

MAREVA INJUNCTION AND JAPANESE PROVISIONAL REMEDY

by

YOSHIFUMI IKEDA

LL.B, The Osaka University, 1987

A THESIS SUBMITTED IN PARTIAL FULFILMENT OF
THE REQUIREMENTS FOR THE DEGREE OF
MASTER OF LAWS

in

THE FACULTY OF GRADUATE STUDIES
(Faculty of Law)

We accept this thesis as conforming
to the required standard

THE UNIVERSITY OF BRITISH COLUMBIA

December 1998

© Yoshifumi Ikeda, 1998

In presenting this thesis in partial fulfilment of the requirements for an advanced degree at the University of British Columbia, I agree that the Library shall make it freely available for reference and study. I further agree that permission for extensive copying of this thesis for scholarly purposes may be granted by the head of my department or by his or her representatives. It is understood that copying or publication of this thesis for financial gain shall not be allowed without my written permission.

Department of Law

The University of British Columbia
Vancouver, Canada

Date December 15th, 1998

ABSTRACT

Private rights are enforced by the powers of the state where an obligee fails to comply with a court order. However, there is a timelag between the time the parties recognize there is a dispute and the time a court order resolving the dispute is rendered. Therefore, it is necessary to prevent the obligee from changing its position to the detriment of the obligor during that period. In a pecuniary claim this may be achieved by freezing a debtor's assets. On the other hand, it is required that a debtor continue his business and ordinary life. The world's various legal systems have responded to these two, oftentimes conflicting requirements in a number of ways. Two basic mechanisms have been invoked: a remedy *in rem*, which is an order directly affecting assets and a remedy *in personam*, which is an order enforced by threat of imprisonment.

This thesis attempts to analyze the Mareva injunction in England and Canada, which is an injunction issued in respect of a pecuniary claim to prevent a defendant from disposing of his assets. The Mareva injunction is compared with the Japanese provisional remedy. Through this analysis, this thesis brings to light the merits and demerits of both the Mareva injunction and the Japanese provisional remedy from the point of view of how effectively an order succeeds in freezing a defendant's assets. This thesis also suggests a new law which may improve current practices in Japan as to provisional remedies.

TABLE OF CONTENTS

Abstract	ii
Table of Contents	iii
Acknowledgment	vi
INTRODUCTION	1
Chapter I History of Civil Execution	5
1.1 History of English Legal System regarding Civil Matters	5
1.1.1 Origin of Equity	5
1.1.2 Origin of Injunction	8
1.1.3 Origin of Civil Contempt of Court	10
1.1.4 Characteristics of English Law	11
1.2 History of Japanese Legal System regarding Civil Matters	12
1.2.1 Prior to the <i>Meiji</i> Restoration (to 1868)	12
1.2.2 After the <i>Meiji</i> Restoration (after 1868)	16
1.2.3 New Civil Preservation Act and Code of Civil Procedure	20
1.3 Comparison between Equity and Japanese Equitable Notion	22
Chapter II Development of Pre-judgment Injunction System in England and Canada	24
2.1 Current Attitude of English and Canadian Court	24
2.2 Other Pre-judgment Remedies in England	26
2.2.1 Injunction	27
2.2.2 Non-injunction Remedy	28
2.3 Other Pre-judgment Remedies in Canada-Pre-judgment Garnishment	29
2.3.1 Injunction	29
2.3.2 Non-injunction Remedy	31
2.3.3 Pre-judgment Garnishing Order	32
2.4 <i>American Cyanamid Co. v. Ethicon Ltd.</i>	32
2.5 Birth of the Mareva Injunction	34
2.5.1 England	34
2.5.2 Canada	38
2.6 Features of Mareva Injunction Compared with Current Pre-judgment Remedies	40
Chapter III Development of Mareva Injunction	41
3.1 England	42
3.1.1 Jurisdiction	43
3.1.1.1 Nature of the Proceedings	44
3.1.1.2 <i>Siskina</i>	44
3.1.1.3 Personal Jurisdiction	46
3.1.1.4 Substantive Cause of Action	49
3.1.1.5 Assets Subject to Injunctions	54

3.1.2	Merits of Case	55
3.1.3	Risk	57
3.1.3.1	Foreign-based Defendant	57
3.1.3.2	Real Risk	58
3.1.3.3	Worldwide Mareva Injunction	63
3.1.3.4	Mareva Injunction After Judgment	66
3.1.4	Protection of Defendant	67
3.1.4.1	Undertaking	67
3.1.4.2	Full and Frank Disclosure	68
3.2	Canada	68
3.2.1	Jurisdiction	69
3.2.2	Merits of Case	71
3.2.3	Risk	72
3.2.3.1	Foreign-based Defendant-Federal Concern	72
3.2.3.2	Real Risk	73
3.2.4	Mareva Injunction After Judgment	75
3.3	Japan	75
3.3.1	Kinds of Pre-Judgment Remedy	75
3.3.2	Jurisdiction	78
3.3.3	Substantive Requirements	78
3.3.3.1	Specification of Assets	80
3.3.3.2	Merits of Case	81
3.3.3.3	Real Risk	82
3.3.3.4	Undertaking	83
Chapter IV	Effect of Mareva Injunction	85
4.1	Effect	85
4.1.1	Remedy <i>in personam</i> or <i>in rem</i> ?	85
4.1.2	Effectiveness of Mareva Injunction	88
4.1.3	Protection of Defendant	93
4.2	Discovery	94
4.2.1	Granting Discovery Order	94
4.2.2	Worldwide Discovery Order	98
4.3	Effect to the Third Party	100
4.3.1	Contempt of Court against Third Party	100
4.3.2	Effect of Worldwide Mareva Injunction on Third Party	101
4.3.3	Protection of Third Party	104
4.3.4	Variation of Mareva Injunction in favor of Third Parties	105
4.3.5	Set Off	106
4.3.6	Recovery of Cost	106
4.4	Effect of Japanese Pre-judgment Attachment	107
4.4.1	Remedy <i>in rem</i>	107
4.4.2	Absence of Discovery	108
4.4.3	Protection of Defendant	109
4.4.4	Protection of Third Party	109

Chapter V	Conclusion (Analysis and Comparison - Possibility of Mareva Injunction under Japanese Jurisprudence)	111
5.1	Effectiveness of Future Judgment	113
5.1.1	Certainty of Asset Preservation	113
5.1.2	Extent to which Assets Can Be Frozen	115
5.1.3	Pursuit of Assets	116
5.2	Protection of Defendant	116
5.3	Protection of Third Party	117
5.4	Can the Mareva-type of Order be Adopted in Japan?	118
5.4.1	Discovery	118
5.4.2	Sanction against Non-compliance with Discovery	120
5.4.3	Worldwide Order	123
	Bibliography	125

Acknowledgment

I wish to show my gratitude to the following persons.

My wife, Ai Ikeda without whose support and understanding this work would not have been commenced and completed.

