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RESEARCH ON WHETHER OTHER COUNTRIES SHOULD ADOPT THE MAREVA INJUNCTION IN AID OF FOREIGN PROCEEDINGS

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FLEUR MALET-DERAEDT*

> Injustice is to be viewed and decided in the light of today's conditions and standards, not those of yester-year.[1]

ABSTRACT: This article explores the question of whether common law countries which have not yet adopted the Mareva injunction in aid of foreign proceedings should implement its English equivalent in their legislation. Two issues must be addressed: whether there is a real need of change in the legislation and whether as a matter of policy, the Mareva in aid of foreign proceedings is not contrary to comity. As to the first issue, based on Lord Nicholls' dissent in *Mercedes-Benz A.G. v Herbert Heinz Horst Leiduck*, it appears that the courts are already equipped with the necessary armoury. As to the second issue, its limited effect in personam, the development of international fraud and the development of international cooperation plead in its favour.

I. INTRODUCTION

> [H]is assets are in Hong Kong, so the Monaco Court cannot reach them; he is in Monaco, so the Hong Kong Court cannot reach him. That cannot be right. That is not acceptable today. A person operating internationally cannot so easily defeat the judicial process. There is not a black hole into which a defendant can escape out of sight and become unreachable.[2]

That is the way Lord Nicholls of Birkenhead grasped and summed up the limits of conflict of laws in cases of international fraud: a simple lack of jurisdiction over the defendant, his assets or the substantive proceedings can defeat any plaintiff's claim, as strong and good on the merits as it might be. The black hole is not limited to play with jurisdictional limits. The battle of the wits also includes a game of hide and seek where the plaintiff and the defendant engage themselves in an asset's pursuit. The first to arrive will serve his own purposes; the plaintiff will enforce his judgment against defendant's local assets or the defendant will remove them from the jurisdiction in order to be judgment-proof.

In many countries, a pre-judgment remedy exists in order to temporarily freeze the assets of the defendant, time for the plaintiff to obtain a definitive judgment and to enforce it within the jurisdiction. In common law jurisdictions, this remedy is the

* DEA de droit des relations économiques internationales (Université de Paris II, Panthéon-Assas); LLM in Commercial Law (Auckland) (in completion).

[1] Lord Nicholls of Birkenhead, *Mercedes-Benz A.G. v Herbert Heinz Horst Leiduck* [1996] AC 284, 308, hereinafter referred to as *Mercedes*.

[2] Ibid 305.

Mareva injunction. It was born in England in the *Nippon Yusen Kaisha v Karageorgis* case,[3] given its name after *Mareva Compania Naviera SA v International Bulk-carriers SA*.[4] It was primarily designed to prevent foreign defendants from removing their assets from the jurisdiction.[5] It was then extended to domestic defendants. The final step was reached in 1990 when it was extended to assets within and outside the jurisdiction,[6] namely, the Worldwide Mareva Injunction. Worldwide Marevas now span the jurisdictions: it is recognised in Australia,[7] Canada,[8] Hong Kong,[9] Ireland,[10] Jersey[11] and New Zealand.[12] In all countries, for both domestic and worldwide Mareva, the plaintiff has to show a good arguable case on the merits and a risk of removal of the assets by the defendant. However, one main condition differs in England from the other countries: the issue of jurisdiction over the substantive proceedings. In *Siskina (Owners of the Cargo lately on board) v Distos Compania Naviera (The Siskina)*,[13] it was held that a Court had no power to grant an interlocutory relief if it had no jurisdiction over the substantive proceedings. *The Siskina* has generally been followed in the Commonwealth.

With the entry of the UK into the European Union, *The Siskina* was superseded by statute, in Section 25 of the Civil and Judgments Act 1982, in order to achieve the aim of Article 24 of the Brussels Convention.[14] This Article allows a court which does not have jurisdiction over the substantive proceedings to grant interim relief when another member court has jurisdiction over the substantive dispute. It is known as interim relief "in aid of foreign proceedings". Section 25 was then extended by the Civil Jurisdiction and Judgments Act 1982[15] (Interim Relief) Order 1997 (S.I. 1997 No. 302) to interim relief in aid of foreign proceedings to non EU members and outside the scope of application of the Brussels Convention. The Mareva injunction *à la sauce anglaise* has now become a wonderful weapon: wherever the substantive proceedings are tried, wherever the defendant or his assets are, the English Court can eliminate any possibility of escape.

England is, however, the only country to be equipped with such an armoury. Why has it not yet been adopted by other countries? It seems that its nickname speaks

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[3] [1975] 1 WLR 1093.
[4] [1975] 2 Lloyd's Rep 509.
[5] *Crédit Suisse Fides Trust S.A. v Cuoghi* [1998] QB 818, 824, hereinafter referred to as *Crédit Suisse*.
[6] *Babanaft International Co. SA v Bassatne and Another* [1990] Ch. 13, hereinafter referred to as *Babanaft*; *Republic of Haiti v Duvalier* [1990] QB 202, hereinafter referred to as *Duvalier*.
[7] *Hospital Products Ltd v Ballabil Holdings Pty Ltd* [1984] 2 NSWLR 662.
[8] *Mooney v Orr* [1994] BCJ No 2322.
[9] *Asean Resources Ltd v Ka-Wah International Merchant Finance Ltd* [1987] LRC (Comm) 835.
[10] *Powerscourt Estates v Gallagher & Gallagher* [1984] ILRM 123.
[11] *Solvalub Ltd v Match Investments Ltd* [1998] ILPr 419, hereinafter referred to as *Solvalub*.
[12] *Zietlow v Simon* (1991) 4 PRNZ 373.
[13] [1979] AC 210.
[14] 1968 Convention on Jurisdiction and the Enforcement of Civil and Commercial Judgments. Hereinafter referred to as the Brussels Convention.
[15] Hereinafter referred to as CJJA.

for itself: the Mareva injunction is called the "nuclear weapon".[16] Efficiency versus danger? Eliminating black holes versus creating black-out in international comity? To answer the question of whether other countries should adopt the Mareva in aid of foreign proceedings, this paper addresses the issues of whether other countries should follow England and whether a change in the legislation is called for. For the purpose of clarity, those issues are dealt with in three parts: the power of the court (II), its jurisdiction over the defendant (III) and the scope of the Mareva (IV).

II. THE POWER OF THE COURT TO GRANT A MAREVA INJUNCTION IN AID OF FOREIGN PROCEEDINGS

A. *The Siskina: a Mareva is Ancillary to the Substantive Proceedings*

The question of whether a court can grant interlocutory relief where it has no other basis of jurisdiction than a claim for interim relief arose for the first time in *The Siskina*. The buyers of cargo shipped it on a vessel, the *Siskina*, having pre-paid the freight to the charterers. However, the latter failed to pay the ship owners for the carriage of the cargo. The ship owners, a Panamanian company managed by Greeks, ordered the vessel to sail to Cyprus for the cargo to be unloaded there and applied to the Supreme Court of Cyprus for an order in rem, without consideration for the buyers' ownership. The content of the cargo was damaged due to bad storage conditions. The vessel then sank in the Mediterranean Sea. She was insured in London. The owners of the cargo sought an injunction in England restraining the owners of the vessel from dealing in any way with insurance proceeds, since the ship owners had no other assets than the insurance moneys. The bills of lading were to be governed by Italian law, any claims to be settled by the courts of Genoa. No claim on the substantive proceedings, whatsoever, could be brought before an English court. The plaintiffs submitted that the basis on which the application could be made was Ord. 11, r. 1(1)(i) which permitted service of notice of a writ out of the jurisdiction "(i) if in the action begun by writ an injunction is sought ordering the defendant to do or refrain from doing anything within the jurisdiction ...".

The House of Lords dismissed the application:[17]

> The sub-rule speaks of "the action" in which a particular kind of relief, "an injunction" is sought. *This pre-supposes the existence of a cause of action on which to found "the action." A right to obtain an interlocutory injunction is not a cause of action. It cannot stand on its own*. It is dependent upon *there* being a pre-existing cause of action against the defendant *arising out of an invasion, actual or threatened by him, of a legal or equitable right of the plaintiff for the enforcement of which the defendant is amenable to the jurisdiction of the court*.

The Siskina imposes three requirements on the plaintiff: (i) the defendant must be duly served either personally or under Ord. 11; (ii) the plaintiff has a cause of action

[16] *Bank Mellat v Nikpour* [1985] FSR 87, 92.
[17] *The Siskina*, above note 13, 256. Emphasis added.

under English law and; (iii) the interim relief must be ancillary to a claim for substantive relief to be granted by an English court.[18]

For lack of jurisdiction of the court over the substantive proceedings, the plaintiff cannot bring a claim only seeking a Mareva since the relief is ancillary to the merits. This solution is regrettable. In what way might it be in the plaintiff's interests to apply for an injunction in a jurisdiction which is not the one to try the substance of the dispute (the primary court)? Several reasons can be given. The very first one is that the place of the trial might not be in the interest of the plaintiff for lack of defendant's assets there. In civil law jurisdictions, as well as under the Brussels Regulation, the limbs of jurisdiction are limited and strict. There might be no connection between the court and the defendant or the location of his assets.

Secondly, the primary court might not know of or have a remedy equivalent to the Mareva injunction. When the substantive proceedings have been started in a civil law jurisdiction, most of the time, the freezing of the assets is an attachment order requiring a proprietary right. If the defendant has dissipated the assets, tracing the ownership is unfeasible. Secondly, only injunctions in rem can be granted.[19] Exercising in rem jurisdiction over assets located outside the jurisdiction is against comity. Although French and German courts are not reluctant to do so, it seriously impedes the efficiency of the injunction since it is subject to recognition and enforcement in the country where the assets are located.

A Mareva has none of these features: it operates in personam and prima facie suffers from no extraterritorial vice. It does not require any proprietary right and it creates no lien.

Applying *The Siskina*, the plaintiff has no pre-judgment remedies available to secure the enforcement of the foreign judgment where it is the most needed: the place(s) where the money is.

At present, the only possibility of getting around *The Siskina* is for the plaintiff to start substantive proceedings where the injunction is sought, even if, later, these proceedings are stayed. When exercising its *forum non conveniens'* discretion, the court does not divest itself of its jurisdiction and therefore, interim relief can still be granted. This possibility was recognised by Lord Goff of Chieveley in *Spiliada Maritime Corp. v Cansulex Ltd*:[20]

> [I]t would not, I think, normally be wrong to allow a plaintiff to keep the benefit of security obtained by commencing proceedings here, while at the same time granting a stay of proceedings in this country to enable the action to proceed in the appropriate forum.

