The Mareva Injunction in Aid of Foreign Proceedings

Paul Michell
The Mareva Injunction in Aid of Foreign Proceedings

Abstract
Courts have long awarded Mareva injunctions to prevent defendants from frustrating the domestic litigation process. An emerging question is whether Canadian courts can order Mareva injunctions in aid of foreign proceedings. Traditional English authority, recently confirmed by the Privy Council, says no. Yet Canadian courts take a different view, and are in the process of developing principles to guide the awarding of Mareva relief in aid of foreign proceedings. After a critical analysis of the debate, this article evaluates several recent decisions, argues in favour of such a power, and proposes a framework by which it should be exercised.
Courts have long awarded *Mareva* injunctions to prevent defendants from frustrating the domestic litigation process. An emerging question is whether Canadian courts can order *Mareva* injunctions in aid of foreign proceedings. Traditional English authority, recently confirmed by the Privy Council, says no. Yet Canadian courts take a different view, and are in the process of developing principles to guide the awarding of *Mareva* relief in aid of foreign proceedings. After a critical analysis of the debate, this article evaluates several recent decisions, argues in favour of such a power, and proposes a framework by which it should be exercised.

Les tribunaux ont depuis longtemps accordé des injonctions *Mareva* dans le but de prévenir les défendeurs étrangers de contrecarrer les litiges internes. Une des questions à laquelle les tribunaux canadiens sont présentement confrontés est de cerner leur compétence dans l'émission de telles injonctions au soutien de procédures judiciaires étrangères. En Angleterre, les autorités y sont opposées, tel que le Conseil privé l'a récemment confirmé. Toutefois, les tribunaux canadiens prennent une tangente différente, puisqu'ils élaborent actuellement de nouveaux principes directeurs pour l'émission d'injonctions *Mareva* au soutien de procédures judiciaires étrangères. Suite à une analyse critique de ce débat, cet article examine plusieurs décisions récentes, prend position en faveur d'un tel pouvoir, et propose un encadrement dans lequel celui-ci pourrait être exercé.

**I. INTRODUCTION** ............................................................... 742

**II. THE SISKINA PRINCIPLE AND ITS EROSION: IS A CAUSE OF ACTION IN THE JURISDICTION REQUIRED?** .................................................. 751

A. *The Siskina* ............................................................... 751

B. *The Spatial Element* .................................................... 754

1. Anti-suit injunctions .................................................... 755

2. Arbitration .............................................................. 757

C. *The Temporal Element* ................................................ 760

D. *Interim Relief in Aid of Foreign Proceedings Under the Brussels and Lugano Conventions* ........................................... 763

E. *Personal Jurisdiction, Due Process, Justiciability, and the Real and Substantial Connection Requirement* ........................................ 765

**III. MERCEDES-BENZ AG V. LEIDUCK** ...................................... 770

A. *Facts* ................................................................ 770

© 1997, M. Paul Michell.

*Associate, Tory Tory DesLauriers & Binnington, Toronto.*
I. INTRODUCTION

You are pursuing litigation against a defendant in a foreign forum. The defendant owns assets located in Canada. However, she has insufficient connections with Canada for a Canadian court to establish personal jurisdiction over her by way of service ex juris. Consequently, no action could be brought against her here. You are concerned that the defendant may spirit her Canadian assets away before you can obtain a judgment abroad and have it enforced against the defendant’s assets in
Canada. May a Canadian court order a *Mareva* injunction in aid of foreign legal proceedings to freeze the defendant’s assets in Canada pending judgment abroad and enforcement of the foreign judgment here?

Provisional and protective measures in transnational litigation, of which *Mareva* injunctions are but one instance,\(^1\) have historically suffered a low profile in Anglo-Canadian law.\(^2\) Yet, faced with technological and political developments that facilitate the movement of assets across borders,\(^3\) the common law’s traditional ambivalence towards pre-judgment provisional and protective measures is, by necessity, eroding.\(^4\) Two recent cases—one involving a series of high-profile Canadian proceedings, *United States v. Friedland*,\(^5\) the other an important decision of the Privy Council on appeal from the Court of

---

1 Aside from *Mareva* injunctions, other forms of provisional and protective measures include preservation orders, orders for the interim appointment of receivers, custodians or experts, orders for security for costs, and orders for the sale and disposition of perishable goods. They are discussed in greater detail in Part VI(E), below.


3 *Derby & Co. Ltd. v. Weldon (Nos. 3 & 4)*, [1990] Ch. 65 at 95 (C.A.), Neill L.J. [hereinafter *Derby Nos. 3 & 4*] (“assets, like the Cheshire cat, may disappear unexpectedly. It is also to be remembered that modern technology and the ingenuity of its beneficiaries may enable assets to depart at a speed which can make any feline powers of evanescence appear sluggish by comparison.”); *Deutsche Schachtbau-und Tiefbohrgesellschaft M.B.H. v. R'As al Khaimah National Oil Co.*, [1990] 1 A.C. 295 at 317 (C.A.), Sir John Davidson M.R. [hereinafter *Deutsche Schachtbau*] (experience has shown the *Mareva* injunction “to be one of the most imaginative, important and, on the whole, most beneficent [innovations] of modern times...”), rev’d in part on other grounds, [1990] 1 A.C. 323 (H.L.).

4 See also art. 3138 of the *Civil Code of Quebec*, *An Act to Establish a New Civil Code and to Reform Family Law*, S.Q. 1980, c. 39 [hereinafter *ccQ*], discussed infra at text accompanying notes 179-181.

Appeal for Hong Kong\textsuperscript{6} \textit{Mercedes-Benz AG v. Leiduck}\textsuperscript{7}—illustrate the utility of \textit{Mareva} injunctions in aid of foreign legal proceedings, but provide conflicting indications as to their availability. Much remains unsettled. This article aims to provide some guidance as to the future development of this important innovation.\textsuperscript{8}

A \textit{Mareva} injunction,\textsuperscript{9} commonly issued \textit{ex parte}, restrains a defendant from transferring or disposing of specified assets from the jurisdiction in which the motion is brought, pending judgment.\textsuperscript{10} These injunctions have been available from the Canadian courts for at least fifteen years.\textsuperscript{11} The jurisdiction to award \textit{Mareva} injunctions is statutory,

\begin{itemize}
  \item \textsuperscript{6} Obviously, Privy Council decisions no longer bind Canadian courts (and of course, they never bound the English courts except in a narrow range of subject-matter). Yet, the Privy Council has decided a number of important conflict of laws appeals in recent years: see, for example, \textit{Showlag v. Mansour}, [1995] 1 A.C. 431 (\textit{res judicata} in recognition and enforcement of foreign judgments); \textit{Owens Bank Ltd. v. Etoile Commerciale s.a.}, [1995] 1 W.L.R. 44 (fraud as defence to enforcement of foreign judgment); \textit{Red Sea Insurance Co. v. Bouygues s.a.}, [1995] 1 A.C. 190 (choice of law in tort); \textit{The Pioneer Container}, [1994] 2 A.C. 324 (stay of proceedings due to choice of court clause in favour of foreign court); and \textit{S.N.I. Aérospatiale v. Lee Kui Jak}, [1987] A.C. 871 (hereinafter \textit{S.N.I. Aérospatiale}) (anti-suit injunctions). Moreover, as major commercial and financial centres, the experience of London and Hong Kong is surely instructive for the development of the law in Canada. The \textit{Mareva} injunction originated and developed in England, and most of its subsequent evolution has taken place there, so it is natural that Canadian courts should look abroad for guidance.

  \item \textsuperscript{7} [1996] A.C. 284 (P.C.) [hereinafter \textit{Mercedes-Benz}].

  \item \textsuperscript{8} See also M.A. Skene, “Commercial Litigation Beyond the Pale: A Comparison of Extraterritorial Antisuit and \textit{Mareva} Jurisdiction Exercised by the Courts of England and British Columbia in Commercial Disputes” (1996) 30 U.B.C. L. Rev. 1.


  \item \textsuperscript{10} See \textit{Camdex v. Bank of Zambia (No. 2)}, [1997] 1 All E.R. 728 at 732 (C.A.), Sir Thomas Bingham M.R. Removal of assets from the jurisdiction (and likely, their transfer to an offshore haven which does not recognize or enforce foreign judgments) is one of a number of judgment proofing strategies which a defendant might choose to adopt. Others include concealing assets, destroying them, or transferring them to third parties, perhaps with the intention that they will be transferred back after the threat of litigation passes.

\end{itemize}
The Mareva Injunction in Aid of Foreign Proceedings

both in England and in the common law provinces of Canada. The Mareva injunction developed in recognition that, in the time gap between the initiation of a lawsuit and its resolution, court-ordered protective and provisional measures may be required to ensure that defendants cannot render themselves judgment-proof. A defendant must not be permitted to “snap his fingers” at a judgment rendered against him. It should be noted that Mareva injunctions are procedural in nature: they do not resolve the substantive merits of a legal dispute. Rather, they ensure that the process of the court is not abused, so that the dispute may be properly resolved.

A Mareva injunction operates in personam against a defendant, compelling her to act in a certain manner in respect of particular assets. It is not an attachment in rem of the defendant’s assets. No lien or charge on the defendant’s assets is created. The plaintiff does not gain a preference or priority in the event of the bankruptcy or insolvency

---

12 Supreme Court Act 1981 (U.K.), 1981, c. 54, s. 37(1): “The High Court may by order (whether interlocutory or final) grant an injunction or appoint a receiver in all cases in which it appears to the court to be just and convenient to do so.”

13 See, for example, Judicature Act, R.S.A. 1980, c. J-1, s. 13(2); Law and Equity Act, R.S.B.C. 1996, c. 253, s. 39; Queen’s Bench Act, R.S.M. 1987, c. C280, s. 56(1); Judicature Act, R.S.N.B. 1973, c. J-2, s. 33; Judicature Act, R.S.N. 1990, c. J-4, s. 105; Judicature Act, R.S.N.S. 1989, c. 240, s. 43(9); Courts of Justice Act, R.S.O. 1990, c. C.43, s. 101; Supreme Court Act, R.S.P.E.I. 1988, c. S-10, s. 34; Queen’s Bench Act, R.S.S. 1978, c. O-1, s. 45, para 8; Judicature Act, R.S.N.W.T. 1988, c. J-1, s. 41; Judicature Act, R.S.Y.T. 1986, c. 96, s. 26; Federal Court Act, R.S.C. 1985, c. F-7, s. 44; and Federal Court Rules C.R.C., c. 663, r. 469(1). Note that New Brunswick r. 40.03 specifically addresses Mareva injunctions.


16 Cretanor Maritime Co. Ltd v. Irish Marine Ltd., [1978] 1 W.L.R. 966 (C.A.); Aetna, supra note 11 at 176-77 (“The gist of the Mareva injunction is the right to freeze exigible assets when found within the jurisdiction, wherever the defendant may reside, providing, of course, there is a cause of action between the plaintiff and the defendant which is justiciable in the courts of England”). The defendant must comply with the terms of the injunction upon pain of contempt: Lin v. Leung (1992), 64 B.C.L.R. (2d) 248 (S.C.). If the plaintiff is making a proprietary claim to specific assets (as opposed to a personal claim) a Mareva injunction is inappropriate. The proper procedure is to seek an interlocutory injunction restraining the use or alienation of specific property on the normal interlocutory injunction threshold: see Polly Peck, supra note 14; and Banco Ambrosiano Holdings S.A. v. Dunkeld Ranching Ltd. (1987), 85 A.R. 278 (C.A.), leave to appeal refused, [1988] 1 S.C.R. v.
of the defendant, although a Mareva injunction does have an important impact upon third parties.\textsuperscript{17} Mareva injunctions involve a familiar clash of values. On the one hand, the courts are concerned to ensure that a defendant cannot frustrate the plaintiff's ability to enforce a judgment if he is eventually successful on the merits. Weighing against this, however, is the defendant's liberty to use, move, or dispose of her assets as she desires where no liability has yet been imposed upon her.\textsuperscript{18}

The latter concern to protect the defendant's freedom of action is partially offset by the relatively stringent conditions which must be met before a Mareva injunction may be ordered. The plaintiff must make full and frank disclosure of all material matters; give particulars of the claim; show grounds for believing that there is a risk that the defendant's assets will be removed or dissipated before judgment; give grounds for believing that the defendant has assets in the jurisdiction; and, importantly, give an undertaking in damages.\textsuperscript{19} Mareva injunctions are less easily obtainable in Canada than in England.\textsuperscript{20} Moreover, the defendant may apply at any time to have the injunction modified or dissolved. Nonetheless, in practical terms, it must be recognized that a Mareva injunction may substantially alter the playing field for the substantive litigation at issue. Where expansion of the range of circumstances under which a Mareva injunction may be ordered is proposed, the proposed expansion must be evaluated by determining whether a proper balance of interests has been achieved.\textsuperscript{21}

\textsuperscript{17} Some confusion as to the nature of the Mareva injunction has arisen, in part because the Mareva injunction does possess some features of an in rem order: it binds third parties, and takes effect immediately, even before notice of it is served on the defendant. See Z. Ltd. v. A-Z and AA-LL. [1982] Q.B. 558 (C.A.); and P. Devonshire, "The Implications of Third Parties Holding Assets Subject to a Mareva Injunction" [1996] L.M.C.L.Q. 268. The impact of Mareva injunctions upon third party financial institutions is particularly important, and accounts in large measure for the effectiveness of the remedy. See A. Malek & C. Lewis, "Worldwide Mareva Injunctions: The Position of International Banks" [1990] L.M.C.L.Q. 88.


\textsuperscript{19} Third Chandris, supra note 14 at 668-69.


\textsuperscript{21} See Chief Constable of Kent v. V., [1983] 1 Q.B. 34 at 49 (C.A.), Donaldson L.J. [hereinafter Kent] (expressing concern that, without the limits imposed on the jurisdiction to award Mareva relief by Siskina, infra note 35, the jurisdiction would tend to become exceedingly broad and
The *Mareva* injunction has evolved from its narrow initial origins, and the courts have adapted it to meet new challenges. For example, *Mareva* injunctions are now available where judgment has been rendered but has not yet been executed. Similarly, “worldwide” *Mareva* injunctions—*in personam* injunctions restraining the defendant from disposing of or moving her assets anywhere in the world, regardless of her present location, or in some cases ordering the transfer of assets between foreign countries—have been awarded. Carefully tailored modifications have been developed. A *Mareva* injunction may be ordered to restrain the disposition of assets within the jurisdiction where

---

22 While the early cases placed specific limitations upon the availability of *Mareva* relief (originally, *Mareva* relief was limited to cases in the Commercial Court concerning debts where the defendant was a foreigner outside the jurisdiction and there was a reasonable apprehension of danger that the assets would be removed from the jurisdiction), these requirements had evaporated within five years: *Barclay-Johnson v. Yuill*, [1980] 3 All E.R. 190 (Ch.D.). The ability of the courts to order *Mareva* injunctions against foreign and absentee defendants was confirmed in England by the *Supreme Court Act 1981*, supra note 12, s. 37(3).


24 On worldwide *Mareva* injunctions, see *Bassatne*, supra, note 22; *Derby & Co. Ltd. v. Weldon*, [1990] Ch. 48 (C.A.) [hereinafter *Derby & Co.*]; *Derby & Co. Ltd. v. Weldon (No. 6)*, [1990] 1 W.L.R. 1139 (C.A.) [hereinafter *Derby No. 6*] (court’s ability to order transfer of assets from one foreign jurisdiction to another); *Re Bank of Credit and Commerce International S.A.* (No. 9); *Bank of Credit and Commerce International (Overseas) Ltd.*, [1994] 3 All E.R. 764 (C.A.); *Mooney v. Orr* (1994), 100 B.C.L.R. (2d) 335 (S.C.) [hereinafter *Mooney*]; and *Ashtiani v. Kashi*, [1987] Q.B. 888 (C.A.) (upholding refusal to order *Mareva* injunction against disposition of assets in foreign jurisdiction and limiting ancillary discovery orders similarly, so that disclosure should be coterminous with the injunction). See also *Zellers Inc. v. Doobay* (1989), 34 B.C.L.R. (2d) 187 (S.C.) [hereinafter *Zellers*] (declining to order *Mareva* injunction against Ontario assets of defendant on the basis that the court has no jurisdiction to make such an order). Worldwide *Mareva* injunctions are awarded on the basis not of the territorial jurisdiction of the forum court over assets within its jurisdiction, but rather on the unlimited jurisdiction of the forum court to exercise *in personam* jurisdiction over a person who is properly made a party to the proceedings before the court: *Derby No. 6* at 1149 (where this approach was justified in part on the basis that an English court is “unwilling to exercise its powers within this country in support of a receiver appointed by a foreign court, save on very strictly limited traditional principles of foreign law” at 1150). See discussion in L. Collins, “The Territorial Reach of Mareva Injunctions” (1989) 105 L.Q. Rev. 262 [hereinafter “Territorial Reach”]; and D. Capper, “Worldwide Mareva Injunctions” (1991) 54 Mod. L. Rev. 329.

25 See, for example, *Gidrxtline Shipping Co. v. Tantomar-Transportes Ltda.*, [1995] 4 All E.R. 507 (Q.B.D. (Comm. Ct.)) (Mareva injunction confined to assets within jurisdiction, but defendants compelled to disclose information as to worldwide assets).
the plaintiff brings an action on a foreign judgment\textsuperscript{26} or arbitral award\textsuperscript{27} in the forum, and the plaintiff may apply for service \textit{ex juris} for this purpose.\textsuperscript{28} However, what if a foreign judgment is pending, but has not yet been rendered? Should \textit{Mareva} injunctions be available in aid of foreign legal proceedings?