Professor Liz R. Edinger, my primary supervisor, who patiently and considerately guided me in the pursuit of my studies. Professor Stephan M. Salzberg. My secondary supervisor, who always encouraged and inspired me in the pursuit of my academic achievement.

Mr. Jarrod Isfeld and Mr. Alexander D.C. Kask, my friends, whose comments and proof-reading were priceless and indispensable.

I would also like to thank Mr. Hiroshi Umemoto and Mr. Teruo Katai, partners of Eiko Sogo Law Office for their financial support.

There are many others including professors and friends to whom a warm thanks must be extended. All of their support and encouragement throughout my LL.M study has been greatly appreciated.

INTRODUCTION

My thesis compares the pre-judgment injunction in England and Canada with the Japanese provisional remedy. Among several types of pre-judgment injunctions or provisional remedies, I focus on the injunction or the pre-judgment provisional remedy for a pecuniary claim for debt or damages (hereinafter ‘a pecuniary claim’),¹ namely the order to prevent the defendant from dissipating or disposing of assets before the decision on the pecuniary claim is rendered in court. As such pre-judgment remedy, the Mareva injunction was created in 1975 in England and was soon adopted in Canada. I examine my topic by centering on the Mareva injunction. The Mareva injunction has primarily developed in England, and therefore I mainly review English cases.

The purpose of my thesis is to introduce the Mareva injunction to Japan and the Japanese pre-judgment provisional remedy to Canada, and to analyze their respective merits and demerits. Additionally, I consider whether the Mareva-type injunction is useful to rectify the problems and difficulties in Japan in securing the enforceability of judgments to be rendered in future.

It is essential that courts have jurisdiction to issue a pre-judgment remedy to secure the effectiveness of a judgment. However, English and Canadian courts had denied for a long time, on principle, the pre-judgment injunction for a pecuniary claim. Nevertheless, once such an injunction, the Mareva injunction, was granted by English and Canadian courts, they quickly developed their jurisdiction to issue the world’s most powerful pre-judgment order for a pecuniary claim: i.e. the injunction to freeze assets not only within the country but also abroad, ‘world-wide Mareva injunction’. I trace the development to creating this powerful injunction in England and Canada.

In Japan the provisional remedy was adopted when Japan modernized after the *Meiji* Restoration in 1868, and since then it has played an important role. However, there has not

**** Note:** In this thesis, all Japanese terms are written in italics. Titles of Japanese books, journals and articles are followed by brackets, “[]”, enclosing their English translations.

¹ Under the Japanese civil law, no remedy *in rem* for the recovery of money is granted unlike common law. Accordingly when I speak of a pecuniary claim in the context of Japanese law, a pecuniary claim includes the remedy for the recovery of money.

been significant change with respect to its jurisdiction since its first enactment. There is no concept in the Japanese provisional remedy to freeze a defendant's assets abroad. I consider whether Japanese jurisprudence can adopt the worldwide provisional order.

Another important element to make the judgment effective is to locate a defendant's assets. There is examination in aid of execution in England and Canada after judgment. However, it does not basically work where the debtor's assets have already been disposed of or dissipated before judgment. The fraudulent conveyance rules were frequently too stringent to solve this problem. Here a pre-judgment disclosure order was necessary in England and Canada. English and Canadian courts solved this problem by granting a discovery order ancillary to a Mareva injunction.

Lack of discovery is a serious shortcoming in the Japanese provisional remedy. As a lawyer in Japan I saw many difficulties in executing a court order for a pecuniary claim because the assets of the debtor could not be found and the information regarding the debtor's assets was insufficient. There is the need for jurisdiction to allow courts to issue a disclosure order against a debtor's assets if just and convenient. Those shortcomings have been recognized but not corrected for almost a hundred years. The solution adopted by England and Canada may be a helpful suggestion to make the Japanese provisional remedy more effective.

Why can English and Canadian courts be allowed to create these powerful orders, the worldwide Mareva injunction and discovery ancillary to the Mareva injunction? In my opinion, one of the answers is the flexibility of equity, which allows a court to create a new type of injunction or an ancillary order. Thus, I review the historical background of equity, and illustrate how equity works and what is the effect. I also examine what Japanese equitable notions were/are and how they worked/work.

In Chapter I, I review the historical background of the injunction in England and the pre-judgment provisional remedy in Japan.

Before 1975, the problem was that judgment rendered in future may not be satisfied because of lack of a defendant's assets. English and Canadian courts, and not their parliaments, solved the problem by granting a new type of injunction, the Mareva injunction. This creation of a new type of injunction was one of the features of equity in England and Canada. It is important to look at the history of equity and its legal characteristics.

The Code of Civil Procedure of Japan (modeled on the German law) was enacted in 1892, soon after the *Meiji* Restoration in 1868. The Code contained the provisions of the pre-judgment procedure and execution procedure. Since then, although the law was amended several times, there has not been a major change of the law. It is helpful for the purpose of my thesis to review the history of the Japanese civil execution.

In Chapter II, I look at the recent development of the pre-judgment injunction leading to creation of the Mareva injunction in England and Canada.

Although the pre-judgment provisional remedy system was adopted without dispute in Japan, the principle that pre-judgment injunctions for a pecuniary claim would not be granted had been well established in England and Canada. However, there were some exceptions to the principle for a non-pecuniary claim, or, under the special condition, for a pecuniary claim. It will be useful to review the background concerning the principle and exceptions to pre-judgment injunction under common law to better understand the necessity and character of the Mareva injunction.

In Chapter III, as one of the main themes, I examine and compare the requirements (both substantial and procedural) of the Mareva injunction and the Japanese pre-judgment provisional remedy.

At the initial stage of the development of the English jurisprudence, eight conditions for the threshold requirement for the Mareva injunction were introduced. Some of them strongly showed that the Mareva injunction was an exceptional remedy, based on the discretion of a court. As the theory developed, the courts gradually expanded where a Mareva injunction can be granted. The location of a cause of action and assets are controversial issues for courts issuing a Mareva injunction. Those must be closely looked at in this chapter. Canadian courts took a little different approach to the requirements of the Mareva injunction. It is worthwhile to examine this difference.

Some of the original eight conditions are common to those of the Japanese pre-judgment provisional remedy. On the other hand, there are some conditions unique to the Japanese pre-judgment provisional remedy. Specification of assets is an important requirement to be examined.

In Chapter IV, I review and compare the effects of the Mareva injunction and the Japanese pre-judgment provisional remedy. It is important to examine both the original Mareva injunction and its ancillary orders.

The uniqueness of both remedies can be shown by their effects. Broadly speaking, while the main effects of the Japanese provisional remedy are enunciated in the statute, those of a Mareva injunction are *per se* self-evidently defined as a type of injunction. The effects of the Japanese provisional remedy are not basically open to dispute, whereas the effects of a Mareva injunction, especially against a third party, were not clear and have gradually been developed in the cases. Furthermore some ancillary orders have been devised to make a Mareva injunction effective, and supplement its shortcomings. The development of the theory regarding the effects of the Mareva injunction will be closely examined.