[18] *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] AC 334, 342, hereinafter referred to as *Channel Tunnel Group*.
[19] France only has pre-judgment remedy in rem. See however the German "Arrest" and the Italian "Sequestro giudiziario" which operate in personam.
[20] [1986] 3 All ER 843, 860.

This view is confirmed by *Channel Tunnel Group*: an injunction was granted even though the court had to stay the proceedings in favour of arbitration. This case puts *The Siskina* into perspective but does not reverse it. The main speech was delivered by Lord Mustill who made it clear that *The Siskina* was not applicable to the case.[21] For present purposes, the other speech of interest was delivered by Lord Browne-Wilkinson, with whom Lord Keith of Kinkel and Lord Goff of Chieveley agreed, representing a majority. The Judge said:[22]

> I can see nothing in the language employed by Lord Diplock (or in later cases in this House commenting on the Siskina) which suggest that a court has to be satisfied, at the time it grants interlocutory relief, that the final order, if any, will be made by an English court.

Rather, "[t]hese are words which indicate that the relevant question is whether the English court has power to grant the substantive relief not whether it will in fact do so."[23]

The Judge pointed out that at the time the injunction is granted, there is no means to ensure that the English court will grant substantive relief. The proceedings might be later stayed on the ground of *forum non conveniens* or because the stay is mandatory because of an exclusive jurisdiction or an arbitration clause. The Judge concluded:[24]

> Even applying the test laid down by the Siskina the court has power to grant interlocutory relief based on a cause of action recognised by English law against a defendant duly served where such relief is ancillary to a final order whether to be granted by the English court or by some other court or arbitral body.

However, at no time, did the Judge mention the possibility of the English courts having no other basis of jurisdiction than the Mareva itself. This view is certainly less restrictive than the view of the court *granting substantive relief* but it does not solve the problem that it still excludes many other cases, for example *The Siskina* itself where no substantive proceedings could be brought before an English court.

Moreover, using this round-about method raises several difficulties. As to practical issues, mainly costs, the plaintiff might be reluctant to start new proceedings. As a matter of policy, it was held in New Zealand in *Sundance Spas NZ Ltd v Sundance Spas Inc.* that this short cut is wrong in principle: "[t]o stay this proceeding for no purpose other than facilitating a Mareva injunction is a misuse of procedure for collateral purpose."[25]

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[21] Above note 18, 362 and 363.
[22] Ibid 342.
[23] Ibid.
[24] Ibid 343.
[25] [2001] 1 NZLR 111, 122.

The Siskina, followed in other jurisdictions, was reversed by statute and is no longer good law in England.

B. *Section 25 CJJA 1982, Order 1997*

1. *The background of the adoption of the Section in the English legislation.*

In *The Siskina*, the Brussels Convention was not yet applicable, since the negotiations for the accession of the UK to it were in progress.

However, when acceding to it, the UK undertook to comply with its spirit. Article 24 sets forth that:[26]

> Application may be made to the courts of a Member State for such provisional, including protective, measures as may be available under the law of that State, even if, under this Convention [Regulation], the courts of another Member State have jurisdiction as to the substance of the matter.

Article 24 does not require the Members to harmonise their interim measures. The granting of the injunction is governed by the domestic law of the country where the injunction is sought, including its rules of service of process. Article 24 applies wherever the defendant is domiciled.[27] What matters, under the Convention, is that substantive proceedings have been started in a Contracting State and that the merits fall within "civil and commercial matters" as defined by the Convention.[28]

The Brussels Convention was adopted in accordance with Article 220 of the EEC Treaty (now Article 293 EC Treaty) which sets forth that Member States shall enter into negotiations with a view to securing the enforcement of judgments of courts or tribunals and of arbitration awards. Because of *The Siskina*, Article 24 was emptied of its substance, unable to achieve its aim. The question was whether the UK was obliged to make available those provisional and protective measures as its own domestic law would afford if its courts had jurisdiction over the substantive proceedings. According to Staughton L.J. in *Duvalier*, "it seems to me that the Convention *requires* each contracting state to make available, in aid of the court of another contracting state, such provisional and protective measures as its own domestic law would afford if its courts were trying the substantive action."[29]

A change of policy was called for in order to achieve the aim of the Convention.

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[26] Now being Article 31 of the Council Regulation (EC) No 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, hereinafter referred to as Brussels I Regulation. The wording of Article 24 has not been changed in Article 31.
[27] *X v Y* [1990] QB 220.
[28] *Jacques de Cavel v Louise de Cavel*, (C-143/78) [1979] ECR I-01055.
[29] Above note 6, 212.

In the first place, Section 25 was enacted in 1982 in the CJJA to reverse *The Siskina* within the scope of application of the Brussels Convention.

In 1997, England went further: Section 25 CJJA 1982, as amended by (Interim Relief) Order 1997 (S.I. 1997 No. 302),[30] applies to non-Convention countries and to proceedings out of the scope of application of the Brussels Convention. "[T]he High Court has power to grant interim relief in aid of substantive proceedings elsewhere of whatever kind and wherever taking place."[31] However, one of the propositions of *The Siskina* remains fundamental and was enacted by statute: the discretion of the court to grant the injunction.

2. *The test of inexpediency*

Section 25(2) expressly confers a discretion to refuse the grant of the relief if "the fact that the court has no jurisdiction apart from this section in relation to the subject-matter of the proceedings ... makes it *inexpedient* for the court to grant it."[32]

Several cases referred to the grant of the injunction when the circumstances were exceptional.[33] Lord Millet, in *Crédit Suisse*, pointed out that the gloss on the wordings of Section 25 was regrettable.[34] The question is not whether the circumstances are exceptional, rather, it is the one of inexpediency.

The test of inexpediency is divided in two stages.

The first one is: if an English Court were the primary court, would it have granted the injunction? Therefore, the plaintiff must show that he has a good arguable case and that there is a risk that the defendant will remove his assets.

The second one is whether the court would interfere with the foreign proceedings. The risk of interference is the first argument raised against the adoption of interim relief in aid of foreign proceedings.[35]

In *Crédit Suisse*, the defendant submitted that the Swiss court had no power to order non residents to disclose information on the whereabouts of their assets. The secondary court, therefore, "should not ... seek to remedy the defects in the laws of other countries".[36] Lord Bingham of Cornhill C.J. rejected the submission:[37]

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[30] Into force on 1 April 1997.
[31] *Crédit Suisse*, above note 5, 825.
[32] Emphasis added.
[33] See *Duvalier*, above note 6, *Derby & Co. Ltd. and others v Weldon and Others (No. 1)* [1990] Ch 48, hereinafter referred to as *Derby & Co (No 1)*.
[34] Above note 5, 829.
[35] *South Carolina Insurance Co. Respondents v Assurantie Maatschappij "de Zeven Provencien" N.V. Appellants*, [1987] AC 24, 40, hereinafter referred to as *South Carolina*.
[36] Above note 5, 826.
[37] Ibid 831-832. Emphasis added.

> [I]t would obviously weigh heavily, probably conclusively, against the grant of interim relief if such grant *would obstruct or hamper the management of the case* by the court seized of the substantive proceedings ("the primary court"), or *give rise to a risk of conflicting, inconsistent or overlapping orders* in other courts. It may weigh against the grant of relief by this court that the primary court could have granted such relief and has not done so, particularly if the primary court has been asked to grant such relief and declined. On the other hand, it may be thought to weigh in favour of granting such relief ... always provided that ... this court does not tread on the toes of the primary court or any other court involved in the case.

Hence, since the order could not be made by the Swiss court, it could not conflict with the Swiss proceedings. The injunction was granted. The role of the secondary court was not to remedy the defects of the foreign law but "rather to supplement"[38] the jurisdiction of the primary court.

What are the key points to remember from Lord Bingham of Cornhill's attempt to narrow down the test of inexpediency? The mere ancillary role of the court should not prevent it from exercising its power.[39] However, this jurisdiction should be exercised with caution because of a potential interference.[40] When there is a gap of order, i.e. when the primary court cannot grant any order, no interference arises. The caution lies in the risk of overlap of orders, i.e. when the primary court could have granted an equivalent order but has refused to do so or the defendant has not applied for it. In *Refco*, the plaintiff contended that obtaining such an injunction before the Illinois court was too difficult. The granting of the injunction by the secondary court was dismissed: the Illinois court had the power to grant a freezing injunction. Lord Millet, referring to Lord Bingham of Cornhill's speech in *Crédit Suisse* held that:[41]

> For my part, I cannot see any significance in the distinction between a case where application has been made to the primary Court and has been refused and a case where this Court is satisfied that application to the primary Court would be pointless because it would inevitably be refused ... It is the ground on which the application, whether actual or contemplated, would be refused which is relevant.

Potter L.J, agreeing on the dismissal of the application, however, disagreed with Lord Millet:[42]

> I do not read the remarks of [*Crédit Suisse*] as indicating that it is inevitable that ancillary relief under s. 25 will be refused whenever an earlier application has been made and refused in the primary Court, or when for some reason the plaintiff has had, but has not exercised, the opportunity to apply to that Court for *Mareva*-type relief. In the latter case, there may

[38] Ibid 827, per Lord Millet.
[39] Ibid 826.
[40] *Refco Inc. and Another v Eastern Trading Co and Others* [1999] 1 LLR 159, 164 and 171, hereinafter referred to as *Refco*.
[41] Ibid 175.
[42] Ibid 174.

> well be some legitimate tactical reason (other than fear of failure) for first seeking such relief in the jurisdiction where the defendant's assets are known to be located.

Thoughtful divergence between their Lordships considering that they both heard *Crédit Suisse*. Was Lord Bingham misunderstood?

In *Ryan v Friction Dynamics Ltd*,[43] a worldwide freezing order had been granted by the primary court (US) when the plaintiff applied in England for a domestic freezing order. Relying on Potter L.J.'s statement, Neuberger J. held that an overlapping order could be granted. However, the Judge also pointed out Dillon L.J.'s statement in *Re BCCI SA*[44] that there is a strong case for "discouraging a multiplicity of applications for overlapping freezing orders against the same defendants in respect of the same assets in different jurisdictions"[45] and to prevent forum shopping by the plaintiff. The Judge came to the conclusion that before granting an overlapping order, the secondary court should give cogent reasons for doing so and should track the terms of the order granted by the primary court. The application for discharge was dismissed. The plaintiff had a cogent reason for the grant of the order: a British bank had misunderstood the US order and had let the defendant use some moneys. In the writer's view, *Ryan* was not an overlapping orders case. The order was not granted in aid of foreign proceedings but rather to support, in England, the efficiency of the order granted by the US court. We will see in part IV that a Mareva cannot be recognised and enforced in common law jurisdictions. Hence, as to third parties, the only way to ensure that the order will be obeyed is to apply for its equivalent in the other jurisdiction.

