[16]

In sum, the alternatives proposed by WPL all suffer from the same fundamental defect in that they are dependent upon voluntary cooperation by the judgment debtor, all while the judgment creditor is severely restricted in the tools available to it to enforce this court's judgment.

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[16] WPL's oral motion for modification of the existing injunction is denied as moot for the separate reason that the court's injunction imposed by the instant order supplants its February 15, 2019, injunction.

The court also recognizes the evidence WPL presents of the current and potential injury and interference such an injunction inflicts upon its ability to attract new customers and retain existing customers globally. However, there must be some degree of impact upon WPL's operations for it to have any practical coercive effect under the circumstances presented. The court addresses further below factors bearing upon an injunction under Rule 60, including the balance of injury, which factors the court incorporates herein by reference also in support of an AWA injunction.

The court has also weighed the propriety of the injunction sought in the instant motion (prohibiting sales to existing and new customers for use in the United States) versus the alternative injunction argued for by SAS and presently in force through the court's February 15, 2019, order (prohibiting sales to new customers for use in the United States). The court finds, in conjunction with its analysis of Rule 60 injunction factors, discussed further below, that an injunction prohibiting sales of WPL software products to "new customers" for use within the United States, (Mem. (DE 809-6 at 28)), is appropriate to achieve the purposes of the AWA and Rule 60, and the balance of the equities presented, instead of an injunction applied to all existing and new customers.

In sum, the AWA authorizes the court to issue an injunction to protect its orders and judgment from collateral attack and frustration, and to serve interests of justice and the law in the United States. In addition, the alternative injunction requested by SAS provides the most effective mechanisms for serving these goals under the circumstances of this case.

2. Rule 60

"The consideration of Rule 60(b) motions proceeds in two stages. *Nat'l Credit Union Admin. Bd.* v. *Gray*, 1 F.3d 262, 264 (4th Cir. 1993). "First there is the question of whether the movant has met each of three threshold conditions: [I]n order to obtain relief from a judgment under Rule 60(b), a moving party must show that his motion is timely, that he has a meritorious defense to the action, and that the opposing party would not be unfairly prejudiced by having the judgment set aside." *Id.* Here, WPL does not provide a basis for contesting these threshhold conditions. Thus, the inquiry turns to whether SAS has met one of six specific sections of Rule 60(b) that authorize relief:

> (1) mistake, inadvertence, surprise, or excusable neglect;
>
> (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);
>
> (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
>
> (4) the judgment is void;
>
> (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
>
> (6) any other reason that justifies relief.

Fed. R. Civ. P. 60(b). Under present circumstances, subsection 6 is the broadest and best fit for relief from the court's prior judgment. "While this catchall reason includes few textual limitations, its context requires that it may be invoked in only 'extraordinary circumstances'

when the reason for relief from judgment does not fall within the list of enumerated reasons given in Rule 60(b)(1)-(5)." *Aikens* v. *Ingram*, 652 F.3d 496, 500 (4th Cir. 2011).

All the reasons discussed above justifying imposition of an AWA injunction provide extraordinary circumstances requiring relief from that part of the court's judgment denying injunctive relief. Moreover, circumstances pertaining to injunctive relief in this case have changed substantially since the time of the court's judgment and appeal thereof, further justifying relief from that part of the court's judgment. Indeed, as set forth below, several critical points relied upon by the United States Court of Appeals for the Fourth Circuit in analysis of injunction factors now have changed to the contrary to support injunctive relief.

To be entitled to an injunction as a part of the court's judgment, a plaintiff must demonstrate:

> (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.

SAS Inst., Inc., 874 F.3d at 385 (quoting *eBay Inc.* v. *MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006)).

With respect to the first factor, the court of appeals held that SAS had not demonstrated an irreparable injury. But changed circumstances shed new light on the court's reasoning regarding this factor. For example, the court of appeals reasoned:

> The jury's damages award was based in part on tes-

> timony provided by SAS's expert that SAS had suffered a total of only $13,500,245 in lost profits by the time of trial. The balance of the $26 million dollar award, over $12 million at least, was therefore based on SAS's expected damages after trial. The fact that SAS already asked for and received these future damages undermines its claim of irreparable injury moving forward. . . . Rather than supporting a finding of irreparable harm, the future damages SAS has already received point to an injury that has already been redressed.

Id. at 386. The issue with this reasoning now is that, while SAS was awarded future damages, it has not collected even $13,500,245.00 in lost profits, much less over $12 million representing future damages. In addition, damages attributable to WPL customers engaged after trial in this matter are not incorporated into the future damages awarded at trial. (See Day 6 Tr. at 185-190; DE 685 at p. 2 & n. 1). Moreover, an injunction limited to "new customers," as SAS seeks in the alternative, guards against overlap with evidence forming the basis for the damages award in the judgment. Thus SAS has demonstrated irreparable harm, not already attributable to damages in the judgment, from new customers engaged by WPL.

The second *eBay* factor now reinforces the first. The court of appeals stated that "[i]njunctions have also sometimes been deemed appropriate based on barriers to collectability after judgment, but SAS has offered only vague concerns on this front." 874 F.3d at 387 (internal citation omitted). At that time, the court of appeals observed, SAS had "tendered little but speculation regarding both WPL's financial status and the U.K.'s unwillingness to enforce portions of its damages award." *Id.* Now,

however, SAS has done both, and more: the court has a clear picture of WPL's financial status and definitive proof of the UK's unwillingness to enforce any portion of the damages award. Further, the court now knows that WPL has sought and will continue to seek to clawback two-thirds of every dollar SAS collects. Furthermore, there is no clearer "barrier to collectability" than the UK injunction that has forced SAS under penalty of criminal contempt to bring a halt to judgment collection activity available in the California court. Indeed, WPL seeks not only a stay of such activity, but also a permanent withdrawal. (See Fourth Witness Statement of Carter-Silk (DE 827-18) ¶28(a)).

The prior observation by the court of appeals that an "injunction ... would frustrate, rather than facilitate WPL's ability to pay damages" now must be viewed from a different perspective. 874 F.3d at 387. The issue now is no longer so much WPL's ability to pay damages but rather the conditions under which it will pay the damages, i.e., whether it will pay damages under terms that it sets voluntarily and under its desired terms enforced through a coercive UK judgment and injunction, or whether it will pay damages under terms set by US judgment collection law. Where WPL has removed most tools available under US collection law, and where the UK judgment and injunction persist, SAS must resort to its own more extraordinary and coercive measures such as the instant injunction to compel relief from WPL.

In the same vein, the balance of the hardships now also has changed. Equities have shifted now that WPL has taken actions to obtain the UK injunction and clawback. While it will suffer harm from lost revenues resulting from the injunction, its own actions play a role in bringing about that harm. SAS has returned to this court

seeking injunction only in the face of counter-offensive maneuvers by WPL to reach into the US and alter ongoing US proceedings and collections.

As noted above, WPL suggests that in order to ensure its continued viability, any injunction must be limited to prohibit new customers in the US rather than new licenses for use in the US. However, WPL has not demonstrated that the injunction sought will prevent it from maintaining operations outside of the US and serving customers outside of the US. WPL cites, for example, customers based outside of the US who may wish to have the option of having employees take a laptop with WPS in or through the US, even if only rarely or occasionally, without having to worry about violating terms of a license. (See, *e.g.*, Tr. (DE 874) at 95). WPL suggests that new customers, even if foreign based, will be discouraged from pursuing WPS with a non-US licensing restriction in place. [redacted]

While the court recognizes these concerns and customer preferences as represented by WPL, these are not sufficiently concrete demonstrations of irreparable harm

to tip the balance of equities in favor of WPL under present circumstances. Emphasized terms above demonstrate new business challenges and risks, but they do not demonstrate insurmountable obstacles to operations globally outside the US. WPL has not demonstrated that an injunction prohibiting new licenses for use in the US necessarily will deter and hinder non-US business permanently, rather than requiring an adjustment in licensing terms and marketing approach to non-US customers.

Finally, the public interest factor has changed in light of WPL's activities in securing the UK injunction and judgment. Previously, the court of appeals observed that "the public interests weighing in favor of an injunction rely upon broad, abstract rule of law concerns. While these interests are certainly legitimate, the award of compensatory and punitive damages in this case already serves them well." 874 F.3d at 388. Recent circumstances have demonstrated how much these public interest considerations now have flipped in favor of SAS. For all the reasons set forth in support of an AWA injunction, "rule of law concerns" now have become paramount. The ability of US courts to enforce their own laws and to allow litigants to pursue freely rights accorded to them under US law have been significantly eroded through WPL's conduct in seeking the UK injunction and clawback relief in the UK judgment. For the same reason, "the award of compensatory and punitive damages in this case" no longer serve well the rule of law concerns. *Id.*

WPL argues nonetheless that other factors identified by this court in denying injunctive relief have not changed, and that such factors remain in place to compel denying injunctive relief now. For example, WPL points to this court's determination that in the absence of a copyright violation injunctive relief to deter future sales

of a non-infringing product is not warranted. (See, *e.g.*, Order (DE 601) at 4-5, 6-7). The court of appeals, however, made clear that a categorical approach to denial of injunction based only upon the presence or absence of copyright infringement is not appropriate:

> SAS asserts that the district court applied a "categorical" approach by discussing the distinction between infringement and non-infringement injuries. SAS is, of course, correct that any categorical approach to injunctive relief is flawed, as the determination of whether to grant equitable relief does not turn on the type of wrongdoing at issue.

SAS Inst., 874 F.3d at 386.

In sum, no factor or factors in combination identified in the court's prior order overcomes the clear balance of the equities now weighing in favor of the injunction presently in place and sought through the instant motion. Accordingly, SAS has demonstrated a basis for amending the court's judgment to include a component of injunctive relief until WPL has paid over the full value of this court's award of damages.

C. Motions to Seal

WPL moves to seal multiple filings related to the instant motion that contain highly confidential, proprietary, and commercially sensitive information of WPL. The public has received adequate notice of the motions to seal, and no less drastic alternative to sealing is available because the confidential information appears throughout the filings sought to be sealed. WPL's interest in preserving the confidentiality of its assets and financial information outweighs any public interest in disclosure, where filing such documents in the public record would disclose information not generally known to

the public. Therefore, WPL's motions to seal are granted, and the clerk is directed to file documents DE 853, 854, 856-859, 864, 867, under seal.

CONCLUSION

Based on the foregoing, the motion for relief under the AWA and Rule 60 (DE 809-5) is GRANTED on the terms set forth herein. In accordance therewith, the court AMENDS its judgment to include the following injunction:

> "WPL" is HEREBY ENJOINED from licensing "WPS" to any "new customer" for use within the United States. For the purposes of this injunction, "WPL" means defendant / judgment debtor and its officers, agents, servants, employees, and all other persons who are in active concert or participation with defendant /judgment debtor; "WPS" means World Programming System and any software developed in whole or in part through the use of SAS Learning Edition; and a "new customer" is any person or entity that held no active license to WPS on January 11, 2019. This injunction expires automatically once defendant / judgment debtor has satisfied the judgment in this case. All other terms of the court's July 15, 2016, judgment, as amended December 8, 2017, and May 3, 2018, not altered herein shall remain in full force and effect.

The clerk is DIRECTED to enter an amended judgment in accordance with the foregoing. Oral motion for modification of injunction (March 4, 2019) is DENIED AS MOOT. Motions to seal (DE 860, 868, 872) are GRANTED, and the clerk is DIRECTED to file documents DE 853, 854, 856- 859, 864, 867, under seal.

SO ORDERED, this the 18th day of March, 2019.

s/ Louise W. Flanagan
LOUISE W. FLANAGAN
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
NORTH CAROLINA
WESTERN DIVISION

NO. 5:10-CV-25-FL

SAS INSTITUTE, INC.,
Plaintiff / Judgment Creditor,
v.
WORLD PROGRAMMING LIMITED,
Defendant / Judgment Debtor.

ORDER

February 15, 2019

This matter came before the court today for hearing on pending motions. The court memorializes as follows the court's rulings at hearing.

1. The court HOLDS IN ABEYANCE the judgment creditor's motion for relief under the All Writs Act and Rule 60 (DE 809-5), pending receipt of accounting information as set forth herein to aid in consideration of the motion, together with the parties' supplemental briefs as herein addressed.

2. The court ORDERS the judgment debtor to file under seal by **February 22, 2019,** an accounting of all sums received from and after September 5, 2018, from all

customers, without geographical limitation. The accounting shall specify the name and invoice address of each customer. No separate motion to seal the same is required.

3. The court ORDERS the judgment debtor to pay by **February 22, 2019,** to the judgment creditor all sums the judgment debtor has received from customers invoiced in the United States from and after September 5, 2018.

4. The court ORDERS the judgment creditor timely to file notice of receipt of any sum paid, to be credited to the judgment in accordance with North Carolina General Statute § 1-239(c).

5. The court ORDERS that no sum previously collected or to be collected by the judgment creditor in the United States is subject to payment to the judgment debtor on the basis of the United Kingdom Protection of Trading Interests Act of 1980.[1]

6. The court DENIES the judgment debtor's motion to strike satisfaction of judgment (DE 791). However, the court reserves for further consideration upon the appropriate motion judgment crediting processes.

7. The court DENIES AS MOOT the judgment debtor's motion for prompt dissolution of ex parte injunction (DE 814), where the court entered separately today in open court an order supplanting its January 11, 2019, order.

8. The court DIRECTS the parties to file on or before **February 28, 2019,** supplemental briefing on the is-

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[1] The court will memorialize in separate memorandum opinion the court's reasoning for its order in this part.

sues raised by the accounting directed herein at section 2. of this order.

9. The court NOTICES renewed hearing on the judgment creditor's motion for relief under the All Writs Act and Rule 60 (DE 809-5) for **1:30 p.m., March 4, 2019,** in New Bern.

10. The parties may seek teleconference with the court in the event of issues with the accounting where resolution in advance of hearing may aid in the court's decisional process.

11. The court GRANTS the pending motions to seal (DE 809, 812, 818, 838, 842).

SO ORDERED, this the 15th day of February, 2019.

s/ Louise W. Flanagan
LOUISE W. FLANAGAN
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
NORTH CAROLINA
WESTERN DIVISION

NO. 5:10-CV-25-FL

SAS INSTITUTE, INC.,
Plaintiff,

v.

WORLD PROGRAMMING LIMITED,
Defendant.

ORDER

February 15, 2019

On consideration of Defendant's Motion for Prompt Dissolution of *Ex Parte* Injunction [Dkt. # 814], and following a 15 February 2019 hearing before this Court on that Motion for Prompt Dissolution, on Plaintiff's Emergency Motion under the All Writs Act to Preserve This Court's Jurisdiction [Dkt. # 809-1], and on Plaintiff's Motion for Relief under the All Writs Act and Rule 60 to Enjoin Licensing for Use within the United States [Dkt. # 809-5], the Court HEREBY ORDERS:

1. This Order supplants the Court's previously entered Order Granting SAS Institute Inc.'s Emergency Motion under the All Writs Act to Preserve This Court's

Jurisdiction [Dkt. # 810.]· The Court issues this replacement Order—which follows notice to all parties, full briefing on the three motions listed above, and oral argument before this Court—to state the reasons it grants Plaintiff's Emergency Motion under the AH Writs Act to Preserve This Court's Jurisdiction.

2. The Court issues an injunction under the All Writs Act, 28 U.S.C. §1651, because it is necessary and appropriate to preserve this Court's jurisdiction over this case while it considers Plaintiff's Motion for Relief under the All Writs Act and Rule 60 to Enjoin Licensing for Use within the United States. Absent an injunction, the Court finds that there is a substantial likelihood that Defendant would seek and obtain an injunction from a U.K. court interfering with this Court's jurisdiction. In particular, Defendant has already obtained an Injunction and Order [Dkt. 809-8, at 100] from a U.K. court that orders Plaintiff—under threat of imprisonment—to take and refrain from taking various actions in U.S. courts where proceedings related to this case are pending. The U.K. court also ordered Plaintiff not to "commence, bring, continue, pursue or take any steps in, any claims, proceedings, applications, or motions before any court of the USA (state or federal) which . . . [p]revent or restrain, or seek to prevent or restrain, [Defendant] from . . . [c]ommencing, bringing, continuing, pursuing, or taking any steps in, any further application or claim before [the U.K.] Court for anti-suit injunction relief or related relief, or damages or compensation, in relation to . . . (2) the North Carolina Liability Proceedings; or (3) any other proceedings, applications or motions in the USA that are or may in the future be on foot arising out of the North Carolina Liability Proceedings, including efforts to enforce the North Carolina Money Judgment

there, and/or the enforcement of judgments given therein." [*Id.* at 104-05 ¶6.a.ii.] The "North Carolina Liability Proceedings" are this case, and the "North Carolina Money Judgment" is this Court's judgment. [See *id.* at 113 ¶8-9.] The Court concludes that this interference with U.S. court proceedings related to this case and this reservation of rights to interfere with these proceedings justifies issuing the following injunction to preserve this Court's jurisdiction. While the Court recognizes its power to issue an anti-suit injunction against WPL's conduct in U.K. proceedings, Plaintiff has not asked for that relief and the Court declines to raise the issue *sua sponte*. The Court concludes that the following injunction is the most equitable relief under the circumstances that would adequately protect this Court's jurisdiction while it considers Plaintiff's Motion for Relief under the All Writs Act and Rule 60 to Enjoin Licensing for Use within the United States.

3. Pending further order of the Court, "WPL" is HEREBY ENJOINED from licensing "WPS" to any "new customer" for use within the United States. For the purposes of this injunction, "WPL" means Defendant and its officers, agents, servants, employees, and all other persons who are in active concert or participation with Defendant; "WPS" means World Programming System and any software developed in whole or in part through the use of the SAS Learning Edition; and a "new customer" is any person or entity that held no active license to WPS on 11 January 2019. This injunction expires automatically once Defendant has satisfied the $79,129,905 judgment in this case.

4. The Court DENIES Defendant's Motion for Prompt Dissolution of *Ex Parte* Injunction [Dkt. # 814]. The concerns Defendant raises about a lack of notice and

reasoning are now moot. And the Court rejects the remaining grounds on which Defendant moves.

5. The Court will issue a future order resolving Plaintiff's Motion for Relief under the All Writs Act and Rule 60 to Enjoin Licensing for Use within the United States.

SO ORDERED, this the 15th day of February, 2019.

s/ Louise W. Flanagan
LOUISE W. FLANAGAN
United States District Judge

APPENDIX E

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
NORTH CAROLINA
WESTERN DIVISION**

NO. 5:10-CV-25-FL

SAS INSTITUTE, INC.,
Plaintiff,

v.

WORLD PROGRAMMING LIMITED,
Defendant.

ORDER GRANTING SAS INSTITUTE INC.'S EMERGENCY MOTION UNDER THE ALL WRITS ACT TO PRESERVE THIS COURT'S JURISDICTION

January 11, 2019

On consideration of the Emergency Motion under the All Writs Act to Preserve This Court's Jurisdiction filed by Plaintiff SAS Institute Inc. ("SAS"), it is hereby ORDERED that the Motion is GRANTED. The Court finds in its discretion that a writ is both necessary and appropriate under the All Writs Act to preserve its jurisdiction over this case while the Court considers SAS's Motion for Relief under the All Writs Act and Rule 60 to Enjoin Licensing for Use within the United States.

Accordingly, pending further order of the Court, "WPL" is HEREBY ENJOINED from licensing "WPS" to any "new customer" for use within the United States. For the purposes of this injunction, "WPL" means World Programming Limited and its officers, agents, servants, employees, and all other persons who are in active concert or participation with World Programming Limited; "WPS" means World Programming System and any software developed in whole or in part through the use of the SAS Learning Edition; and a "new customer" is any person or entity that held no active license to WPS on 11 January 2019. This injunction expires automatically once World Programming Limited has satisfied the $79,129,905 judgment in this case.

It is further ORDERED that World Programming Limited shall file any brief in opposition to SAS's Motion for Relief under the All Writs Act and Rule 60 to Enjoin Licensing for Use within the United States on or before 25 January 2019. SAS shall file any reply to that brief on or before 1 February 2019. The Court will schedule any hearing on that Motion on or after 4 February 2019.

SO ORDERED, this the 11th day of January, 2019.

s/ Louise W. Flanagan
LOUISE W. FLANAGAN
United States District Judge

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NO. 19-1290 (L)
(5:10-cv-00025-FL)

SAS INSTITUTE, INC.,
Plaintiff-Appellee,

v.

WORLD PROGRAMMING LIMITED,
Defendant-Appellant,

NO. 19-1300
(5:10-cv-00025-FL)

SAS INSTITUTE, INC.,
Plaintiff-Appellee,

v.

WORLD PROGRAMMING LIMITED,
Defendant-Appellant.

ORDER

April 7, 2020

The court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Wilkinson, Judge Agee, and Judge Thacker.

For the Court

/s/ Patricia S. Connor, Clerk

APPENDIX G

HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)

CL-2017-000749

BEFORE THE HONOURABLE MR
JUSTICE ROBIN KNOWLES CBE

ON 21 DECEMBER 2018

SITTING IN PRIVATE

BETWEEN:-

WORLD PROGRAMMING LIMITED,

Defendant/Applicant,

and

SAS INSTITUTE INC.,

Claimant/Respondent.

INJUNCTION AND ORDER

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21 DECEMBER 2018

TO:

SAS INSTITUTE INC., 100 SAS Campus Drive, Cary, 27513, North Carolina, United States.

PENAL NOTICE

IF YOU, SAS INSTITUTE INC., DISOBEY THIS ORDER YOU MAY BE HELD TO BE IN CONTEMPT OF COURT AND YOU MAY BE FINED AND HAVE YOUR ASSETS SEIZED AND ANY OF YOUR DIRECTORS, OFFICERS, EMPLOYEES, REPRESENTATIVES OR AGENTS MAY BE IMPRISONED, FINED OR HAVE THEIR ASSETS SEIZED.

UPON the application of World Programming Limited ("**WPL**") dated 19 December 2018 for an interim anti-suit injunction (the "**Anti-Suit Injunction Application**") made without notice to the Defendant, and heard in private

AND UPON reading the Second and Third witness statements of Alexander Carter-Silk dated 19 and 21 December 2018 and Joel Miliband dated 18 December 2018

AND UPON reading WPL's skeleton argument dated 19 December 2018 (as revised on that date) and WPL's supplemental note dated 21 December 2018 and WPL's table of points of full and frank disclosure and fair presentation dated 21 December 2018 (the "**F&F Table**").

AND UPON hearing Leading Counsel (Paul Lowenstein QC and Thomas Raphael QC) for WPL on 21 December 2018

AND UPON the court having decided to sit in private and having made an order preserving the confidentiality of certain materials

AND WHEREAS the SAS Institute Inc. ("**SAS**") has not yet been served with this Application and this order was made in SAS's absence

AND WHEREAS WPL envisages that it may seek further or amended antisuit relief at the Return Date (defined below)

AND WHEREAS WPL contends that paragraphs 12 and 151 of the Second Witness Statement of Alexander Carter-Silk and paragraph 5(b) of the third Witness Statement of Alexander Carter-Silk contain sensitive commercial information which should be protected as confidential information and is defined as the "**Confidential Information**".

AND UPON WPL giving the undertakings to the Court set out in Schedule A hereto

AND WHEREAS certain terms in this Order are defined in Schedule B hereto

IT **IS HEREBY ORDERED** that:

This Order and Further Hearings

1. This order was made at a hearing without notice to SAS. SAS has a right to apply to the Court to vary or discharge the order (see paragraph 11 below).
2. There shall be a further hearing in relation to this application for the purpose of directions, to be listed on 18 January 2019 with a time estimate of 2 hours ("**the Directions Hearing**"). There shall also be a subsequent hearing of the application on a later date ("**the Return Date**") as provided for more fully in paragraph 13 below.