In Chapter V, I discuss the advantages and defects of the English and Canadian Mareva injunction, and the Japanese pre-judgment provisional remedy. Then, based on this analysis, I discuss whether and how the Japanese jurisprudence can adopt the merits of the Mareva injunction.

The distinction between remedies *in personam* or *in rem* is a critical element in this analysis. Furthermore the availability of an ancillary order for discovery is a conclusive merit of the Mareva injunction. I examine the possibility of Japanese jurisprudence accepting a remedy *in personam* supported by threat of imprisonment, and an order for discovery of a defendant's assets whose nature is akin to a pre-judgment examination in aid of execution, even though the Japanese jurisprudence knows examination in aid of execution only in exceptional circumstances.

Chapter One

The History of Civil Execution

An effective way of comparing the jurisprudence of different countries is to make a historical examination of their legal systems, tracing the gradual development of the unique features of each country's jurisprudence into their present state. The principal purpose of this thesis is to compare the Mareva injunction with the equivalent Japanese provisional remedy. In order to illustrate the features of the Mareva injunction, the first step should, therefore, be a brief observation of the birth and development of injunctions in England (including Wales),² with reference to the history of equity and common law in England. Moreover, since it is an important characteristic of civil execution jurisdiction that injunctions are enforced by contempt of court penalties, the history of civil execution in England shall be briefly examined. A history of Japanese civil law, including civil procedure and civil execution, shall also be briefly outlined.

Since it is a universally accepted concept that a justice system must conform to the spirit as well as the letter of the law, it is also my intention in this chapter to clarify the features of an "equitable" notion under the Japanese feudal legal system compared with equity in England, and then to examine how another "equitable" notion works in modern Japanese jurisprudence. It is a relatively recent development in Japanese history that orders in regard to civil issues were not enforced by threat of imprisonment. It is, therefore, important to examine the old system and see why it disappeared.

1.1 History of English Legal System regarding Civil Matters

1.1.1 Origin of Equity

It can be said that common law was conceived by the courts of the Norman Conquest (1066).³ In the Anglo-Saxon era there was no unified English law. As a result of the centralization policy starting with the Norman Conquest, common law was gradually established as the universal custom of the realm. At the time of the Norman Conquest, the

² While there might be the subtle differences between injunctions in England and those in Canada, I will refer to only the history of England, so as to describe environment from which the Mareva injunction developed.

³ F. Pollock, "The King's Justice in the Early Middle Ages" (1898) 12 Harvard Law Review 227 at 227. G. B. Adams, "The Origin of English Equity" (1916) 16 Columbia Law Review 87 at 89.

courts managed both temporal and ecclesiastical cases. William the Conqueror (1066-1087) divided the courts into the temporal court and the ecclesiastical court. He gave the bishops the freedom of their own courts and removed them from dealing with spiritual matters in the hundred and county courts.⁴ It was inevitable that the King's activity and authority should increase with this new system of jurisdiction.⁵

With the agreement of Curia Regis,⁶ Henry II (1154-1189) promulgated the Assize of Clarendon and the Constitution of Clarendon (1164).⁷ The Constitution of Clarendon expanded the jurisdiction of the King's court, reducing that of the court of the church. Henry II also established the centralized court and the circuit court⁸ system on the grounds of 'King's justice'.⁹

This expansion continued and three kinds of King's courts, the King's Bench, Common Pleas or the Court of Common Pleas and the Exchequer,¹⁰ were established in the Edward I (1272-1307) era.¹¹ Law applied in these courts became common over England, and thus common law was formed.¹²

⁴ Pollock, *supra* note 3 at 227.

⁵ It is indicated that the great convenience of the royal courts given by advanced Norman law and the concept of feudalism, in which the principle that a lord owed justice to the men who held their lands of him was already well established on the Continent, were moment for "King's justice". See Pollock, *supra* note 3 at 229.

⁶ Curia Regis (King's Court) was established by William the Conqueror. Its functions were legislative, administrative and judicial. Kaibara Fumio "Eikoku Kouhei-hô no Shingen [The Origin of English Equity] (3)" (1958) 4:2 Kanazawa Hôgaku 117 at 119.

⁷ Although only church courts had had jurisdiction for matters regarding a contract made *fidei laesio*, (without *bona fide*) before, because the law of the church worked to correct sin against *pro salute animae* (sound soul), the king's court also obtained its jurisdiction for these matters under section 15. Kaibara Fumio "Eikoku Kouhei-hô no Shingen [The Origin of English Equity] (1)" (1957) 3:1 Kanazawa Hôgaku 79 at 92.

⁸ The system of the circuit court originated in the Henry I (1100-1135) era. Kaibara 4:2, *supra* note 5 at 123.

⁹ Pollock, *supra* note 3 at 227. Kaibara 3:1, *supra* note 7 at 104

¹⁰ Curia Regis was divided into administration and judicature. The administrative part of Curia Regis changed to Concilium Regis (king's council) and the judicial part of it became King's Court. This King's Court divided into King's Bench, Common Pleas and the Exchequer. Kaibara 4:2, *supra* note 5 at 121. The Exchequer was not only a court of law but a "government office", and an administrative or executive bureau. F. W. Maitland, *Equity, also The Forms of Action at Common Law (Two Courses of Lectures)*, (London: Cambridge University Press, 1916) at 2.

¹¹ Adams, *supra* note 3 at 95. Maitland, *supra* note 10 at 2. Takakubo Sadato, *Igirisu-hô Nyûmon [Introduction to English Law]*, 3d ed. (Tokyo: Chûou Daigaku Shuppan Bu, 1990) at 37.

¹² Pollock states, "The King's justice, with all its innovations in form, was really the strongest guardian of the national law; for the central power of the King's court molded the law to uniformity." Pollock, *supra* note 3 at 235.

The notion of equity existed in the common law courts at the very inception of common law.¹³ At the same time, the King still held a residue of justice and presided over the court of the King's Council.¹⁴ This residual royal justice is the origin of equity.¹⁵ As the organ of the King's prerogative, the Council was the natural organ for the exercise of his equitable powers.¹⁶

The origin of equity as a separate system can be found in the fourteenth century, when common law became so rigid a system that a new means had to be found for the exercise of the royal prerogative¹⁷ in order to secure general justice not provided for in the ordinary way. This duty and this function still remained with the King.¹⁸ The Chancery was a lower department of the Council,¹⁹ and the Chancellor was the King's prime minister and a member of the Council.²⁰ In those days, the Chancellor kept the King's great seal and was a consultant to the King. Through having exercised the power of issuing both judicial and administrative writs to all the King's officials, central and local, the Chancellor already had a well-organized office staff.²¹

¹³ The idea that if common law could not preserve a right to be preserved it was the king's duty to preserve the right prevailed. Adams states, "Common Law and Equity originated together as one undifferentiated system in the effort of the king to carry out his duty of furnishing security and justice to all in the community by making use of his prerogative power through his prerogative machinery." Instead of that, two clear types of jurisdiction, Common Law and Equity, already existed in one court. He concluded, "we must say not that Equity originated in Common Law, but that Common Law originated in Equity." Adams, *supra* note 3 at 91, 92 and 94. The church law also, even though it lost most of its jurisdiction through the Constitution of Clarendon, became connected with the notion of "king's peace", and its idea "conscience" could be realized by the Chancellor. W. Barbour, "Some Aspects of Fifteenth-century Chancery" (1917) 31 Harvard Law Review 834 at 834. Kaibara 3:1, *supra* note 7 at 103.