The matter would stand differently if the US court had refused to grant any order or the English court would have gone further than necessary to support the efficiency of this foreign order, i.e. would have granted in England a worldwide freezing order. This would have been a *real* overlapping order.

What about Potter L.J.' s statement which seems to accept the grant of an overlapping order? In the writer's view, it must be put into perspective. When the primary court has refused the order (or is likely to do so), Millet L.J.'s approach is preferable. When the order sought before the secondary court is only to support the domestic efficiency of the foreign order, Neuberger J.'s approach is correct. Finally, we will see in part III that the order can be granted even before the proceedings have been started abroad. On this point, the writer agrees with Potter L.J. that there can be legitimate reasons for granting the order. It cannot yet interfere with anything. However, the court should be careful in using its discretionary power. Were other countries to adopt the Mareva in aid of foreign proceedings, Potter L.J.'s statement should be taken with care and understood in the light of the factual circumstances of each case mentioned above.

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[43] [2001] CPRep 75, hereinafter referred to as *Ryan*.
[44] [1994] 1 WLR 7083, cited in *Ryan*, ibid.
[45] Ibid.

The second argument militating against injunction in support of foreign proceedings is that the secondary court cannot control the substantive proceedings and is likely to be less aware of all the circumstances of the case.[46] In the writer's view, this does not matter so long as the court can control its own order. It is granted because of the existence of the substantive proceedings. It should therefore adapt to them. As a matter of fact, the secondary court cannot be aware of what is happening abroad if one of the parties does not seize it. If the trial turns in favour of the defendant, the latter will apply for discharge or variation before the secondary court.

The other problem is that the secondary court might not consider the new elements as being as determinative as the primary court. It is submitted that when a court intervenes in aid of foreign proceedings, it must assume that its co-operation must be in accordance with the findings of the primary court. It is of course not bound by them, but it must keep in mind that its role is ancillary - *Accessorium principale sequitur*. According to Schlosser,[47] the best court able to modify the order is the primary court, as far as the support order has been recognised and declared enforceable there. Schlosser contends that the primary court could change the order granted by the secondary court without amounting to an infringement of another country's sovereignty. "Nowadays, one can propose that a customary rule of international law gives power to the courts to modify support orders of foreign courts."[48] Schlosser relies on the practice by some courts of modifying maintenance obligations granted on the basis of The Hague Convention and the lack of contest of the infringement of its sovereignty by the supportive State.

In the writer's view, such a customary rule of international law does not exist. Considering the requirement to establish it - the evidence of a general practice accepted as law[49] - and the very few rules recognised at present, it cannot (yet) exist and is not likely to ever exist. The rule remains that a court must take a foreign judgment as it is; no revision as to its substance is permissible. When the order has been recognised before the primary court, the only possible remedy before it as regards to the support order is an application for declaratory relief.

Moreover, Schlosser's proposition is unrealistic. Firstly, based on *Crédit Suisse*, the Swiss court could not have granted the order. How can a court which cannot by law grant such an order modify it afterwards? And it is unimaginable to ask the Court of Appeal of Douai[50] to modify a Mareva injunction when French law does not even know what a pre-judgment remedy in personam is. It would place on the primary

[46] *Ryan*, above note 43.
[47] P Schlosser "Jurisdiction and international judicial and administrative co-operation" (2000) 284 Recueil des Cours de l'Académie de La Haye, p 193-197 and 294-298, hereinafter referred to as P. Schlosser, RCAH.
[48] Ibid.
[49] Statute of the International Court of Justice, Article 38.
[50] This French court is chosen by pure hazard, nothing in this statement is to be regarded as questioning its competence or generally the competence of French courts.

court a heavy burden of understanding the foreign law when it is a lot easier for the secondary court to read the preliminary hearings before the primary court.

Moreover, several means are at the disposition of the court to control the plaintiff in order to avoid hardship on the defendant. The first one is that the order can be conditional upon the fulfilment of requirements. The plaintiff must generally provide guarantees and undertakings, e.g. obtaining permission from the court before taking any further steps in the substantive proceedings. If they are not respected, the plaintiff places himself in contempt of court, which the defendant can raise to have the order modified or discharged. The penalty is not one-sided, placed solely upon the defendant. Therefore, the problem is not so much that the court does not control the substantive proceedings but it is a problem of being able to control the wrongdoings of the parties.

Does the point of view of the foreign court matter when the English court is asked to exercise its power? In *Crédit Suisse*, the Judges did not consider whether or not the Swiss court would welcome their intervention. The final court to decide whether the injunction should be given its full effect is the court where the enforcement is sought.[51]

Rix J., in *Refco*, adopted a slightly different approach: the English court should be "cautious and sensitive to the informed view of the foreign court concerned with the substantive merits".[52]

Was it necessary to express those concerns? *Crédit Suisse* was decided on the basis of an international instrument requiring the cooperation of its contracting members, the Lugano Convention, equivalent of the Brussels Convention for non EU Members. In *Refco*, Section 25 was applied to a non-convention country. The cooperation was purely one-sided and dependent on the willingness of the English court. However, as pointed out by Morritt L.J in *Refco* before the Court of Appeal, there should not be any difference in the "approach in non-Convention country cases for Parliament must have intended the same principles to apply to all countries."[53] Millet L.J added:[54]

> The test is an objective one. It does not depend upon the personal attitude of the Judge of the foreign Court or on whether the individual Judge would find our assistance objectionable. Comity involves respect for the foreign Court's jurisdiction and process, not respect for the foreign Judge's feelings.

Does the test of inexpediency cover any notion of connection with England? That is when neither the defendant nor his assets are within the jurisdiction, is it inexpedient for the court to grant the injunction? The first case to deal with this

[51] Above note 5, 826.
[52] Above note 40, 170.
[53] Ibid 172.
[54] Ibid 175.

problem was *Duvalier*. The defendants to the merits were resident in France, the location of the assets was absolutely unknown. The only connection with England was the presence there of solicitors who were used in a scheme for the concealment of assets. However, this question was not addressed under the test of inexpediency.

To date, the last case to expressly deal with the connection with the jurisdiction of either the defendant or the assets or both under the inexpediency test is *Motorola Credit Corporation v Cem Cengiz Uzan, Kemal Uzan, Murat Hakan Uzan, Aysegul Akay*.[55] Some of the defendants were not amenable to the English jurisdiction and had no assets in the UK. Paradoxically, the court did not rely on this very lack of connection to dismiss the application but reasoned in terms of enforcement of the order. The problems as to the exercise of such a jurisdiction and the reasoning in terms of enforceability will be dealt with in Part IV.

Finally, *Motorola* raises an interesting question: the Mareva in aid of foreign proceedings is granted as a pre-judgment remedy. The final judgment will be subject to its recognition in England before the plaintiff can enforce it. The defendants contended that it was inexpedient to grant the Mareva: the New York judgment would never be recognised in England since the merits were heard under the American RICO legislation, contrary to English public policy. What is indeed the point of securing assets in view of a prospective enforcement if the judgment cannot be recognised? Although the argument did not succeed since the claim was not in actual fact based on RICO, it opens the door for challenging the inexpediency of the order. The statement of Lord Bingham of Cornhill C.J. might well be true: "[i]t would be unwise to attempt to list all the considerations which might be held to make the grant of relief under section 25 inexpedient or expedient ..."[56] Only practice will provide an understanding of what the inexpediency covers.

It has to be noted that not all the Members of the EU have gone as far as England. Ireland has kept a distinction between proceedings within the scope of application of the Brussels Regulation and proceedings outside of its scope. The Irish equivalent of *The Siskina*, *Caudron v Air Zaire*[57] is still good law for cases outside of the Brussels Regulation.

At this stage, the question is whether there is a real need for other countries to adopt an equivalent of Section 25 or whether the Courts already have the whole armoury.

C. *The Wreck of The Siskina: a Mareva is Not Ancillary to the Substantive Proceedings*

The Siskina has been the subject of much criticism and has received different salvos.

[55] [2004] 1 WLR 113, hereinafter referred to as *Motorola*.
[56] *Crédit Suisse*, above note 5, 831.
[57] [1986] ILRM 10.

Though not concerning an injunction in aid of foreign proceedings, Lord Denning held in *Chief Constable of Kent v V*[58] that since the enactment of Section 37 SCA 1981, a Mareva is a cause of action in itself and can stand on its own. His Lordship therefore came to the conclusion that had the section been applicable before *The Siskina*, the court would have ruled differently. His view has been rejected in subsequent cases.[59]

In *South Carolina*,[60] the majority judgment, referring to *The Siskina*, noticed that the power to grant an injunction has been "circumscribed by judicial authority dating back many years."[61] Lord Goff of Chieveley said that he was reluctant to accept that the power should be limited to certain exclusive categories.[62] Despite the lack of jurisdiction of the court over the merits, the injunction was granted: the anti-suit injunction does not fall within *The Siskina*. As noticed by Michell, when such an exception is recognised, the rule becomes immediately suspect.[63]

According to Staughton L.J., since the enactment of Section 25 CJJA, either a claim for interim relief is itself a cause of action or there can be proceedings and a claim without a cause of action. For him, the solution is "merely a matter of semantics."[64]

In *Channel Tunnel Group*, Lord Browne delivered his judgment on the basis that *The Siskina* correctly stated the law. However, his Lordship expressed doubts that this was the case but reserved his opinion for a future case.[65]

The issue in England as to the power of the court is reduced to a statute-based discussion. However, this is not the only approach to the matter. Whereas the English courts consider that their power exclusively derives from statute, the Australian courts found it in the courts' inherent power to ensure effective administration of justice. The primary development is found in *Riley McKay Pty Ltd v McKay*.[66] The High Court of Australia endorsed it in *Jackson v Sterling Industries Ltd*: "[t]he power of a court to grant injunctions of the Mareva type and associated relief is to be found in its capacity to prevent the abuse of its process ..."[67] While several views were expressed in this case, there was a general consensus that when the power is enacted in a statute, it is only confirmatory of the court's