Injunctions

3. Until further order of the Court, SAS shall not, whether by itself, its directors, officers, employees, legal representatives, or agents:
   a. Pursue, continue or take any further steps in: (i) the Assignment Order Motion so far as it is pur-

sued for the purposes of seeking the *in personam* relief identified in the Indicative Assignment Order Ruling, (ii) the Turnover Order Application, and (iii) the First and Second Limited Remand Motions (save for the purposes of withdrawing, those motions/applications, moving to stay them or otherwise seeking to have action on such application held in abeyance). (For the avoidance of doubt, this order shall not prevent the pursuit of the Assignment Order Motion so far as it is confined to in rem relief as granted by the In Rem Assignment Order.)

b. Seek to obtain from the USDC, or any other court of the USA (state or federal), the orders foreshadowed by and/or contemplated in (i) the Indicative Assignment Order Ruling and (ii) the Indicative Turnover Order Ruling, or any similar orders.

c. Commence, bring, continue, pursue or take any steps in, any claims, proceedings, applications, or motions before any court of the USA (state or federal), which seek any relief, remedy, judgment, decree or order (hereinafter "**relief**") of any the following kinds:

   i. Relief of similar nature and/or effect to that referred to in 3(a) and/or (b) above;

   ii. Relief which imposes (or purports to impose) requirement or requirements on WPL to assign or transfer to SAS (or its agents or representatives or any other person) any assets and/or receivables of WPL and/or any debts owed to WPL, and/or any assets, receivables or debts that may in the future be owed to WPL. For the avoidance of doubt, the aforesaid shall cover any requirement(s) imposed

indirectly on WPL by means of requirements imposed on any officer, employee, agent, legal representative or other person who has, or is said to have, authority to act on behalf of WPL.

iii. Relief which expands or amends or varies the In Rem Assignment Order to have *in personam* effects of the kinds identified in paragraph 3(c)(ii) above. This encompasses adjustments or modifications to any prior order or ruling to impose such a requirement.

d. File its final brief in the Second Limited Remand Motion, due to be filed on 21 December 2018 unless, by the time this order is communicated to SAS or its agents by the means identified in paragraph 8 below, SAS's brief has already been filed.

4. SAS shall, as soon as reasonably practical, and in any event by no later than 4.00 pm Pacific Standard Time on Friday 28 December 2018 take all reasonable steps to procure before the USDC and/or the USCA 9th (as appropriate) a stay or stays of the following applications / motions:

a. The Assignment Order Motion (or any application or motion in respect thereof) so far as it is pursued for the purposes of seeking the in personam relief identified in the Indicative Assignment Order Ruling;

b. Any motion or request to the USDC to make the order contemplated in the Indicative Assignment Order Ruling;

c. The Turnover Order Application;

d. Any motion or request to the USDC to make the order contemplated in the Indicative Turnover Order Ruling;

e. The First and Second Limited Remand Motions.

The stay or stays to be sought pursuant to this paragraph 4 shall be sought so as to remain in effect until on or after such time as the finalisation of this Court's order made upon the hearing of the Return Date (see paragraphs 2 above and 13 below).

5. SAS shall take all reasonable steps to procure that the orders foreshadowed by and/or contemplated in (i) the Indicative Assignment Order Ruling and (ii) the Indicative Turnover Order Ruling, or any similar orders, shall not be made between the date of this order and the Return Date.

6. Until further order of the Court, SAS shall not (whether by itself, its directors, officers, employees, legal representatives, or agents) commence, bring, continue, pursue or take any steps in, any claims, proceedings, applications, or motions before any court of the USA (state or federal) which:

   a. Prevent or restrain, or seek to prevent or restrain, WPL from:

      i. Pursuing, continuing, or taking steps in: this Anti-Suit Injunction Application, any related application before this Court, and/or this action;

      ii. Commencing, bringing, continuing, pursuing, or taking any steps in, any further application or claim before this Court for anti-suit injunction relief or related relief, or damages or compensation, in relation to: (1) the California Enforcement Proceedings, applications or motions therein, (2) the North Carolina Liability Proceedings; or (3) any other proceedings, applications or motions in the USA that are or

may in the future be on foot arising out of the North Carolina Liability Proceedings, including efforts to enforce the North Carolina Money Judgment there, and/or the enforcement of judgments given therein;

For the avoidance of doubt the potential anti-suit applications in this Court covered by 6(a)(i) and (ii) above shall include any applications for injunctive relief in relation to the Discovery Orders, the In Rem Assignment Order and/or the Assignment Order Motion.

b. Require WPL to cease to pursue or continue or take steps in the English applications or proceedings or claims (actual or potential) referred to in 6(a)(i) and (ii) above.

c. Interfere with the English applications or proceedings.

Interpretation of this Order

7. Where SAS is ordered not to do something by the orders herein, it must not and shall not do those things, or materially the same acts, or acts having materially the same effect, by itself or by any other persons. Nor shall SAS procure or encourage other persons to do such acts or materially the same acts. The class of other persons comprises all natural or legal persons and is not limited in any way (but does, for the avoidance of doubt, include, without limitation, SAS's directors, officers, partners, employees and agents).

Service

8. WPL may serve this Order (and the associated documents listed in Schedule A, any further applications and supporting documents in relation to the continuation or variation of this order) on SAS:

a. by emailing the same to SAS's solicitors, Macfarlanes LLP, at the addresses Matt.McCahearty@macfarlanes.com and/or Christopher.Charlton@-macfarlanes.com

b. Delivering the same to Macfarlanes LLP, by hand or by courier, for the attention of Christopher Charlton and/or Matthew McCahearty at the address 20 Cursitor Street, London, EC4A lLT.

c. By emailing the same to SAS, at the address: john.boswell@sas.com

d. By delivering the same to SAS, by hand or courier, at 100 SAS Campus Drive, Cary, 27513, North Carolina in the USA.

9. Where WPL effects service on SAS by one of the methods prescribed above under paragraph 8 before 16:30 local time on any particular day, any document so served will be deemed to have been served on that day.

10. To the extent that service pursuant to paragraph 8 above would not otherwise be valid service, it shall be valid alternative service. For the avoidance of doubt, service of this Order pursuant to paragraph 8(a), (b) and/or (c) shall be alternative service under CPR 81.8(2)(b). Further, if service is effected in those ways or any of them, personal service of this Order for the purposes of CPR Part 81 is dispensed with pursuant to CPR 81.8(2)(a).

Variation or discharge of this order

11. Anyone served with or notified of this order may apply to the Court at any time to vary or discharge this order (or so much of it as affects that person) but they must first inform WPL's solicitors, the details of whom are given below. If any evidence is to be relied

upon in support of the application, the substance of it must be communicated to WPL's solicitors in advance.

12. Liberty to apply to WPL.

The Return Date and costs

13. The Return Date is to be fixed at the Directions Hearing provided for in paragraph 2. At the Return Date, the Court will consider whether this Order shall be continued and/or what further order shall be made. WPL shall file any application to continue and/or this Order (without prejudice to any further application to continue and/or vary this Order that may be appropriate prior to the Return Date) no less than seven clear days in advance of the Directions Hearing.

14. Costs reserved to the Judge hearing the application on the Return Date.

Restriction / Prohibition of use of documents disclosed

15. Pursuant to CPR 31.22(2), the parties and (as appropriate) their legal advisers, experts and witnesses may only make use of the Confidential Information and the parts of the documents within which it is contained (which includes without limitation, the witness statements, the F&F Table and the skeleton arguments) for the purposes of these proceedings, notwithstanding that they were read to the court or referred to at the hearing or referred to in the electronic and hard copy transcripts of the proceedings. No other person may make use of the Confidential Information. This prohibition does not restrict the use of documents which are otherwise in the public domain (e.g. certain US court filings). Further, SAS may use the Confidential Information in any proceed-

ings in relation to the California Enforcement Proceedings or the North Carolina Liability Proceedings provided that SAS takes all necessary steps to maintain the confidentiality of that information (whether by filing documents under seal or otherwise).

Dated: 21 December 2018

COMMUNICATIONS WITH THE COURT

All communications with the Court about this order should be sent to the Admiralty and Commercial Court Listing Office, 7 Rolls Building, Fetter Lane, London, EC4A NL quoting the case number. The telephone number is 020 7947 6826.

The offices are open between 10 a.m. and 4.30p.m. Monday to Friday.

NAME AND ADDRESS OF THE APPLICANT'S LEGAL REPRESENTATIVES

The Applicant's legal representatives are:

Alex Carter-Silk and Claire Blewett of Brown Rudnick LLP, 8 Clifford Street, London, WlS 2LQ. +44 (0) 20 7851 6152, +44 (0) 7502 348 153, ACarter-silk@brownrudnick.com and Cblewett@brownrudnick.com (if contact is made by email, both email addresses must be used).

SCHEDULE A – UNDERTAKINGS

Undertakings given to the Court by the WPL:

(1) To serve on SAS as soon as practicable the Application Notice, evidence in support of the application, this order, any other documents provided to the Court on the making of the application, and/or any note or transcript of the hearing.

(2) If the Court later finds that this order has caused loss to SAS, and decides SAS should be compensated for that loss, WPL will comply with any order the Court may make, this undertaking being limited to such loss caused to SAS: (i) in additional legal costs incurred in complying with this injunction and/or (ii) in taking any consequential additional steps in the Californian litigation to comply with this injunction and/or (iii) interest losses and/or (iv) losses arising out of loss of use of money.

(3) If the injunction is discharged, not to oppose any steps SAS may reasonably need to take to seek leave to be permitted to file its final brief on the Second Limited Remand Motion (which was due to be filed by 21 December 2018) at such later date as may be appropriate. This shall be without prejudice to WPL's jurisdictional and other objections to the aforesaid Motion and all of WPL's rights.

[End of Schedule]

APPENDIX H

HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

CASE NO: CL-2017-000749

ROYAL COURTS OF JUSTICE
STRAND, LONDON, WC2A 2LL

BEFORE:

MRS JUSTICE COCKERILL

BETWEEN:

SAS INSTITUTE INC.,

Claimant,

-and-

WORLD PROGRAMMING LIMITED,

Defendant.

Ms Monica Carss-Frisk QC and Mr Andrew Scott (instructed by Macfarlanes LLP) for the Claimant

Mr Thomas Raphael QC, Miss Josephine Davies and Mr John Bethell (instructed by Keystone Law LLP) for the Defendant

Hearing dates: 16th and 17th May 2019

APPROVED JUDGMENT

DATE: 25 SEPTEMBER, 2019

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

MRS JUSTICE COCKERILL DBE

Cockerill J:

1. This is an application by WPL (World Programming Limited) to continue an injunction granted to WPL without notice by Robin Knowles J just before Christmas 2018. It arises out of the judgment which I gave in this matter on 13 December 2018, reference number [2018] EWHC 3452 (Comm) ("the Enforcement Judgment").

2. In that judgment I refused SAS's (SAS Institute Inc.) application to enforce in this jurisdiction a judgment of the US Court. I did so on multiple grounds, namely that given the rather peculiar facts of this case:

i) Previous proceedings here gave rise to a *res judicata estoppel* which precluded enforcement or rendered it abusive, holding that the two new spins were dependent on the breach of contract claim, and could and should have been brought in the English litigation;

ii) Enforcement of the judgment would be contrary to public policy as enshrined in the Software Directive or contrary to the Protection of Trading Interests Act ("PTIA");

iii) WPL had a counterclaim under section 6 of the PTIA for payment of sums equivalent to 2/3rds of

any past and future recoveries by SAS under its UDTPA Claim (defined below) and that this cross-liability is on a *pari passu* basis, i.e. that any recovery by SAS of sums attributable to the multiple damages judgment at large triggers a liability to pay WPL a sum equivalent to 2/3rds of the amount recovered.

3. In the light of this judgment and events in the US litigation, WPL sought an anti-suit injunction. It was not possible for me to hear that application and Robin Knowles J stepped in. Having heard from WPL he made an order ("the Injunction") which included the following features:

i) SAS was restrained from further pursuing certain proceedings in the US Courts seeking what are known as assignment orders and turnover orders (as explained further below);

ii) SAS was restrained from seeking such relief in any other court of the USA;

iii) SAS was restrained from pursuing any process in the US for relief of similar nature to assignment or turnover orders or *"[r]elief which imposes (or purports to impose) requirement or requirements on WPL to assign or transfer to SAS any assets and/or receivables of WPL and/or any debts owed to WPL and/or any assets, receivables or debts that may in the future be owed to WPL"*;

iv) SAS was restrained from taking further steps in the existing US proceedings, and ordered to *"take all reasonable steps to procure... a stay or stays of"* the extant motions;

v) SAS was ordered to *"take all reasonable steps to procure that the orders foreshadowed by and/or*

contemplated in (i) the Indicative Assignment Order Ruling and (ii) the Indicative Turnover Order Ruling, or any similar orders, shall not be made between the date of this order and the Return Date";

vi) SAS was restrained from pursuing anti-anti-suit processes before the US Courts (i.e. processes which *"prevent or restrain, or seek to prevent or restrain"* WPL from pursuing its "Anti-Suit Injunction Application" or *"any related application before this Court, and/or this action"* or *"any further application or claim before this Court for anti-suit injunction relief or related relief, or damages or compensation)... and from pursuing materially the same acts, or acts having materially the same effect"*.

4. The order was made in anticipation that it would only be in place on an *ex parte* basis for a matter of weeks—at the time of the hearing before Robin Knowles J it was anticipated that the matter could come back *inter partes* on 18 January 2019. In the event that did not prove possible, and matters so arranged themselves (given the events in the litigation more broadly) that it was not until late May that a date was fixed. During that time, at the instance of the Court in the USA, the parties had attempted mediation without success.

5. It is fair to say that the order is not a common order. It is plain to me that its grant has been regarded as a startling and unwelcome action by the US Court. It is a matter of regret in the light of the ties of comity which lie between this Court and the Courts of the United Sates, that the nature of the application and the time pressure under which it was brought meant that Robin Knowles J was not able to give a reasoned judgment, explaining the

jurisprudence which underpinned his decision, and that it has then not been possible for the matter to be fully argued at an earlier date.

6. Before me the parties have argued with great skill the question of whether I can or should continue the injunction. The central question has been whether what the US Court proposes to do is an interference in matters which fall within this Court's jurisdiction such that I should continue the injunction; or whether in the light of fuller consideration, including as to the law, the extent of the proposed action and issues of comity, I should refuse to do so.

7. I should add that there was also an application to discharge the injunction on the basis that there had been a failure to give full and frank disclosure at the without notice hearing. I will deal with the points raised at the close of this judgment, but for present purposes I can say that these arguments were (rightly) not strongly pressed by Ms Carss-Frisk QC on behalf of SAS.

The Facts

8. The facts in this case present themselves in three chapters: the English Liability Proceedings, the US Liability Proceedings and the Enforcement Proceedings (in the UK and the US).

Chapter 1: The English Liability Proceedings

9. In the beginning SAS sued WPL in England for copyright infringement by WPL and for breach of contract, alleging that WPL used the SAS "Learning Edition" software in breach of its "click-through" licence terms. Both claims were eventually rejected by Arnold J in judgments of 2010 and 2013, (the "English Liability Judgments"), but not before the matter had gone to the European Court.

10. A key conclusion of the English Liability Judgments was that the contractual claim was defeated by the Software Directive (enshrined in English law in the Copyright, Designs and Patents Act 1988) which permitted WPL's conduct and overrode the contractual terms to the extent they stated to the contrary.

Chapter 2: The US Liability Proceedings

11. Slightly overlapping with this, in January 2010 SAS brought proceedings in its home court, the District Court for the Eastern District of North Carolina (the "EDNC"). Those proceedings were themselves somewhat complicated. The claims brought involved copyright infringement, breach of contract/fraudulent inducement to contract, tortious interference and a statutory claim for contravention of the North Carolina Unfair and Deceitful Trade Practices Act ("the UDTPA Claim"), which was itself based on the fraud claim.

12. There was a *forum conveniens/lis pendens* challenge by WPL in early 2011 succeeded but was set aside on appeal. WPL then withdrew its objections and filed a formal "Consent to Jurisdiction" in 2012. The reasoning behind this appears to have been in part commercial in that, as WPL's counsel told the US Court, in order to deal commercially in the US WPL could not sensibly resist the jurisdiction of the US Courts. Or to put it another way, as Mr Raphael did in submissions, if WPL were doing business in the US, there would almost inevitably be jurisdiction. There was no attempt by WPL to injunct SAS from pursuing the US Proceedings.

13. Jurisdiction having been established, the parties then proceeded to fight the case. A point which SAS repeatedly emphasised both in the English enforcement hearing and in this hearing before me was that WPL chose to engage meaningfully in the US Proceedings.

SAS succeeded on arguments that the English Liability Judgments did not prevent the claim being litigated in the US, so that the matter proceeded to trial.

14. By way of summary judgment in September 2014 SAS failed on copyright infringement but WPL was found liable for breach of the click-through licence, contrary to the English Liability Judgments. There was then a 14-day jury trial in September and October 2015 at which SAS succeeded on claims for fraud ("the Fraud Claim") and/or the UDTPA Claim. There were subsequent post-trial motions. Compensatory damages were set by a jury at some $26m for each of the breach of contract, fraud and UDTPA heads of claim; and the award in respect of the UDTPA Claim was trebled to some $79m.

15. The US Judgment was first handed down on 16 October 2015 and an amended version followed on 15 July 2016. An appeal was lodged. On 24 October 2017 the US Court of Appeals for the Fourth Circuit affirmed the US Liability Judgment. A petition to the US Supreme Court for *certiorari* was dismissed. During the course of the appeals process WPL lodged US$4.3 million as security as the price of a stay of execution.

16. Thus far direct enforcement in the US has been limited to this sum and an amount of US$1,131,799.65 was paid by WPL pursuant to an order made on 15 February 2019.

Chapter 3: The Enforcement Proceedings (in the UK and the US)

The English Enforcement Proceedings

17. SAS sought to enforce its US Judgment in England, by commencing this action on 8 December 2017. Because of the English Liability Judgments it did not seek to enforce the contractual part of the US Judgment.

It recognised that this court would be bound to refuse enforcement of that part of the judgment, on the basis of *issue estoppel*. SAS sought instead to enforce only the heads of judgment based on fraud and the UDTPA, and those confined to $26m.

18. As noted above, that claim for enforcement in this country failed. In the Enforcement Judgment handed down in early December 2018 I held that the existence of the terms of the contract was a fundamental building block for the Fraud Claim and that without it that claim—as it was formulated in the US—could not have been run. Accordingly, the plea of *issue estoppel* which would have defeated the breach of contract claim equally defeated the fraud claim, and hence the UDTPA claim which was based on that fraud claim. I also held that even if the claim were not barred by *issue estoppel* it would have been barred because it could and should have been brought as part of the original claim. In the circumstances I did not need to decide the other grounds, but I also indicated that I would have found that:

i) It would have been appropriate in this case to refuse enforcement on the grounds of public policy because of conflict with the Software Directive.

ii) S. 5 of the PTIA would prevent recovery of the UDTPA claim.

19. The main reason why SAS sought enforcement here is that WPL is an English company and its only bank accounts are here. Hence SAS sought, but now cannot get, *in rem* enforcement in this jurisdiction. So much is clear.

20. What is also clear is that the US Judgment is effective within the US legal system. There is no dispute on that point and WPL has made clear it is not seeking

any antisuit injunction to restrain normal territorially confined enforcement measures in the USA, such as *in rem* enforcement as to property in the USA.

21. That leaves the question of what happens as regards debts owed to WPL by persons based in neither the UK nor the US. The position here is that normal *in rem* enforcement of the US Judgment in other foreign countries against WPL's assets and receivables in those countries is open to SAS. Whether that route is likely to be fruitful is open to question. The question of whether those other countries would recognise and enforce the US Judgment is a matter for the laws of each such country. So far as European countries are concerned there must be a very real prospect that those countries would refuse to enforce the US Judgment in the light of the inconsistency with the Software Directive.

22. In this connection what has come into focus since the Enforcement Judgment is that the majority of debts owed to WPL by customers based in other countries (aside from the USA) will still be as a matter of English law debts situate in the UK and will be payable to WPL in the UK. The reason for this is that under WPL's pre-December 2018 standard terms, all customers save those from six countries (including the US) and some customers who contracted on bespoke terms, contracted for London arbitration and hence were enforceable, and thus situate, in England.

23. Further in December 2018 WPL introduced new standard terms applicable to customers other than those in the USA. These provide universally for English exclusive jurisdiction (by clause 13.1) and include terms that make it clear beyond doubt that debts are situate here, including a deeming provision (clauses 13.2 and 13.3) and a provision that all payments are recovered by collection

against a deposit here (clauses 2.5 and 2.7). As a consequence all debts owed to WPL by customers contracting on these terms—wheresoever resident—will be (as a matter of English law) debts situate in the UK.

24. This is because under English Law debts owed pursuant to agreements containing such terms as to jurisdiction will be situate in England. This was a point considered in the context of third party debt orders in the recent case of *Hardy Exploration* v *India* [2019] QB 544 where Peter Macdonald-Eggers QC sitting as a Deputy Judge of the High Court noted the general presumption that a debt is sited in the place of the debtor's residence. He went on to say this:

> "The general rule or presumption is open to displacement if it can be demonstrated that the relevant debt is properly recoverable or enforceable in a jurisdiction other than the debtor's residence or domicile, for example if suit must be brought against the debtor in that other jurisdiction, such as by a "special agreement" or an "exclusive right of suit" agreed between the parties in question; if the position were otherwise, the anomalous situation may arise where a third party debt order is made in respect of a debt which a foreign court with exclusive jurisdiction holds to be non-existent."

25. It is, in reality, these debts owed by non-UK and non-US counterparties which are the focus of the injunction, in the light of the progress of SAS's enforcement efforts.

The US Enforcement Proceedings

26. As regards the US, SAS registered the US Judgment in the Central District of California ("CDC") on 28 December 2017. The first step to taking enforcement ac-

tion was to file a "Writ of Execution" against WPL, which SAS did on 4 January 2018.

27. Having chosen California as the base for its enforcement proceedings, SAS became entitled as a matter of US Law to utilise the procedures available under the laws of California. It is not in issue that these include assignment and turnover orders.

28. As regards assignment orders, the key provision is Cal. Civ. P. § 708.510, which provides materially that *"the court may order the judgment debtor to assign to the judgment creditor"* payment rights as further specified. The Court is thus empowered to make an order against the judgment debtor requiring it to assign particular assets.

29. As regards turnover orders, the key provision is Cal. Civ. P. § 699.040, which provides materially for the making of *"an order directing the judgment debtor to transfer to the levying officer"* assets as further specified. The levying officer for these purposes is a US Marshal. The statute makes clear that there is power to make an order against the judgment debtor, requiring it to deal with assets in a particular way.

30. The first application came in February 2018. It was for assignment and turnover orders, but was limited in its ambit. It was directed only at receivables from customers in the USA, although by error one non-US customer was included. SAS explained that it had *"instituted this proceeding in order to seek to collect on one of the few—if not only—US-based assets of WPL, namely amounts payable to WPL by its US licensees"*. SAS's object was to obtain relief against WPL in respect of the amounts payable to it from those licensed to use its product in the US.

31. WPL conceded that *"an assignment order may properly enter with respect to WPL's direct customers located in the United States who are obligated to remit money to WPL"*; but submitted that *"enforcement with respect to any assets that are outside of the United States should be deferred to the U.K. courts, where [SAS] has already instituted an enforcement proceeding"*. WPL also submitted that comity should lead the US Courts to defer to the UK Court as regards property outside the US. There was, and apparently remains, a dispute as a matter of US law as to whether the power to order assignment is one that can be exercised outside the USA.

32. In its Reply, SAS indicated that it was then only seeking orders regarding US based customers but stated that it *"specifically reserves the right to seek to amend the assignment order once SAS obtains information regarding WPL sales outside the United States in the North Carolina proceedings"*, making clear that on its case the US Court had power over any assignable property of the debtor, including property outside the jurisdiction, so long as the court has jurisdiction over the debtor.

33. It was at this point that WPL first sought injunctive relief. On 22 March 2018 WPL sought an anti-suit injunction from this court as regards *"customers, licensees, bank accounts, financial information, receivables and dealings in England"*. The injunction application was made both as to orders for disclosure which were then pending in the EDNC and the proposed assignment order in California. As to the latter, the application was made on the basis that any such order would be an *in personam* order. The application, before Robin Knowles J, did not succeed. Whether or not (as was in issue between the parties) he regarded the application as "prem-

ature", he did consider it inappropriate to grant the injunction when the application was geared to UK assets, and nothing was then impending from the US Courts which could bite on such assets.

34. Very shortly thereafter the February application (for assignment and turnover orders) was dismissed without prejudice by the California Courts. The basis for that dismissal was an evidentiary one; essentially the court was not satisfied that the case had been sufficiently made as to customers owing money to WPL.

35. The attempts at enforcement with which the present injunction is on its face concerned started with a motion on 18 June 2018 for an assignment order.

36. Before proceeding to consider the nature of the relief, I should note that SAS places reliance on the fact that WPL have also at the enforcement stage fully participated in the Enforcement Proceedings in the US—in the sense that they have acknowledged jurisdiction saying *"[i]t would have been a difficult and unattractive argument for WPL to argue that the California Court did not have jurisdiction"* and have proceeded to contest the ambit of the orders sought.