¹⁴ Adams states: "[The King] owed a duty to the community at large to preserve order, to see that justice was done to rich and poor alike, which might at any moment override his feudal duty as the lord of vassals, and must override it if the two came into irreconcilable collision." Adams, *supra* note 3 at 91. See also Maitland, *supra* note 10 at 3.

¹⁵ Kaibara 4:2, *supra* note 5 at 121.

¹⁶ Adams, *supra* note 3 at 98.

¹⁷ Maitland says that common law is contrasted with royal prerogative (and also with statute and with local custom). Maitland, *supra* note 10 at 2.

¹⁸ Adams, *supra* note 3 at 97. Barbour, introduces the same view although he does not clarify whether or not it is correct. He states: "At all events the law became so rigid and inflexible, its practitioners were so absorbed in nice questions of form and pleading, that there was no longer room for equity. This has become the situation early in the fourteenth century; as a result a new field for the royal prerogative is found and equity is administered in the council from which in the next century the Court of Chancery breaks off." Barbour, *supra* note 14 at 834

¹⁹ Chancery was the secretarial department as Civil Service. Maitland, *supra* note 10 at 2.

²⁰ *Ibid.*

²¹ It is sometimes said that the Chancellor was a keeper of the King's conscience and a confessor. However, it is not clearly settled and there is a strong dissenting opinion. T. Plucknett, *A Concise History of the Common Law*, 4th ed. (London: Butterworths, 1948) at 171.

During the course of the fourteenth century, the Chancellor started to hear and judge petitions which had traditionally been heard by the King or the Council. In the fifteenth century, equity became an independent area of jurisprudence and the Court of the Chancery broke from the courts of common law.

Regarding the reason equity became independent of common law, W. Barbour states:

One should notice further that the shaping of equity is in the hands of ecclesiastics who knew little of the common law but a good deal of another system; their interference with the law is indirect, but more marked in that they act through an independent court. For the future there will be two distinct bodies of doctrine which clash with each other. Thus English equity becomes a radically different thing from what it would have been had it remained a part of the common law.²²

1.1.2 Origin of Injunction

In the fifteenth and early sixteenth centuries, the rules of equity were highly developed to provide relief from the procedural or substantive defects of the common law system. Theodore Plucknett explains the defects as follows:

Among the defects of the common law which were most frequently supplied in Chancery was its inability at this date to give specific relief in actions on contract and tort, and so we find in Chancery court bills to secure specific chattels, to compel a conveyance in accordance with a contract of sale, to obtain the cancellation of deeds, and for injunctions against a variety of wrongful acts, especially waste.²³

Thus, under equity, the Chancellor started to issue injunctions for specific performance, not only *to do*, but also *not to do*. F.H. Lawson gives a clear explanation of the reason the remedy of specific performance or the injunction was not acceptable at common law as follows. (Footnotes are mine.)²⁴

²² Barbour, *supra* note 14 at 835.

²³ Plucknett, *supra* note 21 at 651.

²⁴ F. H. Lawson, *Remedies of English Law*, 2d ed. (London: Butterworths, 1980) at 2.

Historically indeed we start from individual wrongs which conformed to easily recognizable types, such as striking or imprisoning a man, or interfering with his land or movable property.²⁵ To them were by degrees added failure to pay debts, the withholding of property in land or goods, attacks on reputation, breach of contract, and so on, covering most of the ground and leaving little over that the average man would think likely to occur and to demand a remedy. Each wrong was provided with its own action, in which the parties had to observe certain requirements of form and substance. . . .

The forms of action were only ways of getting a case before a court, of sorting out the questions of fact and law and reducing them to issues fit to be tried. They had very little influence on the nature of the judgment, and next to none on the ways in which it might be enforced. Execution was the business not of the judges but of bailiffs and sheriffs' officers. Only the simplest tasks could be imposed on them, tasks that admitted of no discretion, and were therefore ministerial, as they were called. They were only two in number: one was to put a successful plaintiff in possession of land held by the defendant,²⁶ the other to seize and sell sufficient of his goods to satisfy a judgment debt. Thus, whereas the ways of getting a case ready for the courts were many and strictly defined, the remedies were few and bore no relation to the forms of action, or only one dictated by common sense.²⁷

²⁵ In the Anglo-Saxon era, crime was generally treated as a private trespass. Most of the civil laws in England, afterward, developed from "action of trespass" which was founded on a breach of the King's peace. One of the characteristics was that the plaintiff claimed for money, not for recovery of specific goods or specific performance, while the unsuccessful defendant was punished, and pretty severely. See Maitland, *supra* note 10 at 343. See also Kaibara Fumio, "*Eikoku Kouhei-hô no Shingen* [The Origin of English Equity] (2)" (1958) 4:1 Kanazawa Hôgaku 42 at 68.

²⁶ Lawson states: "Medieval England did not lack enforcement officers, the sheriffs; and so as one might expect, early remedies were specific. Yet, for reasons that are not entirely clear, only one of them has survived, the specific recovery by a freeholder of land of which he has been dispossessed." He also states that the older remedies available to a freeholder having become unsatisfactory, it was found useful to extend to him the leaseholder's remedy that his real right to the land is protected against anybody, and afterwards, a freeholder had the possession action, referred to as "ejectment" for the recovery of land itself. Lawson, *supra* note 24 at 174, 203.

²⁷ In contrast, in Roman law, specific relief was the norm and was made to give way to the substitutional remedy of damages only where it was considered objectionable for some reason or other. Lawson states: "When from the third century A.D. onwards, the Roman Empire became more and more a police state, any practical objections to specific remedies became much less important and so orders for the specific restoration of property and the specific performance of contracts became the rule; and this preference was handed on to the countries of continental Europe that 'received' Roman law. It accorded well with academic notions. The revived study of Roman law started in the late eleventh century in the Italian universities, and until unique recent times the law professors created a powerful atmosphere within which judges and practicing lawyers have worked. It seems natural and logical that if a person ought to hand over something to another person or should do what he has

1.1.3 Origin of Civil Contempt of Court

As the Chancellor was not a judge but usually a bishop, he judged cases not on the grounds of law but on the grounds of "conscience", subject to Christian peace keeping.²⁸ He required a defendant to act in accordance with his Christian conscience.²⁹ The procedure in the Chancery was inquisitorial.³⁰ The defendant under "subpoena" owed a duty to appear in court and was forced to tell the truth under discovery.³¹

"Equity acts *in personam*" followed this procedure: initially the Chancellor heard a defendant's statement under inquisitorial procedure, as if the Chancellor were a priest and the defendant were a person who was to confess his sin; if the defendant did not tell the truth or comply with this procedure he had to purge himself of wrongdoing; this concerned his own conscience and did not extend to other people.³² A person who violated a decree, therefore,

promised to do, he should be ordered specifically to do his duty." *Ibid.* at 174. Japanese law received Roman law via France and Germany.