[58] [1982] 3 All ER 36, 40-41.
[59] Steven Gee Q.C. *Mareva Injunctions and Anton Piller Relief* (4th Ed. 1998, Sweet & Maxwell), 178.
[60] Above note 35.
[61] Ibid 40.
[62] Ibid 44.
[63] P Michell "The Mareva Injunction In Aid Of Foreign Proceedings" [1993] Osgoode Hall Law Journal 741, 756.
[64] *Duvalier*, above note 6, 211.
[65] Above note 18, 343.
[66] [1982] 1 NSWLR 264, hereinafter referred to as *Riley McKay*.
[67] (1987) 162 CLR 612, 617.

power.[68] The distinction between England and Australia was put at its highest in *Patterson v BTR Engineering (Aust) Ltd*.[69] Rogers A-AJ said that the law about the Mareva in England stemmed from "historical factors and the jurisdictional basis on which the remedy has been built in that country. In Australia, in contrast to England, the primary basis accepted by courts for jurisdiction ... has been the inherent jurisdiction of the court." His Honour held that "[i]n contrast, in Australia, ... the justice of the case may require that injunctive relief be granted even before the cause of action arises."[70]

It seems therefore that Australian courts would not follow *The Siskina* on the issue of power to grant a Mareva since they do not consider that it is necessarily ancillary to a cause of action. This view is confirmed by *Construction Engineering (Australia) Pty Ltd v. Tamber*.[71] The contract contained an arbitration clause. The plaintiff applied for a Mareva. The issue before the Supreme Court of New South Wales was therefore whether the court "has jurisdiction to grant a Mareva injunction when there is no primary proceedings before it and the plaintiff does not propound a cause of action."[72] Clarke J. held that "there is no reason in principle why the jurisdiction of the court to grant Mareva should not apply where the party seeking the order is claiming moneys in an arbitration as well as when he is propounding a claim in the courts."[73] The Judge relied on *Riley McKay* which "instructs that [the] whole purpose [of the jurisdiction] is to prevent conduct inimical to the administration of justice."[74]

In *Cardile v LED Builders Pty Ltd*,[75] the High Court of Australia even suggested that "the term 'injunction' is an inappropriate identification of that area of legal discourse within which the Mareva order is to be placed."[76] According to Devonshire, the High Court of Australia "having emancipated Mareva orders from the realm of injunctions, [...]has positioned Australian law to impose Mareva and analogous relief as *free-standing aid where the circumstances warrant*."[77] If it is not an injunction, what is it? Devonshire suggests that "the order has more affinity to a procedure than a remedy."[78]

Australia is not the only country to depart from England. In Canada, according to Michell, the Supreme of Canada has rejected both *The Siskina* and *Mercedes* in

[68] P Devonshire "Freezing assets, disappearing assets and the problem of enjoining non-parties" (2002) LQR 124, 136.
[69] (1989) 18 NSWLR 319.
[70] Ibid 328-329.
[71] [1984] 1 NSWLR 274.
[72] Ibid 277.
[73] Ibid 278.
[74] Ibid.
[75] (1999) 198 CLR 380.
[76] Ibid.
[77] P Devonshire, above note 68, 138. Emphasis added.
[78] Ibid.

BMWE v Canadian Pacific Ltd[79] "insofar as they purport to make an accrued cause of action a necessary precursor to the award of a Mareva injunction."[80]

What conclusion can be drawn as to the power of the court to grant an injunction when it is not seised of the substantive proceedings? *The Siskina* made it clear that a Mareva cannot stand on its own, it is necessarily ancillary to the substantive proceedings, the cause of action, tried before the court. The different salvos consist in saying that either a Mareva is a cause of action in itself or does not require a cause of action. These salvos only reach the sails of *The Siskina* and make it list, nothing more. To be sunk, the salvo must reach the hull, the foundation of *The Siskina* itself. In other words, it is enough to demonstrate that the Mareva is not granted in aid of the cause of action asserted in the proceedings.

The reasoning is found in Lord Nicholls' opinion in *Mercedes*. Lord Nicholls demonstrated that the Mareva departs from any other classic injunction. The facts were very similar to *The Siskina*. The proceedings were heard in Monaco, no claim could be brought before the Hong Kong court, the defendant was outside the jurisdiction. The majority judgment divided the problem into two questions: the issue of service out of the jurisdiction and the issue of power. Since their Lordships came to the conclusion that they had no jurisdiction over the defendant, there was no point in considering whether the court had the power to grant the injunction. Lord Nicholls took the problem the other way round and analysed the power first. Why choose this path? Once the issue of power is solved, it puts into perspective the issue of service out of the jurisdiction.[81] Lord Nicholls noted that when *The Siskina* was heard, the Mareva was still in its infancy and the Judges did not benefit from the further developments in this area. One of the points mentioned is that the courts now grant worldwide Mareva in order to allow a plaintiff to secure the enforcement of the judgment in other countries. The practice as to the grant of a Mareva must now be scrutinised in the light of the international context.[82]

In passing, this argument raises a policy consideration. There is a kind of paradox that the court seeks to secure the execution of its judgment abroad whereas, on the other hand, it refuses to secure the enforcement there of a foreign judgment.

The learned Judge held that the power of the court exists and has received legislative recognition.[83] The question was therefore a matter of ambit of this power, not of

[79] [1996] 2 SCR 495.
[80] Above note 63, 782.
[81] Above note 1, 305-D.
[82] Ibid 308 A-B.
[83] Ibid 306 A. In England, in s. 37 of the Supreme Court Act 1981, hereinafter referred to as SCA. In Hong Kong, in s. 21L(3) of the Supreme Court Ordinance (cap. 4). In New Zealand, the power is recognised in R 236 B of the High Court Rules. Contrary to Section 37 (3) SCA 1981, R 236 B is confined to assets situate in New Zealand. However, a worldwide Mareva can be granted under the High Court's inherent equitable jurisdiction. See Helen Cull Q.C. and Stephen Kós *Injunctions and other Emergency Relief* (NZLS Seminar, August-September 2000).

existence. Lord Nicholls started his reasoning analysing a purely domestic situation and gradually extended it to an international context.

In domestic proceedings, generally, a plaintiff applies for a Mareva in the same proceedings as the substantive relief. However, this should not obscure the fact that a Mareva differs from other relief: it is not connected with the subject-matter of the merits of the case, "the plaintiff's underlying cause of action is essentially irrelevant when considering the Court's jurisdiction to grant *Mareva* relief."[84] The plaintiff does not hold any legal or equitable interest in the defendant's assets. It simply happens that the plaintiff has a claim which will result in the award of a money judgment and that no specific assets are related to that claim. However, the plaintiff needs to secure somehow that he will receive the money once the judgment is obtained. The Mareva is therefore granted to *facilitate the enforcement of the judgment*.[85]

As a policy consideration, Lord Nicholls came to the conclusion that the reasons underlying the application of the Mareva in aid of domestic litigation should equally apply to foreign litigation.[86] Lord Nicholls specified that the underlying cause of action is irrelevant when the recognition and enforcement of the foreign judgment is sought. "What matters, so far as the *existence* of jurisdiction is concerned, is the *anticipated money judgment* and whether it will be *enforceable* by the Hong Kong Court."[87] Lord Nicholls' statement was probably what inspired the defendants in *Motorola*.

Yet, it can be argued that the plaintiff has to meet the requirement of the good arguable case, therefore, of a good arguable case concerning the underlying cause of action. However, this question does not concern the existence of the power but the discretion of the court to grant the injunction.[88]

Shifting to a second stage, i.e. an international situation, Lord Nicholls analysed the *Channel Tunnel Group* case. A Mareva can be granted when the English courts have potential jurisdiction over the merits, either because the defendant is present within the jurisdiction or has been duly served under one limb of Ord. 11 (except r. 1(1)(b)). His Lordship came to the conclusion that in this situation, if the defendant "had been a Hong Kong resident, the Hong Kong Court would have had jurisdiction to grant the *Mareva* injunction sought. A writ, claiming *Mareva* relief *and nothing further*, could have been issued and served on him in Hong Kong."[89] This conclusion is of importance when considering the question of service out of the jurisdiction.

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[84] Above note 1, 307 C.
[85] Ibid 306 E-F.
[86] Ibid 306 H.
[87] Above note 1, 307 C. Emphasis added.
[88] Ibid 307 F.
[89] Ibid 310.

Coming now to a third stage where nothing further can be claimed before the court than a Mareva. As seen above, Lord Nicholls' conclusion is that a Mareva is ancillary to the enforcement of a substantive relief.[90] The problem is that the right of enforcement of the substantive relief is only prospective, concerning a judgment yet to be obtained, i.e. ancillary to a right of enforcement of a cause of action not yet accrued. His conclusion is *prima facie* inconsistent with the analysis of *The Siskina* where Lord Diplock held that the right to obtain an interlocutory injunction is dependent upon there being a pre-existing cause of action.[91] However, the usefulness of injunctions is that they can be anticipatory, to prevent anticipated wrongs from being committed. Those are *quia timet* injunctions.[92] Given that the feature of the Mareva is to be anticipatory, "there is no obvious reason why it should be an essential pre-requisite in all cases that the underlying cause of action must have accrued."[93] Subsequent lines of authorities, applying *The Siskina*, show that the Mareva will be granted only in support of an *existing* cause of action.[94] However, those lines of authorities, and especially *The Veracruz I,*[95] have been criticised as departing from Lord Diplock's opinion.[96] The general view is that Lord Diplock did not intend to exclude *quia timet* injunctions and even referred to them expressly when his Honour said "action for an injunction *quia timet* to restrain a threatened breach of contract or a threatened tort within the jurisdiction."[97] As stated by Wilde,[98] as Lord Diplock accepted that an interlocutory injunction can be granted in support of a *quia timet* action, the whole basis of *The Veracruz I* disappears.

As a conclusion, a Mareva in aid of foreign proceedings does not depart from a Mareva in aid of domestic proceedings. It is an injunction ancillary to a prospective right of enforcement of a substantive relief, yet to be obtained.

The reasoning of Lord Nicholls was followed by the Court of Appeal of Jersey in *Solvalub*.[99] The Judge reasoned as follow: neither *The Siskina* nor *Mercedes*, in the majority, addressed the question of power. Therefore, the latest judicial pronouncement on this point is found in Lord Nicholls' dissent in *Mercedes*.[100]

Why should other jurisdictions follow Jersey and therefore follow Lord Nicholls? After *Mercedes*, some academics said that considering the composition of the majority judgment -high figures of the law- the case was unlikely to be revisited

[90] Ibid.
[91] Ibid 311.
[92] Ibid.
[93] Ibid 312 B.
[94] Steven Gee, above note 59.
[95] *Veracruz Transportation Inc. v VC Shipping Co. Inc.(The Veracruz I)* [1992] 1 Lloyd's Rep 353.
[96] See Lord Nicholls, above note 1, 312 C-D. For a discussion of *The Veracruz I*, see also L Collins "The Legacy of The Siskina" [1992] LQR 175; D Wilde "Jurisdiction to grant interlocutory (*Mareva*) injunctions" [1993] LMCLQ 309.
[97] *The Siskina*, above note 13, 257-C.
[98] Above note 96.
[99] Above note 11.
[100] Ibid para 33-35

unless the same question came before the House of Lords. However, since the enactment of s. 25 CJJA and the subsequent modification to Ord. 11, this case will never arise again in England. It is therefore respectfully submitted that other jurisdictions should strike out on their own path, for the same reason that the Jersey court did.