37. It is the *in personam* nature of these steps which is the centre of gravity of WPL's arguments. Although WPL denies that it objects to *in personam* relief per se, it certainly appears to object to the combination of *in personam* relief and the forms of relief in question: assignment and turnover orders. As Mr Raphael made clear in closing that is an objection which although not raised in exactly that form in February 2018 in fact extends to any *in personam* assignment or turnover order, regardless of the nationality of the debtor. The concern may be at its most acute as regards UK debtors and at its

least acute as regards US debtors, but logically extends to all.

38. What is said to be offensive about these *in personam* orders—and offensive to the extent that this court should issue an anti-suit injunction—is that they "reach in" to this court's jurisdiction; and in doing so they are said to cut across both the Enforcement Judgment and the original English Liability Judgments.

39. The two orders primarily in question now are:

i) An *in personam* Assignment Order being sought by SAS since 10 October 2018 under the First Remand Motion;

ii) An *in personam* Turnover Order initially sought by motion dated 11 October 2018 and now being pursued under a Second Remand Motion dated 4 December 2018.

40. There is a third Order which should be mentioned—indeed it was perhaps the most controversial order of all: the Order of 5 September 2018 ("the September Order") granted as a result of the June 2018 application. On its terms, it is almost purely *in rem*—it purports to assign debts itself without obliging WPL to do anything; and as an *in rem* order it would not be enforced abroad. That this is how the order reads was not seriously in issue. Its only arguably *in personam* aspect is the penal notice attached to it, which is addressed to WPL.

41. There is however fierce contention about the September Order. WPL says that SAS has undergone a recent change of stance; that they previously accepted it was an *in rem* order only (indeed they relied on it as an *in rem* order in writing to WPL's clients) and that their position before me—that it was an *in personam* order

and always had been—was a *volte face*. SAS submits that WPL is being deliberately obtuse; that the September Order as sought was always *in personam* and that WPL plainly appreciated this and responded to the application on that footing. I will resolve this dispute at the outset so that it is plain which orders are "in play".

42. This is a point where (broadly) SAS's submissions were compelling. The history of the September Order is as follows. The application was made in June pursuant to the provision quoted above at [28]. That application did refer to seeking an order assigning all of WPL's interests in specific debts, but did reference authority which spoke in terms of a right to order WPL to assign such debts. It made plain that it was applying under the relevant rule and that that rule *"authorises a court to issue an order directing WPL to assign to SAS or to a receiver"*.

43. The response of WPL was to contest the making of the order including the scope of the California Court's power under the California statute and discretionary considerations of comity and territoriality. WPL submitted *"a US court order requiring WPL to assign assets . . . would conflict with [other] countries' recognition rules"*. It did not take any issue with the formulation of the order, or seek to argue that the relief sought was *in rem*, and therefore impermissible.

44. The order was granted in the following terms; which as noted above are essentially *in rem* terms.

> "Under applicable California law, upon application of the judgment creditor or notice motion, the court may order the judgment debtor to assign to the judgment creditor all or part of a right to payment due or to become due, whether or not the right is conditioned upon future payments . . .

> . . . the Court GRANTS IN PART the Motion for Assignment Order. The Court assigns to SAS WPL's right to payments from entities identified on SAS's Customer List, as supplemented by Hewitt Schedule 1-1, as customers with accounts receivable, active customers, and customers with recently expired licences. All of WPL's rights and interest, whether or not the right is conditioned on future developments, to payment due or to become due from these companies shall be and hereby are assigned to SAS until such a time as the North Carolina judgment in the amount of $79,129,905.00 is fully satisfied or until further order of the Court.
>
> The Court DENIES IN PART the Motion to the extent it seeks assignment of WPL's right to payments by resellers of its software and by "non-customers," i.e., the entities identified in paragraph 8 of the Robinson Declaration. As SAS withdrew the request for assignment of WPL's right to payments from customers located in the United Kingdom, those customers are excluded from this Order.
>
> Counsel for SAS shall provide notice of this Order to all WPL customers subject to the Order at the addresses identified on the Customer List, as supplemented by Hewitt's Schedule 1-1. Counsel for SAS may contact these companies to request that all such payments be made directly payable to [them, with details specified]. . .
>
> [f]ailure by WPL to comply with this Order may subject WPL to contempt of Court proceedings."

45. It seems fairly plain that what happened was that the statement of relief sought in the motion and the draft order put forward were infelicitously drafted (whether wittingly or not) and that the court understandably simp-

ly adopted the format offered. However, the intention seems (again despite those oddities in the drafting) to have been to seek and to grant *in personam* relief. This reading is supported by the fact that the relevant statute plainly only makes provision for *in personam* relief. That was the provision relied on, pursuant to which the only option was *in personam* relief. There was no other provision which could have been relied upon to give rise to *in rem* relief.

46. It is also supported by (i) the initial reference to the jurisdiction (ii) the reference to contempt (inapplicable if the remedy were one *in rem*) and (iii) the Court's later issue of a "clarification" so as to make the order plainly an *in personam* order—this development is dealt with below.

47. However, as a result the September Order as made was not an *in personam* order. Yet the statute does not, as SAS's evidence recognised: *"empower an order against the property itself, for example an order changing title to the property"*. It was therefore, as the US Courts have since effectively found, a dead letter. Because it was, as made, an *in rem* order (i) it could not bite as there was no jurisdiction to make such an order and (ii) it could not be "clarified" pending appeal; it could only be amended post any appeal.

48. It is certainly true that SAS wrote to WPL's customers relying on the terms of the order overtly: *"Any and all amounts owed by you to WPL have been assigned to SAS"*. However, this does not change the nature of what was applied for. It is perhaps not surprising that SAS opportunistically availed themselves of this favourable wording. It is perhaps ironic that it has in fact led to further delays and legal costs.

49. The applications for the other orders came into being against the background of the September Order. On 11 September 2018, WPL issued a notice of appeal and a motion seeking to stay enforcement *"as to entities that are outside the territory of the United States"* pending determination of the appeal together with supporting submissions. The appeal argued that the CDC had no power under the California statute to *"directly assign WPL's rights to payment overseas to [SAS]"*, and that to the extent that the September Order purported to affect assets outside the US, the California statute did not authorise that; or it was an abuse of the CDC's discretion to order it. WPL also argued that the court had no jurisdiction to directly order the assignment of WPL's rights to payment. This appeal and stay was opposed by SAS, relying on the personal jurisdiction of the California Court over WPL.

50. On 13 September 2018 the CDC, of its own motion, purported to amend the September Order so that it now ordered WPL to assign the relevant payment rights to SAS and execute such assignment within 7 days of the Order. WPL submitted that this was impermissible while the Order was under appeal; and made further submissions on subject matter jurisdiction and comity. Again the application was opposed by SAS.

51. On 20 September 2018 the CDC broadly agreed with WPL (at least to the extent that it considered it "prudent" to vacate the amended order). However, in an indicative ruling, the CDC said it would be "inclined to issue" such an *in personam* assignment order if the matter was remanded to it by the Ninth Circuit.

52. On 10 October 2018, SAS filed with the US Court of Appeals of the Ninth Circuit a motion seeking a limited remand to the CDC to enable the CDC to make the

amended assignment order foreshadowed in its "Indicative Assignment Order Ruling": "the Remand Motion".

53. The Remand Motion indicates that the order ("the Turnover Order") sought would be as follows:

> "The Court Grants in Part the Motion for Assignment Order . . . the Court orders WPL to assign to SAS its right to payments from entities identified on SAS's Customer List, as supplemented by Hewitt's Schedule 1-1, as customers with accounts receivable, active customers, and customers with recently expired licenses. Within seven days of entry of this Order, WPL shall execute an assignment to SAS of all rights, whether or not conditioned on future developments, to payment due or to become due from these companies until such time as the North Carolina judgment in the amount of $79,129,905.00 is fully satisfied or until further order of the court."

54. The order, if made, would require WPL, acting in England, to assign debts payable to it in England (and often from outside the USA) to SAS. It would impose personal obligations and is enforceable in contempt.

55. On 11 October 2018, SAS then brought an application for an *in personam* turnover order "the Turnover Order". This was again opposed by WPL. The CDC held it could not grant that application while the September Order was under appeal, but gave an indicative ruling that it would grant it if the matter was remanded to it:

> "The Court would grant SAS's application for a turnover order if jurisdiction is reinstated. The turnover order appears necessary in light of WPL's refusal to remit any payment to SAS, despite the Court's Assignment Order [i.e. the 5 September

2018 Order], which has not been stayed, and the outstanding $79,129,905.00 judgment against WPL."

56. The Turnover Order sought required WPL to:

"transfer to the United States Marshal Service for the Central District of California all money, accounts, accounts receivable, contract rights, residual accounts, deposits, streams of income, revenue streams and residual rights, which arise from, directly or indirectly, business conducted between WPL and customers with accounts receivable, active customers, and customers with recently expired licenses, as listed on the Customer List".

57. There is an issue as to whether it can cover intangibles such as past payments from such customers already in WPL's bank accounts; SAS appears to say it can. It is thus possible that it could extend to cash already held in UK banks. Although the drafting is not perfectly clear in that the Customer List covers customers worldwide and includes UK customers, SAS has indicated that the order was intended only to apply to receivables due/moneys received from customers outside the UK.

58. The order, if made, would be personally binding on WPL and enforceable in contempt.

59. The issue which WPL identifies therefore is that if made, this Turnover Order would reach into the UK in two respects:

i) It would require WPL to hand over to the US Marshal all the targeted customer debts and payments. This would mean WPL (in England) assigning debts to the US Marshal. It would therefore positively require WPL to do something in England.

ii) It might also require WPL to turn over to the US Marshal even existing monies. That would involve WPL paying monies from its bank accounts in England to the US Marshal.

60. This is not exactly what would have happened if SAS had succeeded before me in the English Enforcement Proceedings; but in terms of effects there are undoubted similarities. It should be noted that while the English Enforcement Proceedings was limited to US$26 million, this US Enforcement Proceedings would seek to enforce right up to the US$79 million limit, if necessary via these forms of relief.

61. On 4 December 2018, SAS made its Second Remand Motion to the Ninth Circuit asking for the Turnover Order application to be remanded to the CDC. That motion was duly opposed by WPL. That opposition was filed on 14 December 2018—the day after I handed down the Enforcement Judgment.

62. On 19 December 2018 WPL issued its application for an interim anti-suit injunction and sought a without notice hearing. The earliest date this court could offer was 21 December. The position on 21 December was that the outcome of the remand motions was awaited. The extent to which they might be granted at any moment was in issue, but my conclusion on the evidence was that this was a possibility, if some way short of a likelihood.

63. The piece of background to add is that on 11 January 2019, and in reaction to the Enforcement Judgment and Robin Knowles J's injunction, SAS applied to the EDNC under the All Writs Act ("AWA") and obtained an *ex parte* injunction preventing WPL from licensing to new customers in the USA unless the $79m judgment is satisfied, which was then given final effect by Judge Flanagan on 18 March 2019 ("the AWA Injunction").

64. The final aspect of the US litigation which I should mention is that the EDNC went on to grant orders of its own motion on 15 February 2019, including an order imposing on WPL an obligation *in personam* to pay SAS certain monies received in the past into its English bank accounts from US customers. These would be payments made subject to the old terms and conditions.

65. I should also note that WPL plainly believes that SAS's aim is destructive and punitive. It believes that SAS aims to damage WPL's business and punish it for defending the claims in this action. I do not consider that I have the evidence to reach a conclusion on this point. But in any event, it seems to me that whether that is the case or not is neither here nor there. Subject to the kinds of questions which underpin the grant of anti-suit relief, SAS are perfectly entitled to use any legitimate means to defend their commercial position. Indeed this is a case where it is quite apparent that both parties have used the resources of talented legal teams on both side of the Atlantic to try to produce the best possible results for their respective businesses.

66. All that matters for the purposes of this judgment is whether what SAS has done meets the requirements for this Court to exercise its discretion to grant an anti-suit injunction. To that aspect I now turn.

The law on anti-suit injunctions and the parties' contentions

67. The backdrop to the debate is the jurisdiction to grant anti-suit injunctions. The existence of this power is not contentious. The Court has the power under s. 37(1) of the Senior Courts Act 1981 to grant injunctions where it is *"just and convenient"* to do so.

68. The jurisdiction is one which is exercised with caution. Often it will require a finding that foreign proceedings are vexatious or oppressive. This is basically because the court has a keen eye to the requirements of comity. Thus:

> "[t]he fundamental principle applicable to all anti-suit injunctions. . . [is that] the court does not purport to interfere with any foreign court, but may act personally on a defendant by restraining him from commencing or continuing proceedings in a foreign court where the ends of justice require": *Stichting Shell Pensioenfonds* v *Krys* [2014] UKPC 41 [2015] AC 616 (PC), [17];

69. To similar effect is *Société Aerospatiale* v *Lee Kui Jak* [1987] AC 871 (PC) 892-894, *"[s]ince such an order indirectly affects the foreign court, the jurisdiction is one which must be exercised by caution."*. This word "caution" is repeated for example in *Airbus* v *Patel* [1999] 1 AC 119, 138: and in *Deutsche Bank* v *Highland Crusader Offshore Partners LP* [2009] EWCA Civ 725 [2010] 1 WLR1023 at [50]: *"An antisuit injunction always requires caution because by definition it involves interference with the process or potential process of a foreign court."*

70. The paradigm case and the one in which this Court's mind will be most at ease is the situation where the anti-suit injunction is sought to protect a party whose contractual right not to be sued abroad is infringed or threatened with infringement. This is not such a case.

71. Anti-suit injunctions are also granted, without requiring vexation or oppression, where the foreign proceedings interfere with the processes, jurisdiction, or judgments of the English court. The re-litigation of matters already decided in England is an established exam-

ple of vexatious re-litigation and interference. Examples are found in: *Aerospatiale* 892-894; *Masri* v *Consolidated Contractors International (UK) Ltd (No.3)* [2008] EWCA Civ 625 [2009] QB 503 [26], [82-89], [100]; *Deutsche Bank* [50]; *Shell* 630E-631A.

72. The paradigm such case is where the injunction is necessary to restrain re-litigation of issues decided by an English judgment given in proceedings in which the respondent has submitted. One rationale for the grant of relief in such cases is that it may be vexatious and oppressive for the respondent to relitigate in such circumstances; another is that the injunction may be necessary to protect the English Court's jurisdiction and judgments.

73. One issue is the extent to which my exercise of the Court's power in this case is delineated by these previous authorities. SAS submitted that the Court's power to grant such relief must be exercised in accordance with principle and having regard to prior authority identifying the categories of case where the ends of justice have been held to require relief. Such statements occur in a number of places, but perhaps the most useful is in *Shell* [18] referring to:

> ". . .three categories of case which . . . have served generations of judges as tools of analysis. The first comprised cases of simultaneous proceedings in England and abroad on the same subject matter. If a party to litigation in England, where complete justice could be done, began proceedings abroad on the same subject matter, the court might restrain him on the ground that his conduct was a "vexatious harassing of the opposite party". The second category comprised cases in which foreign proceedings were being brought in an inappropriate forum to

> resolve questions which could more naturally and conveniently be resolved in England. Proceedings of this kind were vexatious in a larger sense. . . . . Third, there are cases which do not turn on the vexatious character of the foreign litigant's conduct, nor on the relative convenience of litigation in two alternative jurisdictions, in which foreign proceedings are restrained because they are "contrary to equity and good conscience"."

74. The point was not however hugely contentious given that it is well established that it was accepted that: *"[T]he width and flexibility of equity are not to be undermined by categorisation"*: *Castanho* v *Brown & Root (UK) Ltd* [1981] AC 557, 573.

75. Ultimately therefore one might say that the power is always to be exercised with caution, but it is to be exercised with particular caution in a case falling outside these well-established categories.

76. This debate was relevant because WPL contended that in some cases anti-suit injunctions can also be granted to protect the important public policies of the forum. There was an issue between the parties as to the extent to which such an injunction might be granted only where an injunction may be appropriate on other grounds, e.g. vexation and oppression, or a need to protect the Court's jurisdiction, in which case such policies may be relevant to an assessment of what comity demands in all the circumstances.

77. WPL pointed in particular to *Barclays Bank* v *Homan* [1992] BCC 757 per Hoffmann J at 762G-H referring to cases where:

> "the foreign court is, judged by its own jurisprudence, likely to assert a jurisdiction so wide either

> as to persons or subject-matter that to English notions it appears contrary to accepted principles of international law. In such cases the English court has sometimes felt it necessary to intervene by injunction to protect a party from the injustice of having to litigate in a jurisdiction with which he had little, if any, connection, or in relation to subject-matter which had insufficient contact with that jurisdiction, or both. .... These are cases in which the judicial or legislative policies of England and the foreign court are so at variance that comity is overridden by the need to protect British national interests or prevent what it regards as a violation of the principles of customary international law."

78. SAS argued that an anti-suit injunction could not be based solely on considerations of public policy, relying on Mr Raphael's own words in an article entitled *"Do as you would be done by"* [2016] LMCLQ 256, where at p259 he said that *"granting an injunction solely to protect the public policies of the forum may go too far, without a finding of vexation or oppression or a need to protect the jurisdiction of the court."*

79. Finally, there was consideration of the special refinement of anti-enforcement injunctions. The parties were united in accepting that the court has a power to make such an injunction; and also more or less so in accepting that such injunctions will be rare. Both referred to *Masri (No 3)*, per Lawrence Collins LJ (with whose judgment Sir Anthony Clarke and Longmore LJJ agreed) at [94]-[95].

> ". . .it will be a rare case in which an injunction will be granted by the English court to prevent reliance abroad on, or compliance with, a foreign judgment, or an injunction which will indirectly have that ef-

> fect. But there is no general principle that even in such a case no injunction will be granted. . . . No doubt the power will only be exercised in exceptional circumstances."

80. The paradigm is a case where a respondent has obtained and/or sought to enforce the foreign judgment fraudulently or in breach of contract. Two such cases referred to were: *Ellerman Lines* v *Read* [1928] 2 KB 144 (CA); *Bank St Petersburg OJSC* v *Arkhangelsky* [2014] EWCA Civ 593 [2014] 1 WLR 4360 (CA). SAS rested heavily on these cases, saying that the present case was manifestly not of this type. It also pointed to the numerous cases where such an injunction has not been granted.

81. WPL put the argument round the other way, emphasising that the present case is very different from the cases where an anti-enforcement injunction has been refused. It submits that those cases were ones where (i) the equity upon which the injunction relied related to whether the foreign judgment should have been obtained at all, not to the nature of the enforcement measures flowing from an unchallenged judgment, and (ii) either the injunction was sought post the foreign judgment to restrain conventional *in rem* enforcement worldwide; (iii) and/or the fact the injunction is at the enforcement stage may mean that there has been culpable delay.

82. Thus it submitted that *Ecobank* v *Tanoh* [2015] EWCA Civ 1309 [2016] 1 WLR 2231, on which SAS relied, was a very different case being a case of breach of an arbitration clause, where there were liability proceedings going through to judgment in the foreign court, and then an attempt post the judgment to say that because of the arbitration clause, the party who had obtained the judgment should not get the extraterritorial enforcement worldwide.

83. WPL submits that there is no reason why an injunction should not be forthcoming where the equity relied on relates to the exorbitant nature of the enforcement measures themselves, and their interference with the Enforcement Judgment, where there is no attempt to restrain conventional *in rem* enforcement worldwide; and there has been no delay. Key to this latter argument was the concept of the "post judgment equity". WPL says that usually what is relied on is an inconsistency which pre-dates the judgment; and thus by the time that equity is sought to be invoked the answer is that it is too late.

84. WPL relied on *Ardila* v *ENRC* [2015] EWHC 1667 (Comm) [2015] 2 BCLC 560 as an example of a case where a mandatory order has been made in relation to foreign enforcement measures. In that case it was held that vexatious interference with due process of the Court and the interests of justice justified the grant of an injunction where the purpose of the proceedings was to frustrate an order for security supporting extant English proceedings in which the other party had submitted to the jurisdiction.

85. WPL relies in essence on five factors as justifying this unusual course:

i) Interference with and relitigation of the Enforcement Judgment which denies enforcement here;

ii) Relitigation of my conclusions as to *res judicata* and *Henderson* v *Henderson*;

iii) Violation of English public policy, in particular the Software Directive, the PTIA and the rules on recognition;

iv) The exorbitant territorial effect—"reaching in" to England in relation to assets largely situated outside the USA, but substantially here;

v) The intended destructive effect on WPL to which I have alluded above.

WPL says a combination of a few of these factors would suffice, but that taken together they provide an overwhelming case. Only limited weight is placed on the original English Liability Judgments, effectively as an element in a cumulative case.

86. The central issue between the parties has two facets: "reaching in" and interference, as WPL characterise them. They are two sides of the same coin.

87. The essence of WPL's case is that what these *in personam* orders seek to do is to reach into England and act directly on WPL here, in relation to largely UK assets, forcing WPL to take steps in England, on pain of contempt, to transfer them to SAS. WPL contends that the effect of my judgment is that WPL should not be affected here by legal obligations operating in England to pay the US Liability Judgment and that the US processes objected to would cut across this. It is said that (i) the orders seek to achieve what my orders mean should not happen, in and from England and (ii) they would not have been sought had my judgment gone the other way. The result, it is submitted, is to collaterally attack, and set that decision at naught.

88. Against this there is SAS's contention that the US process is separate and different. It says that the Enforcement Judgment is concerned with whether the US Liability Judgment gives rise to obligations enforceable in this Court; and held that it does not, with the consequence that this Court's enforcement processes are unavailable to SAS. It says that it is not central, but on the contrary irrelevant, given that SAS is not seeking to use the English Court's processes to enforce the US Judgment. It is seeking to use the enforcement processes of

courts in the US, where the US Judgment is indisputably enforceable. The Enforcement Judgment does not address the issue of whether these US processes are available to SAS and should not operate as a trigger for anti-suit relief.

89. On the policy arguments, once the legal debate was cleared out of the way there were a variety of issues between the parties reflecting the different policies relied on. SAS contended that the Software Directive makes no provision for member states to export the protections given by the Directive to other states; it protects from enforcement but does not enable injunctive relief.

90. WPL contended that this was not about exporting the directive, but rather about making meaningful those protections which it does give to English software development. There is no good reason why that cannot support an injunction; such relief need not specifically be stipulated.

91. Similar arguments were deployed as to the appropriateness of an injunction to support *Henderson* v *Henderson*.

92. So far as the PTIA is concerned, SAS relied on Parker J in *British Airways Board* v *Laker Airways* [1984] 1 QB 142, where he held that the PTIA did not provide a basis for seeking anti-suit injunctive relief to restrain US proceedings for multiple damages. WPL countered by arguing that that case dealt with whether the PTIA could justify injunctions to restrain US liability litigation for trebled damages; and not the considerations that arise where there is an attempt to rely on a trebled US judgment by extraterritorial enforcement reaching into England, in ways which seek to circumvent an English judgment refusing enforcement here.

93. There was also what might be called a "sauce for the goose" argument—the parties differed as to whether this Court would grant equivalent relief to that being sought via the US Courts; the argument being that if it would it should not therefore act to halt it being granted by another Court. In particular in this connection SAS relied on the position in relation to worldwide freezing relief and receivership orders.

94. The parties also joined issue on the questions of delay and submission. On delay, WPL's position was that there was no relevant delay and *a fortiori* no culpable delay that would justify refusing an injunction, given the strong equities in favour of the injunction. WPL says that its injunction is centrally based on recent matters; namely the features of extraterritorial enforcement measures sought in autumn 2018 and their conflict with my judgment and the legal position it enshrines.

95. As for submission at the enforcement stage, WPL submitted that this should not be a heavy factor against it, particularly given that it had contested the jurisdiction of the US Courts initially, and contested the California Court's jurisdiction as regards the extra territorial relief.

96. WPL pointed to *Shashoua* v *Sharma* [2009] EWHC 957 (Comm) [2009] 2 Lloyds Rep 376, [53-54] urging a nuanced approach to this question. Reliance was also placed on *Svendborg* v *Wansa* [1997] 2 Lloyd's Rep 559, 570, 573, 575 where an anti-suit injunction was granted notwithstanding submission, the court observing it was reasonable to have submitted to the jurisdiction in the circumstances.