²⁸ Plucknett states, "At the later date, it is true, Chancery became a court of conscience, with a jurisprudence deliberately based upon idea, but this was a later development and will not account for the earliest period of Chancery history." Plucknett, *supra* note 21 at 171.

²⁹ The ecclesiastic regained in Chancery what he had lost as a churchman. Barbour, *supra* note 14 at 855.

³⁰ Maitland says, "This procedure is rather like that of the ecclesiastical courts and the canon law than like that of our old English courts of law." He subsequently says, "In the second half of the sixteenth century the jurisprudence of the court is becoming settled. The day for ecclesiastical Chancellors is passing away." Maitland, *supra* note 10 at 5, 9. On the other hand, Plucknett says, "Just as the bill or petition was originally a prayer for administrative intervention, so the next step in the process, the *sub poena*, was also drawn from administrative origins. The threat of a penalty had been used by the government to stimulate the activity of officials as early as 1232. . . ." Plucknett, *supra* note 21 at 644.

³¹ The subpoena is different from the old writs whereby actions are begun in the courts of law in that the former merely states that the defendant has to come to the court and answer the question, while the latter tells the defendant the cause of action of the case. Maitland, *supra* note 10 at 5.

³² The reason is not clearly settled. Barbour says that it was settled in the reign of Henry IV that the decree's operation was confined to the person of the defendant and did not extend beyond the defendant. Barbour, *supra* note 14 at 843. Beale argues that this is the basis for development of civil contempt of court, stating: "Contempt of this last sort—that is, mere disobedience of the king's seal—became of increasing importance from the time the lord chancellor adopted it as the basis of his judicial power. The chancellor had no direct power over property or persons, and no control over any executive officer, sheriff, constable, or bailiff. The decree of his court derived its force from the fact that it was granted by the keeper of the king's seal, and was executed by means of a writ sealed with that seal." J. H. Beale, Jr., "Contempt of Court, Criminal and Civil" (1908) 21 Harvard Law Review 161 at 166. Plucknett insists that in the early common law jurisdiction the order *in personam* was issued, and there is no significant inherent reason why common law should confine itself to an action for damages. Plucknett, *supra* note 21 at 640. See also Kaibara Fumio, "Eikoku Kouhei-hô no Shingen [The Origin of English Equity] (4)" (1960) 6:1 Kanazawa Hôgaku 69 at 73.

was committed to prison to remain until he had purged himself of his wrongdoing by doing the right or undoing the wrong.³³

At the end of the fifteenth century, it was said that the Chancellor compelled parties to comply with his decrees by threat of imprisonment of the party against whom an order was issued. A little later it was said of the Chancery that 'a decree does not bind the right, but only binds the person to obedience, so that if the party will not obey, then the Chancellor may commit him to prison till he obey, and that is all the Chancellor can do.'³⁴ Afterwards, the nature of contempt of court gradually changed from purging a violator of wrongdoing against his conscience into a step in civil process, which is merely a method of executing the decree of the court in favor of the successful party to a suit.

1.1.4 Characteristics of English Law

We have noted that it is a characteristic of English law that there are two legal systems, common law and equity. Procedures under equity are different from those under common law, and equity renders a different type of order to common law. For example, the equitable remedy is enforced by contempt of court, not punitively but coercively. Before this separation, as I will mention in 1.2, English law was not very different from old Japanese law in that common law and equity coexisted and non-compliance with an order could be punished as a direct insult to the lord. In other words, it is because equity became independent of common law and survived that English law is distinguished from civil law in many areas.

Equity created specific types of relief. An injunction is issued subject to equity and enforced by contempt of court. Among equitable remedies, there are remedies to *give*, to *do*, *not to do*, or to *undo*, in other words; to transfer some object, to perform some service other than a transfer, to abstain from some particular conduct, or to destroy, cancel or otherwise undo what has been done. From the point of view of enforcement, these various orders fall into two groups. Some of them can, if necessary, be executed by someone other than the defendant,

³³ Beale argues, as the above, that the Chancellor availed himself of the contempt of court penalty as the means of enforcing decrees, as he was the keeper of the great seal, insisting the legal fiction; where the person who received an order sealed by the King's great seal did not comply with the order, it was thought that he had ignored the King's seal and committed contempt against the King. Beale, *supra* note 32 at 166.

³⁴ Beale, *supra* note 32 at 169.

others can be performed only by the defendant himself. The former class comprises all orders to *give* and to *undo*, together with certain orders to *do*; the others are orders to *abstain*, and orders to perform personal services calling for the exercise of the defendant's skill or judgment. If the defendant fails to obey an order of this class, then in the last resort, the plaintiff may himself make arrangements for substituted performance. On the other hand, if the defendant fails to comply with an order of the latter class, there can be no direct enforcement of the order. The most that can be done is to put pressure on the defendant to obey, by committing him to prison for contempt of court or sequestering his property.³⁵

A pecuniary claim is enforced by seizure and sale of a defendant's asset(s), which is not an equitable remedy but a common law remedy.³⁶ However, an order to prevent a defendant from disposing of or dissipating his assets is an order *not to do*. The order *not to do* is enforced by prohibitory injunctions. The Mareva injunction is one of the prohibitory injunctions.³⁷

1.2 History of Japanese Legal System regarding Civil Matters

1.2.1 Prior to the *Meiji* Restoration (to 1868)

In Japan, civil procedure did not clearly appear until during the *Kamakura Shōgunate* era³⁸ (1185-1333).³⁹

³⁵ Lawson, *supra* note 24 at 175, 176.

³⁶ One of the forms of execution on the person was that a debtor who failed to pay a judgment debt could be imprisoned at the option of his creditor. Imprisonment for debt was abolished by the Debtors Act (U.K.) 1869, c.62, except where a debtor could but would not pay; and debts owed to the Crown were exempted from the Act. By the Administration of Justice Act (U.K.) 1970, c.31, which made general the power to attach earnings, imprisonment was further restricted so as to apply only to persons who default in the payment of maintenance and certain rates and taxes. See Lawson, *supra* note 24 at 8,9. Section 51 of the Court Order Enforcement Act in British Columbia, R.S.B.C. 1996, c. 50, provides, "A person must not be taken in execution on a judgment."

³⁷ The order *to undo* what has been done is enforced by mandatory injunctions or otherwise. The order *to give* or *to do* is enforced by the judgments ordering the specific restitution of land or chattels, the substitution of one object for another, the specific performance of contracts, the prerogative order of mandamus or otherwise. See Lawson, *supra* note 24 at 174-177.