The question turns now to the point of whether the proceedings abroad should be commenced before applying for the injunction. As an ideal situation, the application should be heard when the proceedings have already been started abroad. This would impair the surprising effect. Therefore, when applying for the injunction, the plaintiff should either demonstrate that the case on the merits is pending before a foreign court or undertake that those proceedings will be started within a limited time. The defendant would be able to apply for contempt of court, were the plaintiff not to comply with the undertaking.[101]

Has this already been done? The situation would be very similar to *A v B*[102] in which the Judge granted an injunction which was not to take effect before and until the delivery of the vessel, at which point the plaintiff's cause of action, which did not yet exist, would arise. It must be noted that this practice is recognised by law in England: s. 25 (1) CJJA sets forth that the High Court can grant an injunction in aid of "proceedings commenced or to be commenced".

At the end of the day, what is the difference between Section 37 SCA 1981 and Section 25 CJJA? Apparently, this would only be a matter of where the substantive proceedings are tried.[103] The court may be asked to exercise its jurisdiction under Section 25 in aid of foreign proceedings or under Section 37 in aid of domestic proceedings. According to Staughton L.J in *Duvalier*, the relation between both sections is that in the first place, the judge has to consider whether it is just and convenient to grant the injunction pursuant to Section 37 and then to refuse its granting pursuant to Section 25 when it is inexpedient for the court to do so.[104]

Considering the reasoning of Lord Nicholls in *Mercedes*, the power to come in aid of foreign proceedings already exists. The final difference between both sections is the wording of "inexpediency". Does "convenient" not already convey any notion of an injunction which is not inexpedient? None of these terms have been defined by caselaw. Opening the *New Shorter Oxford English Dictionary,*[105] convenient is defined as something "suitable to or for a purpose, the circumstances", inexpedient is something "not advantageous, useful or suitable." There is, therefore, no difference between Section 37 SCA and 25 CJJA. Hence, on the issue of power, there is no need for a change of legislation.

[101] P Michell, above note 63, 794.
[102] [1989] 2 QB 423.
[103] "Interim relief in aid of foreign proceedings" 16 (1997) CJQ 185, 187-188.
[104] Above note 6, 215.
[105] Clarendon Press, Oxford, 1993.

As demonstrated by Lord Nicholls, when the defendant is within the jurisdiction, a Mareva injunction can be granted in aid of foreign proceedings. However, a caselaw study shows that in the majority of cases, the defendant is outside the jurisdiction. The question turns therefore to the issue of whether a court can serve the Mareva proceedings, and nothing more, on a defendant outside the jurisdiction. In England, the problem of service out of jurisdiction of a Mareva in aid of foreign proceedings was solved by statute. After the modification brought to Section 25 by Order 1997 (Interim Relief), a new rule, r. 8A was inserted in Ord. 11 and provided that service of an originating summons out of the jurisdiction claiming interim relief under Section 25 was permissible with the leave of the court.[106] Service out of the jurisdiction can now be granted in England without leave of the court under Civil Procedure Rules (CPR) 1998 r. 6.19 for cases within the scope of the Brussels I Regulation and with the permission of the court under CPR 1998, r6.20 (4) for other cases. There is no requirement of "an action begun by a writ".

The problem remains for the other countries which still have an equivalent of Rules of Supreme Court (RSC) Ord. 11, r 1(1)(b).

III. SERVICE OUT OF THE JURISDICTION AUTHORISED BY STATUTE

The jurisdiction of the English courts over persons is territorial. Therefore, the traditional rule was that jurisdiction of the courts was dependent upon the domicile of the parties being in England. This rule allowed defendants who had incurred debts within the jurisdiction and had not paid for them to avoid being brought before the English courts by simply leaving the jurisdiction. The gap in the law was progressively filled by the Common Law Procedure Act 1852, the Supreme Court of Judicature Act 1875 and the Supreme Court of Judicature (Consolidation) Act 1925.[107] Primarily, service out of the jurisdiction was justified by the defendant's fraud, defendant who would have otherwise been amenable to the jurisdiction of the English Courts had he not decided to escape from it. Order 11 entitles the High Court to grant leave to a plaintiff to serve the proceedings upon a person outside the territorial limits of England and Wales in those cases specified in the sub-rules. Jurisdiction depends now on service. It is restricted to those upon whom the proceedings can be served within the territorial limits of England and Wales.

To be able to serve a defendant outside the jurisdiction, Order 11 imposes a connection between the claim and the country, mainly when a contract is governed by English law or a tort has been committed in England. Aware that bringing within the jurisdiction of the court a defendant who is not normally amenable to that

[106] Above note 103, 188.
[107] Lawton L.J., *The Siskina*, above note 13, p 236.

jurisdiction could be a breach of comity, the judges exercise the power to serve out of the jurisdiction with great caution.[108]

Ord.11 has been enacted in most common law jurisdictions with few variations.

I turn now to service out of the jurisdiction of a Mareva injunction in aid of foreign proceedings on a foreign defendant. It seems that there is no connection with England within the spirit of Ord. 11. The only reason why the plaintiff seeks a Mareva is either the presence or the probability of the presence of assets there. An ex parte order is even more arguable on the very point of jurisdiction over the defendant outside the jurisdiction. It cannot even be said that defendant was brought *tout court* within the court's jurisdiction since he was not even offered the possibility to be present at his own trial.

The question is whether Ord.11 r.1(1)(b) authorises service out of the jurisdiction of a Mareva and nothing further on a defendant abroad.

In *The Siskina,* the defendants raised the argument that no substantive proceedings were in England and therefore, the injunction did not fall within the wording "if in the action begun by a writ". Lord Denning M.R., in the Court of Appeal, rejected that submission. His Honour's arguments can be summed up as follows: when tracing the different versions of Ord. 11, it does not seem that Parliament had intended such a restriction on the meaning of "action". Secondly, the judges have the power to set up the rules of procedure before the courts and they should use it in order to avoid the unfair situation of the defendant decamping with the moneys. Lord Denning M.R. therefore proposed to usurp the function of the legislative body to adapt the rule to the practice and the new circumstances. It is not a matter of strict interpretation of the letter of Ord. 11, but it is mainly a matter of policy considerations, of harmonisation of the laws and comity.[109] This proposition was criticised by the House of Lords: the wording of Ord. 11 is clear, there must be "action" in England. The court's function is not to usurp the legislature. It has no power to make orders against persons outside its territorial jurisdiction; there is no inherent extra-territorial jurisdiction unless authorised by statute. The judges cannot override a statute, as laudable as their intention might be.[110] However, in *The Siskina*, the questions of power and service out of the jurisdiction were dealt with together. As seen above, they are two different issues and must be dealt with separately.

The question of service out of the jurisdiction when the power of the court is recognised arose in *X v Y*:[111] the injunction was applied for pursuant to Section 25

[108] L Collins *Essays in International Litigation and the Conflict of Laws* (Oxford Press, 1994), 227-229, hereinafter referred to as L Collins, Essays.
[109] Above note 13, CA, 235-236.
[110] Ibid HL, 260. See also *Mercedes*, above note 1, 296.
[111] Above note 27.

CJJA, in aid of the foreign proceedings over a defendant who was neither resident nor present within the jurisdiction. He only had a bank account in London. Ord. 11 had not yet been modified.

The plaintiff submitted alternative arguments. Either the case fell within Ord. 11 r. 1(1)(b) or Section 25, by implication, authorised service of proceedings out of the jurisdiction. The Deputy Judge rejected the submission that Section 25 authorised service out of jurisdiction. The defendant relied on *The Siskina*: since the wording of Ord. 11 had not changed, it had to be interpreted according to the former case. The Deputy Judge rejected that submission "wholly inconsistent with the undoubted purpose of section 25 which was to reverse the effect of the Siskina case ..."[112] Indeed:[113]

> [W]hat is the point of the ... court having a 'power' jurisdiction in such a case if it has no 'territorial' jurisdiction? The answer may be, not much. In the cases where the 'power jurisdiction' is most needed, it may be incapable of being invoked, for want of 'territorial' jurisdiction.

The question was again under scrutiny in *Mercedes*. The majority criticised *X v Y*: "[w]hatever else may be said about the current standing of The Siskina it has not so far been reversed by anything ..."[114] Lord Mustill considered that it was not enough to simply read the words of the rule and see whether, taken literally, they were wide enough to cover the Mareva in aid of foreign proceedings.[115] "Rather, it must be asked whether an extra-territorial jurisdiction grounded only on the presence of assets within the territory is one which par. (b) and its predecessors were intended to assert."[116] Their Lordships took the same reasoning as in *The Siskina*: Ord. 11 is confined to documents setting in motion proceedings designed to ascertain substantive rights. Lord Nicholls was dissenting on this issue. It must be remembered that his Lordship first dealt with the issue of power considering that the answer to that question will provide guidance to answer to the problem of service. Lord Nicholls held that had the defendant been resident within the jurisdiction, a writ and nothing more could have been issued on him. There is no reason, therefore, not to allow service out of the jurisdiction when a writ claiming nothing further than a Mareva can be issued on a domestic basis.

Ord.11 r. 1(1)(b) requires an *action* begun by a writ. And what is a cause of action, anyway? This is no more than a label.[117] Firstly, the range of causes of action is wide and extends to cause of action where the underlying right is elusive. Secondly, some injunctions are even granted when there is no cause of action: for example, anti-suit injunction and *Norwich Pharmacal* orders. "It is only a short step from this to the

[112] Above note 27, 230.
[113] Paul Matthews "No Black Holes, Please, We're Jersey" (1997) Jersey Law Review 132.
[114] Above note 1, 304.
[115] Ibid 299.
[116] Ibid 301.
[117] Ibid 310.