97. SAS contended on these issues that this was the clearest possible case of delay based not just on the nine-year delay but also on the quality and extent of WPL's participation in the US Proceedings. On submission it

says that in circumstances where the proceedings in the US have been on foot for nine years, WPL has fully participated in them, and the US Judgment has been given against it, it is just too late for WPL to ask this Court to interfere with an anti-enforcement injunction. It submits that the time for WPL to seek injunctive relief (if at all) was when the US Proceedings were commenced and that having allowed the proceedings to run to judgment and well beyond it would be unprecedented and contrary to principle to exercise the court's discretion in WPL's favour. It argues that my judgment is analytically irrelevant to the application.

Discussion

98. The jurisdiction to grant an anti-suit injunction derives from the power under s. 37(1) of the Senior Courts Act 1981; it rests on the broad *"just and convenient"* basis.

99. As such, it is an area where the authorities have tried to delineate in specific cases whether that test is met.

100. One area concerns injunctions granted to restrain proceedings brought in breach of jurisdiction agreements. This is the relatively straightforward end of the jurisdiction. It is of no relevance here.

101. Outside this enclave the courts have to grapple with this broad test in the context of a range of less easily defined grounds. As a result it is extraordinarily easy to lose the wood in the trees which represent the various points which come into focus in different cases based on their specific facts. It is also, as a result of the number of features which can be relevant, possible to present a result as deriving from more than one factor, depending on the prism through which one views a particular case.

This was very noticeable in the analysis of the authorities presented during the course of argument, where the parties saw the route to the result in very different ways. It might equally well be said of the result at which I arrive in this case.

102. Each case however comes back to this fundamental question: balancing all the relevant factors together, is it just and convenient to grant the injunction sought?

103. Ultimately the conclusion which I reach is that the answer to this question is, fairly clearly, no. WPL's argument, although with some sound building blocks, was overstrained and cannot succeed.

104. I will deal below with the various strands of argument which were put forward for consideration and which, when considered in the light of the facts of this case and the guidance of the authorities, have contributed to the result which I reach.

105. In terms of legal approach generally there was not much between the parties. Both agreed on the parameters within which the Court's jurisdiction is normally exercised. Both ultimately agreed that the categories for such relief are not closed, though previous cases can provide useful tools of analysis. Both agreed that *"the English forum should have a sufficient interest in, or connection with, the matter in question to justify the indirect interference with the foreign court which an anti-suit injunction entails"* (per Lord Goff, *Airbus* v *Patel* [1999] 1 AC 119, 138) and that the Court will naturally, particularly with the requirements of comity in mind, proceed with caution.

106. Both agreed that one basis on which an injunction may be granted is that it may be either vexatious or oppressive (or both) for a party to relitigate issues decided

in an English judgment, and that another is that the injunction may be necessary to protect the English Court's jurisdiction and judgments.

107. The only real issue of principle between them was as to the question of whether it was permissible for an anti-suit injunction to be founded on a question of public policy alone. The reason why this was of any significance was that WPL chose to place reliance not on any one factor as sufficient in and of itself, but rather to identify three factors, including that of public policy, as justifying the grant of relief.

108. Although it was never quite so expressed, it appeared to have been (rightly) anticipated that an injunction founded solely on the grounds of vexation or interference would not meet the test. I shall deal with the various issues which arise on these heads in more detail below, but in summary: vexation is a ground which WPL conceded most often requires a finding that England is the natural forum. In any event such an argument would naturally rely most heavily on the original English proceedings, but WPL's full participation in the later US Proceedings creates an obvious difficulty for any such argument. Basing the application in interference faces *inter alia* the problem that since my judgment is not one on the merits, but is a judgment relating to enforcement of a judgment of the US Courts, the question of "protecting the jurisdiction" is therefore something of an uncomfortable fit.

109. Hence, bearing in mind my conclusions on the public policy aspects in the Enforcement Judgment, WPL naturally wish to rely on public policy.

110. Again, however, WPL hedged its bets; it was never suggested that this was the only basis for the relief. Instead it was argued essentially that public policy could

found an anti-suit injunction and that public policy aspects could therefore provide a ground. On that basis this, together with the additional ballast given by vexation and interference, was said to satisfy the wide test which underpins the Court's jurisdiction.

111. As to this approach of adding elements together, it may be that this is possible in an appropriate case; certainly both vexation and interference have been relied on jointly in other cases. However, there is a danger that adding elements of different justifications may result in a degree of double counting. This, bearing in mind the need for caution, must be avoided.

112. So far as concerned the possibility of public policy operating as a justification in and of itself, it has appeared to me that in the end the issue of public policy as an independent ground did not therefore arise and a detailed view on this issue is better saved for a case where it really does arise. I will therefore only note in passing that it seems to me far from impossible that public policy could, conceptually at least, give an independent basis for an anti-suit injunction. Certainly Robert Goff LJ (as he then was) in *Bank of Tokyo Ltd* v *Karoon (Note)* [1987] AC 45 , 58, was clear that: *"an English Court may grant an anti-suit injunction where that is necessary to prevent the litigant's evasion of important public policies in an English forum . . ."* and that view has been cited with approval not just by Lawrence Collins LJ (as he then was) in *Masri No 3* [2008] 1 CLC 887; [2009] QB 503, at [86] but also by Sales LJ (as he then was) in *Petter* v *EMC* [2015] EWCA Civ 828 [2015] 2 C.L.C. 178, 198. The suggestion of public policy as a ground therefore has a distinguished pedigree.

113. Similarly in *Shell* v *Krys*. There the Privy Council was dealing with the jurisdiction of the Dutch court

under its own law to authorise the attachment of an Irish debt owed to a BVI company in liquidation in the BVI, in circumstances where the effect would be to obtain an unjustified priority in violation of a mandatory statutory scheme. It characterised such an attachment as exorbitant and adopted the dictum of Hoffmann J in *Homan*:

> "the judicial or legislative policies of England and the foreign court are so at variance that comity is overridden by the need to protect British national interests or prevent what it regards as a violation of the principles of customary international law."

114. That certainly suggests that were another court to act in a way which varied in a significant manner from an important policy of this jurisdiction, an injunction might be granted primarily based on the policies of this jurisdiction.

115. However, while this is a conceptual possibility there seem to me to be two factors which reduce this possibility to one of near vanishing slightness in practical terms. The first is that for this to be so the circumstances will be highly unusual. While Mr Raphael resiled a little from the suggestion in his article that the policies had to be *"radically at variance"*, there must be a variance, and it seems to me that that variance must be both significant (if not necessarily "radical") and must to relate to an important policy of this jurisdiction. Further the jurisdiction which the party injuncted is to be restrained from invoking must be one which is properly regarded as exorbitant. In *Shell* for example there was a wide jurisdiction being invoked in Holland, which was compounded by the fact that the Dutch court had no capability to look at the question of convenient forum, the attachment in question being a matter of right, subject only to very minor qualifications.

116. Secondly, as Mr Raphael accepted in argument, very often the question of protecting policies will in fact go hand in hand with protecting jurisdiction, as seems really to have been the case in *Shell*, and as indeed it is said to do here. I have real doubts as to the practical reality of a situation where a public policy ground arises, absent more conventional grounds also existing.

117. So I would be minded to accept that protection of public policy is conceptually capable of standing alone, and therefore of offering an independent strand of justification for an anti-suit injunction. However, I do not regard this as adding anything to the argument in this case, where the basis for the application did include significant questions of vexation and interference and where those arguments themselves overlapped with the basis for the public policy arguments. The Enforcement Judgment is what it is in large measure because of those policies; it would be double counting to take this as a separate head for justifying an injunction.

118. As regards public policy, to the extent that it is relevant as a ground amongst others, while I would not accept SAS's argument that a public policy based injunction could not arise here because of an absence of specific provision in the relevant enactments, it seems likely that the way in which each policy is treated in its relevant enactment might, if a free-standing public policy injunction were under consideration, have a bearing on the balancing exercise with comity.

119. However, I accept WPL's argument that while the PTIA does not apply in itself as a ground to restrain US Liability Proceedings, because the PTIA specifies remedies for those liability proceedings, the matter may be different at the stage of enforcement when US enforcement proceedings could themselves nullify the PTIA

remedies. For present purposes therefore there is nothing which precludes a consideration of public policy insofar as it adds any separate consideration to the balance.

120. The next question relates to the specific context given by the fact that what is in question is an anti-enforcement injunction. Specifically, the question arises whether an anti-enforcement injunction could ever be available in such a case. Again on the law, I am with WPL to a limited extent. I consider that WPL's characterisation of the authorities to date is correct. I accept that none of the cases where anti-enforcement injunctions were refused arose in a situation with any real resemblance to the present case.

121. However, at the same time neither can it be said that the cases where such an injunction was granted bear much similarity to this case. It is therefore impossible to deduce from the authorities tightly drawn principles either as to when such an injunction will be granted, or when it will not.

122. In this connection it is worth looking at three cases. The first is the case of *Man* v *Haryanto*. It was a case to which both parties looked for assistance—not least, perhaps, because it was, of the "refusal" cases, the case closest to the present in terms of the tortuous factual background.

123. In that case (the facts of which were dryly described by the Court of Appeal as *"a little complicated"*) Mr Haryanto, who was an Indonesian resident, had been sued by ED&F Man, well known sugar traders, in arbitration in England on contracts of sale in relation to which a dispute had arisen. He disputed the jurisdiction of the arbitrators on the basis that some of the contracts concluded with Man were illegal. That argument was defeated at trial. There was then a settlement by contract

relying on that judgment. Under that settlement agreement Mr Haryanto was to pay a substantial sum by three instalments. An instalment of the settlement sum was paid but the second was not. Mr Haryanto then proceeded to relitigate in Indonesia saying the contracts were illegal, and that meant the settlement failed for illegality too. Man participated and lost. Man also (in parallel) responded by seeking an anti-suit injunction and further declarations in England saying the settlement was binding and valid. Both injunction and declarations were granted. Ultimately the inconsistent Indonesian decisions were held to be unenforceable, pursuant to *Henderson* v *Henderson*. Then a further injunction was sought to restrain Mr Haryanto from arguing that the contracts were illegal anywhere else in the world.

124. The Court of Appeal by this stage had to consider three fields of battle: England, Indonesia and the rest of the world. It decided that the position in England was already taken care of by the existing declarations, and that the rest of the world was a matter for the rest of the world. As regards Indonesia (said to be the analogy for the US in this case) the court said:

> "it would be wrong for this court to grant an injunction which is designed to take effect inside Indonesia and which would interfere or purport to interfere with the judgment of a court of competent jurisdiction inside that country."

125. SAS obviously relies on this as a case where a conclusion made by the courts here that an argument was abusive did not drive a conclusion that an injunction should follow. WPL argues that the position there was relevantly different, in that what was in issue was the right to argue about illegality, not the right to enforce and *a fortiori* not the right to enforce in a way which op-

erates *in personam* inside the UK. Both arguments have force; I conclude that the case is not analogous for the reasons given by WPL, but the case nonetheless provides an example of the careful eye which has to be had to comity, even in quite extreme circumstances.

126. It is also worth looking at the two cases where a true anti-enforcement injunction was granted. The first is *Ellerman Lines* v *Read*. In that case the respondent had entered into a Lloyd's salvage agreement providing for London arbitration. Regardless of this he then commenced proceedings in Turkey and, lying to the Turkish courts about the existence of that agreement, obtained a judgment; unsurprisingly that judgment was held to have been obtained not just in breach of contract but also by "gross fraud".

127. The Court of Appeal (Scrutton LJ) said, responding to the submission that there was no jurisdiction to make an anti-enforcement injunction:

> "If there is no authority for this, it is time that we made one, for I cannot conceive that if an English Court finds a British subject taking proceedings in breach of his contract in a foreign court, supporting those proceedings and obtaining a judgment by fraudulent lies, it is powerless to interfere to restrain him from seeking to enforce that judgment. I am quite clear that such an injunction can be and in this case ought to be granted in the terms asked for in the statement of claim."

128. The second case is the *Bank of St Petersburg* case. In that case judgments had been obtained in Russia and had then been compromised by way of a submission of an overall dispute to the English Court under an exclusive jurisdiction agreement. However, the respondent nonetheless tried to enforce these Russian judg-

ments. The Court of Appeal held that the situation was different only in minor degree from *Ellerman Lines*: "*only to the extent there that the English trial had already taken place so that there was a finding that the Turkish judgment had been procured by fraud. Here the trial has not yet taken place and the allegations of fraud are only allegations.*" In doing so it plainly placed significant weight on the exclusive jurisdiction clause.

129. Plainly in my judgment these two cases, where the application for relief was successful, are a considerable distance from the present case. In each of those cases there was blatant wrongdoing in the respondent's actions. In both cases that wrongdoing could easily be recognised and labelled.

130. WPL also directed my attention to *Ardila* which was an attachment (not an enforcement) in the context of a pending summary judgment application. The case was, as Simon J (as he then was) said, a plain case of: "*. . . vexatious interference with due process of the court*". Further it was not analogous in that it was not an injunction restraining enforcement of a regular judgment.

131. Reference was also made in reply to the case of *Bloom* v *Harms* [2009] EWCA Civ 632 [2010] Ch 187. This was also a case of attachment. It arose in the context of an administration of a company incorporated in England and with no assets in the US, made by non-US parties, without notice to the administrators and without the New York court being informed either that the High Court had made an administration order or that the charterparties under which the claims were made had exclusive London arbitration clauses. Again it is hardly surprising to find that Stanley Burnton LJ concluded that there were factors which: "*brought it into the exceptional*

category in which the grant of injunctive relief is justified."

132. In my judgment neither of these cases says anything to diminish the message of exceptionality which is communicated by the true anti-enforcement authorities. On the contrary they tend to reinforce that message.

133. Finally regard should be had to *Ecobank*. This case tells us that:

> " . . . the cases in which the English courts have granted anti-enforcement injunctions are few and far between. . . .
>
> This dearth of examples is not surprising. If, as has heretofore been thought to be the case, an applicant for anti-suit relief needs to have acted promptly, an applicant who does not apply for an injunction until after judgment is given in the foreign proceedings is not likely to succeed. But he may succeed if, for instance, the respondent has acted fraudulently, or if he could not have sought relief before the judgment was given either because the relevant agreement was reached post judgment or because he had no means of knowing that the judgment was being sought until it was served on him."

134. The authorities in my judgment therefore show that in the generality of cases it will take something of the force of a fraud to persuade the court to interfere with another court's enforcement processes after a judgment has been gained. This present case is plainly not a case of fraud or even of breach of contract. That does not mean that WPL is wrong that an injunction may be capable of being granted in circumstances where what is at issue is the exorbitant nature of the relief sought against a background of a judgment which from this

Court's perspective was gained by an abuse of process. However, the authorities do indicate that something very much more than mere exorbitance is likely to be required; only then will the inequity identified be of a sufficient gravity to rank similarly with cases such as judgments obtained by fraud.

135. Looking at the authorities thus far I do therefore conclude that were I to continue the injunction in this case I would be breaking new ground. I would, as SAS submits, be maintaining an unprecedented order. Although WPL cavilled at the designation of "exceptionality" for relief to be granted in this context, it was not able to point to any analogous case, and did not really resist the submission that I would be taking a novel step.

136. As to the point which was at issue on the terminology, I do conclude that when one looks at (i) the rarity of the cases where such a step has been taken (ii) the extremity of the factual scenarios which have prompted the grant of such relief and (iii) the way in which the relief has been justified by the judges in those cases, the term "exceptional" appears to be entirely justified. It follows that if I were to be prepared to maintain the order I would have to satisfy myself that this was an exceptional case.

137. There are effectively two limbs to what WPL says as to why this is an exceptional case. The first is the question of exorbitance—the fact that the relief proposed "reaches in". The second is the question of interference with my judgment, of which the question of abuse and breach of public policy are essentially aspects. WPL complains of interference because it says that my judgment holds that enforcement here should not occur and cuts across both the normal enforcement processes and safeguards as well as my conclusion that the US Liability

Judgment was an abuse of process. That same conclusion on abuse of process then underpins the argument on public policy.

138. On the question of exorbitance, the first issue canvassed was whether the relief sought in the US Enforcement Proceedings was relief this court could grant, as SAS argued. On this, again I substantially accept WPL's argument that there is no true analogy with freezing orders and receivership. At least there is certainly far from a complete analogy. A freezing order does just what it says—it freezes pending judgment. It does not enforce. Therefore, although a freezing order is sometimes described as a "nuclear weapon" it is not designed to produce a final effect in the way enforcement measures are. It does nothing with ownership of assets. A receivership order (which is what was in issue in *Masri (No. 3)*) is closer, in that the receiver will collect assets for an ultimate purpose; but it is still not as final as enforcement.

139. Further, WPL's point that both of these too will be subject to what is referred to routinely in this court as *Babanaft* provisos was well made. What is referred to here is the fact that when granting worldwide relief it is the practice of this court, following the decision in *Babanaft* v *Bassatne* [1990] Ch 13 to include provisos which ensure that persons outside England and Wales would not be affected by it unless certain conditions were fulfilled. In normal circumstances these provisos are drawn in the following terms:

> "Except as provided in paragraph (2) below, the terms of this order do not affect or concern anyone outside the jurisdiction of this Court.
>
> (2) The terms of this order will affect the following persons in a country or state outside the jurisdic-

tion of this Court—

(a) the Respondent or its officer or its, her or his agent appointed by power of attorney;

(b) any person who–

(i) is subject to the jurisdiction of this Court;

(ii) has been given written notice of this order at it, her or his residence or place of business within the jurisdiction of this Court; and

(iii) is able to prevent acts or omissions outside the jurisdiction of this Court which constitute or assist in a breach of the terms of this order; and

(c) any other person, only to the extent that this order is declared enforceable by or is enforced by a Court in that country or state."

140. The basis for this approach was given by Nicholls LJ, as he then was, as being:

> "It would be wrong for an English court, by making an order in respect of overseas assets against a defendant amenable to its jurisdiction, to impose or attempt to impose obligations on persons not before the court in respect of acts to be done by them abroad regarding property outside the jurisdiction. That, self-evidently, would be for the English court to claim an altogether exorbitant, extra-territorial jurisdiction."

141. This process of comparison does illustrate the fact that this Court considers such orders, even to the extent granted by this Court, potentially very intrusive to another court's jurisdiction and at the limits of what this Court will grant.

142. In this connection I was directed to the case of *Joujou* v *Masri* [2011] EWCA Civ 746 [2011] 2 CLC 566,

where the nature of the relief was outlined at [11] of the judgment. In essence, what had been ordered and then upheld by the Court of Appeal was an order appointing a receiver in relation to CCOG's interest in revenues from an oil concession in Yemen, and a freezing order restraining CCOG from disposing of its interest in the concession or selling oil from the concession otherwise than in the ordinary course of business. The order was upheld by the Court of Appeal on the basis that the receivership order was not contrary to principle because it was not a proprietary remedy. It did not change the title to the debts, but merely placed a personal obligation on CCOG, which was subject to the court's jurisdiction, to perform certain acts which had a genuine connection with England, i.e. compliance with an English judgment.

143. Further the extension made to that order whereby the receiver was empowered *". . . to receive, take possession of, sell, deal with or otherwise dispose of all [oil to which CCOG might become entitled], and to exercise all such rights to oil, in the name of and on behalf of CCOG . . . The receiver shall hold all such oil and any proceeds thereof to the credit of this action and to the order of the court"* was itself essentially upheld, with Rimer LJ holding: *". . . I can see no reason in principle why [the] order, if confined to and directed at CCOG, was not properly made, albeit that it may have fallen at the more intrusive end of the court's jurisdiction."*

144. The order made in *Masri* may therefore be regarded as the high-water mark of this court's jurisdiction. It should also be noted that it was made in circumstances of repeated and determined attempts by the debtor to render itself judgment proof, both before judgment was delivered, and after. In addition, the application for the extension arose in circumstances where

it was clear that the reason the initial order had not been successful was because of deliberate steps taken to frustrate that order. It was described by Toulson LJ as: "*a particularly bad example of wealthy debtors using their resources to go to elaborate lengths to avoid payment of a judgment after a full trial of the merits of the dispute before a court whose jurisdiction the debtors had accepted*".

145. While there is plainly a parallel between that case and this, I do not consider that either the circumstances or the relief are analogous. As to the relief, in my judgment even the *Masri* order (as amended) might well be said to be less intrusive than that which SAS seeks from the US Court in this case. Although it was in a sense more intrusive in that it enabled active management of the assets and to that extent came very close to being proprietary in nature, it might more credibly be said to be less intrusive, for the reason highlighted by Rimer LJ—it did not purport to change the ownership of the oil in the way that an assignment order would.

146. At the same time certainly, the circumstances were different. In *Masri* all the rights in question were plainly governed by English Law and the Court was simply looking at one layer of jurisdiction: there had been an English judgment, and the argument was all about how to enforce that English judgment. That would be analogous to the US Proceedings considered alone. But here there is the added complication of the original English Liability Judgment, and the Enforcement Judgment.

147. Further although there is to some extent an analogy with the *Babanaft* provisos in that the order sought in the US may not compel acts by third parties over whom it does not have personal jurisdiction, but can only order the judgment debtor to assign his rights in and to

the property for payments, the overall thrust of the relief which the California Court can grant is more intrusive.

148. For these reasons when we posit a reverse situation to that in which the US Court is placed I consider it unlikely that this Court would grant analogous relief to that which is being sought by SAS in the USA.

149. I accept therefore that this court would not ever grant precisely analogous relief; and if it did grant such relief would do so only subject to safeguards designed to minimize their intrusion into another court's jurisdiction.

150. However, I do not see this question of whether this court would or could act similarly in a mirror image case as a determinative issue. Courts do not exercise their powers in the light of comity on a reflexive basis. Indeed, it is at the heart of comity that courts have respect for each other's processes, and respect the fact that another court may legitimately draw lines in some ways differently to those which that court would do itself.

151. It follows that in considering exorbitance one must also consider the extent of the exorbitance.

152. WPL made points with regard to the nature of the relief by reference to *Masri (No 2)* [2008] EWCA Civ 303 [2009] QB 450. I was urged to put weight on the *dicta* regarding the possibility of an *in personam* order being contrary to international law or comity. This however seemed to be an inapposite reliance—*Masri* was of course dealing with the fleeting territorial presence of a person being used to found jurisdiction and hence relief; that is in stark contrast to the present case which is concerned with very substantial presence and participation. Further this approach would seem to lead to exactly the argument which WPL disavowed—that of objecting to the relief simply by virtue of its *in personam* nature.

153. I was also reminded that in that case the House of Lords cited the earlier judgment of Lord Hoffman in the *Eram* case, where he said:

> "54 . . . The execution of a judgment is an exercise of sovereign authority. It is a seizure by the state of an asset of the judgment debtor to satisfy the creditor's claim. And it is a general principle of international law that one sovereign state should not trespass upon the authority of another, by attempting to seize assets situated within the jurisdiction of the foreign state or compelling its citizens to do acts within its boundaries . . ."

154. This, it was suggested, was just such a case—compelling citizens to do acts within its boundaries. Yet when one looks at what was accepted to be the key passage at [59] in this judgment, the conclusion is this:

> "In deciding whether an order exceeds the permissible territorial limits it is important to consider: (a) the connection of the person who is the subject of the order with the English jurisdiction; (b) whether what they are ordered to do is exorbitant in terms of jurisdiction; and (c) whether the order has impermissible effects on foreign parties."

155. Drawing the threads together on exorbitance in the light of that conclusion, the position here is that we are looking at relief which is certainly different from *in rem* enforcement. It is *in personam* relief. It is relief which is available to the US Court because of WPL's real presence in that jurisdiction and because of WPL's participation in the proceedings which led to the US Liability Judgment.

156. As to the relief itself, it is relief which is very much towards the extreme end of the spectrum, in the

sense that it is relief which this court would not grant. When it comes to "reaching in" it is fair to say that the relief sought certainly has a capacity to operate here. I am not however persuaded that it necessarily "reaches in" to this jurisdiction in a markedly exorbitant fashion, in that it is not necessary for anything to be done under it to be done in this jurisdiction; it is simply that what is to be done will have an effect on what does or would otherwise occur in this jurisdiction.

157. So under the assignment order WPL would have to (somewhere) assign the rights to debts which fall to be paid here, but in relation to those debts, until money is paid, the relevant funds will exist in other jurisdictions. Although it is said that the order would force WPL to act here "on pain of contempt" that is not correct as regards this jurisdiction. WPL will be under an order of the US Court to act, but a failure to do so would not be a contempt for the purposes of this jurisdiction. Again, the matter comes back to the US Court's jurisdiction over WPL. What is being asked is for this court to interfere in that jurisdiction—including as a matter of logic even as regards sums owing from customers in the USA. As to the Turnover Order the matter is perhaps even more straightforward—the requirement is to "turn over" to the US Marshal, who is an American law enforcement officer. Plainly this is a requirement to act in the US, not here.