³⁸ Shigematsu Kazuyoshi, *Nihon Hōseishi Kōyō [Japanese Legal History]* (Tokyo: Keibundō, 1987) at 61.

³⁹ Regarding the year when the *Kamakura Shōgunate* was established, this (1183) is the standard view, even though Minamoto Yoritomo, the founder of the *Kamakura Shōgunate*, was inaugurated as the *Shōgun* at 1192. See Sugiyama Haruyasu, *Gaisetsu Nihon-hō-shi [Outline of Japanese Legal History]* (Tokyo: Keibundō, 1987) at 135. Shigematsu, *supra* note 38 at 61.

Before this era, Japan was ruled by the Emperor, the *Ten-nô*, and the nobles, the *Kuge*.⁴⁰ The rulers relied on the then constitutional codes, *Ritsu* and *Ryô*, to administer the society. *Ritsu Ryô* are legal codes brought over from China. These codes were modified in order to conform with Japanese culture and values. *Ritsu* is penal law and *Ryô* is administrative law.⁴¹ Under this *Ritsu Ryô* system, there was no concept of the civil remedy and civil procedure was part of criminal procedure.⁴²

The *Ritsu-Ryô* system was defeated by Minamoto Yoritomo, a member of the warrior class, the *Buke*, and a founder of the *Kamakura Shôgunate*.⁴³ The two types of civil procedure in the *Kamakura Shôgunate* era called the *Shomu-sata* and the *Zatsumu-sata*.⁴⁴ The *Kamakura Shôgunate* was succeeded by the *Muromachi Shôgunate* (1336-1467).⁴⁵

During the terms of both *Shôgunate*, civil procedure was mainly for resolving disputes with respect to ownership of land by the *Buke*. But as commerce developed in the *Sengoku* era (1467-1573),⁴⁶ which was the era of civil strife after the *Muromachi Shôgunate* collapsed, in order to reinforce their ruling, it became necessary for the rulers to resolve disputes among

⁴⁰ This does not mean that the *Ten-nô* issued an order by himself. The *Ten-nô* himself had little political power. Those who obtained political power issued orders in his name. Those people were usually relatives of the *Ten-nô*, e.g. the Soga and Fujiwara Family. There was no need for the real ruler to make himself *Ten-nô*, rather, it was more useful for him to avail himself of the *Ten-nô* to facilitate his ruling.

⁴¹ There are several *Ritsu* and/or *Ryô*. One *Ryô* was enacted by Tenji *Ten-nô* (662-71). It is called Ômi *Ryô*. Another *Ryô* was enacted by Temmu *Ten-nô* (662-71). It is called Kiyomigahara *Ryô*. In 701, the famous code, Taihō Code (comprising both *Ritsu* and *Ryô*) was enacted. In 718, Yōrō Code was enacted. The *Ten-nô* and the *Kuge* tried to a centralized state under the *Ritsu Ryô* regime. C. Steenstrup, *A History of Law in Japan until 1868* (Leiden: E. J. Brill, 1991) at 34, 35. J.W.S. Davis, *Dispute Resolution in Japan* (Den Haag: Kluwer Law International, 1996) at 21.

⁴² There are two views regarding whether civil procedure did exist. Neither of them is a standard view. However, a scholar who insists that civil procedure existed agrees that criminal procedure dominated and that civil procedure was not clearly distinguished from criminal procedure. See Shigematsu, *supra* note 38 at 36.

⁴³ From this time, the warrior class became the ruling class and the rulers issued an order in the name of the *Shôgunate* instead of the *Ten-nô*. However, the *Shôgunate* was appointed by the *Ten-nô* upon the nomination of the ruling class, which nomination the *Ten-nô* did not have power to reject. Accordingly, technically, the *Ten-nô* was still the source of the law. However, practically, the *Ten-nô* and the *Kuge* were ruled by the *Shôgunate*.

⁴⁴ *Shomu-sata* was for disputes regarding ownership of real estate. *Zatsumu-sata* was for disputes regarding lease and loans. See Shigematsu, *supra* note 38 at 77.

⁴⁵ Regarding the year when the *Muromachi Shôgunate* was established, see Sugiyama, *supra* note 39 at 169.

⁴⁶ The *Muromachi Shôgunate* continued until 1573 when it was taken over by Oda Nobunaga. However, after *Shôgun* Ashikaga Yoshinori was assassinated in 1441 and the civil strife (*Ônin no Ran*) was broken out in 1467, the *Muromachi Shôgunate* lost power to administer all over Japan, but had power to administer only the Kyoto area. See Shigematsu, *supra* note 38 at 62 and Sugiyama, *supra* note 39 at 181.

commoners fairly.⁴⁷ Substantive law also developed during this period. Therefore, civil procedure started to become independent of criminal procedure and administrative procedure.

In the *Tokugawa Shōgunate* era (1600-1868),⁴⁸ civil procedure became highly developed and sophisticated.⁴⁹ In the initial stages, the legal system was based on edicts and decrees.⁵⁰ They were directed mainly against the *Kuge* and the *Buke*, not against commoners.⁵¹

However, in 1742, code consisting of a compilation of many of the existing decrees was established by the *Tokugawa Shōgunate*. It was called the *Kujikata Osadame Gaki*.⁵² Although the *Tokugawa Shōgunate* considered it unnecessary to inform commoners of the content of these laws⁵³ the commoners were, nevertheless, subject to these laws.⁵⁴

The *Osadame Gaki* provided for civil procedure independent of criminal procedure. However, civil procedure was not clearly separated from criminal procedure. Cases commenced by civil procedure were, if necessary, converted to criminal procedure along the way.⁵⁵ There were four types of civil procedure.⁵⁶ When civil proceedings were commenced, a

⁴⁷ Self-help was prohibited in the district ruled by the Imagawa Family, which was the ruling class, *Sengoku Daimyō*. See Shigematsu, *supra* note 38 at 113.

⁴⁸ The political system of the *Tokugawa Shōgunate* combined central control and fiefdoms run by the about 300 feudal lords, *Daimyō*, who paid allegiance to the *Shōgun*. A *Daimyō* provided his domain law, detailing how a local lord wished to run his fiefdom. The laws regarding civil matters for commoners would also be covered by this domain law. See Davis, *supra* note 41 at 23.

⁴⁹ Many case books were written, e.g. *Kōhō Sanrei*, *Saikyo Todome*, and *Saikyo-betsu Todome-chō*. See Shigematsu, *supra* note 38 at 134.

⁵⁰ Two examples are, first, the law on Military Households, *Buke-Shohatto*, which curbed the power of the territorial lords by prohibiting them from forming political alliances and limiting their military activities to their territorial boundaries. The second the law of the Imperial Court and Nobles, *Kuge-Shohatto*, deprived the *Ten-nō* and the *Kuge* of any political power and controlled the appointment of people in senior positions in the *Tokugawa Shōgunate*. Davis, *supra* note 41 at 22.