Consider a scenario in which the parties to a contract include a choice of court clause in favour of a foreign jurisdiction. A party seeking to sue on the contract would, in most cases, be barred from bringing suit in Canada by reason of the clause, and would thus be obliged to pursue legal remedies abroad.\textsuperscript{29} If the defendant had substantial assets in Canada, but few assets in the foreign jurisdiction in which suit was brought, the plaintiff would likely hope to secure a judgment in the foreign forum, then to have it enforced in one or more Canadian provinces against the defendant's assets there. What could the plaintiff do if, in the interim, the defendant began to spirit assets out of Canada in order to ensure that they could not be used to satisfy a possible judgment against her should the plaintiff seek to have it registered or enforced in Canada?

Similarly, in a tort or unjust enrichment case, the defendant might possess assets in several jurisdictions, but those assets may be insufficiently concentrated in any one jurisdiction to satisfy the plaintiff's claim. Moreover, the provinces or states where the assets are located are likely to be unable to assert personal jurisdiction over an absentee defendant who has limited contacts with the province or state in question. Accordingly, the plaintiff would either have to bring parallel suits in several jurisdictions, or else sue in one jurisdiction and then attempt to have the resulting judgment registered or enforced in other jurisdictions in which the defendant had assets. The plaintiff would be concerned that the defendant might frustrate his efforts to satisfy the claim by moving her assets between jurisdictions.

In both the contract and tort or unjust enrichment scenarios, the plaintiff might seek a \textit{Mareva} injunction from a Canadian court with regard to the defendant's assets located in Canada. As noted above, the


\textsuperscript{27} \textit{Deutsche Schachtbau}, supra note 3.


Mareva injunction arose to ensure that defendants do not take unfair advantage of the interstices between bringing proceedings, receiving judgment, and execution. The same problems bedevil transnational litigation, where cases contain elements from more than one jurisdiction. In my view, strong arguments suggest that, so long as certain conditions are satisfied, Mareva relief should also be available in aid of legal proceedings in a foreign forum. I shall outline these arguments, and also address a number of possible objections to the widening of the scope of the jurisdiction to award Mareva relief that my proposal entails.

Before doing so, an important clarification must be made. In determining whether a Mareva injunction may be ordered in aid of foreign proceedings, there are two distinct jurisdictional issues which arise. The first is whether the court possesses the substantive jurisdiction to order a Mareva injunction against the defendant in the circumstances. The second is whether the forum court possesses personal jurisdiction over the defendant, in the sense that it may adjudicate disputes involving her. For a Mareva injunction to be awarded, personal jurisdiction must be established over a defendant by service of process, either within the jurisdiction or outside it by service ex juris.

Even though much debate has focused on the substantive jurisdiction to award Mareva relief in aid of foreign proceedings, in many cases the sticking point is likely to be personal, rather than substantive, jurisdiction. This is so because the exercise of personal jurisdiction is increasingly tied to the issue of whether the court has a real and substantial connection to the substantive dispute at issue, and the defendant's sole connection to the jurisdiction in which the court is located may be that she possesses assets within that jurisdiction. Unlike the American quasi in rem attachment jurisdiction, personal jurisdiction must be established over a defendant by service of process, either within the jurisdiction or outside it by service ex juris.

Historically, many American states allowed for a process of quasi in rem attachment, by which personal jurisdiction could be established over a defendant on the basis of the presence of his or her assets in the jurisdiction. Quasi in rem attachment is distinct from the in personam jurisdiction underlying the Mareva injunction. A Mareva injunction does not itself establish personal jurisdiction over a defendant on the basis of presence of assets in the jurisdiction. There has been considerable litigation in the United States concerning the constitutional status of quasi in rem attachment, specifically, its congruence with the relevant due process clause of the United States Constitution: U.S. Const. amend. XIV. Simply put, the question has been whether a state court can assume jurisdiction over an out-of-state defendant who has few or no contacts with that state other than the presence of assets there. In recent years, quasi in rem jurisdiction has also declined in relative importance, as most states have expanded the scope of jurisdiction in personam through the enactment of long-arm jurisdiction statutes. See discussion in S.A. Riesenfeld, Cases and Materials on Creditors' Remedies and Debtors' Protection, 4th ed. (St. Paul, Minn.: West, 1987) c. 1 and 7; E.F. Scoles & P. Hay, Conflict of Laws (St. Paul, Minn.: West, 1982) c. 7; and R. Wasserman, “Equity Renewed: Preliminary Injunctions to Serve Potential Money Judgments” (1992) 67 Wash. L. Rev. 257 (advocating use of Mareva-type injunctions rather than attachment). See also Restatement
foreign attachment known in many European civil law states, personal jurisdiction over an absentee defendant for the purpose of issuing a *Mareva* injunction is not established by the mere presence of the defendant's assets in the territorial jurisdiction of the court.

Perhaps the greatest obstacle to the extension of the jurisdiction of Canadian courts to award *Mareva* relief in aid of foreign proceedings is judicial unfamiliarity with the prospect of taking positive steps in aid of foreign courts or tribunals. Canadian courts are increasingly aware of the need to respect principles of comity and reasonableness in transnational litigation. For the most part, however, the exercise of this respect has come in the form of judicial self-restraint in order to avoid taking measures which would antagonize or interfere with courts and tribunals in foreign states. The issuance of a stay of proceedings on the basis of the *forum non conveniens* doctrine provides a prime example.

Yet, at times, comity may require positive rather than negative measures from Canadian courts. Canadian courts are not entirely unfamiliar with the exercise of judicial assistance in aid of foreign tribunals, as their experience with letters of request demonstrates. This article seeks to demonstrate that, in some cases, principles of reasonableness and comity suggest that Canadian courts should take positive steps to ensure that, in La Forest J.'s felicitous phrase, individual litigants do not “pay the inevitable price of unfairness” should domestic courts fail to coordinate their processes with those of foreign

---

31 The civil procedure of several European states enables provisional attachment of assets where judgment is pending abroad against the assets of the potential debtor which are within the territorial jurisdiction of the court, a process known as *saisie conservatoire*. There is a distinction between *forum arresti* (jurisdiction assumed over foreigners by attachment of their property, in which judgment is limited to the value of the property so seized, as in the United States) and *forum patrimonii* (in which personal jurisdiction is assumed on the basis of the presence of the defendant's assets in the forum, and there is no limit to the scope of jurisdiction so taken, as in Germany). See generally J. Grunert, “Interlocutory Remedies in England and Germany: A Comparative Perspective” (1996) 15 Civ. Just. Q. 18; and M.J. Dominguez, “Using Prejudgment Attachments in the European Community and the U.S.” (1995) 5 J. Transnat'l L. & Pol'y 41.

32 At one time in English law, jurisdiction could be established over foreigners on the basis of the presence of assets within the jurisdiction. But this practice was effectively ruled obsolete, as it was held to be strictly personal, so that it did not apply to corporations: *Mayor of London v. London Joint Stock Bank Ltd.* (1881), 6 App. Cas. 393 (H.L.). Nonetheless, American courts had earlier adopted the English rule, and continue to apply it (subject to due process requirements) to corporate and individual defendants. See discussion in *The Pertamina*, supra note 15 at 657; and *Ownbey v. Morgan*, 256 U.S. 94 (1921) (foreign attachment). The distinction between assumption of jurisdiction on the basis of seizure of property and the seizure of property to prevent a debtor from frustrating an eventual judgment may seem thin, but it is there: see *Shaffer v. Heitner*, 433 U.S. 186 (1977) [hereinafter *Shaffer*].
The Mareva Injunction in Aid of Foreign Proceedings

II. THE SISKINA PRINCIPLE AND ITS EROSION: IS A CAUSE OF ACTION IN THE JURISDICTION REQUIRED?

A. The Siskina

The argument for the availability of Mareva injunctions in aid of foreign proceedings goes against the weight of conventional authority. As traditionally understood, a Mareva injunction is available only where a cause of action is brought in the jurisdiction in which the injunction is sought. This was the view propounded by the House of Lords in the leading English case, Siskina (owners of Cargo Lately Laden on Board) v. Distos Compania Naviera S.A., in which Lord Diplock held that an interlocutory injunction may be granted only to protect or assert a legal or equitable right which could be enforced by a final judgment in the jurisdiction.

In Siskina, cargo owners sued shipowners in London, seeking damages for breach of duty or contract, and a Mareva injunction restraining the disposition of certain insurance proceeds or their removal from England. In reality, the cargo owners sought only an injunction to restrain the shipowners from removing the insurance proceeds from England, pending the disposition of an anticipated action in the


34 A similarly restrictive approach is also said to apply to Anton Piller orders: Altertext Inc. v. Advanced Data Communications Ltd., [1985] 1 All E.R. 395 (Ch. D.) (declining to issue an Anton Piller order against a foreign defendant who had not yet been served with a writ and given the opportunity to apply to have leave to serve him ex juris set aside). The mere presence of property within the jurisdiction is insufficient to establish the court's jurisdiction or to substitute for a cause of action. On extraterritorial Anton Piller orders, see Protector Alarms v. Maxim Alarms, [1978] F.S.R. 442 (Ch.D).


36 Ibid. at 253. See also L. Collins, ed., Dicey and Morris on the Conflict of Laws, 12th ed. (London: Sweet & Maxwell, 1993) at 194-95 [hereinafter Dicey & Morris]; Sharpe, supra note 9 at ¶ 2.1090. Note, however, that a Mareva injunction may be ordered where the plaintiff has a statutory cause of action: Securities and Investments Board v. Pantell S.A., [1990] Ch. 426. It might be thought that a quia timet injunction would also be an exception to this general rule, and that a similarly flexible approach to the "existing cause of action in the jurisdiction" requirement should also apply to Mareva injunctions. However, a quia timet injunction is awarded either as final relief, or else as relief which is ancillary to another substantive cause of action, (i.e., it is not "free-standing" relief). See discussion in Gee, supra note 9 at 111; and Mercedes-Benz, supra note 7.
Genoese courts brought by the cargo owners. The cargo owners also sought leave of the Court to serve the writ on the shipowners in Greece.\footnote{They did so under the Rules of the Supreme Court (Revision) 1965, S.I. 1965/1776, Ord. 11, r. 1(1) [hereinafter Ord. 11, r. 1(1)], which governs service of process out of England and Wales.}

The \textit{Mareva} injunction was initially awarded, but later set aside on application by the shipowners. The cargo owners successfully appealed to the Court of Appeal,\footnote{\cite{[1977] 3 All E.R. 803 (C.A.).} but the House of Lords reversed. The Law Lords held that the power of the High Court to order an interlocutory injunction\footnote{The case was decided under the English legislation in force when \textit{Siskina} was decided, the Supreme Court of Judicature (Consolidation) Act, 1925 (U.K.), 15 & 16 Geo. 5, c. 49, s. 45(1), which empowered the court to “grant a mandamus or an injunction or appoint a receiver by an interlocutory order in all cases in which it appears to the court to be just or convenient so to do.” It has since been replaced by the Supreme Court Act 1981, supra note 12, s. 37(1).} “presupposes the existence of an action, actual or potential, claiming substantive relief which the High Court has jurisdiction to grant and to which the interlocutory orders referred to are but ancillary.”\footnote{Siskina, supra note 35 at 254 (and, at 256, on the requirement of a substantive cause of action, following \textit{North London Ry. Co. v. Great Northern Ry. Co.} (1883), 11 Q.B.D. 30 at 39-40).} The corollary is that a plaintiff cannot obtain interim or ancillary relief in aid of foreign proceedings until an action is brought in the forum on the basis of the foreign proceedings, \textit{i.e.}, to register or enforce the resulting foreign judgment or arbitral award.\footnote{See \textit{Perry v. Zissis}, [1977] 1 Lloyd's Rep. 607 at 616-17 (C.A.) (refusing to appoint a receiver or to award an injunction restraining the defendants from disposing of their assets in the jurisdiction until final determination of an action in California). As noted below in Part VI(C), it may be possible in some cases for the plaintiff to bring an action or seek a declaration in the forum, but then consent to a stay of proceedings in favour of trial abroad.} The Court had no jurisdiction over the dispute because it could not allow service out on the defendants, so that personal jurisdiction was not established. It follows from \textit{Siskina} that a court should not allow service \textit{ex juris} where a claim for a \textit{Mareva} injunction is the sole relief sought.\footnote{See also, on this point, \textit{Deputy Commissioner of Taxation v. Ahern}, [1986] 2 Qd. R. 342 (S.C.) (allowing application to set aside service out because no cause of action was alleged against the defendants).}

The \textit{Siskina} doctrine contains three related elements: two substantive and one jurisdictional. Of the substantive elements, one is spatial and the other temporal. The spatial element is that the plaintiff must possess a substantive cause of action \textit{in the territorial jurisdiction of the court} in order to ground a \textit{Mareva} injunction. The temporal element is that a cause of action must have accrued \textit{at the time that a \textit{Mareva}}
injunction is sought. The two elements, though distinct, are related for the present purposes, because there is a temporal aspect to the spatial element: where a Mareva injunction is sought in aid of foreign proceedings, the spatial element of the Siskina doctrine is engaged. But so too is the temporal element, because the plaintiff in the domestic court may argue that, although he does not have an accrued cause of action in the jurisdiction, he will have one in the near future—once the foreign court renders judgment.

The third element of the Siskina doctrine is jurisdictional in nature: the court must have personal jurisdiction over the defendant as a necessary precursor to ordering relief. The most difficult cases involve service ex juris, in that in order to establish personal jurisdiction over the defendant, the plaintiff must place his claim within a head of the relevant service ex juris rules. As the discussion in Part E, below, indicates, the personal jurisdiction element has proved to be controversial.

The Siskina doctrine was followed in a number of cases soon after it was promulgated, and has until recently remained good law in England. Yet, from the moment of its birth, the Siskina doctrine has been hotly debated and its orthodoxy has been questioned. This
questioning was aided by the promulgation of section 37(1) of the *Supreme Court Act 1981*, which seems to have provided the impetus for a broader interpretation of the courts' power to order an injunction.46 And indeed, most cases which followed *Siskina* contended that section 37(1) did not affect the requirement that there be a substantive cause of action in the jurisdiction to ground a *Mareva* injunction.47 The courts have emphasized that the statutory basis to award a *Mareva* injunction is narrower than a simple reading would indicate.48

B. The Spatial Element

Although the House of Lords followed *Siskina* with vigour for several years,49 lately, the Law Lords' enthusiasm has faded. They first began to doubt the sweeping terms of *Siskina* in the context of anti-suit injunctions, and later, interim measures in support of foreign litigation or arbitration. In both cases, the needs of litigants embroiled in transnational litigation have placed a stress on *Siskina* which it could not bear.

---


46 Certainly, this was the view of Lord Denning M.R., although as the inventor of the *Mareva* injunction, perhaps he was not entirely disinterested. See especially *Kent*, supra note 21 at 41-43 (allowing injunction against disposition of funds in bank account), in which Lord Denning M.R. suggested that *The Siskina*, supra note 35 would be decided differently after the promulgation of s. 37(1) of the *Supreme Court Act 1981*, supra note 12. But *Kent* was disapproved of by Lord Bridge of Harwich in *Pickering v. Liverpool Daily Post*, [1991] 2 A.C. 370 at 420 (H.L.) [hereinafter *Liverpool Daily Post*].


48 *Channel Tunnel*, supra note 45 at 360-61, Lord Mustill; and Sharpe, supra note 9 at ¶ 1.1140.

1. Anti-suit injunctions

In contrast to the sweeping terms of the \textit{Siskina} doctrine, at least one type of injunction is available without the need for a cause of action: an anti-suit injunction.\textsuperscript{50} This type of injunction prohibits a party from commencing or continuing litigation against a particular party or in respect of a particular cause of action in a specified (usually foreign) forum. In setting out the jurisdiction of the courts to order anti-suit injunctions, the Supreme Court of Canada, the House of Lords, and the Privy Council have claimed broad inherent powers to order injunctions. These broad claims rest uneasily with the narrow confines of the \textit{Siskina} doctrine.

The tide began to turn against \textit{Siskina} in \textit{South Carolina Insurance Co. v. Assurantie Maatschappij “De Zeven Provincien” N.V.},\textsuperscript{51} where the plaintiff sought an anti-suit injunction to restrain a party to English proceedings from commencing parallel litigation against it in the United States. Lord Brandon of Oakbrook confirmed that English courts could grant anti-suit injunctions. He suggested that, although the statutory authority underlying the High Court’s injunction powers may appear at first blush to be wide, in reality it has been “circumscribed by judicial authority dating back many years.”\textsuperscript{52} Accordingly, he limited the scope of the Court’s power to grant injunctions to the terms set out in \textit{Siskina}, while making an exception for anti-suit injunctions.

Lord Goff of Chieveley took a different view. Although he concurred in the result, he declined to accept that anti-suit injunctions should be categorized as an exception to the \textit{Siskina} doctrine. To the contrary, anti-suit injunctions revealed the error of \textit{Siskina}’s dogmatic rule. Lord Goff viewed anti-suit injunctions as but one manifestation of the courts’ broad ability to grant injunctions:

\begin{quote}
I am reluctant to accept the proposition that the power of the court to grant injunctions is restricted to certain exclusive categories. That power is unfettered by statute; and it is impossible to foresee every circumstance in which it may be thought right to make the
\end{quote}

\textsuperscript{50} See \textit{Amchem Products Inc. v. British Columbia (Workers’ Compensation Board)} (1993), [1993] 1 S.C.R. 897 at 930, Sopinka J. [hereinafter \textit{Amchem}] (observing that “[i]n general, an injunction is a remedy ancillary to a cause of action,” but acknowledging that anti-suit injunctions are an “exception to this”); and \textit{S.N.I. Aérospatiale, supra} note 6.


\textsuperscript{52} \textit{South Carolina Insurance, supra} note 51 at 40.
Indeed, an anti-suit injunction may issue even in the absence of a cause of action in the jurisdiction in which the injunction is being sought. In many cases, an applicant will seek an anti-suit injunction enjoining the commencement or continuation of litigation abroad precisely to enable the applicant to continue litigation in the domestic forum, so that there will be a cause of action in the domestic jurisdiction. There are, however, instances where an anti-suit injunction has been sought to prevent litigation from continuing at all, or where the applicant is engaged in litigation in a third foreign forum.

