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# Provisional and Protective Measures in International Litigation: Mareva and Grupo Mexicano

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# PROVISIONAL AND PROTECTION MEASURES IN INTERNATIONAL LITIGATION: *MAREVA* AND *GRUPO MEXICANO*

The panel was convened at 12:30 p.m., Thursday, April 6, by its Chair, Peter D. Trooboff, Covington & Burling, Washington, DC, who introduced the panelists: Lawrence Collins, Q.C., Herbert Smith, London; Gavan Griffith, Q.C., former Solicitor General of Australia, Melbourne; Timothy McEvoy, Freehill Hollingdale & Page, Canberra; Janet Walker, Osgoode Hall Law School, York University, Canada.

## INTRODUCTORY REMARKS BY PETER D. TROOBOFF:

Peter Trooboff explained that this panel focused on both the theoretical and practical issues presented for scholars in the field of private international law and practitioners engaged in transnational litigation by the recent decision of the United States Supreme Court in *Grupo Mexicano de Desarrollo, S.A., et al. v. Alliance Bond Fund, et al.*[1] In brief, the Supreme Court, based on its interpretation of the Judiciary Act of 1789 and Rule 65 of the Federal Rules of Civil Procedure, held in a 5-4 decision that in an action for a sum due in which the plaintiff is not claiming an ownership or other interest in a specific fund, the federal courts may not grant preliminary injunctive relief directing the defendant not to transfer or encumber funds that would be available to satisfy an eventual judgment in the proceeding.

Speaking for the majority in *Grupo Mexicano*, Justice Scalia said that it would be "incompatible with our traditionally cautious approach to equitable powers, which leaves any substantial expansion of past practice Congress, to decree elimination of this significant protection for debtors." Further, the Court of Appeals of New York recently reached a similar result in a unanimous opinion interpreting the counterpart New York civil practice rule for the New York courts, *Credit Agricole Indosuez et al. v. Rossiyskiy Kredit Bank et al.*[2] The New York court relied on concerns that granting the requested relief would "drastically unbalance existing creditors' and debtors' rights." A remedy of the type requested would, the Court of Appeals explained, be best fashioned by the legislature which is equipped to balance "important competing interests" and fashion "appropriate safeguards and standards to ensure that the balance is fairly administered in the individual case." By these decisions, the courts of the United States appear to have refused to grant relief known in the United Kingdom and elsewhere in the common-law world as a *Mareva* injunction.

## SUMMARY OF REMARKS BY LAWRENCE COLLINS:

Lawrence Collins said that he had some sympathy for both the Supreme Court and New York Court of Appeals decisions. He pointed out that in the two cases, the jurisdiction of the U.S. District Court for the Southern District of New York and the Supreme Court of New York, respectively, was based on a forum-selection clause and the choice of New York law. In neither case did the defendant have any assets in New York. Thus, Mr. Collins explained, the plaintiff sought to have the court order relief that the English courts have come to grant only after a lengthy evolutionary process, i.e., the extraterritorial *Mareva* injunction which is an exceptional remedy subject to extensive safeguards developed in practice by the U.K. courts.

Explaining that the U.S. courts, unlike those of the United Kingdom, had not abandoned pre-judgment attachment to conserve assets, Mr. Collins devoted the remainder of his presentation to issues of comity raised by the two American cases. Mr. Collins outlined two paradigm cases, in the first, the court is asked to grant interim relief in relation to acts or assets located in another jurisdiction; in the second, the court is asked to grant relief in aid of proceedings in

[1] Grupo Mexicano de Desarrollo, S.A., v. Alliance Bond Fund, 527 U.S. 308, 119 S. Ct. 1961 (1999).
[2] Credit Agricole Indosuez v. Rossiyskiy Kredit Bank, 94 N.Y.2d 541 (Ct. App. 2000).

a foreign court even though the court ruling on the main case cannot or will not make a similar order itself.