158. In addition, the question of "reaching in" is one which might be said to apply to all *in personam* relief; the nature of the jurisdiction is what "reaches in". Although WPL maintained that the objection was not a blanket objection to *in personam* relief but hinged on the nature of the relief, the logic of the "reaching in" objection is one which applies to all *in personam* relief. To the

extent that that is the objection it is not one which could prompt this court to act, because this Court also will grant *in personam* relief of various types against a party which is amenable to or has submitted to its jurisdiction.

159. I therefore do not consider that the differences between the relief this court might grant and the relief being sought make the potential relief exorbitant in very great measure. The relief sought goes further than this court would order but it is not, one might say, in a different ballpark. I cannot conclude that it is exorbitant to the extent that this court would regard exorbitance alone as sufficient ground to give rise to a basis for anti-suit, still less anti-enforcement relief.

160. The next question concerns interference. On this it is fair to say that the relief sought is relief which will have an effect in terms of enforcing a judgment which, within this jurisdiction, is to be regarded as contrary to public policy in more than one respect.

161. However, the question of interference has to be considered against the full factual backdrop of the judgments in question. In particular it is necessary to bear well in mind what my judgment is, and what it is not. My judgment is not a liability judgment on the merits of the claims. There are two liability judgments: the English Liability Judgment and the US Liability Judgment. My judgment is a judgment which arises out of and is in a sense accessory to the US Liability Judgment. That is because it is a judgment in proceedings brought to enforce that judgment.

162. In the Enforcement Judgment I have not purported to decide the merits of the dispute. Nor have I decided that enforcement should not occur at all. What I have done is to say that, because of the existence of the English Liability Judgment (and the Software Directive,

which itself underpins that judgment) and because of the PTIA, this court will not assist in the enforcement of the US Liability Judgment.

163. This is not therefore a case of interference in the jurisdiction of this court as the proper forum for the dispute; that was an argument which could have been raised at an earlier stage—after the English Liability Judgment, and before the end of the US Liability Proceedings—but was not. Nor is it a case of the English Court's judgment being set at naught. The Enforcement Judgment was a specific judgment in the context of specific enforcement relief; and again matters have moved on considerably since the English Liability Judgment.

164. When it comes to the questions of delay and submission, which are very important in the context (in particular) of anti-enforcement injunctions, I regard these as to a large extent overlapping. This was effectively the approach taken in *Ecobank* at [133], although obviously there may be cases where the two issues need to be considered separately, or where only delay is relevant.

165. The first point here is that I cannot accept the submission by WPL that the time spent in the US Liability Proceedings is not relevant to delay at all. WPL argues that this injunction application is based on recent matters; namely the features of extraterritorial enforcement measures sought in autumn 2018 and their conflict with the Enforcement Judgment. However, that is in a sense to look at the litigation history with a very partial perspective, ignoring the earlier US Liability Judgment. The application may be fairly prompt in the timeline of the enforcement proceedings, but those proceedings are the tail end of a longer liability story.

166. It is inherent in the jurisprudence relating to anti-enforcement injunctions that a good reason for not try-

ing to stop the foreign proceedings before judgment will be necessary. Such good reasons were found to exist in the two rather unusual cases where such injunctions were granted: in *Ellerman* it is clear that there was only a fleeting appearance by the Master before the owners withdrew from the proceedings and that judgment came so swiftly that no steps could effectively be taken before that (it was, it will be recalled, a 1927 case). In *Bank of St Petersburg* the Russian proceedings predated the existence of the basis for the anti-suit injunction (namely the agreement to bring all disputes in London). But neither of those situations is akin to the present.

167. Aside from such "outliers" it may be the case that in the event of extremely exorbitant enforcement measures following a submission/delay an anti-suit injunction would be granted. There may be cases where enforcement measures are so truly exorbitant, or where enforcement measures were later introduced, where previous submission or delay would have no weight. However, in the normal course of events a submission, an engagement with the foreign process, and/or a failure to attempt to stop that process, has a significance which exists—though its weight will obviously be fact dependent. This is not an outlying case for any of the reasons contemplated in the authorities or above.

168. This early delay strikes me as of greater significance indeed than later delays relied on—for example as to the period following Robin Knowles J's refusal of relief in March 2018. Absent the initial period the question of delay would not loom so large; there is certainly force in the argument that no further application could sensibly be made following the March application at least until the intention to pursue *in personam* worldwide relief became apparent. I also accept that my judgment, even if not

fundamental to the relief sought, did provide a tipping point in terms of applying for anti-suit relief. It did, after all, provide an opportunity for "refreshment" of the value to be placed on the English Liability judgment, absent which the failure to challenge the US Proceedings would have been even more significant. Further it did provide a conclusion on abuse of process which obviously provided WPL with some assistance in their argument that the enforcement measures are vexatious.

169. However, even in that context it might be said that there was delay; these latter factors are separate elements in the consideration and neither provided such support that waiting for them could be entirely excused. Even if an avowedly *in personam* worldwide application was not made until October, the reality of what was sought must have been apparent earlier. Even if one says it was not 100% clear until October, there was still a chance to make the application well before 21 December.

170. Further the choice of California as a venue seems always to have been apprehended to be a forum more favourable to judgment creditors—certainly WPL objected to its being chosen as the enforcement forum on that basis. There was no reason why a "hold the ring" application could not have been made earlier as it was in relation to disclosure. And I have concluded that WPL knew that an order for a broader assignment than one directed purely to US customers was a real possibility from a very early stage.

171. As for submission itself I am reminded that Briggs, *Civil Jurisdiction and Judgments* (6th edn) at p550 states that *"an applicant who has already submitted to the jurisdiction of a foreign court should find that this is a substantial obstacle to his obtaining an anti-suit injunction from an English court"*.

172. Although WPL argued that there was no submission in the US Liability Proceedings, that is not a realistic analysis. Of course, jurisdictional points were taken and thoroughly pursued. But ultimately: (i) WPL did abandon that resistance and took a full part in the proceedings and (ii) WPL did not seek to halt or derail those proceedings by seeking the assistance of this court at a time before all the multitudinous costs and resources expended in those proceedings had been expended. That submission may not have been sufficiently significant to prevent this court's active assistance with enforcement, but it does not follow that the same position pertains when what is in question is not active assistance with enforcement, but active assertion to prevent steps being taken in another competent court, indeed in the country where the judgment was obtained.

173. As regards the California submission, while submission and participation may not have much weight, it does nonetheless have some. This is not a case where there was no possibility of avoiding jurisdiction; WPL are not resident in California. While the basis for resistance was difficult, it was not ultimately taken. In context this is not a heavy point against WPL, but it is a point nonetheless.

174. Although for reasons I have given I accept that the *Man* case is not analogous, the dictum of Steyn J (as he then was) at first instance is telling on the subject of the kinds of factors which will be given weight:

> "there is already in existence an Indonesian judgment; it was given in proceedings begun by Man; it was unsuccessfully appealed by Man; the Indonesian court was a court of competent jurisdiction; the procedure adopted is not criticised; the correctness of the Indonesian judgment as a matter of Indone-

> sian law cannot be questioned; reliance on that judgment was only defeated on the ground of English principles of res judicata and English public policy."

175. As Ms Carss-Frisk noted there is a close parallel between those facts and these, although the detail of the case is very different.

176. All of this suggests that the balance tips against the exercise of a discretion to grant an injunction. Further, when one revisits the authorities on comity, the position in my judgment becomes tolerably clear. I note in particular the following points.

177. This court should not assume a superiority in making such a decision. As Hoffmann J said in Ba*rclays Bank* v *Homan*:

> "Today the normal assumption is that an English Court has no superiority over a foreign court in deciding what justice between the parties requires, and in particular, that both comity and common sense suggest that the foreign judge is usually the best person to decide whether in his own court he should accept or decline jurisdiction, stay proceedings or allow them to continue. . . .there must be a good reason why the decision to stop the foreign proceedings should be made here rather than there. Although the injustice which can justify an anti-suit injunction must inevitably be judged according to English notions of justice, it will usually be assumed that a similar quality of justice is available in the foreign court, so the fact that the proceedings would, if brought in England, be struck out as vexatious or oppressive in the domestic sense will not ordinarily, in itself, justify the grant of an injunction to restrain their prosecution in a foreign court.

> The defendant will be left to avail himself of the foreign procedure for dealing with vexation or oppression."

178. There are in fact indications that this court will want to see something of the order of an inability of that other court to act before it takes precedence over the court more naturally the forum for such a determination. So, in *Homan* consideration was given to whether what was to happen in the other jurisdiction was contrary to accepted principles of international law. Similarly, Toulson LJ in *Joujou* v *Masri* indicated (in the minority) that he would say that the court might act if it were satisfied that justice according to internationally acceptable standards could not be obtained in the courts to whose jurisdiction a matter more naturally appertains. Further in the passage from *Deutsche Bank* below there is reference to breach of customary international law or manifest injustice.

179. A margin of appreciation must also be allowed for different courts to do things different ways. Thus in *Deutsche Bank* at [50]:

> "the principle of comity requires the court to recognise that in deciding questions of weight to be attached to different factors, different judges operating under different legal systems, with different legal policies, may legitimately arrive at different answers without occasioning a breach of customary international law or manifest injustice, and that in such circumstances it is not for an English Court to arrogate to itself the decision how a foreign court should determine the matter."

180. Here I am weighing a situation where the line which the US Court has open to it is one which is contrary to this Court's principles, in the sense that the relief it

can give has an extent which is not where this Court would draw the line. At the same time the nature of the relief this Court may grant suggests the difference is one of degree not substance. Further it is plain from the submissions placed before me that the CDC does have a discretion as to whether to exercise this jurisdiction and on what terms.

181. In those circumstances I am unable to accept WPL's submission that the relief is so exorbitant as to trigger relief. Nor can I accept the submission that if this Court's judgment in itself, and as reflecting English policy, is not to be set at naught, it is necessary that this court protect itself and WPL from the interference that SAS seeks to create.

182. There is plainly a possibility that the court in the US will grant the orders currently sought in full; but that it will do so is not a foregone conclusion. This is not a case such as *Shell* where one can be sure that that is what will happen. It may be that the US Court, with the benefit of this judgment, and the explanations which I have given above of both the position as regards the *situs* of much of the outstanding debts, and as to the nature of the relief sought, may itself chose to draw the line of the relief which it is prepared to grant in some different place. But that is a matter which, bearing in mind the principles of comity and the respect which this Court has for the courts of the United States of America, should properly be left to that court. There is no necessity in this case such as that juridical necessity which drove the court in *Shell* to decide that the demands of comity should not in that case be given primacy.

183. But also, there cannot be said to be a necessity in circumstances where there has been submission both as to liability and enforcement; indeed, where enforcement

might well have been capable of stronger challenge if the original submission had not been made.

184. I would however add this. It will be perceived that part of the balancing exercise in reaching the result to which I have come involves not just considerations of comity but also the factor that the decision whether and on what terms to grant such relief is one which is open to the US Court. It has been a factor in the balancing exercise that this is therefore very far from the type of cases alluded to in some of the authorities where the measure sought to be enjoined will follow absent an injunction, or where there are insufficient safeguards available in the relevant jurisdiction.

185. It will also be perceived that I anticipate that my judgment in this matter will be of interest to the courts in the USA when they come to consider the relevant applications.

186. In this context it seems to me that the following passage from the minority judgment of Toulson LJ in *Joujou* v *Masri* is apt:

> "While comity involves self-restraint in refraining from making an order on a matter which more properly appertains to the jurisdiction of a foreign state, the courts of one country may legitimately wish to state plainly how they see the issues in a case in which they have a legitimate interest, in the hope that their perspective may assist the foreign court in its judgment of the matter. That is not the same as trying to dictate to a foreign court how it should decide a matter within its own jurisdiction. Conversely, part of the concept of comity is an expectation that the courts of different countries will, where appropriate, lend their assistance to one another. In some circumstances this can only be

> achieved by the cooperation of the courts in different jurisdictions. There are inevitably some situations where the policies of different countries are in conflict (for example, because of security considerations or because of matters of vital economic interest), but happily they are the exception rather than the rule. The general principle that contracts should be honoured (*pacta sunt servanda*) is common throughout developed legal systems, and countries have a mutual interest in not allowing a party which is properly subject to the jurisdiction of a particular court to try to undermine the effect of that court's orders by a recourse to an alternative jurisdiction."

187. The Enforcement Judgment explains in some detail that from the perspective of this Court, in the light of the original English Liability Proceedings, and the policies which underpinned the result in that carefully and long fought litigation, the US Liability Judgment is one which, with regret, this Court cannot enforce.

188. Further, as I have explained above, there are two points of concern to this court as regards the orders which SAS seeks from the US Court. The first is that the nature of the orders sought go further than any order this court would make—even in the most extreme cases of contumelious default. This court would not order a party resident in the USA to take such steps; and it would refuse to do so because of the principle of comity.

189. Secondly (and this of course overlaps with the first point) the measures which are sought to be adopted in the USA to enforce the US Liability Judgment are ones which, for all WPL's submission to the jurisdiction in the USA, have a potential to have effects in this jurisdiction which to a greater or lesser extent cut across the

Enforcement Judgment. The extent to which this occurs will depend critically on the wording adopted in any order. It is even possible that such an order might, if not carefully worded, require WPL to pay over funds which were specifically sought to be made the subject of the English Enforcement Proceedings—or even funds which SAS specifically accepted in the English Enforcement Proceedings could not be enforced here.

190. It seems that this is a case where this Court and the Court in the US have jurisdictions which could clash with each other—and that the parties, despite the wise encouragement of the Court in the US, have not reached a consensus on a line on which they can agree. On the one hand, this Court has jurisdiction to make an order as sought by WPL, but by this judgment I decline to exercise my discretion to do so. On the other hand, although I understand the matter of jurisdiction to be open to debate, it may well be that the US Court has the jurisdiction to make the orders sought by SAS, yet may decline to do so, or choose to exercise that discretion only to a limited extent. That must be a matter for my sister and/or brother judges in that jurisdiction.

Arguments on discharge

191. I pass briefly to consider the arguments made on discharge.

192. On conduct it was submitted that there was no basis for a without notice application given the rarity with which US Courts grant *ex parte* relief and the unlikelihood of SAS being able to accelerate a decision in the US. It was also argued that there was no basis for obtaining the injunction without the usual undertaking in damages. Finally, it was argued that there was a failure of full and frank disclosure on a number of points.

193. As I fairly openly signalled at the start of this judgment I was not persuaded by any of these arguments; and Ms Carss-Frisk realistically did not press them with enthusiasm.

194. On the question of the without notice application, absent a failure of full and frank disclosure it would be an unusual case where an injunction was discharged on this basis only (though it has recently been done in a rather different context and with an accompaniment of failure of full and frank disclosure by Warby J in *Birmingham City Council* v *Afsar* [2019] EWHC 1560 (QB)).

195. However, in any event I am satisfied that given the injunction was only ready on the date it was, it was impracticable to bring the matter forward on notice, and I am also satisfied that there was (just) sufficient justification for a without notice application; in terms both of risk of a without notice application in the US and a risk of the US Court being persuaded to move in the matter. US Courts may not act truly *ex parte* very often; no more will this court. But (as with this Court) it is plainly possible for it to do so.

196. As for the absence of the undertaking in damages, this was an unusual course, but it cannot be said that it was not raised or disclosed. Any judge of this court (and Robin Knowles J is an experienced judge of this Court) is very well aware of the usual course and will know that in dispensing with the undertaking he or she takes a different approach. It is not necessary for the unusualness of the request to be specifically flagged. In this case the relevant principles and the default position were clearly stated in the skeleton. Nothing more was required.

197. As for full and frank disclosure, some of these drop away in the light of the conclusions above. As for

the remainder the points raised fall some way short of the hurdle of material non-disclosure. Further (and this is to some extent a different way of saying the same thing) there is no real prejudice suggested as arising out of any of these points; which, as Mr Raphael submitted, suggests that the injunction would have been granted if these had been disclosed.

APPENDIX I

COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE
HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

CASE NO: A4/2019/2516 & A4/2019/2516(A)

BEFORE:
LORD JUSTICE FLAUX
LORD JUSTICE MALES
and
LORD JUSTICE POPPLEWELL

BETWEEN:

SAS INSTITUTE, INC.,

Respondent,

-and-

WORLD PROGRAMMING LIMITED,

Appellant.

Thomas Raphael QC & Josephine Davies (instructed by Keystone Law LLP) for the Appellant
Monica Carss-Frisk QC & Andrew Scott (instructed by Macfarlanes LLP) for the Respondent

Remote hearing dates: 22nd & 23rd April 2020

APPROVED JUDGMENT

DATE: 12 MAY, 2020

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be on Tuesday 7th April 2020 at 10.30 a.m.

Lord Justice Males:

Introduction

1. By an order sealed on 27th September 2019 Cockerill J ("the judge") declined to continue an anti-suit injunction granted by Robin Knowles J at a hearing on 21st December 2018 held without notice to the respondent, SAS Institute Inc ("SAS"). However, she gave permission to appeal to this court and continued the injunction pending appeal. On this appeal the appellant, World Programming Limited ("WPL"), contends that the judge was wrong and that the injunction ought to be continued.

2. The injunction granted by Robin Knowles J restrains SAS, in outline, from taking steps to obtain orders from courts in the United States requiring WPL (a) to assign debts owed to WPL from its customers either now or in the future ("the Assignment Order") and (b) to turn over to a United States Marshal payments from customers which it has already received ("the Turnover Order"). Those are orders which the United States District Court for the Central District of California ("the California court") has indicated that it is minded to make by way

of enforcement of a judgment for US $79,129,905 (being compensatory damages of US $26,376,645, tripled pursuant to the North Carolina Unfair and Deceptive Trade Practices Act ("UDTPA")). That judgment was obtained by SAS in an action before the United States District Court for the Eastern District of North Carolina ("the North Carolina court").

3. The Assignment Order, if made in the terms currently proposed, would apply to debts owed from WPL customers anywhere in the world except the United Kingdom, although SAS has reserved the right to seek an order which would extend to United Kingdom customers (albeit that, as explained below, it has offered an undertaking to give 14 days' notice in the event that it forms the intention to do so). The Turnover Order would apply to payments received from WPL customers anywhere in the world including the United Kingdom, wherever those payments were received, although in practice it appears that all payments by WPL customers are made to a bank or banks in the United Kingdom.

4. The dispute between the parties has a long history. It includes an action brought by SAS against WPL in this country in which SAS's claims were dismissed; a decision by WPL, following an unsuccessful challenge on *forum non conveniens* grounds, to submit to the jurisdiction of the North Carolina court and to fight the action there on the merits; a judgment in favour of SAS from the North Carolina court for some US $79 million; an attempt by SAS to enforce the North Carolina judgment in this jurisdiction which failed on the grounds that enforcement here would be (a) an abuse of process, (b) contrary to public policy and (c) prohibited by section 5 of the Protection of Trading Interests Act 1980 ("the PTIA"); and a judgment from the English court in favour

of WPL for over US $5.4 million, which SAS has chosen to ignore.

The background

5. The circumstances in which this appeal arises are set out in detail in the judgment below and in previous judgments. For present purposes I can summarise them as follows.

The parties

6. SAS, a North Carolina corporation, is a developer of analytical software known as the SAS System which enables users to carry out a wide range of data processing and analysis tasks, including statistical analysis. The software enables users to write and run applications written in a language known as the SAS Language. SAS licenses its software to customers in the United States and elsewhere. Until WPL developed an alternative product, SAS customers wishing to run their existing applications or to create new ones had no alternative to continuing to license use of the SAS System.

7. WPL, a United Kingdom company, perceived that there would be a market demand for alternative software which would be able to execute applications written in the SAS Language. It therefore created a product called World Programming System ("WPS"). In doing so, it sought to emulate the functionality of the SAS System as closely as possible, so that its customers' application programs would execute in the same way when run on WPS as on the SAS System. For this purpose it took a licence of the SAS Learning Edition from SAS on terms which (in effect) purported to prohibit the use of the software to

produce a competing product.[1] Contrary to these terms, WPL studied the functionality of the SAS System in order to replicate it in its own software, although it did not have access to or copy the source code of the SAS System or its structural design.

8. Having developed WPS, WPL licensed it to customers in the United Kingdom, the United States and elsewhere. In most cases (but not including United States customers) it did so on terms which provided for arbitration of any dispute in London or (since December 2018) for the exclusive jurisdiction of the English court. From December 2018 its standard terms for non-US customers have also included terms which provide that debts owed by customers are situated in England and a provision that all payments are to be recovered by collection against a deposit in England.

The English liability proceedings

9. SAS sought to prevent WPL from licensing or selling its competing product. It sued WPL in England for copyright infringement and breach of contract, alleging that WPL used the SAS software in breach of its "click-through" licence terms. Both claims were eventually rejected by Arnold J in a judgment of 25th January 2013 (the "English liability judgment" [2013] EWHC 69 (Ch), [2013] RPC 17) after a reference to the CJEU in Luxembourg.

10. Arnold J concluded that although WPL's use of the SAS software in developing WPS was contrary to the terms of its licence, those terms were null and void pursuant to Article 5(3) of Council Directive 91/250/EEC

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[1] So held by Arnold J, although when the case went to the Court of Appeal it was unnecessary to decide this issue: see [10] and [11] below.

("the Software Directive"), enshrined in English law in the Copyright, Designs and Patents Act 1988. The Directive permits a licensee to observe, study and test the functioning of a licensed computer program in order to ascertain the ideas which underlie it, which are not protected by copyright, and renders null and void any contract terms to the contrary. This promotes competition and benefits consumers.

11. SAS appealed to this court against the dismissal of its claims, but its appeal was dismissed on the basis of the Software Directive (see [2013] EWCA Civ 1482, [2014] RPC 8).

The North Carolina liability proceedings

12. In January 2010, before the English liability proceedings had concluded, SAS brought proceedings against WPL in the North Carolina court. The claims brought included copyright infringement, breach of contract, fraudulent inducement to contract, and a statutory claim for contravention of the UDTPA, which was itself based on the fraud claim.

13. WPL challenged the jurisdiction of the North Carolina court on *forum conveniens* grounds and that challenge was initially successful. However, the decision of the District Court was reversed on appeal to the Court of Appeals for the Fourth Circuit which held that a defendant bears a heavy burden to overcome a presumption that a United States plaintiff is entitled to litigate in its home court, and that WPL had failed to overcome this presumption.

14. WPL then submitted to the jurisdiction of the North Carolina court and defended the action on the merits. Commercially, WPL may have had no choice. In order to do business in the United States, WPL could not

sensibly ignore the jurisdiction of the United States courts. Nevertheless WPL did undoubtedly submit to the jurisdiction and made no attempt at that stage to obtain an anti-suit injunction from the English courts to prevent SAS from pursuing the North Carolina proceedings.

15. Both parties sought summary judgment on certain issues, relying on the findings made in the English liability proceedings. The North Carolina court held as follows: (1) the English court had found that what WPL had done in developing WPS was contrary to the terms of its licence agreement with SAS; (2) as a matter of comity and collateral estoppel, WPL was precluded from arguing otherwise; but (3) a United States court was under no obligation to apply the Software Directive because the licence was governed by an express choice of North Carolina law; and (4) accordingly the North Carolina court was not bound by the English court's decision that terms of the licence prohibiting what WPL had done were null and void. The result was that summary judgment was granted to SAS on its breach of contract claim. However, its claims for copyright infringement were dismissed. Subsequently the North Carolina court decided that it would determine the first of these issues for itself rather than treating the decision of Arnold J as giving rise to an issue estoppel. Having done so, however, it reached the same conclusion.

16. There followed a 14-day jury trial in September and October 2015 at which SAS succeeded on its claims for fraud (the fraud consisting of an implied representation that it intended to abide by the licence terms which the English court had held to be null and void) and under the UDTPA. Compensatory damages were set by a jury at some US $26 million for each of the breach of contract,

fraud and UDTPA heads of claim; and the award in respect of the UDTPA claim was trebled to some US $79 million. Although SAS had pleaded a claim for damages based on lost sales worldwide, the compensatory element of the damages awarded was calculated exclusively by reference to past and prospective future sales lost to customers in the United States.