The availability of anti-suit injunctions demonstrates that there is no requirement that injunctive relief be ancillary to a substantive cause of action in the jurisdiction; instead, reliance is placed upon a more amorphous conception of justice and fairness to the parties. The applicant need only demonstrate that it would be “unconscionable” to allow the other party to pursue litigation in a foreign forum. In Amchem, the leading Canadian case on anti-suit injunctions, Sopinka J. stated that “in general, an injunction is a remedy ancillary to a cause of action” but acknowledged that an anti-suit injunction was an exception to this rule. As a result, developments in the law of anti-suit injunctions demonstrate that there is at least one important exception to the Siskina doctrine, and a rule with such a large exception becomes immediately suspect.

---

53 Ibid. at 44.
56 It was initially thought that the theoretical rationale for anti-suit injunctions was that they protect the jurisdiction of the forum court. However, in South Carolina Insurance, supra note 51 at 41-43, Lord Brandon specifically rejected the suggestion that such injunctions were concerned with preventing interference with the court’s process, as did Lord Goff in S.N.I. Aérospatiale, supra note 6 at 892-93. The position of the two Law Lords has since been confirmed in Airbus Industrie, supra note 55.
57 As Adrian Briggs as observed, the traditional approach to the award of anti-suit injunctions raises a host of issues which have largely been overlooked: A. Briggs, “The Unrestrained Reach of an Anti-Suit Injunction: A Pause for Thought” [1997] L.M.C.L.Q. 90 (identifying choice of law issues arising out of the equitable right not to be subjected to vexatious or oppressive litigation).
58 Amchem, supra note 50 at 930.
2. Arbitration

The strict *Siskina* requirement that there be a substantive cause of action in the jurisdiction to ground the award of a *Mareva* injunction has faced its most severe challenge in the context of international arbitration.59 A domestic court may award injunctive relief in aid of foreign arbitral awards.60 Moreover, it has long been the law in England that the court may order an injunction in aid of pending or intended foreign arbitral proceedings where the court orders a discretionary stay in favour of arbitration abroad.61

In *Channel Tunnel*,62 the House of Lords held that an interlocutory injunction may be ordered in an action subject to a mandatory stay under the *Arbitration Act, 1975*,63 even where the arbitration itself is to take place abroad. During the construction of the tunnel under the English Channel, a contractual dispute arose between the owners of the tunnel and the construction consortium. Their contract provided for reference of disputes to a panel of experts, and eventually, to arbitration in Brussels. The owners sought an injunction

---


60 Courts may also award security for costs in international arbitration proceedings, although they will do so only in “exceptional” circumstances: *S.A. Coppée-Lavalin N.V. v. Ken-Ren Chemicals and Fertilizers Ltd.* [1995] A.C. 38 (H.L.). But see *Bank Mellat v. Helliniki Techniki S.A.*, [1984] Q.B. 291 (C.A.) (application for security for costs for foreign arbitration refused). Note, however, that it is defendants rather than plaintiffs who seek security for costs, whereas it is plaintiffs who seek Mareva relief. Of course, where there is a counterclaim the strict distinction between plaintiff and defendant may not be so clear. Also, an injunction may be granted to restrain the disposition of assets where costs have been awarded on an interlocutory order: *Panton (Faith) Property Plan Ltd. v. Hodgetts*, [1981] 2 All E.R. 877 (C.A.).

61 *Siporex*, supra note 44; and *The Rena K*, [1979] Q.B. 377 (Adm. Ct.).

62 *Supra* note 45, followed in *Aiyela*, *supra* note 23 at 375 (recognizing that the *Siskina* rule was modified by *Channel Tunnel*). See generally J. Hill, “Enforcing Arbitration Agreements and Interim Relief” [1993] L.M.C.L.Q. 465.

63 (U.K.), 1975, c. 3, s. 1(1).
restraining the consortium from suspending work on the tunnel pending the arbitration. The House of Lords held that an injunction could be awarded despite the existence of the mandatory stay of proceedings in favour of arbitration abroad. Having set out the jurisdiction to order injunctive relief, however, the Law Lords declined to do so on the facts.

*Channel Tunnel* indicates that, although a substantive cause of action may be a necessary precursor to an interlocutory injunction, the cause of action need not be within the territorial jurisdiction of the court in which interlocutory relief is sought. In this way, a domestic court can order interlocutory relief in aid of foreign judicial or arbitral proceedings. However, the dispute must be potentially justiciable by the domestic court in order for the court to order interim relief, even if, in practical terms, the order of a stay will be virtually automatic.

*Channel Tunnel* thus draws into question *The Siskina*'s requirement that the plaintiff must rely upon a substantive cause of action in order to ground ancillary relief in the form of a *Mareva* injunction, at least to the extent that the cause of action must be one located within the territorial jurisdiction of the court. However, *Channel Tunnel* did not challenge the requirement that a cause of action must have accrued, or that the defendant be amenable to the personal jurisdiction of the court in order for *Mareva* relief to be ordered.

In a similar vein, in *Phonogram Ltd. v. Def American Inc.*, the High Court held that an interlocutory injunction was available in England where domestic proceedings had been stayed in favour of California proceedings. Although the case concerned foreign litigation rather than arbitration proceedings, the court followed *Channel Tunnel* in holding that it possessed the authority to grant interlocutory injunctive relief where the relevant causes of action were within the territorial jurisdiction of the English court, even though the court ordered a stay of proceedings in favour of litigation abroad on *forum non conveniens* grounds.

However, the court held that it would be appropriate to order an injunction in aid of foreign legal proceedings only in unusual circumstances. In particular, it would be reluctant to make an order

---

64 *Qingdao Ocean Shipping Co. v. Grace Shipping Establishment* ("*The Xing Su Hai*"), [1995] 2 L.L. R. 15 at 25 (Q.B.D. (Comm. Ct.)) [hereinafter *The Xing Su Hai*].

65 *Channel Tunnel, supra* note 45 at 342-43, Lord Browne-Wilkinson, and at 362, Lord Mustill.

66 Sharpe, *supra* note 9 at § 1.1170 (suggesting that the cases establish that "[t]he jurisdiction of the courts to grant injunctions is limited only by the principle that the suit in which injunctive relief is claimed must raise a justiciable issue between the parties")

67 (1994) T.L.R. 493 (Ch.D.) [hereinafter *Def American*].
which might pre-empt a ruling of a foreign court. The foreign court might make its own Mareva-type order. If the foreign court did not have the power to make such an order, the English court would "be likely to refuse the relief sought on the ground that the applicant was guilty of 'forum shopping.'" Where foreign and domestic proceedings continue simultaneously, the fact that the foreign court has already made a restraining order is merely one factor to be considered in the domestic court's determination as to whether to order a Mareva injunction: it is not determinative.\(^6\)

The British Columbia Supreme Court did not express such reservations about the award of provisional relief in aid of foreign arbitration proceedings in *Trade Fortune Inc. v. Amalgamated Mill Supplies Ltd.*\(^6\) A charter-party agreement contained a clause providing for arbitration of disputes in London, and for English law to govern. A dispute arose, and the arbitration process was commenced. Before the arbitration was complete, the plaintiff brought an action in British Columbia seeking a pre-judgment garnishing order. The defendant sought to have the garnishing order set aside, and also sought a stay of proceedings pending the outcome of the arbitration in London. The court held that under provincial legislation it could award a garnishing order as an "interim measure of protection" pending arbitration in London to secure funds for payment of an eventual arbitration award.\(^7\)

The court further held that its ability to award such an interim measure was unaffected by the statutory requirement that it order a stay in favour of arbitration in London.\(^7\) The dispute remained justiciable in British Columbia despite the mandatory stay.

There are limits upon the courts' willingness to award Mareva relief in aid of foreign arbitral proceedings. In *Rosseel N.V. v. Oriental Commercial Shipping (U.K.) Ltd.*,\(^7\) the English Court of Appeal declined to award a worldwide Mareva injunction in aid of a New York arbitral award. The court was prepared to order a Mareva injunction in aid of foreign arbitral proceedings with respect to assets within its own jurisdiction, but held that it should be very reluctant to make an order that would have the effect of extending outside its jurisdiction, and

---


\(^6\) (1994), 89 B.C.L.R. (2d) 132 (S.C.) [hereinafter *Trade Fortune*].


\(^7\) Ibid., s. 8.

\(^7\) [1990] 1 W.L.R. 1387 [hereinafter *Oriental Commercial*].
would do so only in a very exceptional case. Lord Donaldson M.R. noted that, if worldwide Mareva injunctions were to be made in aid of foreign proceedings, the result might well be “criss-crossing long arm jurisdictional orders with a high degree of probability that there would be confusion and, indeed, resentment by the nations concerned at interference with their jurisdictions.”

Note, of course, that it was worldwide Mareva relief being sought, so that concerns of comity weighed heavily.

C. The Temporal Element

The Law Lords in Siskina were understandably concerned that injunctive relief should not be available in the abstract, without a basis in an underlying legal dispute justiciable in the English courts. Accordingly, they made it a condition of granting a Mareva injunction that a cause of action must have arisen at the time that relief was sought. Yet the requirement that a cause of action must have already arisen before injunctive relief can be granted denies relief to plaintiffs with deserving cases. The rigidity of the Siskina doctrine has, at times, led lower courts to construct devices to avoid it where its application would produce injustice.

In A. v. B., the English Commercial Court held that a Mareva injunction was available even where no subsisting cause of action had yet arisen. The court made the award of a Mareva injunction conditional upon the delivery of a vessel, at which point the plaintiff’s cause of action—which did not yet exist—would arise. The English courts have also been willing to order Mareva injunctions in the absence of a pre-existing cause of action where statutory language authorizes doing so. However, the current rule in England is that the temporal element

73 Presumably, similar reluctance would apply to an order in favour of legal proceedings in another contracting state: see ibid. at 1389 (describing Republic of Haiti, supra note 44, as “very unusual”).

74 Supra note 72 at 1389.


76 See In Re Oriental Credit Ltd., [1988] 1 Ch. 204 (injunction granted under Companies Act 1985 (U.K.), 1985, c. 6, s. 561, to restrain company director from leaving the jurisdiction to avoid attending an examination even where there was no subsisting cause of action). See also Insolvency Act 1986 (U.K.), 1986, c. 45, s. 423 (fraudulent conveyance provisions apply regardless of whether a cause of action has yet accrued), discussed in C.F. Forsyth, “Interlocutory Injunctions Where There is No Legal or Equitable Right to be Protected” [1988] Camb. L.J. 177.
of *Siskina* remains very much in force. Thus, in *The Veracruz I*, the Court of Appeal declined to award a *Mareva* injunction in anticipation of a breach of contract and, in a decision released mere days before the Privy Council's decision in *Mercedes-Benz*, the Court of Appeal again confirmed that a *Mareva* injunction is unavailable where a cause of action had not yet arisen.78

Despite the apparent approval of the temporal branch of the *Siskina* doctrine, the current status of the English rule remains somewhat murky. This is so because, even though the Court of Appeal has genuflected to the rule, it has determined that an injunction is available even in an action for a declaration. The lower courts have followed *The Veracruz I* and *Siskina* in holding that the power to grant an injunction must be based on a cause of action, but have gone on to hold that a declaration of right amounts to a cause of action for the purpose of ordering an injunction, and ordered an injunction on this basis.79 If a mere declaratory judgment can serve as a cause of action sufficient to ground interim relief, then the temporal branch of the *Siskina* doctrine appears to be weak and easily circumvented.

Paul Marshall argues convincingly that the temporal branch of the *Siskina* rule misses the main point, namely that, in order to obtain a *Mareva* injunction, the plaintiff must cross the threshold of showing a "good arguable case," which in his view "renders the distinction between an accrued cause of action and a cause of action which will, for all practical purposes, inevitably accrue, unnecessary ...."80 Marshall's argument bears emphasizing: the threshold for obtaining *Mareva* relief is high,81 so that theoretical niceties as to whether or not a cause of action has yet arisen will almost invariably pale in the light of evidence of conduct verging on fraud on the part of a defendant.

This logic has largely been accepted by the Australian courts, which have adopted a broader approach to the temporal element than

---

77 *Supra* note 44.

78 *Department of Social Services v. Butler*, [1995] 4 All E.R. 193 (C.A.) [hereinafter *Butler*] (*Mareva* injunction unavailable to prevent alleged disposition of assets where no finding of child support liability under statutory framework had yet been made).


81 Sharpe, *supra* note 9 at ¶ 2.870 (*Mareva* injunction should be refused unless "there is a good prospect of success at trial"); and see cases noted *supra* note 20.
that contemplated by Siskina.\textsuperscript{82} In part, this may be due to a more explicit recognition that the purpose of the Mareva injunction is to prevent an abuse of the process of the court in relation to the (anticipated) exercise of its powers.\textsuperscript{83} Thus, in Deputy Commissioner of Taxation v. Sharp,\textsuperscript{84} a Mareva injunction was awarded where no cause of action had yet arisen. The revenue authorities had demonstrated that the defendants were likely to remove their assets to frustrate tax assessments against them, even though the assessments had not yet crystallized into causes of action because the relevant payment deadlines had not yet expired. The Court suggested that Lord Diplock’s formulation of the rule in Siskina—requiring an accrued cause of action—was too narrow, and that a better approach was that “a Mareva injunction may be made where there is a real risk that a debtor may deal with his or her assets before judgment against him or her so as to stultify that judgment when obtained.”\textsuperscript{85} The Australian decisions suggest that a strict interpretation of Siskina’s temporal element may work injustice.\textsuperscript{86}

Recent English decisions concerning the impact of Mareva injunctions on third parties and co-defendants indicate a certain degree of flexibility with regard to Siskina’s accrued cause of action requirement. In each case, a Mareva injunction was ordered against a related party even though a cause of action technically did not lie against it, due to evidence that it held assets beneficially which could be


\textsuperscript{84} (1988), 82 A.C.T.R. 1 (S.C) [hereinafter D.C. Taxation].

\textsuperscript{85} Ibid., para. 23.

\textsuperscript{86} See also Patterson v. BTR Engineering (Aust) Ltd. (1989), 18 N.S.W.L.R. 319 at 329 (C.A.), Rogers A.-J.A. (“in some circumstances ... the justice of the case may require that injunctive relief be granted even before the cause of action arises”), and at 331 (“Ultimately, what the plaintiff has to show is that the defendant, by attempting to put his assets out of reach, is seeking to frustrate the court’s power to grant an effective remedy.”); and Construction Engineering (Aust) Pty Ltd v. Tambil (Australasia) Pty Ltd. (1984), 1 N.S.W.L.R. 274 (S.C) (court may award Mareva injunction in aid of pending arbitration proceeding).
attributed to the defendant, against whom a cause of action did lie. It is probably accurate to say that these cases cannot be reconciled with Siskina: they illustrate the rigidity of that doctrine and suggest that it would be better for the courts to base the principles upon which they will order Mareva injunctions upon a different foundation.

The question as to whether a Mareva injunction should be available where there is no cause of action at all need not be resolved here. The floodgates arguments underlying the reasoning in Siskina do have some force, and it is difficult to conceive of an injunction being sought without reference to any cause of action anywhere. But in the circumstances under discussion—where a Mareva injunction is sought in aid of foreign proceedings—there is a cause of action: the only complicating factor is that it is being adjudicated abroad. I also argue that a Mareva injunction should be ordered in aid of foreign proceedings even where those proceedings have not commenced, so long as an undertaking is given to commence them as soon as possible, and in any event, within a set time limit.

D. Interim Relief In Aid of Foreign Proceedings Under the Brussels and Lugano Conventions

Siskina's bar to the ability of English courts to order Mareva injunctions in aid of foreign legal proceedings was partially removed by the reception of the Convention on Jurisdiction and the Enforcement of

87 See Aiyela, supra note 23 (Mareva injunction upheld against defendant's wife); Aiglon Ltd. v. Gau Shan Co. Ltd., [1993] 1 Lloyd's Rep. 164 (continuation of a Mareva injunction ordered against company against which no cause of action lay which held assets "stripped" from named shell defendant); and T.S.B. Private Bank Int'l S.A. v. Chabra, [1992] 1 W.L.R. 231 (Ch. D.) (A cause of action lay against one defendant, the majority shareholder of the second corporate defendant, which held most of his assets. A Mareva injunction was ordered against the second defendant against whom no cause of action lay, on the reasoning that the injunction was ancillary to the plaintiff's cause of action against the first defendant.). See also Vereker v. Choi, [1985] 4 N.S.W.L.R. 277 (S.C.) (Mareva injunction awarded against wife of defendant who was otherwise not party to action).

88 See Skene, supra note 8 at 36-37.

89 See, for example, problems along the lines of Gouriet v. Union of Post Office Workers, [1978] A.C. 435 (H.L.). See Butler, supra note 78 (Mareva injunction restraining disposition of assets against individual against whom a maintenance order had been made under statute where there was no underlying cause of action).

Judgments in Civil and Commercial Matters into English law. That incorporation renders Siskina inapplicable where interim relief is sought in aid of legal proceedings in a Contracting State. Proceedings must have been brought (or be about to be brought) in a Contracting State, the defendant must be domiciled in a Contracting State, and the subject matter of the litigation must be within the scope of the Conventions (i.e., civil and commercial matters). In awarding interim relief in aid of foreign proceedings, English courts do not exercise substantive jurisdiction over the dispute: they exercise jurisdiction for the limited purpose of granting provisional measures.

In a celebrated case, the English Court of Appeal upheld injunctive relief restraining the disposition of assets in aid of French proceedings seeking recovery of assets from the family of deposed Haitian president Jean-Claude “Baby Doc” Duvalier. Similarly, a Mareva injunction was ordered in aid of French proceedings against a defendant domiciled in Saudi Arabia. Likewise, a plaintiff pursuing an action in Ireland against a defendant domiciled in a Convention State was awarded a “worldwide” Mareva injunction in aid of the Irish proceedings.