With respect to the first type of case, civil law courts have no problem with granting preliminary relief as to assets within the jurisdiction. Further, when the plaintiff is asserting ownership in or equitable relief concerning the assets in question, U.S. courts are prepared, as they were in the Marcos case in the 9th Circuit, to issue an *in personam* order requiring that the defendant not transfer assets located outside the jurisdiction.[3]

In *Grupo Mexicano*, the plaintiff asserted no such ownership interest in the funds at issue. Further, any order directed at the defendants would have defeated the bona fide restructuring plan for a Mexican company, a plan that the Mexican courts were in the course of implementing and that called for certain preferred creditors (e.g., workers) to be paid ahead of general creditors. The defendants did not raise in their briefs the argument that the requested injunction would have interfered with that plan. Based on this analysis, if it had been fully presented and explored, Mr. Collins doubted that an English court would have granted a *Mareva* injunction in circumstances of the *Grupo Mexicano* decision.

On the other hand, no comity issues arise when the *Mareva* jurisdiction is extended to assets abroad through the ancillary power of the English courts to force the defendant to disclose the location of assets abroad. The defendant is not required to take any particular action regarding such assets in the other jurisdiction and the plaintiff must persuade the court where the assets are located to grant relief.

In the second paradigm case, the issue is whether the requested action by the court addressed will interfere with proceedings in the other jurisdiction. English courts have issued *Mareva* injunctions even though the court of another jurisdiction would not have had equivalent power in a similar case. The issue in such cases is particularly difficult when the foreign court has expressly refused to grant the relief requested. English courts have said in *dictum* that they may grant relief in such situations, but some of the judges recognized the severe comity implications of allowing such relief and the need for care in deciding whether to allow such a remedy.

**SUMMARY OF REMARKS BY TIMOTHY MCEVOY:**

Timothy McEvoy concentrated first on the Supreme Court's unfortunate interpretation of the Judiciary Act of 1789. Noting that equity has always been able to adapt to suit the changing needs of justice, he criticized the Supreme Court for having based its ruling on the jurisdiction of the Chancery Court in England in 1789. He noted with approval Justice Ginsburg's statement in the dissent that "[a] dynamic equity jurisprudence is of special importance in the commercial law context." Mr. McEvoy pointed to the dissent's emphasis on the remedy at law being "worthless" if provisional relief is not available, particularly given the technologically sophisticated means for rapidly moving assets from one jurisdiction to another. Mr. McEvoy cited Judge Richard Posner's more perceptive analysis in *Roland Machinery v. Dressler Industries*,[4] recognizing that the requirements of irreparable harm and absence of an adequate remedy at law merge when the only remedy sought at trial is money damages.

Mr. McEvoy concluded by reviewing the provisions on preliminary relief that appear in the draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters being prepared by a Special Commission of the Hague Conference on Private International Law.[5] In particular, draft Article 13 would permit granting of injunctive relief in cases such as those decided by the U.S. Supreme Court. However, the draft provisions require enforcement in the courts of another contracting state only if the court granting the initial injunctive relief

[3] The Republic of the Philippines v Marcos, 862 F.2d 1355 (9th Cir. 1988)(injunction upheld when granted *in personam* and limited to assets over which plaintiff sought equitable relief through a constructive trust).

[4] Roland Machinery v. Dressler Industries, 749 F.2d 380, 383 (7th Cir. 1984).

[5] Available at www.hcch.net.

has jurisdiction over the defendant based on grounds set forth in the Convention. Absent such jurisdiction over the underlying matter, the court is limited under the draft Convention to orders affecting property within its territory (Article 13(1)) or to an order that is also territorial in nature and intended to protect, on an interim basis, a claim on the merits which is pending elsewhere.