⁵¹ Shigematsu, *supra* note 38 at 131.

⁵² It was contained in two volumes. The first volume consisted of public acts and precedents; while the second one covered mainly civil and criminal decisions relating to individual acts and behavior. The second volume was a secret code only known by several commissioners and officials of the *Tokugawa Shōgunate*. Davis, *supra* note 41 at 22.

⁵³ Under Confucianism, people cannot criticize politics. The *Tokugawa Shōgunate* adopted Neo-Confucianism as its official ideology. See Kobayakawa Kingo, *Kinsei Minji Soshō-hō Seido no Kenkyū* [Research of Civil Procedure System in the Latter Part of Feudalism] (Tokyo: Meisho Fukyū Kai, 1988) at 68. Henderson states: "Often these hierarchical relationships of man-over-man have been characterized as a rule-of-man, and Confucianistic philosophy also often supports such a term. Hence, the 'legal' system has been viewed as a power structure with nothing more than authoritarian duties for subordinates, without any correlative rights; the individual person at the bottom had only status as members of a hierarchical group, but no individual legal status as such." D. F. Henderson, "Law and Political Modernization in Japan", in R. Ward ed, *Political Development in Modern Japan* (New Jersey: Princeton University Press, 1968) at 404.

⁵⁴ Shigematsu, *supra* note 38 at 131.

⁵⁵ *Ibid.* at 214. Henderson states: "The *deiri suji* was essentially a civil procedure between adversary private

commissioner, the *Bugyô*, would accept the petition by the plaintiff and summon the defendant to a hearing and then render a judgment. It was considered unnecessary to proceed to a public trial.⁵⁷ Conciliation and settlement were encouraged⁵⁸ even to the point of parties being forced to reach a compromise under threat of punishment.⁵⁹ Only when parties could not settle disputes, a commissioner would render a judgment, *Saikyo*.⁶⁰ There was no appeal.⁶¹

A commissioner generally followed the applicable precedents. However, judgment was sometimes based on justice and convenience, *Dôri*, instead of on substantive law or

parties as opposed to the criminal *gimmi-suji*, but if the party was slow to compromise or otherwise offensive during trial, the officials could proceed to treat the party as a criminal and place him in jail or subject him to torture to bring him into line." Henderson, *supra* note 53 at 409. He also indicates that in criminal cases, except for grave offenses, conciliation was allowed. D.F. Henderson, *Conciliation and Japanese Law: Tokugawa and Modern vol. 1* (Seattle: University of Washington Press, 1965) at 171, 172. See also Steenstrup, *supra* note 41 at 157-159.

⁵⁶ (1) *Ronsho*: the procedure for disputes regarding land boundaries, and right of water and common; (2) *Kuji* (narrow meaning): the procedure for a pecuniary claim and a claim for recovery and delivery of real property and movables; (3) *Nakama-goto*: the procedure for disputes regarding mutual affairs, e.g. after some carpenters built a house and received the payment, disputes arose regarding how the money was to be distributed among them; and (4) the procedure for disputes arising from a social relationship, i.e. master-apprentice and parent-child, e.g. inheritance disputes. In *Kuji*, there were two kinds of procedure. One was called *Kane* (money)-*kuji*. The other was called *Hon* (main)-*kuji*. *Kane-kuji* was for a pecuniary claim with interest. *Kane-kuji* was tried summarily - the plaintiff simply had to present to the commissioner the appropriate documentation bearing his and the defendant's seals. *Hon-kuji* was for the matters other than a pecuniary claim with interest, e.g. complaint for recovery and delivery of real estate and movables. Kobayakawa, *supra* note 53 at 127-135. See also Henderson, *supra* note 53 at 406 and J. H. Wigmore, *Law and Justice in Tokugawa Japan Part XI* (Tokyo: The Japan Foundation, 1975) at 121-124.

⁵⁷ Adjudication is part of politics under Confucianism. Since no criticism of politics was allowed, the *Tokugawa Shôgunate* never allowed a public trial. See Kobayakawa, *supra* note 53 at 131.

⁵⁸ There were two kinds of principles regarding this. One was that a court did not intervene in disputes regarding distribution of money within a group. This principle was called *Nakama-goto*. The other was that conciliation or settlement was primary resolution and judgment was exceptional resolution. This conciliation or settlement was called *Naisai*. Although an anthology of admonition to commissioners, *Tokugawa-ki*, said that all lawsuits could not be resolved by conciliation or settlement, it was provided that a pecuniary claim was primarily resolved by conciliation or settlement. It was also advised by a guide book for commissioners, *Kourigata Kokoroe Sho*, that important matters like confirmation of land boundaries were not to be tried rapidly, but basically courts should wait a while for stating trial. This technique was used to encourage parties to conciliation or settlement. Kobayakawa, *supra* note 53 at 69, 77-91, 131-133.

⁵⁹ Henderson, *supra* note 55 at 171-181. See also Davis, *supra* note 41 at 23.

⁶⁰ When a judgment, *Saikyo*, was rendered, a document in which the content of the judgment was written was handed to the parties. This document was called the *Saikyo Shômon*. Where parties reached settlement, *Naisai*, they had to apply for the court to grant the settlement, submitting a document called the *Naisai Shômon* which shows the content of the settlement. This procedure was called *Saikuchi Kikitodoke*. Since a settlement granted by a court was deemed to be the same as a decision by the court, *Naisai Shômon* was as effective as *Saikyo Shômon*. Kobayakawa, *supra* note 53 at 533.

⁶¹ It was considered that to file an appeal was an insult to law and a rebellion against the authority of the *Tokugawa Shôgunate*. An appeal was not only prohibited, but the person who tried to do so was punished. Kobayakawa, *supra* note 53 at 131.

precedents.⁶² Where old precedents did not fit the current circumstances, *Dori* worked to correct the resulting injustice and inconvenience.

Commissioners, as representatives of the ruler, the *Shōgun* or the *Daimyō*, had a wide range of discretion with respect to procedural matters and decision making. Once a decision was made, it was no longer a mere resolution of the dispute but became an order from the ruler to the people involved.⁶³ In the *Tokugawa Shōgunate* era, thus, the civil litigation and execution systems were part of the official administration rather than independent of the administration. When a party refused to comply with the judgment, *Saikyo*, he was punished as a criminal.⁶⁴ This punishment was not to enforce the plaintiff's rights as established in the judgment but to maintain the authority of the *Tokugawa Shōgunate*.