---


92 “Contracting states” are those states which are parties to the Brussels or Lugano Conventions. The CJJA 1982, supra note 91, ss. 24, 25, gives courts the power to order interim relief, but do not require its exercise, as s. 25(2) provides that such measures as are allowed by national law may be applied at the court’s discretion. Section 25(3) allows the power to be extended by an order in council so as to apply to other states, although this has not been done.


94 Although, see X. v. Y., [1990] 1 Q.B. 220.

95 See Neste Chemicals S.A. v. DK Line S.A. (“The Sargasso”), [1994] 3 All E.R. 180 at 187 (C.A.); and Balkanbank v. Taher, [1995] 2 All E.R. 904 at 920 (C.A.) [hereinafter Balkanbank] (party which invokes the interim relief jurisdiction may be considered to have submitted to the jurisdiction of the English courts for the purposes of a counterclaim against it).

96 Republic of Haiti, supra note 44.

97 X. v. Y., supra note 94.

98 Balkanbank, supra note 95.
The Convention experience demonstrates that, with a system of international reciprocity in the recognition and enforcement of foreign judgments and orders in place, some provision must be made for courts to make provisional and protective orders in aid of proceedings in other Convention States. Yet the Convention jurisprudence might also suggest that the relaxation of the traditional limitations upon the ability of domestic courts to order provisional and protective measures in aid of foreign proceedings is feasible only where there is a treaty-based international set of rules governing the exercise of jurisdiction and the recognition and enforcement of foreign judgments. In a recent Ontario case, Farley J. suggested that the ease of travel and transfer of assets between jurisdictions has created a need for legislation in Canadian provinces akin to article 25 of the Brussels/Lugano Conventions.99

In my view, the argument that a treaty-based system for the allocation of jurisdiction and the enforcement of judgments is a necessary precursor to the extension of the courts’ ability to award Mareva relief does not withstand scrutiny. Even though Canada is not a party to any multilateral conventions analogous in scope to the Brussels/Lugano Conventions, recent years have seen a reformation of many elements of Canadian private international law by the Supreme Court of Canada. This process indicates avenues by which Canadian courts, properly informed, may order Mareva injunctions in aid of foreign proceedings, even in the absence of a multilateral convention enabling (or even binding) them to do so. Indeed, the English experience with the award of interim measures in aid of litigation in other Contracting States leads one to ask why the English courts (or any other common law courts, for that matter) could not order such measures on the basis of properly developed common law rules.

E. Personal Jurisdiction, Due Process, Justiciability, and the Real and Substantial Connection Requirement

The third element of the Siskina doctrine is the requirement of personal jurisdiction. To order a Mareva injunction, the court must exercise proper personal jurisdiction over the defendant. The concern that there be a close relationship between subject matter jurisdiction and personal jurisdiction has always animated the English courts,100 and there is growing recognition of the importance of this relationship in

---

100 See, for example, Rosler v. Hilbery, [1925] Ch. 250 (C.A.).
Canadian courts. Where the defendant is present in the territorial jurisdiction of the court, or has submitted to the court's jurisdiction, no problem of personal jurisdiction arises.\textsuperscript{101} Where the defendant is outside the territorial jurisdiction of the court, matters are more complicated, because the defendant has a reasonable expectation that process will be served upon her only in carefully defined circumstances.\textsuperscript{102}

Most Canadian common law provinces permit the plaintiff in an action to serve process \textit{ex juris} without leave of the court. In Ontario, a plaintiff must place his case under a head of Rule 17.02 in order to serve a defendant \textit{ex juris}.\textsuperscript{103} On one level, then, the question as to whether a plaintiff seeking an injunction may serve originating process upon a defendant who is outside the territorial jurisdiction is to be answered merely by determining whether the claim can be placed within the language of Rule 17.02(i):

A party to a proceeding may, without a court order, be served outside Ontario with an originating process or notice of a reference where the proceeding against the party consists of a claim or claims, ...

(i) for an injunction ordering a party to do, or refrain from doing, anything in Ontario or affecting real or personal property in Ontario.

The language of the rule is, however, ambiguous. Canadian authority suggests that service \textit{ex juris} should be set aside where a \textit{Mareva} injunction is the sole relief sought.\textsuperscript{104} It seems that provincial service \textit{ex juris} rules will be governed by the requirement that there must be a real and substantial connection between the claim and the province.\textsuperscript{105} Rule

\textsuperscript{101} Moran v. Pyle National (Canada) Ltd., [1975] 1 S.C.R. 393 at 397 [hereinafter Moran v. Pyle]. The traditional rule that mere transitory presence in the jurisdiction suffices to establish personal jurisdiction over the defendant, as exemplified by \textit{Maharanee of Baroda v. Wildenstein}, [1972] 2 Q.B. 283 (C.A.) may go too far, in that it may be transgress inchoate constitutional limits of a due process variety, but I need not address this point here.


\textsuperscript{103} Otherwise, a plaintiff must seek leave of the court under r. 17.03. Analogous provisions allowing service out where an injunction is sought exist in all other Canadian common law provinces.

\textsuperscript{104} Suncorp Realty Inc. v. PLN Investments (1986), 36 Man. R. (2d) 280 (Q.B.) [hereinafter Suncorp Realty]. No cases have interpreted r. 17.02(i) of the \textit{Ontario Rules}, supra note 28, or its Alberta or British Columbia counterparts. See \textit{Alberta Rules of Court}, Alta. Reg. 390/68, r. 30(1); and \textit{B.C. Rules of Court}, 1990, B.C. Reg. 221/90, r. 13(1)(i).

17.02 and its counterparts in other common law provinces merely enumerate particular instances of a “real and substantial connection,” the test set out in *Morguard*.

On a more general level, Canadian courts have properly expressed concern that defendants outside the jurisdiction not be subjected to litigation in Canada, where there is no real and substantial connection between the underlying dispute and this country. So, for example, in *Elesguro Inc. v. Ssangyong Shipping Co.*, leave to serve *ex juris* for a *Mareva* injunction to freeze a ship in Canada was refused where neither the parties nor the ship had any connection with Canada. And in *Canadian Pioneer Petroleums Inc. v. F.D.I.C.*, a similar concern that an injunction not be awarded where the underlying dispute was properly addressed in a foreign forum was evident. These cases emphasize the requirement that, for a Canadian court to take subject matter jurisdiction over a dispute, there must be a real and substantial connection between the dispute and the court (or more properly, with the territorial jurisdiction in which the court is located).

Although, as noted above, the presence of the defendant’s assets in the territorial jurisdiction of the court does not establish personal jurisdiction over an absentee defendant for the purpose of allowing the court to adjudicate a substantive claim, the presence of assets does have an important practical consequence. The courts’ willingness to impose injunctive relief is conditioned by an appreciation of the concern that such orders be effective because enforceable against the defendant. There is no theoretical reason preventing a court from taking personal jurisdiction over a defendant who is outside its jurisdiction. The

---

106 *Morguard*, supra note 105. See *Frymer*, supra note 105 at 65 and 74-75.

107 See *Northern Sales Co. v. Government Trading Corp. of Iran* (1991), 48 C.P.C. (2d) 254 at 259 (B.C.C.A.). See also *Sharpe*, supra note 9 at ¶ 1.1250 (“Were such an injunction allowed in the absence of a cause justiciable in the domestic court, its practical effect would often be to force the foreigner to come to the jurisdiction to defend an action ordinarily justiciable in a foreign court only to protect or obtain release of his or her assets.”)


111 Other than certain due process concerns which, though of central importance in the United States, have not as yet played a role in Canada. See P.W. Hogg, *Constitutional Law of Canada*, 3d ed. (Toronto: Carswell, 1992) (updated to 1996), para. 13.5(b). Certainly, public international law does not require a connection between the parties to a dispute and the forum for protective measures to be invoked: C. McLachlan, “Transnational Applications of Mareva Injunctions and Anton Piller Orders” (1987) 36 I.C.L.Q. 669; F.A. Mann, “The Doctrine of
presence of the defendant’s assets in the jurisdiction affects not the
court’s subject-matter jurisdiction, but rather, by increasing the
likelihood that the order will be enforceable against the defendant, it
influences the exercise of the court’s discretion as to whether to exercise
this subject-matter jurisdiction over the defendant.

For personal jurisdiction purposes, there is an important
distinction between *Mareva* injunctions, which are provisional and
protective in nature, and substantive forms of relief. It would obviously
be inappropriate for a Canadian court to order an interlocutory
injunction against a person who had no real and substantial connection
to the court. This would represent the vindication of the worst type of
forum shopping. But where the injunctive relief sought is both
protective in nature and anticipates that a foreign judgment or award
will be secured and subsequently registered or enforced in Canada, any
unfairness to the defendant melts away. Jurisdiction to freeze assets is
not premised on possession of jurisdiction to determine the substantive
merits of the dispute, and there is accordingly no reason why the same
standard of personal jurisdiction should apply in both instances.

This conclusion is reinforced by reference to the American
experience with provisional relief in aid of arbitration. The availability
of attachment in the United States in aid of foreign arbitration
proceedings is a matter of some uncertainty. One line of authority,
exemplified by *McCreary Tire & Rubber Co. v. CEAT*, denies it on the
premise that such attachment is inconsistent with arbitration. The
converse position was taken in *Carolina Power & Light Co. v. Uranex*,
where a federal district court upheld the attachment of assets in
California pending the resolution of arbitration in New York. The
defendant’s connections to California were minimal—indeed, too
minimal to support the assertion of personal jurisdiction over it under
the *International Shoe Co. v. Washington* standard for the purpose of
exercising substantive jurisdiction over the merits of the dispute.

---

International Jurisdiction Revisited After Twenty Years” (1984) 186 Hague Recueil des Cours 9 at
73; and L. Collins, “Provisional Measures, the Conflict of Laws and the Brussels Convention”

112 But see *Airbus Industrie*, supra note 55.

113 A. Briggs, “How Soon is an English Court Seised (Revisited)?” [1994] L.M.C.L.Q. 470 at
472 (“It is now clear that jurisdiction to grant provisional or protective measures bears no necessary
or uniform connection to jurisdiction to hear the action on the underlying merits.”)

114 501 F.2d 1032 (3d Cir. 1974) [hereinafter *McCreary*].

115 451 F.Supp. 1045 (N.D. Calif. 1977) [hereinafter *Uranex*].

116 326 U.S. 310 (1945) [hereinafter *International Shoe*].
Moreover, Uranex was decided soon after Shaffer, which had extended the in personam "minimum contacts" requirement of International Shoe to the exercise of quasi in rem jurisdiction.

The Uranex court noted that the United States Supreme Court, in Shaffer, had been careful to leave open an exception to the general rule governing personal jurisdiction enunciated in that case, so that attachment of assets in one jurisdiction could be ordered pending resolution of litigation or arbitration elsewhere, despite the fact that the defendant's contacts with the attaching forum were inadequate to establish substantive jurisdiction there. In so holding, the Uranex court was explicitly motivated by the concern that courts must not be powerless to prevent an abuse of process, and must ensure that litigants cannot render themselves judgment proof after the writ is served. The inconsistency between McCrery and Uranex has yet to be ironed out: McCrery has received some subsequent support, although most courts and commentators prefer Uranex.

It should be recalled that a Mareva injunction in aid of foreign proceedings does nothing more than freeze the defendant's assets. It does not condemn them for judicial sale or otherwise affect title to

---

117 Supra note 32.
118 Uranex, supra note 115 at 1048.
121 Schlosser, supra note 2 at 162-63; C.N. Brower & W.M. Tupman, "Court-Ordered Provisional Measures Under the New York Convention" (1986) 80 Am. J. Int'l L. 24 at 31; and Scoles & Hay, supra note 30 at 244.
property. Moreover, there is no question of the domestic court taking personal jurisdiction over an individual merely on the basis of the presence of his or her assets within the jurisdiction. Finally, the plaintiff must still satisfy the normal requirements of a *Mareva* injunction, and they are onerous, as *Friedland No. 5* demonstrated.

III. *MERCEDES-BENZ AG V. LEIDUCK*

As the preceding Parts demonstrate, the three elements of the *Siskina* doctrine each have been subjected to attack and subversion. They were ripe for reappraisal. In 1995, the Privy Council was presented with an opportunity to revisit *Siskina* head-on. Regrettably, the majority shied away from the challenge, although a spirited dissent by Lord Nicholls showed the way forward.

A. Facts

In *Mercedes-Benz*, a German auto manufacturer entered into a contract with Leiduck, a German citizen, and a Monaco corporation (IRSAM) controlled by him, to promote the sale of automobiles to a customer in Russia. To finance this scheme, Mercedes-Benz advanced (US) twenty million dollars to IRSAM, secured by a promissory note from, and guaranteed by, Leiduck. IRSAM defaulted on the promissory note, as did Leiduck on the guarantee. Mercedes-Benz argued that the funds it had advanced to IRSAM had been misappropriated in favour of ICR, a Hong Kong company controlled by Leiduck.

Mercedes-Benz brought a civil action in Monaco against Leiduck to recover the funds. Leiduck was also made the subject of criminal proceedings in Monaco, and was placed in police custody there. Meantime, Mercedes-Benz became concerned that Leiduck was attempting to transfer assets out of Hong Kong, and brought an action in the Supreme Court of Hong Kong against Leiduck and ICR. Mercedes-Benz argued that, although the Monaco proceedings, then still in progress, would likely end in its favour, and that the resulting judgment could be enforced in Hong Kong under bilateral arrangements for the reciprocal enforcement of judgments between France and Hong Kong, for practical purposes it would be unable to enforce the Monaco

122 *Supra* note 5.
123 *Supra* note 7.
judgment in Hong Kong because the defendants were spiriting their assets out of Hong Kong in the interim, so as to render themselves effectively judgment proof.

The Hong Kong action against ICR was subsequently abandoned, but the action against Leiduck continued. Mercedes-Benz sought injunctive relief, and several interim orders were made against Leiduck. After an initial delay, Leiduck brought applications to have all of the orders against him set aside. The applications setting aside the orders were allowed at trial, and affirmed on appeal. Mercedes-Benz then brought a further appeal to the Privy Council. At the time of that hearing, judgment had not yet been reached in the Monaco action, but was anticipated within hours.

Two issues arose before the Privy Council. The first was one of personal jurisdiction: whether the Court should grant leave to serve process *ex juris* under the Hong Kong rules (the relevant Hong Kong rule being identical to the English Ord. 11, r. 1(1)(b)) upon the defendant Leiduck in Monaco. Could the court grant leave to serve out on a foreigner not present in the forum, and whose only connection to the forum was that he possessed assets there? The second and related question concerned the substantive jurisdiction of the court to award the *Mareva* relief being sought. Was a *Mareva* injunction available in the forum in a case where the defendant was not present, and where there was no substantive cause of action in the forum, given that the *Mareva* injunction sought was ancillary to foreign, rather than domestic, legal proceedings?

B. Lord Mustill's Majority Speech

Lord Mustill, joined by Lords Goff, Slynn of Hadley, and Hoffmann, began by examining the question of personal jurisdiction, on the basis that if that question should be answered in the negative, the substantive question would not arise. Leiduck was a foreigner, and was outside the territorial jurisdiction of the Court. Mercedes-Benz had no cause of action against him in Hong Kong, and he had no connection to Hong Kong, other than the assets he possessed there. Personal jurisdiction over the defendant had to be established by service. As the

126 *Supra* note 37.
defendant was outside the jurisdiction, the plaintiff had to place its application for service out within a head of Ord. 11 to be entitled to seek leave of the court to have the writ served on the defendant:

R. 1(1) ... service of a writ out of the jurisdiction is permissible with the leave of the Court if in the action begun by the writ—

(b) an injunction is sought ordering the defendant to do or refrain from doing anything within the jurisdiction ...127

Could an application for a *Mareva* injunction be placed into this category where no permanent relief was sought because no cause of action had been brought in the jurisdiction? Lord Mustill held that a facial reading of the statutory provision proved insufficient for a proper interpretation. Accordingly, the issue of personal jurisdiction could be resolved only by engaging in an examination of the juridical basis for a *Mareva* injunction.128

The first possibility was that, despite its name, a *Mareva* injunction is not really an injunction at all, but instead a form of pre-judgment attachment. As Lord Mustill noted, while this view had some initial support in the case law, it could not be sustained. A *Mareva* injunction operates *in personam*, not *in rem*: it creates no proprietary rights, and more importantly, does not serve as a source of subject-matter jurisdiction over the defendant. Further, refutation of the attachment thesis came from the observation that, although initially *Mareva* injunctions were available only against foreigners who were outside the territorial jurisdiction of the forum court, this requirement was later abandoned, so that *Mareva* injunctions could be ordered against defendants without regard to their nationality.

The second possibility, derived from the *Mareva* case itself,129 was that an injunction could issue where a plaintiff had a right to be paid a debt owing to him, even where he had yet to establish this right by obtaining a judgment for it. This possible explanation had been advanced in an effort to distinguish an earlier line of cases that had been hostile to pre-judgment injunctive relief. Yet, *Siskina* and other cases indicated that the earlier line of authority was in fact correct on this

---


128 *Mercedes-Benz*, *supra* note 7 at 299 ("The first step would be to ascertain not only what a *Mareva* injunction does, but also how, juristically speaking, it does it. This should be straightforward but is not.")

129 *Supra* note 14.
point.\textsuperscript{130} Lord Mustill concluded that this explanation of the juridical source of the \textit{Mareva} injunction was inadequate.