17. WPL appealed, initially to the Fourth Circuit (874 F.3d 370 (4th Cir.2017)), and then by a petition to the Supreme Court for *certiorari*, but to no avail. During the course of the appeals process it lodged security of US $4.3 million as the price of a stay of execution. The Court of Appeals said that, for the breach of contract claim, the English court was not an adequate forum (although it was SAS which had chosen it), that there were many factual and legal differences between the proceedings in England and in North Carolina, and that there was a conflict between North Carolina public policy (which was more protective of intellectual property and freedom of contract) and the EU public policy enshrined in the Software Directive.

18. By the time of the hearing before the judge which has given rise to this appeal, direct enforcement of the judgment in the United States had been limited to this US $4.3 million. In addition WPL had paid an amount of US $1,131,799.65 pursuant to an order made on 15th February 2019. We were told that by the date of the hearing before this court, SAS had recovered some US $8.2 million in total in the United States.

The English enforcement proceedings

19. SAS sought to enforce the North Carolina judgment in England by commencing this action on 8th December 2017. Because of the English liability judgment it did not seek to enforce the judgment on the breach of

contract claim, recognising that the English court would be bound to refuse enforcement of that part of the judgment, on the basis of issue estoppel. It sought instead to enforce only the heads of judgment based on fraud and the UDTPA, and those confined to the compensatory element of some US $26 million.

20. The claim for enforcement in this country failed. In a judgment delivered on 13th December 2018 ("the Enforcement Judgment" [2018] EWHC 3452 (Comm), [2019] FSR 30) Cockerill J held that the terms of the contract which purported to prohibit WPL's conduct constituted a fundamental building block for the fraud claim and that without it that claim—as it was formulated in the North Carolina proceedings—could not have been run. Accordingly, the enforcement claim failed on four grounds:

(1) First, the issue estoppel which would have defeated the breach of contract claim equally defeated the fraud claim, and hence the UDTPA claim which in turn was based on the fraud claim. That was because the fraud claim depended on the licence terms which the English court had held to be null and void.

(2) Second, even if enforcement of the North Carolina judgment were not barred by issue estoppel, it would have been barred as an abuse of process, applying *Henderson* v *Henderson* (1843) 3 Hare 100, because the claims in that action could and should have been brought as part of the original claim in England.

(3) Third, enforcement would be contrary to the important public policy, embodied in the Software Directive, of preventing the monopolisation of ide-

as and promoting competition and consumer welfare.

(4) Fourth, following the decision of Lord Hodge in the Scottish case of *Service Temps Inc* v *MacLeod* [2013] CSOH 162, [2014] SLT 375, enforcement of the UDTPA element of the judgment, including the compensatory damages awarded in respect of that claim, was barred by section 5 of the PTIA.

21. In addition Cockerill J gave judgment in favour of WPL on its counterclaim pursuant to section 6 of the PTIA to recover so much of the damages paid to SAS as exceeded the part attributable to compensation.

22. SAS sought permission to appeal to this court against the Enforcement Judgment, but permission was refused by Flaux LJ on 4th December 2019 on the ground that the proposed appeal had no real prospect of success. Accordingly the decision that the North Carolina judgment will not be recognised or enforced in this jurisdiction is now final.

The Californian enforcement proceedings

23. Nevertheless, the North Carolina judgment is valid and enforceable under United States law. In order to take advantage of enforcement procedures available there, SAS registered the judgment in the Central District of California (a state in which WPL has customers) on 28th December 2017 and filed a Writ of Execution against WPL on 4th January 2018. The enforcement procedures available under Californian law include the orders for assignment and turnover which have given rise to WPL's claim for an anti-suit injunction.

24. As regards assignment orders, the key provision is Cal. Civ. P. §708.510, which provides that "the court may order the judgment debtor to assign to the judg-

ment creditor" payment rights as further specified. The California court is thus empowered to make an order against a judgment debtor requiring it to assign specified assets.

25. As regards turnover orders, the key provision is Cal. Civ. P. § 699.040, which provides for the making of "an order directing the judgment debtor to transfer to the levying officer" assets as further specified. The levying officer for these purposes is a United States Marshal.

26. Both these statutory provisions operate *in personam* as distinct from *in rem*. That is to say, they order the judgment debtor to assign or turn over the asset in question, as distinct from the court order itself having the effect of assigning or turning over the asset. Failure to comply with an order is punishable as a contempt of the California Court.

27. SAS's first application came in February 2018. It was for assignment and turnover orders but was directed only at receivables from WPL customers in the United States. WPL conceded that "an assignment order may properly enter with respect to WPL's direct customers located in the United States who are obligated to remit money to WPL"[2], but submitted that "enforcement with respect to any assets outside of the United States should be deferred to the U.K. courts, where [SAS] has already instituted an enforcement proceeding". WPL also submitted that comity should lead the United States courts to defer to the English court as regards property outside the United States.

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[2] Mr Thomas Raphael QC for WPL told us that this concession was intended to be made on the basis that what SAS was seeking was an *in rem* order, although on its face the language of the concession seems clear.

28. In response SAS indicated that it was only seeking orders regarding United States based customers but stated that it "specifically reserves the right to seek to amend the assignment order once SAS obtains information regarding WPL sales outside the United States in the North Carolina proceedings", making clear that on its case the California Court has power to order the assignment of any property, wherever situated, of a judgment debtor over which it has personal jurisdiction.

29. It was at this point that WPL first sought injunctive relief in England. On 22nd March 2018 it sought an anti-suit injunction to restrain SAS from seeking assignment orders as regards "customers, licensees, bank accounts, financial information, receivables and dealings in England". The application failed. Robin Knowles J considered it inappropriate to grant an injunction concerned with United Kingdom assets when no order was pending from the United States courts which would bite on such assets.

30. In the event SAS's February 2018 application for assignment and turnover orders failed for lack of evidence that there were customers owing money to WPL.

31. The attempts at enforcement with which we are now concerned began with a motion to the California court on 18th June 2018 for an assignment order. Although the application was made pursuant to the California Court's *in personam* jurisdiction, the order made by the court on 5th September 2018 appears to have been in *in rem* terms; that is to say, it purported actually to assign WPL's rights to payment from specified customers to SAS. It appears likely that this was a drafting slip by SAS and that the order which it proposed was simply adopted by the court without this error being noticed.

32. This led to extensive procedural wrangling about the effect of this order and the court's jurisdiction to make it, including an appeal to the Ninth Circuit Court of Appeals. For present purposes, however, it is sufficient to say that the California court has indicated that if the matter is remanded to it by the Ninth Circuit, it would make the *in personam* orders which SAS seeks. These indicative orders were made on 20th September and 14th November 2018.

33. The Assignment Order which SAS seeks and which the California court has indicated that it is prepared to make is in the following terms:

> "The Court Grants in Part the Motion for Assignment Order . . . the Court orders WPL to assign to SAS its right to payments from entities identified on SAS's Customer List, as supplemented by Hewitt's Schedule 1-1, as customers with accounts receivable, active customers, and customers with recently expired licenses. Within seven days of entry of this Order, WPL shall execute an assignment to SAS of all rights, whether or not conditioned on future developments, to payment due or to become due from these companies until such time as the North Carolina judgment in the amount of $79,129,905.00 is fully satisfied or until further order of the court."

34. The identified customers are those based in the United States and elsewhere, but do not include customers based in the United Kingdom.

35. The Turnover Order which SAS seeks would require WPL to:

> "transfer to the United States Marshal Service for the Central District of California all money, ac-

> counts, accounts receivable, contract rights, residual accounts, deposits, streams of income, revenue streams and residual rights, which arise from, directly or indirectly, business conducted between WPL and customers with accounts receivable, active customers, and customers with recently expired licenses, as listed on the Customer List, as supplemented by Hewitt's Schedule 1-1 ('Customer List'), with the exception of non-customers and U.K. customers, . . . as well as possession of documentary evidence of any and all such assets. . . .".

36. There is an issue whether this order would require turning over of payments from customers already in WPL's bank accounts. SAS says that it would and I shall proceed on this basis. The judge commented that the drafting of this order was not clear, in particular whether it would extend to customers worldwide or exclude United Kingdom customers. However, SAS has indicated that the proposed order is not intended to apply to receivables from United Kingdom customers and I proceed on this basis. It appears that the order would extend to money received from customers outside the United Kingdom held in United Kingdom bank accounts.

37. As the judge said, it is not a foregone conclusion that the California Court would make the orders precisely in the terms sought by SAS and set out above. But there is, at any rate, a substantial risk that it would make orders either in these terms or in terms to substantially the same effect.[3]

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[3] If both orders are made in the terms currently proposed, there would appear to be a contradiction between them. While the Assignment Order requires WPL to assign receivables to SAS, the

38. Although neither of these proposed orders applies to debts owed by or received from United Kingdom customers, SAS has made clear that it reserves the right to seek orders which do so extend once the English enforcement proceedings are concluded, as they now are. However, it may be important to note that the California court has not, so far at any rate, indicated that it would be prepared to make such orders.

The English anti-suit injunction

39. On 19th December 2018, six days after delivery of the Enforcement Judgment, WPL issued its application for an interim anti-suit injunction. At a hearing on 21st December 2018, held without notice to SAS, Robin Knowles J granted the injunction with which we are now concerned. In short, it prohibits SAS from taking steps to seek either of the proposed orders or any similar relief from any court in the United States. In addition it prohibits SAS from taking any step before any United States court to restrain the pursuit of WPL's application in the English court for an anti-suit injunction or related relief.

Further developments in the United States

40. In February 2019 the North Carolina court issued an order of its own motion that no money collected by SAS in the United States would be subject to the "clawback" provisions of the PTIA.

41. In March 2019 SAS obtained an order from the North Carolina court, in what is described as an "All Writs Action", preventing WPL from licensing WPS to new customers in the United States until the judgment

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Turnover Order appears to require WPL to turn over those same receivables to a United States Marshal.

for US $79 million is satisfied. The court described the order made by Cockerill J pursuant to section 6 of the PTIA as an "affront" to the United States liability judgment, and stated that the anti-suit injunction obtained by WPL undermined enforcement of that judgment by "reach[ing] directly into proceedings in the United States" and "prevent[ing] SAS from seeking the full panoply of judgment collection tools" available.

42. WPL appealed against that order to the Fourth Circuit Court of Appeals. Its appeal was dismissed. In a judgment dated 12th March 2020 the court emphasised that WPL does business in the United States and that the orders which SAS had sought applied to income received by WPL other than from customers in the United Kingdom. It is worth quoting some of the passages from the court's judgment:

> "While we take the occasion to express our respect for the judicial system and judges of the United Kingdom, the district court here needed to ensure that a money judgment reached in an American court under American law—based on damages incurred in America—was not rendered meaningless. The court chose to enforce its judgment in the most measured terms, concentrating on the litigants' U.S. conduct and collection efforts. Failing to take even these modest steps would have encouraged any foreign company and country to undermine the finality of the US judgment. . . .
>
> Rather than the district court's anti-clawback injunction being an affront to comity, actions by WPL have shown a lack of respect for American courts and American law. 'The conflict . . . we confront today has been precipitated by the attempts of another country to insulate its own business entities from

> the necessity of complying with legislation of our country designed to protect this country's domestic policies.' *Laker Airways*, 731 F.2d at 955. Comity is not advanced when a foreign country condones an action brought solely to interfere with a final U.S. judgment. See *Paramedics Electromedicina Comercial Ltda* v *GE Med. Sys. Info. Techs., Inc*, 369 F.3d 645, 654-55 (2d. Cir. 2004); *Laker Airways*, 731 F.2d at 930. Nor is comity advanced when one country enjoins legitimate collection efforts in another country. . . .
>
> The question before us did not have to come about. WPL could have proceeded differently at many points. It could have developed its product without violating SAS's license agreements. Or it could have declined to enter the U.S. market. But WPL cannot participate in the U.S. market, violate U.S. law, and expect to avoid the consequences of its conduct. . . ."

43. Clearly these are comments which we must take seriously. Equally clearly, public policy in our two countries pulls in opposite directions. It is the policy of the United States courts that damages for certain types of claim should be trebled and that judgments for trebled damages should be enforced; but it is the policy of the United Kingdom Parliament, enacted in primary legislation, that the non-compensatory element of such damages should be clawed back.

SAS's motivation

44. It was WPL's case before the judge that SAS's object in seeking the Assignment and Turnover Orders is to damage WPL and force it out of business. The judge was not prepared to find that this was so, considering it irrelevant. Although Mr Raphael reiterated the submission, I

am not prepared to make such a finding either. I do not find it surprising that a business such as SAS which has suffered losses assessed at US $26 million should seek to use all available means to recover those losses. Nor is it surprising that SAS, having the benefit of a jurisdiction which will treble the compensatory element of its claim, should seek to take advantage of that. There is no need to search for darker motives.

45. I note, however, that the compensatory damages of US $26 million included not only loss of past sales which SAS would have made to United States customers if it had not been for competition from WPL, but also an assessment of lost future sales. Presumably, if WPL is prevented from licensing new customers in the United States, SAS will in fact be better placed to win those new customers for itself. That, however, is not a matter for us.

The judgment under appeal

46. The injunction granted by Robin Knowles J was expressed to continue until it could be fully considered at a hearing attended by both parties. Although it was envisaged that this further hearing would take place within a matter of weeks, in the event it did not take place until the hearing before the judge in May 2019. When the hearing did take place, WPL contended that the injunction should be continued, submitting in outline that the proposed Assignment and Turnover Orders "reached in" to this jurisdiction and, in so doing, conflicted with both the Enforcement Judgment and the original English liability judgment.

47. The judge declined to continue the injunction. She held that the court has jurisdiction to grant an anti-suit injunction and, in an appropriate case, an anti-enforcement injunction, but that the latter would only be

granted in an exceptional case, generally requiring conduct akin to fraud or, at any rate, of sufficient gravity to rank similarly with cases where judgment had been obtained by fraud. She said that injunctions have been granted to restrain conduct which the English court regards as vexatious or oppressive, and also where an injunction is necessary to protect the English court's jurisdiction and judgments, but she did not regard this as such a case. An injunction to restrain vexatious conduct will generally be granted only where England is the natural forum to resolve the dispute, but the fact of WPL's submission to the North Carolina court created an obvious difficulty for it. On the other hand, an injunction to protect the Enforcement Judgment was "something of an uncomfortable fit" in circumstances where that judgment was not a judgment on the merits of the dispute. Moreover, while public policy might justify an injunction, it would only be in highly unusual circumstances that this would provide an independent ground for an injunction.

48. Applying these principles, the judge held that the proposed Assignment and Turnover Orders were exorbitant in the sense that they would amount to enforcement against assets in this jurisdiction and that they went beyond any relief which an English court would grant, but that they were not "markedly exorbitant" or "exorbitant in any great measure" because they did not require anything to be done by WPL in this jurisdiction. Further, while the Orders would have the effect of enforcing in this jurisdiction a United States judgment which had been held to be contrary to English public policy in more than one respect, that did not cut across or interfere with the Enforcement Judgment which had decided nothing more than that the English court would not lend its en-

forcement processes to SAS. As I read the judgment, the judge's essential conclusion was that:

> "181. In those circumstances I am unable to accept WPL's submission that the relief is so exorbitant as to trigger relief. Nor can I accept the submission that if this Court's judgment in itself, and as reflecting English policy, is not to be set at naught, it is necessary that this court protect itself and WPL from the interference that SAS seeks to create."

49. It was in the context that WPL had failed, in the judge's view, to make good its essential case for an injunction that she went on to consider discretionary factors such as delay, submission to the jurisdiction of the United States courts and comity. She indicated that these were factors of some weight telling against the grant of an injunction, but the overall tenor of her judgment makes it clear that, if she had accepted WPL's essential case, these would not have deterred her from granting the injunction sought.

The submissions on appeal

50. In brief outline, the submissions of the parties on appeal were as follows.

51. Mr Thomas Raphael QC for WPL emphasised that WPL does not seek to prevent SAS from enforcing the North Carolina judgment in its entirety. He accepted that the judgment is enforceable by normal methods of enforcement against assets in the United States, but contended that the proposed Assignment and Turnover Orders would constitute an illegitimate interference with the enforcement jurisdiction of the English court. That is because they reach into this jurisdiction by having an effect on assets which are situated here and require WPL on pain of contempt proceedings in California to do acts

here, and because they create in substance the same result as if SAS had succeeded in obtaining recognition and enforcement here of the North Carolina judgment when in fact such recognition and enforcement was refused on grounds of public policy. In those circumstances Mr Raphael submitted that an anti-suit injunction to restrain SAS from seeking such orders was necessary to prevent illegitimate interference with the jurisdiction of the English court. He submitted also that it was vexatious and oppressive for SAS to seek such orders from the California court because of their extra-territorial reach and interference with the Enforcement Judgment and the public policy on which it was based.

52. In his written submissions and in his initial oral submissions Mr Raphael insisted that an anti-suit injunction should extend even to restrain SAS from seeking an order for the assignment of debts due from WPL's United States customers. In his reply, however, no doubt in response to questions from the court, he offered an undertaking in these terms:

> "As a condition of the court granting the injunction sought, and if the court requires it, WPL would be prepared to undertake, subject to a liberty to apply:
>
> (a) to pay to SAS all revenues that will be received from customers who are located in the USA where such customers and revenues are within the scope of the *in rem* assignment order; however
>
> (b) this would be without prejudice to any rights WPL might have to claim sums under its section 6 PTIA counterclaim and the judgment orders thereon."

53. Mr Raphael submitted that such an undertaking was unnecessary, but that it was (as he described it) a

pragmatic undertaking which WPL was prepared to give if the court took a different view.

54. Finally, Mr Raphael submitted that, if all else failed, there should nevertheless be an injunction to restrain SAS from seeking an anti-suit injunction in the United States which would interfere with WPL's counterclaim under the PTIA.

55. For SAS, Ms Monica Carss-Frisk QC supported the judge's reasoning and conclusion. She emphasised the evaluative and discretionary nature of the issue, the fact that WPL carries on business in the United States and submitted to the jurisdiction of the North Carolina court, which included submission to the enforcement jurisdiction of the United States, and that the orders sought are *in personam* orders against the defendant over whom the United States courts have personal jurisdiction, which are not so very different from the kind of order which an English court might make in comparable circumstances. She relied also on considerations of comity, emphasising in particular the views expressed by the North Carolina court and the Court of Appeals for the Fourth Circuit.

56. Ms Carss-Frisk also offered two undertakings in the course of her oral submissions. One related to debts due to WPL from United Kingdom customers. She informed us that, although it has reserved the right to do so, SAS has no current intention of seeking to extend its proposed Assignment Order to require an assignment of debts due from United Kingdom customers of WPL, and that it would undertake to give 14 days' notice to WPL if its intention were to change. That would give WPL an opportunity, if so advised, to seek relief from the English court.

57. The second undertaking offered related to WPL's counterclaim under the clawback provisions of the PTIA. Here Ms Carss-Frisk said that SAS has no current intention to seek any further injunction to prevent enforcement of that counterclaim beyond the order which the North Carolina court has already made of its own motion and that it would undertake to give 14 days' notice if that intention were to change. On that basis she submitted that an order from this court is unnecessary and that, if the position were to change, the correct course would be for WPL to make an application to the Commercial Court.

Relevant legal principles

58. I begin by summarising some basic principles.

The situs of a debt

59. The judge explained that under English conflicts of law principles, the general rule is that a debt is situated in the place of the debtor's residence or domicile. However, this general rule is displaced if the debt is owed pursuant to an agreement providing for arbitration in England or the exclusive jurisdiction of the English court. In such a case, the debt will be situated in England. She cited the decision of Mr Peter Macdonald-Eggers QC in *Hardy Exploration & Production (India) Inc* v *Government of India* [2018] EWHC 1916 (Comm), [2019] QB 544:

> "82. . . . (5) The general rule or presumption is that the debt or chose in action is properly recoverable or enforceable in the place of residence, or domicile, of the debtor (*New York Life Insurance Co* v *Public Trustee* [1924] 2 Ch 101, 115, 119-120); *Chaturbhuj Piramal* v *Chunilal Oomkarmal* (1933) 60 LR Ind App 211, 220-222; *Kwok Chi Leung Karl* v

Commissioner of Estate Duty [1988] 1 WLR 1035, 1040-1041; *Société Eram Shipping Co Ltd* v *Cie Internationale de Navigation* [2003] UKHL 30, [2004] 1 AC 260, paragraph 72; *Hillside (New Media) Ltd* v *Baasland* [2010] EWHC 3336 (Comm), [2010] 2 CLC 986, paragraph 33; *Taurus Petroleum Ltd* v *State Oil Marketing Co of the Ministry of Oil, Iraq* [2017] UKSC 64, [2018] AC 690, paragraph 30). . . .

(6) That general rule or presumption is open to displacement if it can be demonstrated that the relevant debt is properly recoverable or enforceable in a jurisdiction other than the debtor's residence or domicile, for example if suit must be brought against the debtor in that other jurisdiction, such as by a 'special agreement' or an 'exclusive right of suit' agreed between the parties in question; if the position were otherwise, the anomalous situation may arise where a Third Party Debt Order is made in respect of a debt which a foreign court with exclusive jurisdiction holds to be non-existent *(New York Life Insurance Co* v *Public Trustee* [1924] 2 Ch 101, 111-112, 115, 119-120); *Chaturbhuj Piramal* v *Chunilal Oomkarmal* (1933) 60 LR Ind App 211, 220-222; *Société Eram Shipping Co Ltd* v *Cie Internationale de Navigation* [2003] UKHL 30, [2004] 1 AC 260, paragraphs 72-74)."

60. Neither party challenged this as an accurate summary of English law.

61. The significance of these principles for the present case, when applied to the Assignment Order and Turnover Order sought by SAS from the California Court is as follows:

(1) Debts due from United States customers of WPL are not subject to any contractual term

providing for arbitration in England or the exclusive jurisdiction of the English court. Accordingly the general rule applies, which means that these debts are situated in the United States.

(2) Debts due from customers in the United Kingdom are situated in the United Kingdom. That is not only the residence of the debtor, but also (and primarily) because they are subject to arbitration here or the exclusive jurisdiction of the English court.

(3) Debts due from the majority of WPL's customers in third countries are also situated in the United Kingdom, because they are subject to arbitration here or to the exclusive jurisdiction of the English court. However, there are some customers in third countries whose contracts do not provide for arbitration or exclusive jurisdiction here. Debts due from this minority are situated in the country of the customer's residence.

(4) Funds already received from customers from any jurisdiction (including the United States) which are held in a United Kingdom bank account represent a debt owed by the bank to its customer, WPL. The *situs* of such a debt is the United Kingdom, that being the residence or domicile of the debtor bank.

62. Accordingly, the Assignment Order, if made, would require WPL to assign to SAS debts due from customers in third countries which are situated in this jurisdiction. Similarly it would do so if SAS were to seek to extend the proposed Assignment Order to cover debts due from United Kingdom customers, as it has reserved

the right to do. Equally, the Turnover Order, if made would require WPL to transfer to a United States Marshal debts due from banks which are also situated in this jurisdiction.[4]

63. SAS did not dispute that this would be the effect of the Assignment and Turnover Orders which it seeks or reserves the right to seek. Conversely, WPL could not dispute that the effect of the injunction granted by Robin Knowles J is to prevent SAS from seeking an order from the California Court for the assignment of debts due from United States customers which are situated in the United States.

Territorial enforcement of judgments

64. It is recognised internationally that the enforcement of judgments is territorial. When a court in State A gives judgment against a defendant over whom it has personal jurisdiction, it is for that court to determine in accordance with its own procedures what process of enforcement should be available against assets within its jurisdiction. But for a court in State A to seek to enforce its judgment against assets in State B would be an interference with the sovereignty of State B. As Lord Hoffman explained in *Société Eram Shipping Co Ltd* v *Cie Internationale de Navigation* [2003] UKHL 30, [2004] 1 AC 260:

> "54. . . . The execution of a judgment is an exercise of sovereign authority. It is a seizure by the state

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[4] To the extent that the Turnover Order requires receivables situated here to be turned over to a United States Marshal, it would appear to raise the same issues as the Assignment Order. Accordingly, when considering the Turnover Order, I shall focus on funds held by WPL's banks and will not address separately its impact on receivables owed to WPL.

of an asset of the judgment debtor to satisfy the creditor's claim. And it is a general principle of international law that one sovereign state should not trespass upon the authority of another, by attempting to seize assets situated within the jurisdiction of the foreign state or compelling its citizens to do acts within its boundaries."