Court granting an injunction as a protective measure in respect of a right (of enforcement) which has not yet come into existence."[118] Accordingly, Lord Nicholls concluded that "[t]he end result, that a *Mareva* injunction in aid of a prospective judgment being sought from another Court is an injunction within the meaning of par. (b), is sensible and reasonable."[119]

In *Krohn GmbH v Varna Shipyard*,[120] the Royal Court of Jersey followed Lord Nicholls. The court held that "the words of rule 7(b) of [the Service of Process (Jersey) Rules 1994] should be given their natural meaning."[121] Accordingly, service on a defendant outside Jersey was granted. Jersey, being equipped with a classic armoury composed of the equivalents of Section 37 SCA and Ord. 11 r. 1 (1)(b) reached the same position as England reached under Section 25 CJJA and CPR 1998 r.6 (20) without any legislative change.

Supposing that *The Siskina* was right in saying that the Mareva is ancillary to the substantive proceedings, saying that Parliament had intended the grant of the injunction only when an action is tried before the court under Ord. 11 r. 1(1)(b) does not make sense in the light of the other limbs to grant service. According to the maxim *accessorium principale sequitur*, when the court has jurisdiction over the substantive proceedings, the court also has the ancillary jurisdiction. It means that when proceedings are served under Ord. 11 (except 1(1)(b)), the court has the ancillary jurisdiction anyway. What would be the point of Parliament only confirming a power that the court already has? It must be that Parliament had intended to give the court the "accessory" without the "principal." Ord. 1(1)(b) has its own scope, is an independent heading.

Supposing that all the arguments above are wrong and that there is a real problem in the wording of Ord. 11 which prevents the court granting service, what are the policy considerations militating in favour of an intervention of Parliament to modify the rule? In 2005, does the Ord. 11's justification of circumventing the defendant's fraud to the jurisdiction of the court still make sense? Considering the means of communication, the ease of removing assets by a simple click on the Internet, this is finally a matter of fraud *tout court*. Alternatively, it is a *fraud to the enforcement of a foreign judgment*. Capper's statement, "if assets within the jurisdiction were ground enough for Mareva relief there could be well a forum shopping problem,"[122] does not stand. International fraud requires international cooperation wherever the assets are. It can be argued that international co-operation based on an international instrument, i.e. where Sovereign States have agreed to it, and "unilateral judicial activism for the purpose of assisting foreign courts at the mere request of an interested party"[123] are two different things. However, the judges have consistently

[118] Above note 1, 312.
[119] Ibid 313.
[120] [1998] ILPr 614, hereinafter referred to as *Krohn*.
[121] Ibid 620.
[122] D Capper "The trans-jurisdictional effects of Mareva injunctions" [1996] CJQ 211, 230.
[123] P Schlosser, RCAH, above note 47, 389-394.

referred to a need of co-operation to respect comity and to adapt to the needs of the international community. What drives them is not imperialism but a concern for "good manners", for comity, in order to avoid becoming a black-hole jurisdiction.[124] In this area, co-operation should occur without waiting for an international instrument to allow it, as it is already the case in cross border insolvency.[125] The *BCCI* case is a striking example of spontaneous international co-operation.

When looking at the facts of the cases where a Mareva in aid of foreign proceedings was granted, fraud is always central. A typical Mareva case is when:[126]

> ... the defendant is accused of participation in fraud or dishonesty, or [when] defendant's financial affairs are so structured, for instance because it is a company which has lost its single or major asset, or because its funds in England are typically purely transient, or because its funds are typically concealed in or switched between entities which lack transparency ...

The determinative test for a Mareva in aid of foreign proceedings is therefore the obvious willingness of the defendant to conceal his assets, using either the weaknesses of conflict of laws or the strengths offered by foreign law to use non-transparent legal entities; and the white hands of the plaintiff. The courts should restrain themselves from granting a Mareva where the allegations are on both side.[127]

In *Babanaft* (though concerning a post-judgment remedy), the defendants were held "unusually peripatetic in their life style and elusive in the way they do business and hold assets ... All "their" assets appear to be held in the names of a large network of companies incorporated in many countries in which they or members of their families hold bearer shares."[128]

In *Duvalier,* there was strong evidence that the defendants had "been attempting to conceal their assets, or place them beyond the reach of courts of law." It was even acknowledged by their lawyer. There was evidence that the defendants had used a stratagem explained by a lawyer in a book that dealt with the concealment of assets within the Swiss jurisdiction.[129]
In *Solvalub*, the Judge expressed concerns of not transforming Jersey into a judgment-proof haven.[130] Considering that a well-known offshore country[131] has decided not to follow *The Siskina*, there would be some kind of paradox if Members of the OECD, fighting against money laundering and tax-heaven, could become

[124] *Krohn*, above note 120, 619.
[125] *Crédit Suisse,* above note 5, 827.
[126] *Refco*, above note 40, 164 and 171.
[127] Ibid 164.
[128] Above note 6, 22.
[129] Above note 6, 206-208.
[130] Above note 11.
[131] See also the discussion before the Bahamian courts whether to follow or not *The Siskina* in A Trichart and N Watts "Plugging black holes: freezing assets in aid of foreign proceedings" (2001) 39 Law Society Journal 50, 52.

judgment-proof havens because either the courts or Parliaments have decided to close their doors to international cooperation on a simple issue of service.

The question is whether other courts, such as Australian, Canadian or New Zealand ones would be ready to reject *The Siskina* and *Mercedes* on the question of service out of the jurisdiction.

Trichart and Watts suggest that the Australian courts could play with the subtle difference in the wordings of its own legislation. The authors also mentioned a Report of the Law Commission considering a change in the wordings.[132] According to the writer, the Australian approach as to the cause of action and the Mareva is enough for considering that the Australian court can grant service.

According to Michell, the meaning of the Ontario equivalent of Ord. 11 r. 1(1)(b) is ambiguous and the Canadian courts tend to require a connection between the underlying dispute and the country.[133] However, the author suggests that since *The Siskina* and *Mercedes* have not been followed on the accrued cause of action, the courts might be more flexible on the issue of service.[134]

The power and the jurisdiction having been established, the question arises as to the scope of the Mareva. Section 37 (3) SCA does not restrict the scope, geographical or otherwise of the relief, i.e. Section 37 can be the basis for a Mareva over foreign assets.[135]

IV. THE GEOGRAPHICAL SCOPE OF THE MAREVA

In its wide meaning, extraterritoriality is defined as the application of national laws to conduct occurring outside the national territory. It includes two different notions: the application of the substantive domestic law to acts outside the jurisdiction and the exercise of jurisdiction over foreigners, often referred to as "exorbitant jurisdiction". Extraterritoriality is contrary to public international aw.
A Mareva can be granted over domestic assets or foreign assets. Therefore, when granted worldwide, it is prima facie extraterritorial and contrary to international comity. This conclusion must be put into perspective. It actually depends on whether the order must be notified aboard. Part A will deal with the geographical scope of the order on a defendant within the jurisdiction. As to the exercise of an exorbitant jurisdiction, we will see in Part B that the geographical scope of the Mareva over a defendant abroad is necessarily limited to a domestic one.

[132] Ibid 54-55.
[133] Above note 63, 766.
[134] The author relies on *United States v. Friedland* (No 1) (20 August 1996) Vancouver Reg. C. 963067 (B.C.S.C) [unreported], ibid 783.
[135] *Babanaft,* above note 6, 27.

A. *Worldwide Mareva on a Defendant Within the Jurisdiction*

The worldwide scope of the Mareva is not typical of an injunction in aid of foreign proceedings and the same difficulty arises when it is granted in aid of domestic proceedings.

1. An extraterritorial order conform to principles of international law as to a defendant within the jurisdiction

As seen in the introduction, the Mareva was, in a first place, limited to assets within the jurisdiction. In *Ashtiani v Kashi*,[136] it was pointed out that the difficulty for the court to control or police the enforcement of the Mareva in other countries and the problems arising out of the notification of the order to third parties abroad barred the court from granting an extraterritorial order. This judgment was based on policy considerations.[137] Were they correct? It depends on whether the order should be notified on third parties abroad. At present, it is enough to consider the question as regards the defendant. Extraterritorial orders must be seen in the light of principles of public international law. An injunction granted in one country can give rise to serious questions of sovereignty. This is illustrated by two cases of inter-governmental disputes.[138] The extraterritoriality, however, does not affect the Mareva. It acts in personam. It does not affect title of property abroad, it is not an attachment and the court does not seek to control the activities abroad of foreigners who are not subject to the personal jurisdiction of the English court. Therefore, in *Babanaft*, it was held that the Mareva does not infringe the exclusive jurisdiction of the courts of other countries concerning assets.[139] Nothing in s. 37 SCA restricts the power of the court as to the geographical scope of the order.

However, the issue of extraterritoriality is not limited to the presence/residence of the defendant within the jurisdiction. It has no boundaries. Take a worldwide order on a defendant who was amenable to the court's jurisdiction at the time of the making of the order. A well-advised defendant might disappear from the jurisdiction and would make contempt of court proceedings a theoretical penalty. There is no mechanism to prevent him from disobeying the order abroad and concealing his foreign assets. Therefore, for more efficiency, the order must be notified to third parties abroad who hold assets of the defendant on his behalf. Foreign banks are required by the order to take any step to ensure that withdrawals from the accounts are blocked. This is an exercise of an exorbitant jurisdiction over third parties abroad.

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[136] [1987] QB 888.
[137] *Babanaft*, above note 6, per Kerr L.J., 27.
[138] For further developments, see L Collins, Essays, above note 108, 99-117.
[139] *Babanaft*, above note 6, per Lord Nicholls, 41; *Derby & Co. Ltd. and Others v Weldon and Others (Nos. 3 and 4)* [1990] Ch 65, per Lord Donaldson of Lymington, 82, hereinafter referred to as *Derby & Co (Nos. 3 & 4)*.

2. *An extraterritorial effect on third parties abroad*

This issue must be clarified: third parties might not be wholly abroad (a) and when they are, the court does not (and cannot) pretend to control acts of foreigners not amenable to the jurisdiction of the court. The efficiency of the order, in this case, is subject to its recognition and enforcement abroad (b).

(a) The Babanaft proviso

Third parties who receive notice of the injunction are also subject to contempt of court if they contribute to the dealing with or disposing of any assets.[140]

However, "[i]f [the third party] is wholly outside the jurisdiction of the court, he is either not to be regarded as being in contempt or it would involve an excess of jurisdiction to seek to punish him for that contempt."[141] The order can only be efficient if it is recognised by the foreign court. This question will be dealt with in sub-paragraph (b).