Having dismissed these two possible explanations, Lord Mustill concluded that the only remaining explanation was that the \textit{Mareva} injunction, like an anti-suit injunction, was \textit{sui generis}. Given this, Lord Mustill considered it misleading to suggest that, solely because a \textit{Mareva} injunction is called an 'injunction,' it should automatically fall within the category delineated by Ord. 11, r. 1(1)(b). The true question, according to Lord Mustill, was 'whether an extra-territorial jurisdiction grounded only on the presence of assets within the territory is one which sub-paragraph (b) and its predecessors were intended to assert.'\textsuperscript{131} He was confident that the answer was "no": the rule contemplated only applications for permanent injunctions.\textsuperscript{132}

By contrast, Lord Mustill held that the purpose of the Hong Kong (and English) service \textit{ex juris} rules was:

\begin{quote}
\vspace{1em}
to authorise the service on a person who would not otherwise be compellable to appear before the English court of a document requiring him to submit to the adjudication by the court of a claim advanced in an action or matter commenced by that document. Such a claim will be for relief founded on a right asserted by the plaintiff in the action or matter, and enforced through the medium of a judgment given by the court in that action or matter. The document at the same time defines the relief claimed, institutes the proceedings in which it is claimed, and when properly served compels the defendant to enter upon the proceedings or suffer judgment and execution in default. Absent a claim based on a legal right which the defendant can be called upon to answer, of a kind falling within Ord. 11, r. 1(1), the court has no right to authorise the service of the document on the foreigner, or to invest it with any power to compel him to take part in proceedings against his will.\textsuperscript{133}
\end{quote}

On this view, the purpose of the rule is to allow service out so that substantive claims may be adjudicated. It follows that an application for a \textit{Mareva} injunction is simply not the sort of relief included within Ord. 11. It does not seek the enforcement of rights as between the plaintiff and the defendant: instead, "it merely ensures that once the mechanisms of enforcement are set in motion, there is something physically available upon which they can work."\textsuperscript{134} Lord Mustill turned to the very language of Ord. 11 itself for support. The initial paragraph of r. 1 refers to "the action begun by the writ," which to

\begin{footnotes}
\textsuperscript{130} \textit{Mercedes-Benz, supra} note 7 at 301.
\textsuperscript{131} Ibid.
\textsuperscript{132} See, for example, \textit{James North, supra} note 43.
\textsuperscript{133} \textit{Mercedes-Benz, supra} note 7 at 301.
\textsuperscript{134} Ibid. at 302.
\end{footnotes}
Lord Mustill demonstrated that Ord. 11 was confined to claims for substantive relief, and an application for a Mareva injunction in aid of foreign proceedings did not qualify. Thus, he held that there was no jurisdiction to allow service out on the basis of an application for a Mareva injunction not based in a substantive cause of action in the forum.

Lord Mustill repudiated several other arguments which supported a broad interpretation of the scope of Ord. 11, r. 1(1)(b). Mercedes-Benz had contended that an analogy could be drawn with quia timet injunctions. He held that a quia timet injunction, unlike a Mareva injunction, presupposes the violation or threatened violation of a substantive right. The act which a quia timet injunction seeks to prevent (a violation of rights) is an unlawful one. By contrast, the right to a Mareva injunction is unconnected to the substantive right underlying the cause of action, and the act which it seeks to prevent (the dispersal of assets) is not inherently unlawful. These distinctions were sufficient, in Lord Mustill’s opinion, to render Mareva injunctions outside the scope of Ord. 11, r. 1(1)(b).

Lord Mustill also rejected the contention that Siskina had, in effect, been overruled by the enactment of section 25 of the CJIA 1982. While he accepted that, for the purposes of the Brussels Convention, a new set of rules relating to jurisdiction and judgments in general, and preliminary and protective measures in particular, applied amongst Convention States, there was no indication at all that The Siskina’s common law rule had been overruled outside the Brussels Convention context. This conclusion was reinforced by the observation that, in the present case, the forum was Hong Kong, which (like Canada) has no statutory equivalent to section 25 of the CJIA 1982, and no relationship to the Brussels Convention.

Although his views on the issue of personal jurisdiction were sufficient to dispose of the appeal, Lord Mustill conceded that the substantive jurisdictional question was a live one:

It may well be that in some future case where there is undoubted personal jurisdiction over the defendant but no substantive proceedings are brought against him in the court, be it in Hong Kong or in England, possessing such jurisdiction, an attempt will be made to obtain Mareva relief in support of a claim pursued in a foreign court. If the considerations fully explored in the dissenting judgment of Lord Nicholls of Birkenhead were then to prevail a situation would exist in which the availability of relief otherwise considered permissible and expedient would depend upon the susceptibility of the defendant to personal service. Their Lordships believe that it would merit the close attention of the rule-making body to consider whether, by an enlargement of Ord 11, r

---

135 Discussed supra at text accompanying notes 91-94.
This passage suggests that he was inviting the legislature to overturn the decision. It highlights the regret which many must feel that such an evolution was not thought to be possible by way of the processes of the common law itself.\textsuperscript{137} It seems clear that the majority was reluctant to decide as it did, but it is equally clear that Lord Mustill felt compelled by the language and the history of the statutory provision to reach his conclusion.

C. Lord Nicholls’ Dissenting Speech

Lord Nicholls of Birkenhead began his dissent with the following words:

The first defendant’s argument comes to this: his assets are in Hong Kong, so the Monaco court cannot reach them; he is in Monaco, so the Hong Kong court cannot reach him. That cannot be right. That is not acceptable today. A person operating internationally cannot so easily defeat the judicial process. There is not a black hole into which a defendant can escape out of sight and become unreachable.\textsuperscript{138}

Like the majority, Lord Nicholls agreed that the substantive authority of the courts to order a Mareva injunction in aid of foreign legal proceedings should be distinguished, and addressed separately, from the issue of personal jurisdiction over an absent defendant by service out. But unlike the majority, Lord Nicholls suggested that the personal jurisdiction issue could not properly be addressed until the substantive issue had been settled.

Lord Nicholls held that, where a plaintiff had begun litigation abroad and the defendant was physically present in the forum, the domestic courts would unquestionably possess the authority to order a Mareva injunction to enjoin the defendant from disposing of assets in order to render herself judgment-proof. Indeed, the need for such an authority would be “particularly compelling when the foreign court has

\textsuperscript{136} Mercedes-Benz, supra note 7 at 304-05.

\textsuperscript{137} Especially given the House of Lords’ view, reiterated in several recent cases, that it can continue to develop the common law: see, for example, White v. Jones, [1995] 2 A.C. 207; Woolwich Equitable Building Soc’y v. Inland Revenue Commissioners, [1993] A.C. 70; and Lipkin Gorman (a firm) v. Karpnale Ltd., [1991] 2 A.C. 548. Although the composition of the Judicial Committee of the Privy Council and the Appellate Committee of the House of Lords is not identical, it is for practical purposes very similar.

\textsuperscript{138} Mercedes-Benz, supra note 7 at 305.
no power to grant interim relief in respect of assets outside its territorial jurisdiction."¹³⁹ Like the majority, he held that the scope of the Mareva injunction could only be properly defined by reference to the remedy's underlying rationale. He agreed that a Mareva injunction "is not connected with the subject matter of the cause of action in issue in the proceedings,"¹⁴⁰ and that the cause of action is "essentially irrelevant" when considering the jurisdiction of the court to order Mareva relief.¹⁴¹

To the contrary, Mareva relief is not so much granted in aid of a cause of action as it is to protect the process of the court. Given the essentially protective function of the Mareva injunction in safeguarding a prospective enforcement process, Lord Nicholls held that the reasons underlying the application of the Mareva injunction in aid of domestic litigation applied equally to foreign litigation. The reasons that domestic courts recognize and enforce foreign judgments and arbitral awards could be extended to enable domestic courts to order provisional and protective relief in aid of those (prospective) foreign judgments and awards.

Lord Nicholls then grappled directly with Siskina. In his view, Siskina's authority was attenuated by the fact that the Law Lords had not addressed the jurisdictional and substantive elements of the case separately. Moreover, Siskina had been decided only three years after the substantive jurisdiction to award Mareva relief had first been claimed by the Court of Appeal. Consequently, the Law Lords did not then have the benefit of the subsequent consolidation and development of the substantive Mareva injunction jurisdiction. Accordingly, Siskina's pronouncements as to the personal jurisdictional limits upon the court's ability to award Mareva injunctions had been made at a time when the Mareva injunction itself was in its infancy, and the contours of the substantive jurisdiction to award it were in flux. In such circumstances, it was not surprising that the Law Lords had tended to caution in outlining the limits of the personal jurisdictional requirements to award Mareva relief.

In addition, the development subsequent to Siskina of an undoubted jurisdiction to award anti-suit injunctions indicated that a rigid approach to the categorization of the court's ability to award injunctive relief was inappropriate. As conditions changed, so too would

¹³⁹ Ibid.
¹⁴⁰ Ibid. at 306.
¹⁴¹ Ibid. at 307 (although the plaintiff's chances of success in an underlying cause of action might well prove to be an important element in deciding whether to exercise the court's jurisdiction to award relief, it will not determine the existence or scope of the jurisdiction itself).
the court’s ability to award injunctive relief to keep pace with developments. The award of Mareva injunctions in aid of foreign proceedings was indicative of this. Moreover, the enactment of section 37(1) of the Supreme Court Act 1981\(^{142}\) had resolved any doubts as to the juridical soundness of the Mareva injunction.

Lord Nicholls considered that Channel Tunnel had placed an important qualification upon Siskina. The Law Lords in Channel Tunnel had determined that Siskina’s requirement that, as a precondition to the awarding of Mareva relief, there must be “a cause of action recognised by English law,” or a substantive right “subject to the jurisdiction of the English court” would be satisfied where the cause of action was itself justiciable by the English court.\(^{143}\) However, due to a contractual choice of court clause, the litigation (or, as was the case in Channel Tunnel, the arbitration) was to take place abroad. Given this, the answer to the substantive question posed in Mercedes-Benz was that the court possessed the jurisdiction to order a Mareva injunction in aid of foreign proceedings, at least where the litigation or arbitration was potentially justiciable by the forum court and where the defendant was subject to the service of process.\(^{144}\)

Of course, the Mareva injunction’s status as interim and protective relief meant that, until the applicant secured a foreign judgment or award and sought to enforce it in the forum, no substantive relief could be claimed. The question was whether a Mareva injunction sought in anticipation of a foreign judgment or award could be said to be founded upon a cause of action. The question was not easily answered, mostly because discussion of the point was “doomed to be circular.”\(^{145}\) To say that a “cause of action” was required was simply to beg the question: a “cause of action” is no more than a lawyer’s category for a set of facts to which a remedy will attach. Lord Nicholls’ view was that lawyers tend to think of causes of action in terms of traditional categories. Once outside those categories, the term “cause of action” carried very little explanatory power. Again, the anti-suit injunction served as a prime example. What right does an anti-suit injunction protect, other than a right not to be sued in a foreign court where it would be unconscionable so to do? To attempt to locate a cause of

\(^{142}\) Supra note 12.

\(^{143}\) Supra note 45 at 360-61.

\(^{144}\) Ibid. at 310 (“The boundary line of the Mareva jurisdiction is to be drawn so as to include prospective foreign judgments which will be recognised and enforceable in the Hong Kong courts.”)

\(^{145}\) Ibid.
action underlying the award of an anti-suit injunction was to engage in a tautological inquiry. Lord Nicholls pointed to a Norwich Pharmacal order as another example of provisional relief which was not concerned with resolution of the underlying dispute between the parties.

So, although Lord Nicholls did not dispute Siskina’s requirement that there be an underlying cause of action in order to ground Mareva relief, he indicated that there was no valid reason why the cause of action in question had to be one under adjudication in the court from which Mareva relief was being sought. To the contrary, the House of Lords’ decision in Channel Tunnel showed that a cause of action being litigated or arbitrated in a foreign forum would suffice. Insofar as Siskina required a pre-existing cause of action to ground the award of Mareva relief, Lord Nicholls would have overruled that decision.

Having answered the substantive question in the affirmative, Lord Nicholls then turned to the issue of personal jurisdiction. Given that the defendant was not present in the jurisdiction, could he be served with the writ? The analysis centred upon the proper interpretation of Ord. 11, r. 1(1)(b). Given Lord Nicholls’ conclusion on the substantive question that “[a] claim for a Mareva injunction may stand alone in an action, on its own feet, as a form of relief granted in anticipation of and to protect enforcement of a judgment as yet to be obtained in other proceedings,” he did not doubt that such relief fell squarely into the category established by Ord. 11, r. 1(1)(b). Simply put, that rule applies to all types of injunctions, and the Mareva injunction, though admittedly unusual, is nonetheless an injunction for the purpose of the rule.

Underlying Lord Nicholls’ dissent was a concern that the processes of justice should not be undermined by sophisticated litigants. Otherwise, it would be simple for the legal process to be defeated, a consideration underlined by the speed and ease with which assets may be transferred over jurisdictional boundaries.

146 See Norwich Pharmacal Co. v. Customs and Excise Commissioners, [1974] A.C. 133 (H.L.) (an order requiring the disclosure of the name of the proper defendant to an action).

147 Mercedes-Benz, supra note 7 at 313 [emphasis in original].
D. Aftermath

Academic reaction to the Privy Council’s decision in *Mercedes-Benz* has been generally hostile.\(^{148}\) For the most part, commentators regret that the Board did not adopt a more ambitious approach to the award of provisional relief in aid of foreign proceedings. But at the same time, commentators also indicate that the composition of the majority—consisting of some of the leading Law Lords—means that *Mercedes-Benz* is unlikely to be revisited in the near future, and that it will be adopted in England as well as in Hong Kong. They have consequently concentrated their efforts at securing legislative reversal of the decision, although some hold out the hope that were the question to be addressed by the House of Lords it might be answered differently.\(^{149}\) Indeed, the existence of section 25(3) of the *CJA 1982*, which allows the extension of the *Brussels Convention*’s framework for interim remedies to other states by Order in Council, is pointed to as evidence that legislative intent would be honoured by adopting a narrow reading of the courts’ power to award *Mareva* relief.

Canadian courts and commentators should question whether the logic of *Mercedes-Benz* is written in stone for them. It is a central argument of this article that *Mercedes-Benz* does not control Canadian courts, and that it is both open to Canadian courts, as well as desirable, for them to follow the compelling dissent of Lord Nicholls in *Mercedes-Benz* and to adopt a more coherent approach to the award of provisional and protective relief in aid of foreign proceedings. In the following parts, I argue that the Canadian context is different in significant ways from its English and Hong Kong counterparts, and that there are convincing reasons which justify a distinct approach to *Mareva* relief in aid of foreign proceedings. Moreover, recent developments indicate that Canadian courts are striking out on their own path, and that there are no obstacles left to the development of a Canadian jurisdiction to award *Mareva* relief in aid of foreign proceedings.


\(^{149}\) See “Trans-Jurisdictional Effects” supra note 148 at 231.
IV. A CANADIAN APPROACH TO THE AWARD OF MAREVA INJUNCTIONS IN AID OF FOREIGN PROCEEDINGS

A. Introduction

For several years, Canadian courts adopted Siskina wholeheartedly,150 and even recently, courts which stray from Siskina have been reversed on appeal.151 Ontario authority has reiterated and supported Siskina’s requirement that there must be a cause of action in the jurisdiction to ground injunctive relief.152 Yet some courts have expressed sentiments which draw into question the continuing dominance of Siskina. The Nova Scotia Court of Appeal recently relied upon Channel Tunnel to support the following propositions:

There are only two limitations on a superior court’s jurisdiction to grant injunctive relief, whether interlocutory or final:

i) The court must have personal jurisdiction in that the defendant is amenable to the jurisdiction of the court, and

---

150 Litz v. Litz (1995), 101 Man. R. (2d) 40 at 45 (Q.B.) (injunction must be granted in conjunction with an action known to law); Kaiser Resources Ltd. v. Western Canada Beverage Corp. (1992), 71 B.C.L.R. (2d) 236 at 244-45 (S.C.) [hereinafter Kaiser Resources] (injunctive relief ancillary to substantive cause of action refused); Burkart v. Dairy Producers Co-Op. Ltd. (1990), 87 Sask. R. 241 at 247-48 (C.A.) (court may not order an injunction in the absence of a substantive cause of action within its jurisdiction); Suncorp Realty, supra note 104 at 95-97 (same); C.D.N. Research and Development Ltd. v. Bank of Nova Scotia (1981), 32 O.R. (2d) 578 (H.C.J.) (Mareva injunction unavailable where no claim made against defendant); and Standal Estate, supra note 83 at 135.


ii) The plaintiff must have a cause of action.\textsuperscript{153}

The Ontario Court of Appeal continued this revisionist trend in \textit{Fastfrate},\textsuperscript{154} where the Crown sought an injunction against a company charged with participation in a price-fixing conspiracy under section 45(1)(c) of the \textit{Competition Act}.\textsuperscript{155} The company sold its assets before trial, and was in the process of transferring the proceeds of sale to its American parent. The majority held that the courts possess the jurisdiction to grant a "\textit{Mareva} type of injunction" to preserve assets in the jurisdiction so that the defendant in a criminal prosecution cannot render itself judgment-proof should a fine be ordered against it. The Court declined to make such an order on the facts of the case, however.

Weiler J.A., concurring, held that Ontario courts possess jurisdiction to grant an injunction "as long as there is an issue which would be justiciable."\textsuperscript{156} This suggests that the normal requirement for the granting of an injunction is a cause of action before the court. But, as in England, Ontario courts may also grant an injunction where an issue is "justiciable," meaning that an injunction may be awarded where the issue would have grounded a cause of action in Ontario but for a stay of proceedings there.\textsuperscript{157}

\textbf{B. \textit{BMWE v. Canadian Pacific Ltd.}}

Canadian questioning of \textit{Siskina} recently culminated in a decision of the Supreme Court of Canada, which has apparently now swept \textit{Siskina} aside. In \textit{BMWE v. Canadian Pacific Ltd.},\textsuperscript{158} a railway company altered the work schedule for its employees. The union representing the employees objected to the change and filed a grievance under its collective agreement with the railway. The union also obtained an interlocutory injunction from the British Columbia Supreme Court restraining the railway from changing the existing work schedule. The

\textsuperscript{153} \textit{Amherst (Town) v. Canadian Broadcasting Corp.} (1994), 133 N.S.R. (2d) 277 at 279 [hereinafter \textit{Amherst}]. Note that no indication was given that the cause of action must be in the territorial jurisdiction of the court.