65. Lord Millett expressed the same idea:

"79. The principle was succinctly stated by Lord Russell of Killowen CJ in *R* v *Jameson* [1896] 2 QB 425, 430. In describing the canon of statutory construction that, if another construction be possible, general words in an Act of Parliament will not be construed as applying to foreigners in respect of acts done by them outside the dominions of the enacting power, he observed:

> 'That is a rule based on international law by which one sovereign power is bound to respect the subjects and the rights of all other sovereign powers outside its own territory.'

80. The near universal rule of international law is that sovereignty, both legislative and adjudicative, is territorial, that is to say it may be exercised only in relation to persons and things within the territory of the state concerned or in respect of its own nationals. . . .

. . . 98. If the debt is situate and payable overseas, however, it is beyond the territorial reach of our courts. The books contain many statements to this effect. In *Ellis* v *M'Henry* (1871) LR 6 CP 228, 234 Bovill CJ said:

> 'In the first place, there is no doubt that a debt or liability arising in any country may be dis-

> charged by the laws of that country, and that such a discharge, if it extinguishes the debt or liability, and does not merely interfere with the remedies or course of procedure to enforce it, will be an effectual answer to the claim, not only in the courts of that country, but in every other country. This is the law of England, and is a principle of private international law adopted in other countries. . . . Secondly, as a general proposition, it is also true that the discharge of a debt or liability by the law of a country other than that in which the debt arises, does not relieve the debtor in any other country. . . .
>
> 108. . . . Just as the English court would not regard a foreign court as being a court of competent jurisdiction to discharge a debt recoverable here, so a foreign court would not regard our court as competent to discharge a debt recoverable there; and that was sufficient in itself to preclude the making of the order in respect of a foreign debt. Although in places this was described as a matter of discretion and in other places as a matter of principle, I think that the rationale was based on principle.
>
> 109. However that may be, I have no doubt that the issue should be regarded as one of principle. Our courts ought not to exercise an exorbitant jurisdiction contrary to generally accepted norms of international law and expect a foreign court to sort out the consequences."

66. In *Société Eram* a judgment creditor sought to enforce a judgment obtained in a French court and registered in England against a judgment debtor resident in Hong Kong. It did so by seeking to obtain a third party debt order (previously known as a garnishee order)

against a credit balance of the judgment debtor in a bank account with a Hong Kong bank. The evidence was that Hong Kong law would not recognise such an order made in England in relation to a debt sited in Hong Kong. Accordingly, as a matter of Hong Kong law, payment to the judgment creditor by the bank pursuant to a third party debt order would not operate to discharge the bank's debt to the judgment debtor.

67. The House of Lords held that it was not open to the English court in these circumstances to make a third party debt order. Such an order was a proprietary remedy which operated by way of attachment of the debtor's property and discharged the third party from its obligation to the judgment debtor. Accordingly such an order was an infringement of Hong Kong sovereignty and was not available where there would be no such discharge under the law where the debt was situated, that is to say Hong Kong.

68. The House of Lords affirmed "the distinction between 'personal jurisdiction, i.e. who can be brought before the court' and 'subject matter jurisdiction, i.e. to what extent the court can claim to regulate the conduct of those persons'", previously explained by Hoffmann J in *Mackinnon* v *Donaldson, Lufkin & Jenrette Securities Corpn* [1986] Ch 482. As Hoffmann J had put it:

> "It does not follow from the fact that a person is within the jurisdiction and liable to be served with process that there is no territorial limit to the matters which the court may properly apply its own rules or things which it can order such a person to do."

69. In *Société Eram* the English court had personal jurisdiction over the judgment debtor, but did not have subject matter jurisdiction over the debt due from the

bank which was situated in Hong Kong. That was fatal to the application for a third party debt order.

70. It is important to note that these principles do not depend upon the nature of the claim or the nature of the loss suffered upon which the court in State A adjudicates. They are concerned with the location of the assets against which enforcement of that judgment is sought. It is, therefore, nothing to the point that the conduct of which the claimant complains occurred, or the losses which it suffered were incurred, in State A where the trial on liability takes place. Those matters may justify the exercise of personal jurisdiction over the defendant by the courts of State A if the defendant is resident elsewhere, but do not confer enforcement (or subject matter) jurisdiction on the courts of State A over assets located in other jurisdictions.

71. It is important also that these principles are recognised internationally. Lord Hoffmann referred to a "general principle of international law that one sovereign state should not trespass upon the authority of another". Lord Millett described the exercise of an exorbitant enforcement jurisdiction as "contrary to generally accepted norms of international law". It follows that, just as the English courts will give effect to these principles when enforcing an English judgment, so too we can expect that foreign courts will respect the territorial jurisdiction of the English courts over assets located here when making orders for the enforcement of their own judgments.

72. Applying these internationally recognised principles to the present case, the North Carolina and California courts have personal jurisdiction over WPL but do not have subject matter jurisdiction over debts owed to WPL which are situated in England. That is so notwithstanding that the losses for which the North Carolina

court has given judgment were incurred by SAS in the United States. Nevertheless the effect of the proposed Assignment Order would be to require WPL to assign debts situated in England to SAS which would at least purport to discharge its customers from any obligation owed to WPL, while the effect of the proposed Turnover Order would be to require WPL to give instructions to its banks in England which would discharge the debts situated in England currently owed by the banks to WPL. In substance, therefore, the proposed orders are exorbitant in that they affect property situated in this country over which the California court does not have subject matter jurisdiction, thereby infringing the sovereignty of the United Kingdom.

73. Ms Carss-Frisk submitted that it makes all the difference that the Assignment and Turnover Orders would operate not *in rem* but *in personam*, as orders against WPL over whom the Californian Court has personal jurisdiction. While that is so as a matter of form, in substance the effect of the proposed orders would be precisely that which the House of Lords in *Société Eram* held to be contrary to internationally recognised principles.

74. The English courts will in some circumstances make an order against a defendant over whom there is *in personam* jurisdiction affecting property situated abroad. But they will only do so subject to such orders being recognised and enforced by the courts in the state where the property is situated. In this way the English courts ensure that their orders do not have exorbitant effect and do not infringe the sovereignty of the state concerned. The House of Lords in *Société Eram* recognised this important limitation on the scope of extra-territorial *in personam* orders made by the English

courts. For example, Lord Bingham referred to the practice of the English courts when granting a worldwide freezing order against a defendant over whom the court has personal jurisdiction:

> "23. Similar reticence was approved by the Court of Appeal (Kerr, Neill and Nicholls LJJ) when considering world-wide *Mareva* injunctions in *Babanaft International Co SA* v *Bassatne* [1990] Ch 13. The court accepted that there was nothing to preclude English courts from granting *Mareva* type injunctions against defendants extending to assets outside the jurisdiction, but insisted (per Kerr LJ, page 32) that:
>
> > 'there can be no question of such orders operating directly upon the foreign assets by way of attachment, or upon third parties, such as banks, holding the assets. The effectiveness of such orders for these purposes can only derive from their recognition and enforcement by the local courts, as should be made clear in the terms of the orders to avoid any misunderstanding suggesting an unwarranted assumption of extraterritorial jurisdiction.'
>
> Nicholls LJ was similarly concerned (page 44) at the 'extraterritorial vice' of unqualified orders. He pointed out (page 46):
>
> > 'The enforcement of the judgment in other countries, by attachment or like process, in respect of assets which are situated there is not affected by the order. The order does not attach those assets. It does not create, or purport to create, a charge on those assets, nor does it give the plaintiff any proprietary interest in them. The English court is not attempting in any way to inter-

> fere with or control the enforcement process in respect of those assets.'

As is well known, this judgment was reflected in what became the standard form of *Mareva* injunction order, until further protection was afforded to those holding overseas assets of persons subject to *Mareva* injunctions pursuant to the judgment of Clarke J in *Baltic Shipping Co* v *Translink Shipping Ltd* and *Translink Pacific Shipping Ltd* [1995] 1 Lloyd's Rep 673."

75. Lord Hoffmann spoke to similar effect:

"57. So in *Babanaft International Co SA* v *Bassatne* [1990] Ch 13 the late Kerr LJ, who was a master of international commercial law, said, at p 35:

> 'Unqualified *Mareva* injunctions covering assets abroad can never be justified, either before or after judgment, because they involve an exorbitant assertion of jurisdiction of an *in rem* nature over third parties outside the jurisdiction of our courts,'

58. The result was that freezing orders have been tailored to make it clear, first, that they do not affect anyone outside the jurisdiction unless enforced by a court of the relevant country and, secondly, that they do not prevent third parties such as foreign banks, which have an English presence and are therefore subject to the jurisdiction, from complying with what they reasonably believe to be their obligations under the law of the *situs* or proper law of the debt or any order of a local court: see *Baltic Shipping Co* v *Translink Shipping Ltd* [1995] 1 Lloyd's Rep 673.

59. The conclusion I draw from this survey of prin-

> ciple and authority is that there are strong reasons of principle for not making a third party debt order in respect of a foreign debt. . . ."

76. These principles were affirmed in *Masri* v *Consolidated Contractors International (UK) Ltd (No. 2)* [2008] EWCA Civ 303, [2009] QB 450. The claimant obtained judgment in English proceedings against defendants who had submitted to the jurisdiction of the English court and defended the proceedings on the merits. When the defendants failed to pay the judgment debt, the claimant sought an order for the appointment of a receiver by way of equitable execution to receive oil revenue due to the defendants. The order made by the judge included modified *Babanaft* provisos, broadly to the effect that foreign customers of the defendants were not affected by the order except to the extent that the order was declared enforceable by or was enforced by a court in the country or state of the customer concerned (see [24] of the judgment).

77. Lawrence Collins LJ explained at [53] that an order for the appointment of a receiver by way of equitable execution operates *in personam*, having effect "as an injunction restraining the judgment debtor from receiving any part of the property which it covers, if that property is not already in his possession, but it does not vest the property in the receiver". However, this did not avoid the necessity for the court to have subject matter jurisdiction in accordance with recognised principles of international law in order to make an order affecting foreign assets:

> "35. Consequently the mere fact that an order is *in personam* and is directed towards someone who is subject to the personal jurisdiction of the English court does not exclude the possibility that the mak-

ing of the order would be contrary to international law or comity, and outside the subject matter jurisdiction of the English court."

78. He referred in this connection to the *Babanaft* provisos, which were necessary to ensure that the English court was not claiming an exorbitant extra-territorial jurisdiction, and to the decision of the House of Lords in *Société Eram*. Having done so, he summarised the following principles:

> "47. The following propositions can be derived from this important decision. First, it is not permissible as a matter of international law for one state to trespass upon the authority of another, by attempting to seize assets situated within the jurisdiction of the foreign state or compelling its citizens to do acts within the foreign state's boundaries. Second, it would be an exorbitant exercise of jurisdiction to put a third party abroad in the position of having to choose between being in contempt of an English court and having to dishonour its obligations under a law which does not regard the English order as a valid excuse. Third, an *in personam* order against a person subject to the English jurisdiction may be contrary to international comity. Fourth, a garnishee or third party debt order is a proprietary remedy which operates by way of attachment against the property of the judgment debtor, and creates a proprietary interest by way of security in the debt or fund and gives priority to the claim of the judgment creditor to have his debt paid out of the fund before all other claims against it including that of the judgment debtor himself (Lord Bingham at [24]), or has proprietary consequences and takes effect as an order *in rem* against the debt owed by

> the third party to the judgment debtor (Lord Millett at [87]-[88]), or is in essence execution *in rem* against the property of the judgment debtor, because the discharge of the third party's indebtedness is an essential part of the execution. Fifth, a third party debt order cannot be made where it will not discharge the debt of the third party or garnishee to the judgment debtor according to the law which governs that debt, even if the order is directed *in personam* to a bank with a branch in London, because the order in respect of a foreign debt was an attempt to levy execution on an asset in the foreign jurisdiction."

79. Thus, in accordance with these propositions, an *in personam* order against a person subject to English jurisdiction *may* be contrary to international comity because of its extra-territorial effect, in which case it would not be permissible to make such an order as a matter of international law. How then was the distinction to be drawn between *in personam* orders which do infringe this principle and those which do not? Lawrence Collins LJ's answer to that question was as follows:

> "59. As I have said, the fact that it acts *in personam* against someone who is subject to the jurisdiction of the court is not determinative. In deciding whether an order exceeds the permissible territorial limits it is important to consider: (a) the connection of the person who is the subject of the order with the English jurisdiction; (b) whether what they are ordered to do is exorbitant in terms of jurisdiction; and (c) whether the order has impermissible effects on foreign parties.
>
> 60. CCOG's connection with the English jurisdiction is that it submitted to the jurisdiction of the English

court, defended the case on the merits, and has a substantial English judgment outstanding against it. I do not consider that the court exceeded the bounds of international jurisdiction by ordering CCOG not to receive the proceeds of oil, or in ordering it to co-operate with the receiver and to give notice of his appointment to its customers. CCOG will have to inform customers of the position and they will have to take advice. I suggested in the course of argument that the reality of the matter is that CCOG will be concerned that customers may think that a receiver has been appointed because it is bankrupt. CCOG has only itself to blame for that, and if it wishes to avoid that impression it has only to pay the judgment debt, which the group can well afford to do.

61. Nor do I consider that the effects on third parties show that the exercise of jurisdiction is exorbitant. CCOG accepts that the third party is protected by the *Babanaft* provisos from being found in contempt by interfering with the order. I do not consider that there is anything in the point that the effect of the order may be that, because the judgment debtor (if he complies with the order) has to decline to receive payment, the third party will be put in a quandary in that he cannot pay his creditor, who is refusing payment. Oil contracts are high value, and it will not take many customers or many shipments to clear the judgment debt. The number of potential purchasers is limited and they will be well able to take advice. . . .

. . . 70. Does the receivership order infringe any of the principles in *Société Eram*? In my judgment it does not.

71. First, it is not a proprietary remedy. It does not change the title to the debts, nor impose any charge. Second, the third party is not required by the order to pay the receiver, and there is no question of any discharge of the debts being effected by the order. Third, the consequence is that the third party debtor is not in danger of being compelled to pay twice. Fourth, the only person who is directly subject to the order is CCOG, which is subject to the jurisdiction of the court, and is being ordered to perform certain acts which have a genuine connection with England, namely compliance with an English judgment against it. Fifth, the third party debtors are protected from being put in the position of having to choose between being in contempt and having to dishonour their obligations under the applicable law by the *Babanaft* provisos in the order. Sixth, the right of the receiver to sue for the debts in a foreign country is limited to cases where his title to sue will be recognised by the foreign court.

72. The essence of the decision in *Société Eram* so far as it concerns international jurisdiction is that it is wrong for one legal system to reach out and affect title to property in another country (the judgment creditor's interest in a foreign debt), and, as in the case of attachment of debts, place the citizens of that other country in a position where they may have to pay twice. To do so is an impermissible exercise of extraterritorial jurisdiction. This is not such a case."

80. For these reasons the receivership order made in *Masri (No. 2)* fell on the right side of the line. But critical to this conclusion were "the careful and proportionate limitations on the scope of the receivership order" (as

Lawrence Collins LJ described them at [135]), that is to say the modified *Babanaft* provisos, ensuring that foreign customers of the defendants were not affected by the order except to the extent that the order was declared enforceable by or was enforced by a court in the country or state of the customer concerned.

81. There is much in the reasoning of Lawrence Collins LJ explaining why the receivership order in that case was not exorbitant which can be applied to the proposed Assignment and Turnover Order in the present case. Those orders would operate *in personam* against WPL, which has a substantial connection with the United States in view of the business which it does there and submitted to the jurisdiction of the North Carolina court. Nobody is forced to do business in the United States. On the other hand, unlike the receivership order in *Masri (No. 2)*, which merely ordered the defendant not to receive the revenue in question, the proposed orders would require positive action by WPL in this country. While the Assignment Order would not necessarily have to be complied with in England, in practice it would require action by WPL here where its offices and all of its directors and staff are based. The Turnover Order would necessarily require action by WPL in England, as that is where instructions would have to be given to its banks, and because it requires WPL to provide documentary evidence of its customer receivables. These are orders, therefore, which compel action within this jurisdiction by an English company in respect of assets situated here.

82. Moreover compliance with the Assignment Order would purport to have an impact on third parties, namely WPL's customers, by discharging their obligations owed here to WPL and replacing them with a corresponding

obligation owed to SAS.[5] But customers would not have the protection of any *Babanaft* proviso or the assurance that their position would not be affected unless and until the Assignment Order was declared enforceable by the English court as the court of the *situs* of the debt. And they would know that the assignments by WPL had been effected under penalty of contempt proceedings in the United States in circumstances where the English court has held that the North Carolina judgment is contrary to public policy and will not be recognised or enforced here. That could leave customers in real uncertainty.

83. In the circumstances, the proposed Assignment and Turnover Orders can properly be regarded as exorbitant, being contrary to the internationally accepted principle that enforcement of a judgment is a matter for the courts of the state where the asset against which it is sought to enforce the judgment is located.

84. The judge held that these Orders were not "markedly exorbitant" or "exorbitant in any great measure" because they did not require anything to be done by WPL in this jurisdiction. In that I think she was mistaken as a matter of fact. More importantly, however, her conclusion on this issue was coloured by her view that the Orders would not cut across or interfere with the Enforcement Judgment which had decided nothing more than that the English court would not lend its enforcement processes to SAS. I turn next to that issue.

What did the Enforcement Judgment decide?

85. The Enforcement Judgment undoubtedly did decide that the English court will not permit its enforce-

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[5] So too would the Turnover Order, to the extent that it applies to receivables situated here, save that the customers' new obligation would be owed to a United States Marshal.

ment processes to be used by SAS to enforce the North Carolina judgment. Accordingly it is not open to SAS to obtain from the English court (for example) a third party debt order requiring payment to itself of debts owed here to WPL or a receivership order over WPL's assets here. But in my judgment, the Enforcement Judgment was more than a merely procedural decision about the availability of English enforcement remedies. It was a decision, as a matter of substance, that the North Carolina judgment would not be recognised and is not enforceable in this jurisdiction. This follows from the internationally recognised principles concerning the territorial allocation of enforcement jurisdiction to which I have referred.

86. As Lord Millett put it in *Société Eram* at [98], in the passage more fully quoted above:

> "If the debt is situate and payable overseas, however, it is beyond the territorial reach of our courts."

87. The converse is also true. A debt situated and payable here is beyond the territorial reach of foreign courts unless the foreign judgment is one which the English court will recognise. To require that the foreign judgment is recognised by the English court is not a mere formality. On the contrary, it gives proper effect to the principle that enforcement is a matter for the courts of the state where an asset is situated.

88. Because SAS initially sought recognition and enforcement here, we know from the Enforcement Judgment that the North Carolina judgment will not be recognised or enforced in this jurisdiction and that it is contrary to English public policy. That is now a final and binding decision between the parties. However, even if there had been no enforcement proceedings here, it would remain relevant to consider whether the North Carolina judgment is one which the English courts would

be prepared to recognise and enforce. For the reasons given in the Enforcement Judgment, the North Carolina judgment would not have been recognised or enforced here even if there had been no English enforcement proceedings. It follows that assets located here are beyond the territorial reach of the courts of the United States.

89. It follows also that the judge's conclusion that the Assignment and Turnover Orders were not "markedly exorbitant" was based upon a mistaken premise.

Anti-suit injunctions

90. The jurisdiction of the English court to grant an anti-suit injunction is of long standing. The basic principle is that the jurisdiction is to be exercised "when the ends of justice require it": *Société Nationale Industrielle Aerospatiale* v *Lee Kui Jak* [1987] 1 AC 871, 892A-B; *Airbus Industrie G.I.E.* v *Patel* [1999] 1 AC 119, 133D-E. It was common ground between the parties that established categories of case where an injunction may be appropriate (which may overlap) include cases where an injunction is necessary to protect the jurisdiction of the English court and cases where the pursuit of foreign proceedings is regarded as vexatious or oppressive: *Aerospatiale* at 892G-893D. Equally, it was common ground that the jurisdiction is not confined to these categories and must be applied flexibly: *Castanho* v *Brown & Root (U.K.) Ltd* [1981] AC 557, 573 ("the width and flexibility of equity are not to be undermined by categorisation"); *Aerospatiale* at 892G (the cases "show, moreover, judges seeking to apply the fundamental principles in certain categories of case, while at the same time never asserting that the jurisdiction is to be confined to those categories"). I understand that broadly similar principles apply to the grant of anti-suit injunctions in the United States:

see the discussion of the *Laker* litigation by Lord Goff in *Airbus* at 136C-137C.

91. The English cases, including in particular *Airbus*, emphasise that great caution must be exercised before such an injunction is granted, at any rate in cases where the injunction is not sought in order to enforce an arbitration or exclusive jurisdiction clause, and that this is necessary because of the requirements of comity. I shall return to this topic.

Anti-enforcement injunctions

92. Before I do so, I need to refer to the cases dealing with anti-enforcement injunctions. These are cases where the foreign proceedings have proceeded as far as judgment and the unsuccessful defendant seeks an injunction from the English court to restrain the successful claimant from enforcing the judgment. Ms Carss-Frisk submitted that such injunctions may only be granted in exceptional cases, supporting the judge's approach that, in general, it would be necessary for an applicant to show conduct akin to fraud or, at any rate, of similar gravity. Mr Raphael acknowledged that such injunctions would be rare, but submitted that exceptionality was not a distinct jurisdictional requirement.

93. In my judgment there is no distinct jurisdictional requirement that an anti-enforcement injunction will only be granted in an exceptional case. Such injunctions will only rarely be granted, but that is because it is only in a rare case that the conditions for the grant of an anti-suit injunction will be met and not because there is an additional requirement of exceptionality. That accords, in my judgment, with the approach of Lawrence Collins LJ in *Masri* v *Consolidated Contractors International (UK) Ltd (No. 3)* [2008] EWCA Civ 625, [2009] QB 503 at [94], where he commented that such injunctions would only be

granted in rare cases, or in exceptional circumstances, but did not identify this as a distinct jurisdictional requirement. In any event, exceptionality would be a vague and somewhat elastic criterion and (if it matters) it is hard to see why this case, with its complex procedural history, should not be regarded as exceptional.

94. Only two cases were cited to us in which an anti-enforcement injunction has been granted. These were *Ellerman Lines Ltd* v *Read* [1928] 2 KB 144 and *Bank St Petersburg OJSC* v *Archangelsky* [2014] EWCA Civ 593, [2014] 1 WLR 4360. In both of these cases the injunction was granted to enforce compliance with a contractual jurisdiction agreement. In *Ellerman Lines* v *Read* the judgment abroad had been obtained by fraud, while in the *Bank St Petersburg* case enforcement of the judgment was described as being contrary to both the letter and the spirit of the applicable jurisdiction agreement. Counsel resisting the injunction in the latter case emphasised what he described as "the exceptional nature of an anti-enforcement injunction as opposed to an anti-suit injunction", but the Court of Appeal did not endorse this as a distinct requirement which had to be satisfied for such an injunction to be granted.

95. *Ecobank Transnational Inc* v *Tanoh* [2015] EWCA Civ 1309, [2016] 1 WLR 2231 contains at [107] to [119] a review of the cases in which an anti-enforcement injunction has been refused. Christopher Clarke LJ concluded that:

> "118. In short, the cases in which the English courts have granted anti-enforcement injunctions are few and far between. Of the two examples to which we were referred, one was based on the fraud of the respondent and the other involved an attempt to execute a judgment when, after it had been ob-

> tained, the respondent had promised not to do so. Knowles J suggested another circumstance where an injunction might be granted, namely where the judgment was obtained too quickly or too secretly to enable an anti-suit injunction to be obtained, a circumstance far removed from this case. No example has been cited to us of a case where an anti-enforcement injunction has been granted simply on the basis that the proceedings sought to be restrained were commenced in breach of an exclusive jurisdiction or arbitration clause.
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> 119. This dearth of examples is not surprising. If, as has heretofore been thought to be the case, an applicant for anti-suit relief needs to have acted promptly, an applicant who does not apply for an injunction until after judgment is given in the foreign proceedings is not likely to succeed. But he may succeed if, for instance, the respondent has acted fraudulently, or if he could not have sought relief before the judgment was given either because the relevant agreement was reached post judgment or because he had no means of knowing that the judgment was being sought until it was served on him. That is not this case."

96. In all of the cited cases in which an anti-enforcement injunction has been refused the applicant sought to prevent any enforcement of the foreign judgment. We were not shown any case such as the present where the injunction applicant sought only to restrain certain kinds of enforcement, leaving the claimant in the foreign proceedings free to enforce its judgment in other ways. It is evident that such a case may raise different considerations.