A major difficulty occurs when the third party is neither wholly inside nor wholly outside the jurisdiction. This concerns banks which operate internationally using branches. As a branch, the overseas entity does not have a separate legal personality. If the head office is incorporated in the country of the court granting the injunction, the head office and the overseas branch are both amenable to the jurisdiction of the court. On the other hand, this branch is also amenable to the law where it exercises its activities. What is required in the order might be illegal under the foreign law. The overseas branch is in the awkward position of being in contempt of court if it does not respect the order and violates the foreign law.

The other problem, though not concerning jurisdiction, is that the relationship between the defendant and the bank is contractual. The bank has a contractual obligation to let the defendant deal with his own assets. The plaintiff is usually ordered to secure money to reimburse the damages suffered by the third party for any breach of contract.

The English courts, faced with the dilemma of non-separate entities, made full use of their talent creating the now so-called *Babanaft* proviso which made it clear that the order was not to have effect on foreigners. The first version of the proviso was criticised by Lord Donaldson M.R. in *Derby & Co (No 3 & 4)*. His first objection was that it treated natural persons differently from juridical persons. The second was that banks amenable to two jurisdictions were placed in a very difficult position. He finally expressed doubts as to the validity of the proviso which had ex facie no

[140] *Z Ltd. v A-Z and AA-LL* [1982] QB 558, 573.
[141] *Derby & Co (Nos. 3 and 4)*, above note 139, 82.

extraterritorial effect and so was not capable of recognition and enforcement under the Brussels Convention.[142]
Hence, Lord Donaldson articulated his own proviso:[143]

> Provided that, in so far as this order purports to have any extraterritorial effect, no person shall be affected thereby or concerned with the terms thereof until it shall be declared enforceable or be enforced by a foreign court and then it shall only affect them to the extent of such declaration or enforcement unless they are: (a) a person to whom this order is addressed or an officer of or an agent appointed by a power of attorney of such a person or (b) persons who are subject to the jurisdiction of this court and (i) have been given written notice of this order at their residence or place of business within the jurisdiction, and (ii) are able to prevent acts or omissions outside the jurisdiction of this court which assist in the breach of the terms of this order."

From "provided that..." to "(a)" inclusive, the proviso only concerns third parties abroad: the effect of the order is subject to its recognition by the foreign court. Starting at "(b)", the proviso concerns third parties neither wholly within nor outside the jurisdiction. Its aim is to bind those who are able to comply with the order and excuse those who are not.

As to the "(ii)" part of the proviso, third parties amenable to two jurisdictions can apply to the court for a variation of the order in respect of assets outside the jurisdiction to "what it reasonably believes to be its obligation, contractual or otherwise, under the laws and regulations of the country or State in which those assets are situated or under the proper law of the account in question."[144]

It must be noted that in New Zealand, the second part of the *Babanaft* proviso has little relevance. Pursuant to rule 236 B(2) of the High Court Rules, third parties have to be identified in the order. This places a heavy burden upon the New Zealand courts which have, in the first place, to identify where the assets are (through the disclosure order) and then, whether they are held by a third party.

(b) What future for the recognition and enforcement of provisional and protective measures in an international convention?

The problem of recognition and enforcement abroad is grasped by Temm J. in *Zietlow v Simon*:[145]

> [O]ne of the matters that exercises my mind about a Mareva injunction over foreign assets is that I am disinclined to make Court orders that cannot be enforced ... It is not intended that the order should be served on anyone outside New Zealand.

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[142] Ibid 83-84.
[143] Ibid 84.
[144] *Baltic Shipping Co. v Translink Shipping Ltd. and Translink Pacific Shipping Ltd* [1995] 1 Lloyd's Rep 673, 674.
[145] Above note 12, 374.

According to Kerr L.J.:[146]

> [T]he key to the proper exercise of any extraterritorial jurisdiction must lie in the question whether there is international reciprocity for the recognition and enforcement of the type of order which is under consideration, in this case a *Mareva* injunction or a variant of it purporting to operate on the defendants' assets abroad.

Kerr L.J. had in mind the Brussels Convention.

In common law jurisdictions, a Mareva cannot be recognised: it does not fall within the category of "final and conclusive judgment" of the rights of the parties to the trial. Even where a bilateral treaty exists between those jurisdictions, the condition of "final and conclusive" judgment remains.

It would be unwise to attempt to draw any conclusion on the recognition and enforcement of a Mareva in civil law jurisdictions. Nonetheless, the French example might be noteworthy to foresee the difficulties arising in those jurisdictions. Prima facie, a Mareva injunction can be recognised in France. Indeed, there is no requirement of final and conclusive judgment, it is enough that the judgment be definitive, i.e. has been declared enforceable in the country which has granted the injunction. However, French courts will only enforce it if under French law there is an equivalent of the injunction.[147] On this point, the Mareva is the opposite of a *saisie-conservatoire*, which requires the plaintiff to demonstrate a proprietary right; or a *référé-provision*, only applicable to a contractual matter where the rights of the plaintiff are (almost) already assessed. Moreover, both act in rem. The problem moves towards the "exportability" of the injunction.

Within the EU, since the transformation of the Brussels Convention into the Brussels I Regulation, the procedure for recognition and enforcement of foreign judgments within the EU has been over-simplified. Article 33 sets forth that "A judgment given in a Member State shall be recognised in the other Member States *without any special procedure being required*."[148] Article 38 sets forth that "A judgment given in a Member State and enforceable in that State shall be enforced in another Member State when, on the application of any interested party, it has been declared enforceable there." Finally, Article 32, which defines what a "judgment" is, does not require it to be "final and conclusive." The grounds for challenge are limited by Articles 34 and 35: when the judgment is contrary to the public policy of the Member where the recognition is sought or/and when it has not respected some specific limbs of jurisdiction. What happens when the country where the recognition is sought does not know the type of injunction granted? The Schlosser

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[146] *Babanaft,* above note 6, 29.

[147] C Kessedjian, "La reconnaissance et l'exécution des jugements étrangers en France hors les Conventions de Bruxelles et de Lugano", in G Walter and SP Baumgartner (eds) *Civil Procedure in Europe, Vol. 3, Recognition and Enforcement of Foreign Judgments Outside the Scope of the Brussels and Lugano Conventions* (Kluwer Law International, 2000), 190-191.

[148] Emphasis added.

Report on the Brussels Convention suggests that the foreign court is under the obligation to apply its closest equivalent.

A Mareva granted pursuant to Article 31 of the Regulation can be prima facie recognised and enforced within the EU. However, the jurisprudence of the European Court of Justice (ECJ) comes into play, which seems to question the English practice.

The very first limitation to the grant of interim relief was laid down in *Bernard Denilauler v SNC Couchet Frères.*[149] The very power of a freezing order lies in its surprising effect, i.e. an ex parte order. It prevents the defendant from concealing the assets before the order is made. However, the ECJ held that ex parte orders are not "judgments" within the meaning of the Regulation.

The second limitation concerns the jurisdiction to grant the relief. As the study of this limitation stems from the ECJ and only concerns EU Members, it is enough at this stage to mention that the ECJ controls the grounds on which the court bases its jurisdiction in order to avoid any *détournement* of the Regulation. *Van Uden Maritime BV v Kommanditgesellschaft in Firma Deco-Line and Another* seems to limit the scope of the injunction to the assets within the country where the injunction is sought:[150]

> The courts of the place or, in any event, of the contracting state, where the assets subject to the measures sought are located, are those best able to assess the circumstances which may lead to the grant or refusal of the measures sought ...

This leads to the question "whether orders made under Article 24 of the Convention [Article 31 of the Brussels Regulation] were ever intended for export."[151] *Van Uden* was ruled for an injunction in rem and the question whether this case will affect the Mareva remains unanswered.

In *Mario Reichert and others v Dresdner bank A.G. (No. 2)*,[152] the ECJ held that when the court intervenes in aid of foreign proceedings, there must be "a real link between the subject matter of the measures sought and the territorial jurisdiction of the Contracting State of the court before which those measures are sought."[153] *Reichert* puts an end to any attempt of the English courts to act as an international policeman. In the *Motorola* case, there was no connection whatsoever with some of the defendants. Had the *Motorola* case been a "EU case", the court should have dismissed the order on the basis that there was no connection with England.

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[149] (C-125/79) [1980] ECR I-01553, para. 18.
[150] (C-391/95) [1998] ECR I-07091, para. 16, hereinafter referred to as *Van Uden*.
[151] Peter Kaye "Extraterritorial Mareva orders and the relevance of enforceability" [1990] CJQ 12, 14.
[152] *Mario Reichert and others v Dresdner bank A.G.* (No. 2) (C-261/90) [1992] ECR I-2149, hereinafter referred to as *Reichert*.
[153] Ibid para. 40.

Finally, as stated above, one of the grounds to challenge the recognition and enforcement is the fact that the judgment is contrary to the public policy of the Member where the recognition is sought. Even though the courts make it clear that the Mareva acts in personam, an order seeking to control the acts of a defendant abroad might well be seen contrary to public policy, as being extraterritorial and stepping on the toes of the court. Moreover, Mareva, on third parties, seem to have an effect in rem. This was pointed out by Lord Denning M.R in *Z Ltd. v A-Z and AA-LL*,[154] though put in perspective, confirmed in *Babanaft*[155] and criticised in *Derby & Co (No 3 & 4)*.[156] Where it has an in rem effect, it can normally only be granted by the court of the *lex situs*.

The ground of "contrary to public policy" becomes relevant in the context of the Hague Project Convention on Civil Jurisdiction and Recognition and Enforcement of Foreign Judgment since it contains an Article on provisional and protective measures. Even though the project is asleep, it might well be roused one day. This issue needs to be looked at carefully under the project to ensure that the question will not arise again. It might well be that the solution lies in harmonisation of pre-judgment remedies.

If the problem of enforceability played tricks on some eminent figures of the English courts in *Babanaft*, *Duvalier* and *Derby and Co Ltd. (No.1)*, the concern of granting an order which might not be efficient abroad was put into perspective in later cases[157] and is considered irrelevant by academics. According to Capper, the approach in terms of potential enforceability abroad is "unworkable. It would require the court to ascertain where the defendant's assets were located and whether any international reciprocity treaty applied to them."[158] According to Kaye, "care should be taken in the future before deifying enforceability [abroad] as a criterion to be taken into account in the exercise of extraterritorial Mareva jurisdiction."[159] It is argued that as far as the court is convinced that the order will have some efficiency within its own jurisdiction, it does not have to consider whether it will be enforced abroad.[160] A court seized of the substantive proceedings does not consider whether its final judgment will be recognised abroad. So should be the case for an interlocutory injunction. This consideration should not bar the court from exercising its jurisdiction.

We turn now to the scope of a Mareva on a defendant abroad.