\textsuperscript{154} \textit{Supra} note 20.

\textsuperscript{155} R.S.C. 1985, c. C-34.

\textsuperscript{156} \textit{Supra} note 20 at 590ff, under the Ontario \textit{Courts of Justice Act}, \textit{supra} note 13, s. 101(1).

\textsuperscript{157} Weiler J.A. thus approved of the approach taken by the House of Lords in \textit{Channel Tunnel}, \textit{supra} note 45.

\textsuperscript{158} [1996] 2 S.C.R. 495 [hereinafter \textit{BMWE}].
company unsuccessfully appealed the injunction order to the British Columbia Court of Appeal,\textsuperscript{159} arguing that the Canada Labour Code\textsuperscript{160} provided no forum for interlocutory injunctions.

On appeal to the Supreme Court of Canada, the issues were whether the superior courts of British Columbia possessed the substantive jurisdiction to issue injunctions in connection with disputes arising out of collective agreements; and, importantly for our purposes, whether those same courts could issue interlocutory injunctions in the absence of an underlying cause of action. The Court answered both questions in the affirmative.

McLachlin J., for the Court, addressed squarely the railway's argument that an interlocutory injunction must be ancillary to a substantive cause of action. In her view, any restrictions stemming from Siskina as to the courts' power to make such orders had been removed by the Law Lords in Channel Tunnel.\textsuperscript{161} She observed that, in Channel Tunnel, the Law Lords had "categorically reject[ed] the submission that to grant interim relief, the courts must have jurisdiction over the cause of action."\textsuperscript{162} Indeed, Channel Tunnel had been received into Canadian law on this point, to the effect that "the courts have jurisdiction to grant an injunction where there is a justiciable right, wherever that right may fall to be determined."\textsuperscript{163} Accordingly, McLachlin J. held that the British Columbia Supreme Court had jurisdiction to order an interim injunction even in the absence of a cause of action seeking final relief.

The Court in BMWE addressed neither Mareva injunctions nor the transnational context, and the decision did not advert to the Privy Council's decision in Mercedes-Benz, perhaps because the issue of personal jurisdiction simply did not arise on the facts. Yet there can be little doubt, given the breadth of the language used by McLachlin J., that both Siskina and Mercedes-Benz have been decisively rejected in Canada, insofar as they purport to make an accrued cause of action a necessary precursor to the award of a Mareva injunction. This is a welcome development, though regretfully, the Court's reasoning in BMWE was rather brisk on this point. The underlying rationale of the Siskina doctrine was neither identified nor addressed: it was simply dismissed as

\textsuperscript{159} (1994), 93 B.C.L.R. (2d) 176.
\textsuperscript{160} R.S.C. 1985, c. L-2.
\textsuperscript{161} Supra note 45.
\textsuperscript{162} BMWE, supra note 158 at 504.
\textsuperscript{163} Ibid. at 505, citing Amherst, supra note 153; Fastfrate, supra note 20; and Kaiser Resources, supra note 150.
having been rejected by the Law Lords themselves, an account which is accurate only in part, as I have suggested in Part II(B)(2), above.

Although the Supreme Court in BMWE said nothing directly about the personal jurisdiction issue addressed in Siskina and Mercedes-Benz, the Court's definitive language as to the substantive jurisdiction to order Mareva relief necessarily implies a similarly relaxed approach to the taking of personal jurisdiction for the purpose of ordering Mareva injunctions. Consequently, the scene is ripe for consideration of a greater willingness to award interim relief in aid of foreign proceedings, even where the defendant is outside the territorial jurisdiction of the domestic court.

C. The Constitutional Context

Even before Siskina was overruled by the Supreme Court in BMWE, there were inklings in a number of Canadian decisions that an alternative approach was evolving. As BMWE was concerned with a context other than Mareva injunctions, it is useful to examine this line of authority so as to determine where BMWE's overruling of Siskina leaves the ability of Canadian courts to order Mareva injunctions in aid of foreign proceedings.

In the pre-Morguard world, in which sister provinces were treated as foreign jurisdictions for the purpose of the recognition and enforcement of judgments, a case very similar to the facts of Mercedes-Benz arose. In NEC Corp. v. Steintron International Electronics Ltd., an Ontario court ordered a Mareva-type injunction to prevent the disposition of assets from Ontario where the plaintiff had succeeded at trial in British Columbia and there was evidence indicating that the defendant would attempt to dissipate its assets while the British Columbia judgment was under appeal. The plaintiff had obtained an ex parte order registering the British Columbia judgment in Ontario under the latter province's reciprocal enforcement legislation. The court was convinced that the defendant was attempting to dispose of its Ontario assets to frustrate the plaintiff's efforts to enforce its British Columbia judgment there.

---

164 Morguard, supra note 105.
165 (1985), 52 O.R. (2d) 201 (H.C.J.) [hereinafter NEC].
166 Reciprocal Enforcement of Judgments Act, R.S.O. 1980, c. 432, s. 2 (now R.S.O. 1990, c. R.5, s. 2).
NEC was decided before Aetna, the leading Canadian decision on the impact of the federal context upon Mareva injunctions. Although the Supreme Court of Canada in Aetna did not go so far as to prohibit intra-Canadian Mareva injunctions, the Court did indicate that the federal nature of Canada must be taken into account. In consequence, the Court narrowed the scope of the availability of an interprovincial Mareva injunction such as that made in NEC. Although Aetna would have had no impact upon the application of NEC's logic to Mareva injunctions in aid of truly foreign proceedings, the Supreme Court's celebrated decision in Morguard, and the subsequent debate as to whether the Morguard principles apply not only to the judgments of other Canadian provinces, but to truly foreign judgments as well, leave NEC's continuing vitality open to some doubt. It is perhaps ironic that Aetna came before Morguard, although it probably made the latter decision inevitable.

In Morguard, the Supreme Court of Canada mandated the recognition and enforcement of judgments issued by sister provinces where there is a real and substantial connection between the defendant and the court rendering judgment. This rule has subsequently been extended by a number of lower courts to judgments rendered by American states. Morguard and its eventual application to truly foreign judgments was presaged in some ways by DiMenza v. Richardson Greenshields of Canada Ltd., where the court refused to order a Mareva injunction enjoining the removal of assets from Ontario where the defendant was moving to Maryland and the defendant advanced evidence that an Ontario judgment could be enforced against him there.

167 Aetna, supra note 11.

168 Ibid. at 36-38. The decision in Aetna was influenced by the fact that the defendant had submitted to the jurisdiction of the Manitoba courts, so that any eventual Manitoba judgment would be enforceable in Ontario or Quebec: see Aetna, supra note 11 at 27-29.

169 Supra note 105.


172 (1989), 74 O.R. (2d) 172 (Div. Ct.).
At the very least, the case law indicates the close relationship between the award of Mareva injunctions and the rules concerning the recognition and enforcement of foreign judgments.

It seems likely, then, that the logic of Morguard would only reinforce Aetna's reluctance to allow interprovincial Mareva injunctions. However, one should not be so quick to assume that Morguard's more liberal approach to the recognition and enforcement of foreign judgments has obviated entirely the need for Mareva injunctions within Canada, let alone with regard to truly foreign judgments. There may be some cases in which a plaintiff should be entitled to a Mareva injunction from a court in one province in aid of proceedings in another province.

173 Fastfrate, supra note 20 at 605-06, Weiler J.A. ("Clearly, a threatened removal of assets outside of Canada is more likely to lead to the granting of a Mareva injunction because, generally, it is more difficult to enforce a judgment outside the jurisdiction") This suggests that the availability of Mareva relief is inversely related to the perceived ease of enforcing the judgment abroad. Weiler J.A. seems to forget, however, that it is unlikely that a judgment emanating from the Competition Act would be enforceable abroad, as it would likely be considered an attempt to enforce a penal or revenue law by a foreign court.


175 See Imperial Oil v. Gibson (1993), 72 B.C.L.R. 195 at 199 (C.A.) which interprets Aetna, supra note 11, to say that in some cases, a Mareva injunction will be appropriate even within the federal system. See also Stinchcombe v. Schwartz, [1991] B.C.J. No. 413 (S.C.) (QL), (McColl J.) (court declined to award injunction freezing absentee defendant's B.C. assets pending resolution of Alberta action, on the basis that there was no justiciable action in B.C. which would endow the court with jurisdiction). But see McLellan v. Parent, [1992] N.W.T.R. 226 (S.C); and McLellan v. Parent, [1995] N.W.T.J. No. 66 (S.C.) (QL) (denying applications for interlocutory injunctions concerning rental income in the Northwest Territories held by a Quebec resident, in part on the basis that Morguard's liberalization of interprovincial recognition and enforcement of judgment rules meant that the plaintiff would not suffer irreparable harm if the rental income was not attached pending trial. The plaintiff would not suffer undue hardship by being forced to enforce the resulting Northwest Territories judgment in Quebec against the defendant there. Note that the court assumed—perhaps incorrectly—that Morguard applies to Quebec. But the court's point is probably applicable to the common law provinces).
D. The International Context: Mareva Injunctions in Aid of “Truly Foreign” Legal Proceedings

Rapid developments in Canadian conflict of laws rules suggest that Canadian courts may now be more willing to award interim relief in aid of foreign proceedings. As lower courts have extended Morguard’s more liberal rules for the recognition and enforcement of foreign judgments to truly foreign judgments, it is strange that an Ontario court would consider whether (or indeed, be required, depending upon one’s interpretation of Morguard) to recognize and enforce a civil judgment issued by a court in another province, or an American state or federal court, yet be unable to afford a plaintiff in the foreign forum interim measures of relief in order to ensure that the plaintiff’s subsequent attempts (if successful on the merits) to recognize and enforce that judgment in Ontario would be thwarted by the defendant’s efforts at judgment proofing.

Many American courts, for example, possess the power to order interim measures in aid of foreign proceedings. Similarly, the new Civil Code of Quebec contains provisions concerning the award of provisional measures in aid of foreign proceedings. Article 3138 provides that

[a] Quebec authority may order provisional or conservatory measures even if it has no jurisdiction over the merits of the dispute.

176 See cases cited supra note 171.

177 See Barclay’s Bank Ltd. v. Tsakos, 543 A.2d 802 (D.C. App. 1988) [hereinafter Tsakos], (allowing attachment of local assets pending the outcome of foreign proceedings). On remand, the trial court stayed the action pending the outcome of the foreign proceedings: 618 A.2d 134 (D.C. App. 1992). Tsakos was followed in Mendes v. Dowelanco Indus. Ltda., 651 So.2d 776 (Fla.App. 3 Dist. 1995) (court may stay substantive action on a forum non conveniens basis in favour of foreign proceedings, but maintain jurisdiction over defendants’ assets in the forum in order to satisfy any judgment the plaintiff might secure; the question of whether the defendants’ assets were properly the subject of orders of the Florida court had not yet been determined). See also Cameco Industries, supra note 120 (attachment of Maryland assets of non-resident Guatemalan corporation as security for pending judgment in Louisiana). In some states, the power to attach local assets in aid of foreign proceedings is specifically provided for by statute. See, for example, New York Civil Practice Law & Rules § 6201 (McKinney Supp. 1996).


179 CCOQ, supra note 4.
The interpretation of the provision arose recently in *Lamborghini (Canada) Inc. v. Automobili Lamborghini S.P.A.*, where the Quebec Superior Court addressed an action for damages arising out of an exclusive distribution agreement between a Canadian dealer and an Italian manufacturer of luxury sportscars. The agreement contained an exclusive choice of court clause in favour of the courts of Bologna, Italy. The court dismissed the action on the basis that the defendant had no place of business in Quebec and the agreement had been concluded in Italy, so that the Quebec courts had no jurisdiction to entertain the action.

However, the plaintiff had also sought an injunction even though the court did not have jurisdiction over the merits of the action. On the facts, the court declined to order such relief, but it did outline the circumstances in which it would exercise its discretion to order provisional or conservatory measures. Following well-established Quebec case law on the award of interlocutory injunctions, the court held that: where the plaintiff's rights were clear, an injunction should be granted; where doubtful, an injunction should be granted only upon consideration of the balance of convenience; and where non-existent, an injunction should be refused.

Could not a system of interim relief in aid of foreign proceedings be constructed on common law principles alone? Within Canada there is a unitary court structure, with the Supreme Court of Canada at the apex. Accordingly, that Court can ensure a degree of control over jurisdiction and judgments. From this foundation, there would appear to be no impediments to a *Mareva* power in aid of foreign proceedings, given the broad wording of provincial legislation. Although, as discussed above, it is only in exceptional circumstances that the power would ever need to be invoked within Canada in relation to the proceedings of courts in other provinces, where a *Mareva* injunction is sought from a Canadian court in aid of truly foreign proceedings, the need for provisional relief is much clearer.

---


V. UNITED STATES V. FRIEDLAND

A. Facts

In Friedland, the United States Environmental Protection Agency (EPA) and the state of Colorado had sued a well-known stock promoter in a federal district court in Colorado to recover the costs of cleaning up a polluted mine site in that state. It was alleged that, at the time that the site had been polluted, it had been owned or operated by a company controlled by the defendant.

Concerned that the defendant did not have sufficient assets in the United States to satisfy the anticipated American judgment against him, the EPA sought a Mareva injunction in British Columbia to prevent the defendant from removing the assets from Canada. The defendant, who was overseas, had recently been involved in a transaction in which he was to receive shares worth some (US) $152 million in a Canadian mining company. The order restrained the defendant from disposing of assets, or assets which were about to come into his hands in British Columbia, pending the disposition of the Colorado suit.

B. Judgment

Injunctions were initially granted in both British Columbia\(^{182}\) and Ontario\(^{183}\). Spencer J., of the British Columbia Supreme Court, held that the traditional prerequisites for a Mareva injunction had been met. He also observed, without deciding, that as the defendant was not a resident of British Columbia, and the Colorado incident had no connection with British Columbia, it was unlikely that a substantive cause of action could be advanced against him in the province. Nonetheless, Spencer J. held that there was "strong authority" in BMWE to support the proposition that the court possessed jurisdiction to award a Mareva injunction to enjoin the defendant from removing assets from the province pending disposition of the case in Colorado. Since BMWE,


\(^{183}\) Friedland No. 2, supra note 5
Spencer J. held, “it is now clear that interlocutory assistance can be granted to proceedings in a foreign court without an underlying cause of action.”\textsuperscript{184} Spencer J. also granted leave to serve the defendant \textit{ex juris}.

The defendant sought a review of the injunctions in both provinces.\textsuperscript{185} Sharpe J. lifted the Ontario order, but not on the basis of jurisdictional objections.\textsuperscript{186} Rather, he lifted the orders on the ground that the EPA representatives had failed to disclose material facts and had made numerous misleading statements and representations to the court in the initial injunction applications. Accordingly, the decision concerned irregularities in the plaintiff’s case rather than the jurisdictional basis for awarding \textit{Mareva} injunctions in aid of foreign legal proceedings.

Nonetheless, the \textit{Friedland} litigation is the first Canadian case to address such \textit{Mareva} injunctions, and, in the light of the controversy over the availability of \textit{Mareva} relief in aid of foreign legal proceedings, Canadian courts may be glad of guidance on the issue. At the very least, \textit{Friedland} demonstrates that the circumstances under which \textit{Mareva} relief may be sought in aid of foreign proceedings are not fanciful, but to the contrary, are increasingly likely to arise. Moreover, the case also demonstrates that courts will be careful to balance the needs of the plaintiff with the rights of the defendant, and that the requirements for the award of a \textit{Mareva} injunction in aid of foreign proceedings will be as strict as those governing a more traditional \textit{Mareva} injunction.

\textit{Friedland No. 1}’s lead was soon followed in \textit{Adler, Coleman Clearing Corp. (Trustee of) v. Roddy DiPrima Ltd.},\textsuperscript{187} in which Harvey J. ordered a \textit{Mareva} injunction in aid of American proceedings. The plaintiff had brought an action against the defendant in New York for fraud, deception, and various violations of securities law. The plaintiff obtained judgment in New York, although the final amount of judgment remained to be determined at the time of hearing in British Columbia. The plaintiff sought a \textit{Mareva} injunction in British Columbia enjoining the defendant from disposing of $750,000 on deposit in a securities company in Vancouver, in anticipation of bringing an action to enforce the New York judgment in British Columbia.

Harvey J. rejected the defendant’s contention that the plaintiff could not obtain an injunction without demonstrating the existence of a

\textsuperscript{184} \textit{Friedland No. 1}, supra note 5 at 12.

\textsuperscript{185} \textit{Friedland No. 3}, supra note 5.

\textsuperscript{186} \textit{Friedland No. 5}, supra note 5.

\textsuperscript{187} (1997), 28 B.C.L.R. (3d) 181 (S.C.) [hereinafter \textit{Adler}].
cause of action justiciable in British Columbia. Reviewing Friedland No. 1 and BWME, Harvey J. concluded that, although an injunction is generally a remedy which is ancillary to a cause of action, those cases "are clear authority for the proposition that an interim injunction may be granted to prevent removal of assets so that they are available for execution in a foreign judgment."^{188}

Friedland No. 1 and Adler make it clear that Canadian courts are likely to give an expansive interpretation of McLachlin J.'s reasons in BWME with regard to the ability of the courts to award Mareva relief in aid of foreign proceedings. While this is highly desirable, in neither case did the court set out principles by which the exercise of this new jurisdiction could be properly measured. In addition, in citing the broad language of BWME, neither court turned its attention to the prudential concerns which had underlain Siskina. Although I argue in this article that the Supreme Court of Canada was right to inter Siskina in BWME, the concerns motivating the doctrine advanced in Siskina are worthy of concern, and will have to be addressed in a principled fashion in the award of Mareva relief in aid of foreign proceedings. In the following part, I outline principles which attempt to address those concerns.