97. That said, it is worth noticing one of the cases where an injunction was refused. In *ED & F Man (Sugar) ltd* v *Haryanto (No. 2)* [1991] 1 Lloyd's Rep 429 the defendant had obtained a judgment in Indonesia which was inconsistent with a prior decision of the English court. The claimant sought an injunction to restrain him from relying on the Indonesian judgment, including in further proceedings in Indonesia. Neill LJ said at 437 rhc:

> "The position in Indonesia also is clear. In my view it would be wrong for this Court to grant an injunction which is designed to take effect inside Indonesia and which would interfere or purport to interfere with the judgment of a court of competent jurisdiction inside that country."

98. As Lawrence Collins LJ observed in *Masri (No. 3)* at [93] after citing this passage:

> "it is plainly a very serious matter for the English court to grant an injunction to restrain enforcement in a foreign country of a judgment of a court of that country."

99. This is of some relevance to the extent that the injunction obtained by WPL prevents SAS (as it does) from seeking an order for the assignment of debts due from customers located in the United States which are situated in that country.

Comity

100. Comity is undoubtedly an important consideration in this case, not least in view of the comments made by the Court of Appeals for the Fourth Circuit, but it is necessary to appreciate its proper scope in the circumstances of this case. A number of strands are relevant.

101. First, the English court has great respect for the work of foreign courts, particularly those in countries such as the United States with which we share common traditions and fundamental principles, and which have a high regard for the rule of law. To grant an injunction which will interfere, even indirectly, with the process of a foreign court is therefore a strong step for which a clear justification must be required.

102. In *Deutsche Bank AG* v *Highland Crusader Offshore Partners LP* [2009] EWCA Civ 725, [2010] 1 WLR 1023, Toulson LJ said:

> "50. An anti-suit injunction always requires caution because by definition it involves interference with the process or potential process of a foreign court. An injunction to enforce an exclusive jurisdiction clause governed by English law is not regarded as a breach of comity, because it merely requires a party to honour his contract. In other cases, the principle of comity requires the court to recognise that, in deciding questions of weight to be attached to different factors, different judges operating under different legal systems with different legal policies may legitimately arrive at different answers, without occasioning a breach of customary international law or manifest injustice, and that in such circumstances it is not for an English court to arrogate to itself the decision how a foreign court should determine the matter. The stronger the connection of the foreign court with the parties and the subject matter of the dispute, the stronger the argument against intervention."

103. When an anti-suit injunction is sought on grounds which do not involve a breach of contract, comity, telling against interference with the process of a foreign court,

will always require careful consideration. The mere fact that things are done differently elsewhere does not begin to justify an injunction. It is evident in the present case that the anti-suit injunction granted by Robin Knowles J is viewed by the United States courts as an unwelcome interference with their process. That is inevitably a cause for concern and regret. However, as Toulson LJ's summary explains, comity will be of less weight where the order made or proposed to be made by the foreign court involves a breach of customary international law.

104. Second, there is a relationship between comity and delay. In general, the greater the delay in seeking relief, the further the foreign proceedings will have advanced, and the more justifiable will be the foreign court's objection to an order by the English court which is liable to frustrate what has gone before and waste the resources which have been expended on the foreign proceedings.

105. The relationship between comity and delay was explained by Christopher Clarke LJ in *Ecobank Transnational Inc* v *Tanoh* in a passage which, despite its length, is worth quoting in full

> "132. Comity has a warm ring. It is important to analyse what it means. We are not here concerned with judicial *amour propre* but with the operation of systems of law. Courts around the free world endeavour to do justice between citizens in accordance with applicable laws as expeditiously as they can with the resources available to them. This is an exercise in the fulfilment of which judges ought to be comrades in arms. The burdens imposed on courts are well known: long lists, size of cases, shortages of judges, expanding waiting times, and competing demands on resources. The administra-

tion of justice and the interests of litigants and of courts is usually prejudiced by late attempts to change course or to terminate the voyage. If successful they often mean that time, effort, and expense, often considerable, will have been wasted both by the parties and the courts and others. Comity between courts, and indeed considerations of public policy, require, where possible, the avoidance of such waste.

133. Injunctive relief may be sought (a) before any foreign proceedings have begun; (b) once they have begun; (c) within a relatively short time afterwards; (d) when the pleadings are complete; (e) thereafter but before the trial starts; (f) in the course of the trial; (g) after judgment. The fact that at some stage the foreign court has ruled in favour of its own jurisdiction is not *per se* a bar to an anti-suit injunction: see the *AES* case. But, as each stage is reached more will have been wasted by the abandonment of proceedings which compliance with an anti-suit injunction would bring about. That being so, the longer an action continues without any attempt to restrain it the less likely a court is to grant an injunction and considerations of comity have greater force.

134. Whilst a desire to avoid offence to a foreign court, or to appear to interfere with it, is no longer as powerful a consideration as it may previously have been, it is not a consideration without relevance. A foreign court may justifiably take objection to an approach under which an injunction, which will (if obeyed) frustrate all that has gone before, may be granted however late an application is made (provided the person enjoined knew from an

early stage that objection was taken to the proceedings). Such an objection is not based on the need to avoid offence to individual judges (who are made of sterner stuff) but on the sound basis that to allow such an approach is not a sensible method of conducting curial business.

135. Mr Coleman submitted that "comity has no role to play in the timing of the application for, or the grant of, an anti-enforcement injunction". I disagree. Timing is of considerable significance. The grant of an interlocutory injunction to prevent the commencement or continuance of a duplicate set of proceedings may well be a sound step which (a) gives effect to contractual rights and (b) avoids the cost and waste of rival proceedings operating in tandem and the risk of inconsistent judgments—results which considerations of comity would favour. In the case of an anti-enforcement injunction the application will, by definition, be made after the rival proceedings have run to judgment. The grant of an injunction will mean that the cost of those proceedings and the resources of the rival court will (unless the injunction is discharged) have been wasted. It will not avoid the risk of inconsistent decisions although it will preclude the respondent from enforcing the existing potentially inconsistent decision.

136. In the case of anti-enforcement injunctions there are further considerations which underpin the need for caution expressed in the cases. First, an order precluding enforcement in countries outside England and Wales or those States which are subject to the Brussels/Lugano regime will, if obeyed, in effect preclude the consideration by the courts of

> those countries as to whether they should recognise or enforce the judgement in question. That is a matter which it is, intrinsically, for the relevant court to decide according to its applicable law. Moreover, insofar as the order prevents enforcement in the country of the court which gave the judgment it is, indirectly, an interference with the execution in its own country of the judgment which the court has given and can expect to be obeyed.
>
> 137. In short, both general discretionary considerations and the need for comity mean that an applicant for anti-suit relief needs to act with appropriate despatch. In the *Transfield Shipping* case [2009] EWHC 3629 (QB) at [78] I observed that 'comity, which involves respect for the operation of different legal systems, calls for challenges . . . to be made promptly in whatever is the appropriate court". Whilst recognising that delay is not necessarily a bar to relief, and the importance of upholding the rights of those who are the beneficiaries of exclusive jurisdiction agreements, I do not regard the cases subsequently decided by this court as rendering that statement inaccurate."

106. Christopher Clarke LJ's comments about the waste of resources caused by delay, in particular where an anti-enforcement injunction is sought, were made in the context of an application to restrain enforcement of a foreign judgment in its entirety. To grant such an injunction would render the entire liability proceedings a waste of time and resources. That is not this case. In the present case the injunction sought by WPL does not seek to prevent SAS from enforcing the North Carolina judgment in its entirety. WPL does not invite the English court to prevent SAS from enforcing the North Carolina

judgment by normal methods of enforcement against assets in the United States. Nor does it suggest that the English court has any role in considering the appropriateness of the order upheld by the Fourth Circuit preventing WPL from licensing new customers in the United States. Accordingly, regardless of the outcome of this appeal, the North Carolina judgment will stand and there are processes of enforcement available to SAS in the United States. These have already achieved some (albeit not a full) recovery and may well continue to do so in any event.

107. WPL's application to the English court is based essentially on what it contends to be the exorbitant and therefore illegitimate effect of the proposed Assignment and Turnover Orders. I shall have to consider whether the injunction which it has obtained goes beyond this objective. However, the grant of an anti-suit injunction limited to dealing with the exorbitant effect of the proposed Orders would not "frustrate all that has gone before" and would not involve the same kind of waste of resources as that described in *Ecobank*.

108. Third, comity requires that in order for an anti-suit injunction to be granted, the English court must have "a sufficient interest" in the matter in question. As Lord Goff explained in *Airbus* at 138G-H:

> "As a general rule, before an anti-suit injunction can properly be granted by an English court to restrain a person from pursuing proceedings in a foreign jurisdiction in cases of the kind under consideration in the present case, comity requires that the English forum should have a sufficient interest in, or connection with, the matter in question to justify the indirect interference with the foreign court which an antisuit injunction entails."

109. Often that sufficient interest will exist by reason of the fact that the English court is the natural forum for determination of the parties' dispute. But as Lord Goff was careful to emphasise at 140 B-D, this is only a general rule, which must not be interpreted too rigidly. In a case where the injunction is sought in order to protect the jurisdiction or process of the English courts, the existence of a sufficient interest will generally be self-evident. Indeed, the need to protect the jurisdiction of the court has been described as "the golden thread". In *Masri (No. 3)* at [86] Lawrence Collins LJ said this:

> "In *Bank of Tokyo Ltd* v *Karoon (Note)* [1987] A.C. 45, 58, Robert Goff LJ referred to Judge Wilkey's statement in *Laker Airways Ltd* v *Sabena Belgian World Airlines* (1984) 731 F 2d 909, 926-927 that anti-suit injunctions were most often necessary (a) to protect the jurisdiction of the enjoining court, or (b) to prevent the litigant's evasion of the important public policies of the forum, and concluded [1987] AC 45, 60:
>
> > 'without attempting to cut down the breadth of the jurisdiction, the golden thread running through the rare cases where an injunction has been granted appears to have been the protection of the jurisdiction; an injunction has been granted where it was considered necessary and proper for the protection of the exercise of the jurisdiction of the English court.'"

110. *Shell International Petroleum Co Ltd* v *Coral Oil Co Ltd* [1999] 2 Lloyd's Rep 606 is an example of such a case. Thomas J was unable to conclude that England was the natural forum for the trial of the claim, but nevertheless held that the English court had a sufficient interest to justify an injunction.

111. Fourth, however, comity is a two-way street, requiring mutual respect between courts in different states. This need for mutual respect means that comity requires a recognition of the territorial limits of each court's enforcement jurisdiction, in accordance with generally accepted principles of customary international law, which I have already described. Lord Bingham explained this in *Société Eram* at [26]:

> "If (contrary to my opinion) the English court had jurisdiction to make an order in a case such as the present, the objections to its exercising a discretion to do so would be very strong on grounds of principle, comity and convenience: it is . . . inconsistent with the comity owed to the Hong Kong court to purport to interfere with assets subject to its local jurisdiction . . ."

112. Just as it is inconsistent with comity for the English court to purport to interfere with assets subject to the local jurisdiction of another court, so it is inconsistent with comity for another court to purport to interfere with assets situated here which are subject to the jurisdiction of the English court.

Submission and delay

113. The passage from the judgment of Christopher Clarke LJ in *Ecobank Transnational Inc* v *Tanoh* set out above explains that delay by an applicant for anti-suit relief may be an important and sometimes decisive factor against the grant of an injunction, but is not necessarily a bar to relief. It is a factor to be considered, but the weight to be accorded to it will depend on all the circumstances of the case.

114. The fact that an applicant for anti-suit relief submitted to the jurisdiction of the foreign court may also be

an important and sometimes decisive factor, but again is not necessarily fatal. The position is fairly summarised in Briggs, *Civil Jurisdiction and Judgments* (6th Edition), at page 550:

> "No reported case holds, clearly and precisely, that an applicant will forfeit the right to ask for an injunction if he has already submitted to the jurisdiction of the foreign court. But if the applicant has taken a step in the foreign proceedings which goes beyond a challenge to that court's jurisdiction, it will be more difficult to persuade an English court that the respondent should now be restrained from continuing with those proceedings. ... But the principle of the matter seems reasonably clear: an applicant who has already submitted to the jurisdiction of a foreign court should find that this is a substantial obstacle to his obtaining an anti-suit injunction from an English court."

115. In the present case WPL submitted to the jurisdiction of the North Carolina court and fought the liability proceedings there on the merits. Accordingly it was (or rapidly became) far too late for it to seek an anti-suit injunction to restrain SAS from pursuing its claim there despite the existence of the judgment in WPL's favour in the English liability proceedings. For the same reasons, it would be impossible for WPL to seek an injunction to prevent SAS from enforcing the North Carolina judgment at all. But it does not follow, in my judgment, that it is too late for WPL to seek an injunction preventing SAS from enforcing the judgment in ways which have exorbitant effect. Its submission to the jurisdiction of the North Carolina court can fairly be treated as a submission to normal enforcement procedures conforming to generally accepted international principles, but not as a

submission to enforcement measures which are not of that nature. An application could not have been made any earlier for an anti-suit injunction on the ground that SAS *might* seek to enforce any judgment extra-territorially. That would have been regarded as an implausible speculation.

116. Similarly, WPL took part in the California court proceedings objecting to the orders sought by SAS, essentially on the ground that measures of that nature were a matter for the English court. Whether or not that is regarded as a submission to the jurisdiction of the California court seems to me of little significance. In substance WPL was objecting to the making of the Assignment and Turnover Orders on jurisdictional grounds (or, at any rate, on grounds closely connected with jurisdictional issues) and (as Mr Raphael put it) did not waive its jurisdictional objections by making them.

117. In these circumstances I consider that the judge was, if anything, too harsh on WPL in concluding that submission and delay were factors telling against the grant of an injunction in this case, at any rate to the extent that such an injunction is limited to dealing with the exorbitant effect of the proposed Assignment and Turnover Orders on assets located within the jurisdiction of the English court. However, that is a matter which need not be pursued further, as it is apparent that she accorded these factors relatively little weight and would not have regarded them as preventing the grant of an injunction if the conditions for such a grant had been satisfied.

The approach of an appellate court

118. The approach of an appellate court in a case such as this was set out by Rix LJ in *Star Reefers Pool Inc* v *JFC Group Ltd* [2012] EWCA Civ 14, [2012] 1 Lloyd's Rep 376:

"2. The essential question which arises on this appeal is whether Teare J was right to say that JFC's Russian proceedings were vexatious or oppressive. It is suggested on behalf of Star Reefers that that finding was an exercise in discretion, and that no effective appeal can be mounted against it. In my view, however, such a finding is an evaluative judgment, and a condition precedent to the grant of any injunction in such a case as this, where no exclusive English jurisdiction or arbitration clause has been agreed between the parties. In this respect it is analogous to the concept of abuse of process: see *Aktas* v. *Adepta* [2010] EWCA Civ 1170, [2011] QB 894 at [53]. In both cases, those of vexatious or oppressive conduct and abuse of process respectively, an evaluative assessment has to be made, which is not an exercise of discretion but a matter on which there is, in theory, a right or wrong answer. If the answer is that such conduct exists, there then arises a question of discretion as to whether an injunction against foreign proceedings in the one case, or a stay of domestic proceedings in the other case, will be granted. It may be of course that the finding of vexatious conduct or of an abuse of process carry the court almost the whole way to its decision to grant an injunction or a stay: but that does not affect the fact that the prior finding is not itself an exercise of discretion. Factors which may come in at the second, discretionary, stage in the context of an anti-suit injunction include the important matter of comity.

3. Of course, the finding of an experienced judge of the Commercial Court that there has been vexatious conduct (I will adopt that shortened expres-

> sion) is entitled to proper respect, and if it involves an assessment of a large number of factors may for that reason be hard for an appellate court to dislodge. However, it is a serious finding, reflecting a view of what is to count as unacceptable behaviour in the sphere of international litigation. Moreover, in the typical case, such as this, all the evidence is documentary. In such circumstances, this court is entitled to conduct a serious review of the issue."

Should an anti-suit injunction be granted in this case?

119. Adopting that approach, it is time now to apply these principles, to the extent I have not already done so, in answering the question whether an injunction should be granted to restrain SAS from seeking the proposed Assignment and Turnover Orders. For this purpose it is convenient to divide the issue into four separate categories.

Debts due from customers in the United States

120. The injunction granted by Robin Knowles J prevents SAS from seeking an order for the assignment of debts due from WPL customers in the United States. As I have indicated, these are debts which under English conflicts principles are situated in the United States. There is no good reason why the English court should seek to prevent SAS from enforcing the North Carolina judgment against United States assets of WPL by whatever procedures are available to SAS under United States law. To do so would itself represent an exorbitant exercise of jurisdiction by the English court, contrary to principles of comity, and it is no surprise that the United States courts have taken exception to this aspect of the injunction.

121. I conclude, therefore, that the injunction should not have been granted in these wide terms and that the judge was right not to continue it.

122. As I have indicated, Mr Raphael sought to deal with this particular issue by offering an undertaking. However, I do not think that this would be satisfactory. There is no justification for the English court to interfere with enforcement of the North Carolina judgment against assets in the United States. It is better to say so, rather than continuing an injunction in wide terms which is wrong in principle against an undertaking to make payments which, if there were any question about whether it had been complied with, would have to be policed by the English court.

123. However, my conclusion that the injunction should not have been granted in the wide terms in which it was granted does not mean that no injunction at all was appropriate.

Debts due from customers in the United Kingdom

124. Debts due from United Kingdom customers are situated in this jurisdiction. Accordingly, as I have explained, for SAS to seek an order for the assignment of such debts in circumstances where the North Carolina judgment will not be recognised or enforced in this jurisdiction would be an exorbitant interference with the jurisdiction of the English court, in the light of the internationally recognised principles for the territorial allocation of enforcement jurisdiction which I have described. For that reason such an order could also be characterised as vexatious. If necessary, therefore, I would conclude that the criteria for an anti-suit injunction to restrain SAS from seeking such an order are satisfied. Such an injunction would be necessary to protect the territorial enforcement jurisdiction of the English court.

125. It would remain to consider whether such an injunction should be refused as a matter of discretion, having regard to issues of comity, delay and submission. Of these, comity would present the most serious obstacle but, for the reasons I have explained, would not in my judgment prevent the grant of an injunction. It is notable that SAS has not so far sought, and the United States courts have not indicated that they would be prepared to grant, an Assignment Order extending to debts due from WPL customers in the United Kingdom. It may be that this forbearance involves some recognition of the exorbitant effect of such an order and the proper role of the English court in relation to such debts. Whether or not that is so, such an order would be exorbitant in the sense I have described, which means that relatively little, if any, weight should be given to comity as a factor telling against the grant of an injunction. While it would be a matter of regret to grant an injunction which would risk causing offence to a United States court, it would in my judgment be our duty to do so.

126. As it is, however, the question does not directly arise in the light of the undertaking offered by SAS to give 14 days' notice in the event that it intends to seek an order from the United States courts extending to the assignment of debts due from United Kingdom customers. I would accept that undertaking, which provides sufficient protection to WPL and means that an injunction is unnecessary.

Debts due from customers in other countries

127. The Assignment Order which SAS intends to seek, and which the California court has indicated that it would be prepared to grant, would order WPL to assign to SAS debts due from WPL customers in countries other than the United States and the United Kingdom. Such

debts are less obviously situated in the United Kingdom than debts due from customers here. Nevertheless it was not disputed that such debts are indeed situated here pursuant to English conflicts rules when WPL's contract with the customer concerned provided for arbitration here or for the exclusive jurisdiction of the English court. In principle, therefore, these debts are in the same position as debts due from United Kingdom customers and, for the same reasons, no undertaking being offered, there should be an injunction to restrain SAS from seeking an Assignment Order extending to these debts.

128. The judge expressed the hope that, in the light of her judgment and in particular of her explanation regarding the *situs* of outstanding debts, the California court might choose to draw the line of the relief which it was prepared to grant in some different place, but she regarded this as a matter which should properly be left to that court. I respectfully disagree. While I too would hope that the California court will recognise and understand the position of the English court, in accordance with internationally recognised principles the enforceability of the judgment of a foreign court against assets located in this jurisdiction is a matter for the English court.

129. The position is different, however, as regards customers in third countries who did not contract with WPL on terms providing for arbitration here or for the exclusive jurisdiction of the English court. Such debts are not situated in England but in the country of the customer's residence. An Assignment Order requiring WPL to assign such debts to SAS might be regarded as exorbitant, but is not an order in which the English court would have a sufficient interest to intervene. Accordingly the injunc-

tion which I would grant should be limited in the case of third country customers to debts which are situated here.

The Turnover Order

130. The proposed Turnover Order would require WPL to turn over to a United States Marshal funds held in its bank accounts in this jurisdiction which also comprise a debt or debts situated here. Again, therefore, there should be an injunction to restrain SAS from seeking a Turnover Order requiring WPL to turn over such funds.

131. The injunction should make clear, to avoid misunderstanding, that it is limited to bank accounts in this jurisdiction. It should not prevent SAS from seeking a Turnover Order relating to any accounts which WPL may have in other countries. Again, while such an order might be regarded as exorbitant, it is not one in which the English court would have a sufficient interest to intervene. As it is, however, the evidence before this court is that WPL's only bank accounts are here, so this point is probably academic.

132. To the extent that the proposed Turnover Order would also require WPL to turn over receivables (that is to say, debts due from customers) situated in the United States or in third countries, it raises the same issues as the proposed Assignment Order and should therefore be dealt with in the same way.

The PTIA counterclaim

133. The judge concluded the Enforcement Judgment by giving judgment in favour of WPL on its counterclaim pursuant to section 6 of the PTIA to recover so much of the damages paid to SAS as exceeded the part attributable to compensation. Although no such order was contained in the injunction granted by Robin Knowles J, the

order made by the judge following the judgment under appeal included the following:

> "Further to paragraph 6 of the Knowles J injunction until the Court of Appeal's final order on WPL's Appeal is made, SAS shall not seek or pursue before any US court any relief which restrains or prohibits WPL from effectively pursuing or enforcing this action and/or any orders granted therein and/or its claims under s.6 of the Protection of Trading Interests Act 1980 or taking any steps or applications in relation thereto (including anti-suit injunctive relief to protect the same), or interferes with the aforesaid. . . ."

134. Mr Raphael submitted that this order, the effect of which, broadly speaking, is to restrain SAS from seeking an anti-suit injunction in the United States which would interfere with WPL's counterclaim under the PTIA, should be continued.

135. In response Ms Carss-Frisk said that SAS has no current intention to seek any further injunction to prevent enforcement of that counterclaim beyond the order which the North Carolina court has already made of its own motion and that it would undertake to give 14 days' notice if that intention were to change.

136. I would accept that undertaking. Although the judge made the order which I have set out, we have no judgment explaining her reasons for doing so and, in any event, the landscape has now changed in the light of our judgment. The undertaking offered provides sufficient protection to WPL and, if SAS's intention changes, it would be preferable for WPL (if so advised) to make any application to the Commercial Court, which can deal with the matter in the light of whatever circumstances then

exist and provide a reasoned judgment for whatever course it decides to take.

Disposal

137. For the reasons which I have sought to explain I would:

(1) discharge the injunction granted by Robin Knowles J which was continued by the judge pending this appeal;

(2) accept the undertaking by SAS to give 14 days' notice of any intention to seek an Assignment Order extending to debts due from WPL customers in the United Kingdom and, on that basis, decline to grant any injunction in respect of such debts;

(3) grant an injunction to restrain SAS from seeking an Assignment Order extending to debts due from WPL customers in countries other than the United States and the United Kingdom with whom WPL has contracted on terms providing for arbitration in London or for the exclusive jurisdiction of the English court;

(4) grant an injunction to restrain SAS from seeking a Turnover Order relating to (a) funds held with banks in the United Kingdom (but not to any funds held with banks elsewhere) and (b) debts due from WPL customers in countries other than the United States and the United Kingdom with whom WPL has contracted on terms providing for arbitration in London or for the exclusive jurisdiction of the English court; and

(5) accept the undertaking by SAS to give 14 days' notice of any intention to seek any further injunctive relief to prevent enforcement of WPL's counterclaim under section 6 of the Protection of Trad-

ing Interests Act 1980 and, on that basis, decline to continue the order made by the judge in this respect which will expire when our final order on this appeal is made.

Lord Justice Popplewell:

138. I agree.

Lord Justice Flaux:

139. I also agree.