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[154] Above note 140, 573.
[155] Above note 6, 25.
[156] Above note 139, 83.
[157] *Derby & Co (Nos 3 & 4)*, ibid 80-81.
[158] D Capper "Worldwide Mareva Injunctions" (1991) MLR 329, 336.
[159] P Kaye, above note 151, 15.
[160] *Derby & Co (Nos 3 & 4)*, above note 139, 81.

B. *The Impossibility of Granting an Extraterritorial Order on a Defendant Outside the Jurisdiction*

This impossibility results from statute and from international comity's considerations.

1. *The impossibility by statute of granting a worldwide freezing order*

When a person outside the jurisdiction is properly served under Ord. 11, this person is "precisely in same position as a person who is in this country."[161] There is no reason in principle why an injunction should not restrain a person properly brought before the court from disposing of assets abroad. In *Babanaft*, though the defendants were not within the jurisdiction, a post-judgment worldwide Mareva was granted. In *Derby & Co (Nos. 3 & 4)*,[162] the defendants were outside the jurisdiction and had no assets within the jurisdiction, a worldwide Mareva was granted pending trial in England.

The question is whether a court can grant a worldwide order in aid of foreign proceedings on a defendant outside the jurisdiction, even if he does not have assets within the jurisdiction. For the plaintiff, the temptation of killing two birds with one stone is great. There would be no need for him to apply for interim relief in several jurisdictions. One application on a worldwide basis before the court would be enough.

This issue must be seen in the light of policy considerations, i.e. a problem of *forum shopping* and of the wording of Ord. 11.

As to the problem of *forum shopping*, it must be noted that in England, any notion of connection with the territory has disappeared. A worldwide Mareva can be issued on a defendant abroad without the presence of assets there being a pre-requisite. In *Motorola*, the court restrained itself from doing so by resorting to the inexpediency test: the order would be inefficient. It is regrettable that the Judges answered this question in terms of efficiency. It should also have been pointed out that a worldwide Mareva over a defendant abroad who has no assets within the country is an exorbitant jurisdiction. The grant of a worldwide order in *Babanaft* and *Derby & Co (Nos. 3 & 4)* was justified because the substantive proceedings have some appropriate connection with England. With a Mareva in aid of foreign proceedings, there is none, except the presence of assets there. On this issue, to avoid any forum shopping by the plaintiff and any exercise of an exorbitant jurisdiction, it is submitted that a necessary pre-condition in obtaining the order is the presence of assets (or striking evidence of a probability of the presence of assets) within the jurisdiction. This submission does not at any level question the developments as to the Mareva granted in aid of domestic proceedings. It simply distinguishes it.

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[161] *Duvalier*, above note 6, 216.
[162] Above note 139.

As to the scope of the Mareva, in *Motorola*, the court had the power to grant worldwide freezing and disclosure orders because CPR 6.20(4) no longer restricts the scope of the injunction. Service out of the jurisdiction pursuant to Ord. 11 r. 1(1)(b) does not allow the courts to go that far. The defendant is brought before the court to be ordered to do or to be refrained from doing an act *within the jurisdiction*. This limit on the geographical scope was pointed out in *Duvalier*[163] and in *Mercedes Benz*:[164]

> Paragraph (b) applies only to acts or omissions within the territorial jurisdiction of the Hong Kong Court, so it would embrace only *Mareva* injunctions confined in this way.

A distinction must be drawn in the expression "worldwide Mareva": the order freezing the assets and the disclosure order of the whereabouts of the assets. The purpose of the disclosure order is for the plaintiff to obtain information on the location of assets abroad in order to apply, in the country where the assets are, for interim relief or for the enforcement of the judgment. It was, for example, the only aim of the Mareva in *Duvalier*.[165] Even though the disclosure order is ancillary to the freezing order, the geographical scope of the freezing order does not limit the geographical scope of the disclosure order. In other words, the freezing order can be granted on a domestic basis and coupled with a disclosure order of assets worldwide. As the disclosure order is ancillary to the freezing order, if there are no assets within the jurisdiction, there cannot be any Mareva, therefore, no application for a disclosure order. The grant of a worldwide disclosure falls within the scope of Ord. 11 r. 1(1)(b). The defendant is ordered to disclose the whereabouts of his assets to the court. It is only on this issue that the writer agrees with Capper:[166] there could well be a problem of forum shopping. The possession of a single bank account within the country, even almost empty, is enough for the plaintiff to obtain information as to the location of the remainder of the assets. This is where the temptation lies. However, the grant of this ancillary injunction is subject to the court's discretion. It must also be remembered that the court will not grant it if the assets within the jurisdiction are enough to meet the claim. "[T]he court should not go further than necessity dictates."[167] The writer relies on a wise use by the court of its discretion on this issue.

There must, however, be some kind of penalty placed upon the defendant: it would be too easy for him to disclose the whereabouts of his assets and to remove them afterwards. One of the possible solutions is that the disclosure order implies a freezing order over the assets concerned. There is a vicious circle in this implication. It means that the disclosure order restrains the defendant from doing an act outside the jurisdiction. The other possibility is that those foreign assets are not frozen but

[163] Above note 6, 213.
[164] Above note 1, 313.
[165] Above note 6, 216.
[166] Above note 122.
[167] *Derby & Co (Nos 3 & 4)*, above note 139, 79.

if the defendant removes them after the disclosure, he is in contempt of court.[168] From a practical point of view, the result obtained under the worldwide disclosure order is the same as that under a worldwide freezing order on a defendant outside the jurisdiction. However, the reasoning is respectful of the letter of Ord. 11 r. 1(1) (b) "within the jurisdiction." The question moves towards the *point* of granting such an order. In *Duvalier*, a worldwide disclosure order was granted over a defendant outside the jurisdiction. In *Motorola*, the same application was dismissed. The difference between both: the concern of the court of granting an order that can be enforced in England.

2. *The Impossibility in Practice of Granting an Efficient Worldwide Disclosure Order*

In *Duvalier*, a worldwide Mareva was granted on a defendant outside the jurisdiction. The only connection with England was the presence there of English lawyers of the family who knew where the remainder of assets was. There was no problem of service and therefore enforceability on these lawyers. Over the family Duvalier, service was not granted pursuant to Ord. 11 r.1(1)(b) but pursuant to R.S.C Ord. 11 r. 1(2), which was specific for Convention countries and did not restrict the scope of the injunction.

The very question of granting an order on a worldwide basis was considered by the learned Judge under the heading "*discretion*". To him, what was relevant was the fact that the circumstances of the case cried out for a worldwide order. What was determinative was the proven intention of the defendant to conceal any assets beyond the reach of the courts. His Honour based his judgment on the *Babanaft* case, considering that some features were similar: the defendants were crooks.

This very practice, on this very specific point, is highly objectionable, going to "the very edge of what is permissible"[169] even though "cases where it will be appropriate to grant such an injunction will be rare - if not very rare indeed."[170]

In *Crédit Suisse*, Millet L.J. held that it is a "strong thing" to restrain a foreign defendant from dealing with his overseas assets. In his Honour's opinion, it is:[171]

> most appropriate that protective measures should be granted *by those courts best able to make their orders effective*. In relation to orders taking direct effect against the assets, this means the courts of the state where the assets are located; and in relation to orders in personam, including orders for disclosure, this means the courts of the state where the person enjoined *resides*.

For the purposes of this paragraph, i.e. the disclosure order only, the core of the

[168] D Capper, above note 122, 218.
[169] L Collins "The territorial reach of Mareva Injunctions" [1989] LQR 262, 281.
[170] *Duvalier*, above note 6, 215.
[171] Above note 5, 827. Emphasis added.

problem is hit: the order's efficiency. The main problem of a defendant being abroad lies in the efficiency of a penalty if he disobeys the order. The traditional sanction is contempt of court. The party entitled to the benefit of the order may apply to the court to enforce the order by committing the other party to prison, issuing a writ of sequestration, imposing a fine or striking out the defence. In the context of a Mareva in aid of foreign proceedings on a defendant outside the jurisdiction, these remedies, though available, might well be inefficient. Take a defendant who refuses to disclose the whereabouts of his assets, even within the jurisdiction, the fine cannot be executed. The defendant is abroad, the commitment to prison is launched *in vacuo*. As to striking out the defence, the English courts are reluctant to do so, especially when the defendant contests that the order is well founded.

Is that a textbook case? *Motorola* is noteworthy. The disclosure order was granted worldwide over some defendants outside the jurisdiction. Fantastic case of fraud to the rights of the plaintiff worth US $ 1 billion, fantastic use by the defendants of the tactics offered by the conflict of laws to bar any action of the plaintiff, fantastic multiplied and repeated contempt of court punished by ineffective commitment to prison. The defendants' appeal to set aside the Mareva in aid of foreign proceedings was heard, though they made it clear that if the order was to be confirmed, they would still not respect it. The Court of Appeal allowed the appeal: the test of inexpediency includes a concern of the court as to whether the order can be enforced and penalised in case of disobedience.[172] There are circumstances where the maxim "equity cannot act in vain" is fully relevant. At the end of the day, the grant of the injunction might be more a matter of common sense as to practical reality than any gloss on the meaning of "convenient" or "inexpedient". The defendants were correct in pointing out that the English jurisdiction would become the "juridical police authority in international fraud cases in circumstances where there would be no or no real prospect of enforcing its orders."[173]

If other countries were to adopt the Mareva in aid of foreign proceedings, these limits should be borne in mind.

V. CONCLUSION

In England, *The Siskina* locked a door that Parliament had to unlock. There is no reason in principle why this case should still lock the door in other countries. It can be said that the situation in England results from an intervention from Parliament and therefore the courts cannot take it on themselves to override statutes. However, this reasoning is false for two reasons. Parliament, in England, intervened because it had to comply with its international obligations stemming from the signature of the Brussels Convention. It could not afford to wait for another vessel to be sunk and the case coming before the House of Lords. The second reason is that the courts limited a power that Parliament granted unlimited.

[172] Above note 55, para. 115 and 125.
[173] Ibid para. 89.

It must be noted that Hong Kong is currently in the process of reviewing its civil procedure. The Final Report on Civil Justice Reform was released on 3 March 2004.[174] Amongst the 150 recommendations is a recommendation for the reform of the grant of injunctions in aid of foreign proceedings. From paragraph 328 to 340, in the writer's view, the report does nothing else than refer to Lord Nicholls dissent. Accordingly, there is no need for new legislation to implement the Mareva in aid of foreign proceedings. Courts already have the whole armoury.

[174] <http://www.civiljustice.gov.hk/fr/> (at 1 November 2004).