**SUMMARY OF REMARKS BY JANET WALKER:**

Professor Janet Walker explained why the Canadian Constitution would not have prevented granting of the relief sought by the plaintiffs in *Grupo Mexicano*. She emphasized how the Canadian Constitution, as interpreted by the Canadian Supreme Court, left room for the evolving jurisdiction in law and equity of the Canadian courts. She pointed to the *Friedland* cases[6] in which the British Columbia and Ontario courts granted *Mareva* injunctions *ex parte* to prevent the dissipation of assets ($152 million in mining shares) that the United States government sought to secure in order to satisfy an eventual judgment in a U.S. environmental law proceeding. In the end, the Ontario injunction was overturned, but the United States was held immune from the subsequent damages counterclaim.

Professor Walker submitted that the reluctance of the United States courts to grant the requested *Mareva* injunctions resulted from traditional American skepticism about actions of government that deprive a person of private property without due process of law. She suggested that the outcome in the case demonstrated that differences in particular procedural rules and customs can sometimes be integrally related to profound distinctions in the nature and scope of the authority of national courts in private law adjudication. Professor Walker pointed to the importance of focusing on such core principles in developing the proposed Hague Convention rather than simply on trying to harmonize national rules. Finally, she noted the contrast between the detailed pleading requirements under Canadian and English law and the less detailed notice-pleading requirements under U.S. law. As a result, Canadian and English courts requested to grant the kind of relief sought in *Grupo Mexicano* might receive a more complete account of the facts than their U.S. counterparts and might be better positioned to exercise their discretion and grant the requested relief.

**SUMMARY OF REMARKS BY GAVAN GRIFFITH:**

Gavan Griffith, while acknowledging that a leading Australian judge had expressed the same concerns about the use of the *Mareva* injunction that appeared to have influenced the majority of the Supreme Court, expressed some difficulty in accepting the Supreme Court's narrow construction of the Judiciary Act of 1789, limiting the incorporated principles of equity to those exercised in 1789. Australia also inherited the British common law and principles of equity, but had no difficulty involving equitable remedies in tandem with the evolution of the common law.

Turning to *Grupo Mexicano*, he noted that the exercise of proper judicial restraint would have responded to the fears of abuse that appear to have caused the majority to stop the evolution of American law on this subject. Mr. Griffith emphasized the importance of the availability of such relief in view of the capacities of instant and almost traceless transfer of moneys. In his judgment, the reluctance of the Supreme Court to permit the injunction because of the potential injury to defendant's interests could be overcome by requiring appropriately large and open-ended (rather than fixed-amount) bonds from plaintiffs who seek this type of injunctive relief in order to protect the defendant from inequitable losses. In this connection, he noted the inadequacy of the $50,000 bond that the trial court had ordered in *Grupo Mexicano*.

[6] United States v. Friedland cases, [1999] A.C.W.S. 3d 552, 1999 ACWSJ Lexis 19914 (Dec. 23, 1999) (summarizing the history of the case in Ontario).

Mr. Griffith concluded by reviewing the Helsinki Principles that were approved in August 1996 by the International Law Association (ILA) and developed by its Committee on International Civil and Commercial Litigation.[7] He proposed the principles as a useful reference for the evolutionary common law development. However, even the Helsinki Principles recognize that, absent a treaty, interlocutory orders for interim measures will be enforceable only in the jurisdiction in which the defendant is subject to *in personam* jurisdiction.

## DISCUSSION

During the discussion period, the panel reviewed the safeguards that the English courts have imposed in granting *Mareva* injunctions. Questions were raised about the effectiveness of the injunction sought by the plaintiffs in *Grupo Mexicano* since the only relevant assets were in Mexico, and it was unclear whether the Mexican courts, where restructuring proceedings were under way, would have given effect to any order that the American court would have granted.[8]

[7] Available from the ILA headquarters at http://<www.ila.org>.

[8] For further valuable analysis of the decision, see Lawrence Collins, *United States Supreme Court Rejects Mareva Injunctions*, 111 LAW Q. REV. 601 (1999) and Stephen Burbank, *The Bitter with the Sweet: Tradition, History, and Limitations on Federal Judicial Power—A Case Study*, 75 NOTRE DAME L. REV. 1291 (2000).