VI. A PROPOSED APPROACH TO MAREVA INJUNCTIONS IN AID OF FOREIGN PROCEEDINGS

A. Introduction

In order to set out some principles to guide the courts in awarding interim measures on the strength of pending or continuing foreign proceedings, it will be helpful to look to the cases defining the scope of Mareva injunctions themselves. The central goal of the Mareva injunction is to prevent the process of the court from being abused by a defendant who disperses her assets out of the jurisdiction in order to avoid execution should a judgment be rendered against her.^{189} As a result, it must be emphasized that Mareva injunctions are only to be awarded where the plaintiff demonstrates that there is a real risk that,

^{188} Ibid. at 184.

^{189} Derby Nos. 3 & 4, supra note 3 at 76, Lord Donaldson of Lymington M.R. ("The fundamental principle underlying this jurisdiction is that, within the limits of its powers, no court should permit a defendant to take action designed to ensure that subsequent orders of the court are rendered less effective than would otherwise be the case.") But see Dunlop, supra note 9 at 139 (citing authority critical of the abuse of process theory).
unless an injunction is ordered, the defendant will remove her assets from the jurisdiction in order to evade judgments against her. Mere suspicion or a grab for a tactical advantage over an opponent in litigation are insufficient to ground an injunction, as Friedland demonstrates. The following parts outline the circumstances under which a Canadian court may determine whether to order a Mareva injunction in aid of foreign proceedings. A number of related issues are also addressed.

B. In What Circumstances Should a Canadian Court Aid Foreign Proceedings?

Domestic courts should order Mareva relief in aid of foreign proceedings only where a judgment or award emanating from those foreign proceedings would likely be recognized in the domestic court. To a great degree, a prospective decision as to whether a foreign judgment or award would be recognized or enforced in the domestic jurisdiction can be made by the domestic court, although there are admittedly some difficulties. In order to determine prospectively whether a foreign judgment or award would be recognised in Canada, a domestic court must consider whether, according to Canadian law, the foreign court or tribunal properly has personal jurisdiction over the defendant. Traditionally, this meant that the defendant had to be served with process in the foreign jurisdiction at the time the suit was commenced, or had submitted, or agreed to submit, to the jurisdiction of the foreign court or tribunal. More recently, there has been some uncertainty as to whether the “real and substantial connection” test enunciated in Morguard, with regard to the recognition and enforcement of judgments in the

---

190 Derby No. 6, supra note 24 at 1153; Ninemia Maritime Corp. v. Trave Schiffsahrtsgesellschaft M.B.H. und Co. k.G. ("The Niedersachsen"), [1983] 1 W.L.R. 1412 at 1422 (C.A.). This satisfies the requirement that the Mareva injunction in aid of foreign proceedings should be awarded only when "truly necessary" to protect the jurisdiction and process of the foreign court or tribunal. See Westin & Chrocziel, supra note 59 at 743.

191 Lord Denning M.R. in the Court of Appeal in Siskina, supra note 38 at 809, expressly stated that the anticipated foreign judgments in that case would be recognized and enforced in England.


193 Ibid.

interprovincial context, also applies to "truly foreign" judgments.\footnote{195} That issue need not be resolved here: the point is simply that the domestic court, in determining whether to order a \textit{Mareva} injunction in aid of foreign proceedings, must evaluate—to the extent possible—whether it would be likely to recognize and enforce the final outcome of those proceedings. If it would not, then it should refuse to order a \textit{Mareva} injunction in aid of them. The plaintiff should bear the onus of demonstrating—on a balance of probabilities—that any judgment or award emanating from the foreign proceedings would be enforceable in the forum.

Once it is determined that the foreign court properly took jurisdiction over the defendant, a number of other conditions must be satisfied in order for a foreign judgment or award to be eligible for recognition and enforcement in Canada. The judgment or award\footnote{196} must be final and conclusive (i.e., \textit{res judicata}, and so not open to re-examination by the court or tribunal which gave it),\footnote{197} and for a fixed sum of money.\footnote{198} As well, the judgment or award must not be vulnerable to the raising of certain defences against it: it must not have been procured by fraud,\footnote{199} or rendered in contravention of natural justice,\footnote{200} or contrary to the public policy of the Canadian court.\footnote{201} Further, the subject matter of the foreign judgment or award must not concern foreign revenue, penal, or other public law.\footnote{202} Finally, the foreign judgment or award must not be inconsistent with a prior Canadian judgment or award. Where it can be shown that the anticipated foreign judgment or award would not satisfy one or more of these conditions, no \textit{Mareva} injunction should be awarded in aid of it.

\footnote{195} See cases cited \textit{supra} note 105.
\footnote{197} \textit{Nouvion v. Freeman} (1889), 15 App. Cas. 1 (H.L.). The fact that the judgment may be subject to appeal in the foreign jurisdiction is irrelevant, although the domestic court may choose to stay enforcement pending the appeal: \textit{Colt Industries v. Sarlie} (No. 2), [1966] 1 W.L.R. 1287 (C.A.).
\footnote{198} \textit{Sadler v. Robins} (1808), 1 Camp. 253, 170 E.R. 948. But see below at Part VI(H).
\footnote{200} \textit{Ivey, supra} note 171; \textit{Four Embarcadero, supra} note 165; \textit{Adams v. Cape Industries PLC}, [1990] Ch. 433 (C.A.); and \textit{Pemberton v. Hughes}, [1899] 1 Ch. 781 (C.A.).
\footnote{201} \textit{Boardwalk Regency Corp. v. Maalouf} (1992), 6 O.R. (3d) 737 (C.A.).
\footnote{202} \textit{Ivey, supra} note 171; and \textit{Huntington v. Attrill}, [1893] A.C. 150 (P.C.).
Some of these factors, by their very nature, will not be amenable to determination by a Canadian court until judgment has been rendered by the foreign court or tribunal. For example, at the time that a *Mareva* injunction in aid for foreign proceedings is sought from a Canadian court, there may be no evidence or indication that the foreign proceedings have been procured by fraud or in violation of natural justice. However, once a *Mareva* injunction is ordered, the defendant in the foreign proceedings should be able to seek review of the order and have it dissolved if he or she can demonstrate that the foreign judgment or award would not be recognized or enforced in Canada due to a violation of one of the above conditions, even if at that time no such judgment or award has yet been rendered. Where the defendant can demonstrate this, any *Mareva* injunction which has been ordered should be dissolved.

In addition, as Lord Nicholls suggested in *Mercedes-Benz*, in exercising its discretion to order a *Mareva* injunction in aid of foreign proceedings, the court must evaluate the plaintiff's prospects of obtaining judgment in the foreign forum. This may appear at first to be a Herculean task, and it is conceded that such a process is impressionistic at best. But it should also be recalled that the same issue must be addressed in purely domestic *Mareva* injunction decisions. Whenever a court awards a *Mareva* injunction, it is bound to determine the *prima facie* merits of the plaintiff's case. Such a determination need not necessarily be more difficult where the case is being litigated abroad.

Finally, the plaintiff must demonstrate to the court's satisfaction that, even if he were to be successful in the foreign litigation, the defendant does not possess sufficient assets in the foreign jurisdiction to satisfy the judgment. If the defendant possesses sufficient assets in the foreign jurisdiction to satisfy the anticipated judgment or award then, absent special circumstances, the assistance of the Canadian courts is not required. Indeed, it would amount to an abuse of process to allow the plaintiff to invoke the processes of the Canadian courts for the purpose of obtaining a *Mareva* injunction to freeze assets of the defendant unnecessarily.

---

203 *Supra* note 7 at 307.

204 See *Derby & Co. supra* note 24, where the English Court of Appeal emphasized, in the context of worldwide *Mareva* injunctions, that the plaintiff must show that the defendant's assets within the forum are insufficient to meet the plaintiff's claim, but that the defendant possesses sufficient assets abroad for this purpose. In the case of a *Mareva* injunction in aid of foreign proceedings, the reverse should be true. The plaintiff should be required to show that the defendant has insufficient assets in the foreign forum to satisfy the plaintiff's claim, but that the defendant does possess assets in the territorial jurisdiction of the domestic court.
Must foreign proceedings already have been commenced before Mareva relief could be sought from a Canadian common law court? It is difficult to see a valid reason why such a requirement should be thought necessary. The element of surprise is often essential to the success of provisional relief, and it may be that in some cases the defendant's assets must be frozen even before the foreign proceedings are commenced. The procedural requirements of foreign law might be cumbersome enough to justify a Canadian court to order a Mareva injunction in relation to assets located here in anticipation of the plaintiff commencing proceedings abroad. The plaintiff would have to provide an undertaking to commence the foreign proceedings within a specified period of time, and the defendant would be able to revisit the injunction if the plaintiff did not comply with the undertaking.\footnote{The situation would be very similar to that in A. v. B., supra note 75; and D.C. Taxation, supra note 84; and other Australian cases cited supra note 86.} Alternatively, the injunction itself could be deemed to expire after a specified date.

Finally, the normal requirement that notice be provided by the plaintiff to the defendant that an injunction has been ordered against her, and also that notice be provided to relevant third parties (particularly financial institutions) should also be upheld in the award of Mareva injunctions in aid of foreign proceedings. The fact that such injunctions are being awarded in aid of foreign proceedings also suggests that notice of the award of the injunction be provided to the foreign court or tribunal in whose aid they are awarded, and that notice of subsequent revisions or modifications to the injunction also be provided to the foreign court or tribunal. This may go some distance to ensuring that the domestic and foreign courts do not issue contradictory orders.

C. Why Not Bring an Action in the Forum?

Given the lingering practical and doctrinal uncertainties associated with a Mareva injunction in aid of foreign proceedings, one might well ask why the prudent litigant would not attempt to avoid such problems simply by bringing an action in the domestic forum in which relief is sought. If a litigant wants an Ontario court to order a Mareva injunction, why not bring an action in Ontario for this purpose? In some cases, it will be both possible and prudent to do so. On the authority of Fastfrate,\footnote{Supra note 20. See also Trade Fortune, supra note 69; Channel Tunnel, supra note 45; and Def American, supra note 67.} an Ontario court could order a Mareva injunction (provided

\footnote{Supra note 20. See also Trade Fortune, supra note 69; Channel Tunnel, supra note 45; and Def American, supra note 67.}
of course that the usual requirements for a *Mareva* injunction were made out) even if the action in Ontario were to be stayed in favour of the foreign action. Consequently, it may be possible to, in effect, bring an action or seek a declaration in an Ontario court merely for the purpose of obtaining ancillary (*Mareva*) relief.\(^\text{207}\)

When a domestic court stays proceedings on the basis of the *forum non conveniens* doctrine, it is not divesting itself of subject-matter jurisdiction: rather, it is choosing to defer to a foreign court on the theory that it is more just and appropriate for the matter to be tried elsewhere.\(^\text{208}\) A court can award a *Mareva* injunction and then order a stay of proceedings in favour of a foreign court on the basis of the *forum non conveniens* doctrine.\(^\text{209}\) It appears that it can do so even where the plaintiff brings the action in breach of an exclusive jurisdiction or choice of court clause.\(^\text{210}\) Thus, a plaintiff might well consent to a stay of its own action in Ontario in favour of trial abroad (where proceedings might already have been commenced), so long as the Ontario court ordered a *Mareva* injunction as preliminary relief in aid of foreign proceedings.

Yet, should preliminary relief generally be available where the domestic court stays an action on *forum non conveniens* grounds in favour of trial in a foreign forum? Lord Goff thought so, as he suggested in the leading English case on *forum non conveniens* doctrine, *Spiliada Maritime Corp. v. Cansulex Ltd.* ("The Spiliada") that

> it 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.\(^\text{211}\)

The import of Lord Goff's statement was addressed in *Tortel Communications Inc. v. Suntel, Inc.*\(^\text{212}\) The plaintiff Ontario corporations claimed a debt from a Georgia corporation and a Grand Cayman corporation arising out of a telephone supply contract and repair contract concerning activities in Ontario. The plaintiffs discovered that a Manitoba company owed a debt to one of the

\(^{207}\) See also the cases cited *supra* note 79.


\(^{210}\) *Channel Tunnel*, *supra* note 45 at 363.

\(^{211}\) [1986] 3 All E.R. 843 at 860 (H.L.) [hereinafter *The Spiliada*].

\(^{212}\) (1994), 97 Man. R. (2d) 265 (C.A.) [hereinafter *Tortel*].
defendants on an unrelated contract. They sued the defendants in Manitoba, served the defendants with process *ex juris* without leave, and obtained prejudgment garnishment of the debt. The defendants succeeded in bringing applications to have the service set aside, to stay the proceedings on the grounds that Manitoba was a *forum non conveniens*, and to have the prejudgment garnishment set aside.

The Manitoba Court of Appeal upheld the setting aside of service *ex juris* and the stay of the action on *forum non conveniens* grounds. The underlying dispute had “no real and substantial connection” with Manitoba, and none of the parties carried on business there. The plaintiffs, relying upon Lord Goff’s statement in *The Spiliada*, argued that the garnished funds should be held pending the disposition of the action abroad. Philp J.A., for the majority, noted that Lord Goff had indicated that a domestic court may, at least in some circumstances, allow a plaintiff to maintain a prejudgment remedy in place even where the action is stayed on *forum non conveniens* grounds in favour of trial abroad. However, Philp J.A. narrowed the application of this doctrine to the circumstances of *The Spiliada*, where it had been determined that the plaintiff had acted reasonably in bringing the initial proceedings in the domestic forum. By contrast, in *Tortel*, the plaintiffs’ underlying cause of action had no real and substantial connection with Manitoba.

Twaddle J.A., concurring, agreed that the mere presence of assets within the jurisdiction provided an inadequate basis to allow service *ex juris* or to establish a real and substantial connection with the Manitoba courts. However, he suggested that the court’s jurisdiction might be properly exercised in circumstances where the plaintiff could demonstrate that “without the security provided by the Manitoba asset, any judgment the plaintiff might obtain elsewhere would likely remain unsatisfied.”213 The plaintiff had not advanced such evidence.

Although there may be attractions from the plaintiff’s point of view to bringing an action in the forum and seeking a *Mareva* injunction as ancillary relief, in some cases a plaintiff may be precluded from following such a course of action. First, the plaintiff may not have a cause of action against the defendant in the jurisdiction. Second, he may be barred from commencing actions other than in a specified forum due to a choice of court clause. (Note, however, that it is a matter of debate as to whether a choice of court clause can be said to preclude an

---

213 Ibid. at 269.
application to another forum for preliminary and protective relief.\textsuperscript{214}\) Third, the plaintiff might be the subject of a foreign anti-suit injunction barring him from bringing applications in foreign courts (again, it may be a matter of interpretation as to whether an anti-suit injunction extends to preliminary and protective relief).

Fourth, domestic courts commonly take a dim view of duplicative litigation. A plaintiff who seeks to initiate what appears to a domestic court to be parallel proceedings may find that the court not only stays the action, but also declines to award any preliminary and protective relief.\textsuperscript{215} Finally, and importantly, speed is often of the essence where a Mareva injunction is sought in aid of foreign proceedings (as it is in the case of purely domestic Mareva injunctions). Having to bring a full-fledged action in a domestic court in order to secure a Mareva injunction in favour of foreign proceedings will be time-consuming and expensive: and a pointless formality as well, if all that is really sought is preliminary and protective relief in aid of foreign proceedings.

Accordingly, although bringing an action in the forum may be an effective technique for a plaintiff engaged in litigation abroad to secure the necessary protective and provisional measures in aid of those proceedings, there should be no requirement that he or she should do so. Under the approach outlined in this article, bringing an action in order to secure a Mareva injunction in aid of foreign proceedings would, in most cases, be dilatory. A motion could simply be made for the Mareva relief without the necessity of bringing an action in the forum.

D. Why Not Seek Mareva-Type Relief from the Foreign Court?

Should a party seeking a Mareva injunction in aid of foreign proceedings be required, as a preliminary step, to seek such relief as is available from the foreign court where the substantive dispute is to be adjudicated? In an area of law where domestic courts are often concerned with the requirements of comity, it might be thought that every attempt to exhaust foreign remedies should be required before the domestic court will order a Mareva injunction in aid of foreign

\textsuperscript{214} See further discussion of this point in Part VI(G), below.

proceedings. Lord Mustill in Channel Tunnel gave voice to the concern that the domestic court not interfere with the process of the foreign court, which might suggest that a restrictive approach be taken to the awarding of Mareva relief in aid of foreign proceedings.

Despite these concerns, a number of factors militate against the imposition of a requirement that efforts to secure preliminary or protective relief be made initially in the foreign court or tribunal before a domestic court can entertain a motion for a Mareva injunction in aid of foreign proceedings. First, the desired remedy may simply not be available in the foreign court. If it is available, then the domestic court should consider facilitating the enforcement of the foreign order in the domestic jurisdiction. Second, the Amchem rule for anti-suit injunctions is inappropriate in the Mareva injunction context. Motions for Mareva injunctions are necessarily made ex parte. The element of surprise is invariably essential. Accordingly, the better view is that there should be no “exhaustion of local remedies” requirement. A motion for revision or dissolution of a Mareva injunction in aid of foreign proceedings can always be brought by the defendant, and a ruling by the foreign court would certainly constitute a material change for this purpose. However, if interim relief has already been sought from and refused by the foreign court or tribunal, this would be a factor suggesting that a Canadian court should similarly refuse such relief.

E. Recourse to Other Domestic Legislation

There are, of course, a number of other forms of protective and provisional relief to which a plaintiff may wish to have recourse. Apart from Mareva injunctions, these include injunctions to restrain fraudulent conveyances, Anton Piller orders, orders appointing a receiver.

---

216 See Amchem, supra note 50. As a precondition for obtaining an anti-suit injunction, the applicant must first seek relief in the form of a stay of proceedings on the basis of the forum non conveniens doctrine from the foreign court so that the Canadian court will not order an anti-suit injunction which would preempt the foreign court's determination of its own jurisdiction. See also DefAmerican, supra note 67.

217 Channel Tunnel, supra note 45 at 358.

218 See Westin & Chrocziel, supra note 59 at 744. The domestic court should carefully examine the foreign court's reasons, if any, for refusing to order the requested relief.

219 The courts have long maintained a jurisdiction to grant interlocutory protective relief in cases of alleged fraud. The fraud jurisdiction was always seen as an exception to the rule in Lister v. Stubbs (1890), 45 Ch.D. 1 (C.A.) [hereinafter Lister], namely that the courts will not allow execution prior to judgment: see Campbell v. Campbell (1881), 29 Gr. 252 (Ont. H.C.J.). It should be noted
injunctions to preserve or to restrain the disposition of a specific asset pending trial, and absconding debtors legislation, among others. The circumstances of some cases may enable a plaintiff to make use of such measures in order to freeze the assets of the defendant in the jurisdiction without the need to apply for a *Mareva* injunction. If so, the plaintiff should be entitled to do so, and *Mareva* injunction relief may be unnecessarily duplicative.

Similarly, in some situations a plaintiff may be able to secure the necessary relief by way of application under the *Bankruptcy and

---

that the fraud jurisdiction is distinct from the jurisdiction to award *Mareva* injunctions. Indeed, one objection to the recognition of the *Mareva* injunction in Canada was that provincial legislation had rendered such injunctions superfluous, although this argument was rejected in *Aetna*, supra note 11 at 179-80. The fraud jurisdiction, unlike a *Mareva* injunction, is purely retrospective: it may be invoked only where a fraudulent conveyance has already taken place in order to restrain the defendant from making any further conveyance or to set aside the impugned conveyance. On the fraud jurisdiction, see *Mills v. Petrovik* (1980), 30 O.R. (2d) 238 (H.C.J.), an exception to *Lister* in cases of fraud, tending to assimilate the fraud jurisdiction to the *Mareva* injunction jurisdiction. See also *Robert Reiser & Co. Inc. v. Nadore Food Processing Equipment Ltd.* (1977), 17 O.R. (2d) 717 (H.C.J.) (plaintiff must be a creditor and it must be clear that a fraud has been committed); and *Canadian Tire Corp. Ltd. v. Summers*, [1992] O.J. No. 2042 (Gen. Div.) (QL) (clear evidence of fraud required). The rise of the *Mareva* injunction has largely superseded the fraud jurisdiction. Under the *Fraudulent Conveyances Act*, R.S.O. 1990, c. F.29, s. 2, a non-judgment creditor (i.e., a creditor with an unliquidated claim) may seek an order, because the provision refers to "creditors or others," which is defined very broadly: see *Holdenreid v. Holdenreid* (1978), 29 C.B.R. (N.S.) 138 at 147 (Ont. H.C.J.) (A non-judgment creditor must demonstrate, however, that she possessed a valid claim against the defendant); and *Owen Sound General and Marine Hospital v. Mann*, [1953] O.R. 643 (H.C.J.). See generally M.A. Springman, G.R. Stewart & M.J. MacNaughton, *Fraudulent Conveyances and Preferences* (Toronto: Carswell, 1994) § 12(a)(ii).

220 *Anton Piller k.g. v. Manufacturing Processes Ltd.*, [1976] Ch. 55 (C.A.) [hereinafter *Anton Piller*]; see *Ontario Rules*, supra note 28, r. 45. The Canadian law is discussed in *Sharpe*, supra note 9 at ¶¶ 2.1100-2.1300.

221 A court may order the appointment of a receiver or manager in order to preserve and operate a debtor's assets: *Ontario Rules*, supra note 28, r. 41 and r. 45.01; and *Courts of Justice Act*, supra note 13, s. 101. See also *Ontario Rules*, r. 14.05(3)(g) (originating process). A receiver may be appointed in aid of a *Mareva* injunction: *Ballabil Holdings Pty. Ltd. v. Hospital Products Ltd.* (1985), 1 N.S.W.L.R. 155 (C.A.).

222 *Ontario Rules*, supra note 28, r. 45.

223 *Absconding Debtors Act*, R.S.O. 1990, c. A.2, s. 2(1) (property of Ontario resident who departs province with intent to defraud creditors or to avoid arrest or service may be seized and attached).

Insolvency Act,225 or the Winding Up Act,226 or under federal or provincial corporate legislation.227 The assistance of domestic courts may be sought in aid of a foreign receiver.228 Nothing about the Mareva injunction in aid of foreign proceedings precludes recourse to other measures, and where available, a plaintiff will want to review them for their utility in the particular circumstances. Yet the speed and effectiveness of Mareva relief, and its prospective nature, means that it, alone, may provide a remedy in circumstances in which other provisional and protective measures do not. Indeed, that is why the Mareva injunction originated in the first place.

F. The Mareva Injunction in Aid of Foreign Proceedings as the Corollary to a Worldwide Mareva Injunction?

An analysis of worldwide Mareva injunctions is instructive because in many ways the injunction in aid of foreign proceedings is the mirror image of the worldwide Mareva injunction. A worldwide Mareva injunction is most likely to be ordered when the defendant has insufficient assets within the jurisdiction to satisfy a potential judgment in the forum, but does have sufficient assets outside the jurisdiction to do so. The theory, then, is that by freezing the assets of the defendant outside the jurisdiction, the plaintiff could bring an action in the forum and if successful, attempt to enforce the judgment abroad against the

228 See Price Waterhouse Ltd. v. Paribas Bank of Canada (1992), 13 C.B.R. (3d) 176 (N.S.S.C.T.D.) (recognition of Ontario receiver in Nova Scotia); C.I.B.C. v. Idanell Korner Ranch Ltd. (1990), 2 C.B.R. (3d) 184 (Sask. Q.B.) (recognition of B.C. receiver in Saskatchewan); See C.A. Kennedy Co. Ltd. v. Stibbe-Monk Ltd. and Dorothea Knitting Mills Ltd. (1976), 14 O.R. (2d) 439 (Div. Ct.) (recognition of foreign receiver); Re IIT (1975), 8 O.R. (2d) 359 (H.C.J.) (vesting Ontario assets in liquidator in aid of Luxembourg liquidation). Schemmer v. Property Resources Ltd., [1975] Ch. 273, is sometimes mistakenly said to stand for the proposition that English courts are traditionally unwilling to exercise their powers in support of a receiver appointed by a foreign court. But a closer reading of the case indicates that Goulding J.’s refusal to lend aid to a foreign receivership order was limited to the facts of the case, namely, that there was an insufficient connection between the defendant and the jurisdiction in which the receiver was appointed to justify recognition of the foreign court’s order in England. As well, the American securities legislation upon which the plaintiff’s cause of action was based was a penal law, thus unenforceable in England.
defendant's frozen foreign assets. The pre-judgment *Mareva* injunction prevents the defendant from dissipating her assets in the meantime in an effort to frustrate the forum court's judgment.

Exactly the reverse happens in the case of a *Mareva* injunction in aid of foreign proceedings: domestic (and, in exceptional circumstances, perhaps foreign assets as well) are preserved in order that the defendant may not thumb her nose at a foreign judgment, particularly given that the foreign judgment will in all likelihood be enforced in the forum. Indeed, it could be argued that the *Mareva* injunction in aid of foreign proceedings is much more respectful of comity and jurisdictional concerns than the worldwide *Mareva* injunction, because it allows the court in whose territorial jurisdiction the assets are located to determine whether or not to order an injunction over assets located there, rather than facing the difficulties which may arise from the extravagant jurisdiction claimed by a worldwide *Mareva* injunction.

It follows, therefore, that except in the most compelling and unusual cases, *Mareva* injunctions in aid of foreign proceedings should address only assets within the territorial jurisdiction of the domestic court.\(^2\) Admittedly, difficult issues may arise as to how to determine the *situs* of intangible assets for this purpose, particularly given that different national laws may come to conflicting conclusions as to where a given asset is located. The courts have repeatedly warned that worldwide *Mareva* injunctions will be awarded only in "extreme" or "rare" circumstances: this should be even more so for worldwide *Mareva* injunctions in aid of foreign proceedings, although even they may be appropriate in such extreme circumstances.\(^2\)

The corollary of a restrictive approach to worldwide *Mareva* injunctions is an expansion of the jurisdiction to award *Mareva* relief in aid of foreign proceedings. Given that domestic courts have expressed the concern that *Mareva* relief should generally be sought in the state in which the assets sought to be "frozen" are located,\(^2\) this will necessarily mean that recourse should be had to a Canadian court in circumstances in which litigation is proceeding abroad but assets which might satisfy an eventual judgment are located in Canada.\(^2\)

---

229 *Oriental Commercial*, *supra* note 72 at 1389, Lord Donaldson M.R.; and *Mercedes-Benz*, *supra* note 7, Lord Nicholls (dissenting).

230 *Schlosser*, *supra* note 2 at 163 (arguing in favour of availability of worldwide *Mareva* injunctions in aid of foreign proceedings).

231 *The Xing Su Hai*, *supra* note 64 at 24.

232 See also *supra* note 204.
G. Cases Involving Exclusive Jurisdiction Clauses

A strong argument could be made that, even though the courts technically possess the substantive jurisdiction to award interim relief in cases in which a dispute arises over a contract which contains an exclusive jurisdiction clause in favour of a foreign forum, the domestic courts should decline to order interim relief in such cases.\textsuperscript{233} The question as to whether an agreement by the parties to confer exclusive jurisdiction upon certain courts or arbitral bodies to resolve their disputes should preclude resort to another court for a protective \textit{Mareva} injunction has also arisen in the context of the \textit{Brussels/Lugano Conventions}.\textsuperscript{234} There is no principled reason why parties to a contract should not have the autonomy to exclude recourse by one or both parties to particular courts for provisional or protective relief. Given that, in practical terms, a \textit{Mareva} injunction is likely to influence the terms of resolution of the substantive dispute by the foreign court or arbitral body, domestic courts might be wary in such cases of ordering interim relief.

In some cases, it might be demonstrable that the award of protective and provisional relief by a foreign court would be contrary to the intention of the parties to the contract. The debate as to the proper scope to be given to exclusive jurisdiction clauses in international contracts is likely to play itself out in the context of a motion seeking a \textit{Mareva} injunction in aid of foreign proceedings where the motion might technically be considered to have been brought in breach of an exclusive jurisdiction clause.\textsuperscript{235} More difficult than the theoretical question as to whether the parties may exclude recourse to protective measures by particular courts is the practical issue of whether they have, by a particular clause in a contract, actually done so. This will be a matter of interpretation according to the law of contract of the jurisdiction in which the party seeking provisional relief brings its motion.

Although Canadian courts are never bound by the choice of the parties to a contract, in most cases there are strong reasons for enforcing such choices. Given that \textit{Mareva} injunctions are likely to be awarded only in circumstances bordering on fraud, it might be better to adopt a rule of contract interpretation that, while allowing parties to contract

\textsuperscript{233} \textit{Channel Tunnel}, supra note 45 at 368, Lord Mustill.

\textsuperscript{234} For example, does art. 17 of the \textit{Convention} trump art. 247?

\textsuperscript{235} See \textit{The Siskina}, supra note 35; \textit{Channel Tunnel}, supra note 45; and \textit{Air Zaire}, supra note 43.
away explicitly their rights to pursue interim relief from foreign courts, would generally presume against such contracting-out. Courts observing fraudulent conduct are likely not to respect the choice of the parties, so perhaps the question of whether parties to an international contract can choose to contract out of interim relief issued by foreign courts is of only theoretical interest.\[236\]

H. The Distinction Between a Mareva Injunction in Aid of Foreign Proceedings and the Recognition/Enforcement of a Foreign Order

In making a *Mareva* injunction in aid of foreign proceedings, the Canadian court is not being asked to recognize or enforce a foreign order, but is instead making its own order. What effect should be given by a Canadian court to a foreign freezing order of the *Mareva* type if a party to foreign litigation seeks to have it enforced here? In some ways, the issue is a traditional recognition and enforcement of foreign judgments question, save for the fact that the common law has traditionally been extremely wary of giving effect to foreign injunctions of any kind.\[237\]

For one, the common law has insisted upon a requirement that a foreign judgment be final and conclusive between the parties, in the sense that it would resolve the controversies between them. There is normally good reason for such a requirement: it ensures that the domestic court is not drawn into an investigation of the process of the foreign court, or faced with the prospect of enforcing a foreign order which is subsequently modified or lifted. It is unclear whether a foreign injunction of the *Mareva* type would fulfil this requirement, given that according to the traditional rules, a foreign order of specific performance or the specific delivery or restitution of chattels will not be recognised.\[238\] So, although there is no theoretical reason to refuse to


\[238\] P.M. North & J.J. Fawcett, *Cheshire and North’s Private International Law*, 12th ed. (London: Butterworths, 1992) at 367. However, some statutory recognition schemes specifically provide for the recognition of non-money provisions, including injunctions: see CJA 1982, Sch. 7, para. 1. See also White v. Verkouille, [1990] 2 Qd. R. 191 (S.C.) (recognizing receiver appointed by Nevada court and allowing him to take possession of the defendant’s Queensland bank accounts, given that there was a sufficient connection between the Nevada court and the defendant). But compare Re Resort Condominiums Int’l Inc., [1995] 1 Qd. R. 406 (S.C.) (declining to give effect to
enforce foreign interim relief, practical considerations indicate that a domestic court may feel more comfortable making its own order in aid of foreign proceedings.

Yet, in the face of increasing pressure from litigants, this historical reluctance may be dissolving. In recent years, American courts have shown a greater willingness to give effect to protective and provisional measures (normally Mareva-type freezing orders) issued by foreign courts.\(^{239}\) However, there is a residual reluctance to do so, as demonstrated by *Pilkington Bros. PLC v. AFG Industries Inc.*\(^{240}\) There, a United States district court declined to give effect to an English interim injunction, in part because it was concerned that comity not be affected by a possible misinterpretation of the injunction on its part. The court also expressed concern that it not be seen to be interfering in English arbitration proceedings which had been the subject of contractual agreement. Further, the court did not want to initiate a "race to the courthouse" between two or more fora, and was worried that modifications to the order in one forum might not be accepted in the other. It was better, in the court's view, for the English court to receive all applications for modification of the injunction's terms. In a later case, a federal district court also refused to enforce an *ex parte* temporary restraining order issued by the English High Court.\(^{241}\)

It is unclear whether the *Pilkington* court's reluctance to enforce a foreign injunction was motivated more by its analysis of the particular circumstances or simply a lack of comfort with the novelty of the situation before it. In any event, the concerns it raised were real ones. Yet, if courts are going to continue to take a dim view of the extraterritorial extension of foreign injunctive relief, then they are likely to be faced with an increasing number of requests to lend their interlocutory or procedural orders of foreign arbitrator).

\(^{239}\) See *Cardenas v. Solis*, 570 So.2d 996 (Fla. App. 3d Dist. 1990), rev. denied, 581 So. 2d 163 (Fla. 1991) [hereinafter *Cardenas*] (upholding, on basis of comity, temporary injunction freezing half of funds contained in defendant's Miami bank accounts to preserve the status quo pending disposition of domestic relations suit in Guatemala); *Nahar v. Nahar*, 656 So.2d 225 (Fla. App. 3d Dist. 1995) (adopts broader approach of the *Restatement* rather than more qualified approach of *Cardenas*); *de Pacanins v. Pacanins*, 650 So.2d 1028 (Fla. App. 3d Dist. 1995) (recognition of Venezuelan letters rogatory seeking freeze of assets in U.S. pending outcome of Venezuelan litigation; follows *Cardenas*). See also *Belle Island Inv. Co. v. Feingold*, 453 So.2d 1142 (Fla. App. 3d Dist. 1984), cause dismissed, 459 So.2d 1039 (Fla. 1984) (allowing privately appointed receiver in St. Vincent who had obtained an injunction restraining defendant from dealing with assets to enforce injunction in Florida). See generally *Restatement (Second) of Conflict of Laws*, (St Paul, Minn.: American Law Institute, 1971) §§ 98 and 102, comment g.

\(^{240}\) 581 F.Supp. 1039 at 1045 (D. Del. 1984) [hereinafter *Pilkington*].

assistance to foreign courts in the form of giving effect to foreign protective orders against assets located within their own territorial jurisdiction.

It is perhaps understandable that domestic courts would be reluctant to "enforce" foreign injunctive relief which may be amenable to revision by the foreign court, and thus productive of inconsistencies. Whatever its motivation, this reluctance suggests that domestic courts should be more willing to make their own orders in aid of foreign litigation. Making their own orders would have the advantage of giving domestic courts more control over the terms and conditions upon which such injunctions would be ordered, thus largely avoiding the problems which so troubled the court in Pilkington.

VII. CONCLUSION

The development of a substantive jurisdiction to award Mareva injunctions in aid of foreign legal proceedings is much needed. The recognition of such a jurisdiction will ensure that the process of courts is not abused by unscrupulous defendants, and that illegitimate judgment-proofing is not rewarded. Given this demonstrated need, the question arises as to whether Canadian courts will broaden the scope of the jurisdiction to award Mareva relief to include Mareva injunctions in aid of foreign legal proceedings.

I have argued that not only are there strong reasons to take this step, but that it can be taken on the basis of principles extracted from existing cases. Moreover, extending Mareva relief to encompass orders in aid of foreign proceedings will not lead Canadian courts to take substantive jurisdiction over disputes which have no real and substantial connection to Canada. To the contrary, recognition that provisional and protective measures are purely procedural in nature and do not affect the substance of the dispute will enable the courts to meet the needs of parties engaged in transnational litigation.

Recurring dissatisfaction with Siskina's restrictive account of the courts' jurisdiction to award Mareva relief has finally asserted itself in BMWE. Now that Siskina is dead in Canada, some attention must be paid as to how the concerns which the doctrine in that case wrestled with should be addressed. Principles to guide the evolution of the exercise of the courts' discretion to order Mareva relief in aid of foreign proceedings have begun to emerge. I have outlined those principles, and argued that if they are followed, they will assuage any residual concerns which the courts may have that they not be faced with litigants seeking injunctive
relief in the absence of a justiciable cause of action, while at the same time, allow the courts to order *Mareva* relief in aid of foreign proceedings.