Accordingly, the main purpose of this punishment was not civil execution as is civil contempt of court in England. Where the defendant did not have enough money to pay the judgment, all of his assets were distributed under a kind of bankruptcy procedure, called *Bunsan*, but he was not otherwise punished. There was no "imprisonment for debt".⁶⁵ There was no necessity for civil execution nor did the concept of pre-judgment order exist.⁶⁶

1.2.2 After the *Meiji* Restoration (after 1868)

In 1854, the *Tokugawa Shōgunate* signed a Treaty of Friendship with the United States, opening two seaports to American ships and permitting a consul to reside in Japan. Until then, the *Tokugawa Shōgunate* had forbidden Japanese citizens to leave the country, had allowed only the Netherlands and China to have trade relations with Japan and had required the

⁶² The *Osadame Gaki* itself did not require a commissioner to judge a case subject to *Dōri*. However, since the *Osadame Gaki* did not clearly state the law, a commissioner had broad discretion in judging a case. He was bound by *Dori* when he exercised this broad discretion. Some legal books, for example *Tokugawa Kin-rei Kou* and *Ritsu-ryō Yōryaku*, recommended this approach. Kobayakawa, *supra* note 53 at 66. See also Ishii Ryōsuke, *Gotōke Reijyo, Ritsu-ryō Yōryaku [Anthology of Rules, Outline of Law]* (Tokyo: Sōbun-sha, 1959) at 299. Henderson states: "But in adjudication the *Osadame Gaki* and other basic decrees provided that reason (*dōri*) should override the great law as found in custom and precedents." Henderson, *supra* note 53 at 409.

⁶³ A lawsuit was called *Kuji*, which means "public matters". See Kobayakawa, *supra* note 53 at 66, 523-527.

⁶⁴ Henderson, *supra* note 55 at 176.

⁶⁵ See 1.1.4, above, for discussion of this issue.

⁶⁶ Although a money economy developed during the *Tokugawa* era, it was far removed from modern capitalism. The *Tokugawa Shōgunate* did not promote commerce but protected agriculture. Under this policy, the transaction of land, especially farm land, was in principle prohibited. Since the necessity for the civil execution law or the pre-judgment remedy was not strong under the circumstances where commerce did not develop and transactions of land was restricted, those laws did not develop.

Dutch and Chinese to remain at the isolated location in Nagasaki harbor, *Dejima*, to avoid contact with Japanese citizens. Other Western powers quickly entered into agreement with Japan similar to the Treaty of Friendship. This treaty was unequal and disadvantageous to Japan.⁶⁷ Signing of the subsequent treaties resulted in several strong feudal lords, *Daimyô*, banding together to oppose the *Shôgunate*'s relations with the foreign governments. These anti-*Shôgunate* forces were successful in forcing the *Tokugawa Shôgun* to step down and surrender his power to the Emperor, the *Ten-nô*. In 1868, the *Ten-nô* declared that imperial rule had been restored. This act marked the beginning of the *Meiji Restoration*, so named after the *Ten-nô* who resumed power.⁶⁸

At the beginning of the *Meiji Restoration*, the Japanese government realized that it had to modernize Japan to avoid being taken over by foreign powers, as had occurred elsewhere in the world. It decided to accept modern capitalism, copying the features of Western countries' political and legal systems. With the advent of modern capitalism,⁶⁹ the Japanese government hastened to establish a civil litigation system, mainly by copying the English, French, and German systems. A primary impetus was that the Japanese government wanted to have the Western countries agree to the revision of the unequal treaties,⁷⁰ which those countries refused to do until Japan modernized its legal system and provided protection to the interests of those Western country citizens who might live, work or invest in Japan.

Even after the *Meiji Restoration*, the prefectural governors, who used to be feudal lords, still retained the power to handle civil cases within their prefectures.⁷¹ In 1869, the *Minbu-shô* (Department of the Interior) was established. Subsequently under the order from the government, called the *Minbu-kan Futatsu*,⁷² authority to hear complicated and/or

⁶⁷ It was agreed that nationals of these foreign countries were not subject to Japanese laws. The treaty with the United States also contained tariff provisions which were more favorable for American goods being imported into Japan than Japanese products being sent to the United States. Davis, *supra* note 41 at 24.

⁶⁸ *Ibid.* at 22, 24, 25.

⁶⁹ At the same time, the *Meiji* government established some substantial civil laws. Under these laws, Japanese people became free to dispose of their land. See Ukai Nobunari *et al.*, *Nihon Kindai-hô Hattatsu-shi* [*The History of Japan's Modern Law*] vol. 1, 2d ed. (Tokyo: Kei-sô Shobô, 1974) at 11, 49, 89.

⁷⁰ Ukai Nobunari *et al.*, *Nihon Kindai-hô Hattatsu-shi* [*The History of Japan's Modern Law*] vol. 2, 3d ed. (Tokyo: Kei-sô Shobô, 1979) at 123, 140.

⁷¹ Ukai Nobunari *et al.*, *Nihon Kindai-hô Hattatsu-shi* [*The History of Japan's Modern Law*] vol. 6, 2d ed. (Tokyo: Kei-sô Shobô, 1973) at 16.

⁷² Shigematsu, *supra* note 38 at 316.

interprefectural civil cases was given to the *Minbu-kan*, who were members of the *Minbu-shô*. Although the authority of a *Minbu-kan* was limited to particular cases, the *Minbu-kan* system was the first unified, independent civil litigation system in Japan.⁷³ In 1872, the power of the prefectural governors, formerly the feudal lords, was extinguished and the sovereignty of the Meiji government was established by order by the government, *Hai-han Chi-ken*. In 1873, Etô Shinpei was appointed Head of *Shihô-shô*, the central government's Law Department. He transferred the authority of the *Minbu-kan* to the Law Department. Only the Law Department could manage the courts.⁷⁴ In 1876, the (old) Supreme Court of Japan, the *Taishin-in*, was established, and the foundation of the modern judicial organization was established.⁷⁵ In 1891, the Japanese government enacted the Court Organization Act, and the modern system of judicial organization was completed.⁷⁶

The rules of civil procedure had been established in 1874. Even though it was comprehensive and well organized, with only fifty sections the *So-tô Bun-rei*⁷⁷ was incomplete system. Then, in 1891,⁷⁸ the Japanese government enacted both the Court Organization Act and the Code of Civil Procedure. This latter included the civil execution (remedies) law and the civil preservation law. It was drafted by Hermann Techow, a German jurist, and modeled on the Code of Civil Procedure in Germany (1877) and the Prussian Land Execution Act.⁷⁹ Under this legislation, the Japanese government adopted as part of the civil preservation law a general pre-

⁷³ Ukai vol. 6, *supra* note 71 at 24.

⁷⁴ *Ibid.* at 61.

⁷⁵ *Ibid.* at 19, 21, 43, 53, 82. Ukai vol. 2, *supra* note 70 at 102, 107, 129. See also Henderson, *supra* note 53 at 424.

⁷⁶ Ishii Ryôsuke, *Japanese legislation in the Meiji Era* trans. W. J. Chambliss (Tokyo: Pan-pacific Press, 1958) at 17.

⁷⁷ George Walles Hill, who was an American lawyer, seemed to be involved in drafting it. Mukai Ken, "*Minji-soshô-hô Hôten Hensan no Sendatsu Tachi* [Pioneers in Japan Drafting Code of Civil Procedure]" (1991) 971 *Juristo* at 18. Mukai Ken, "*Meiji Shonen ni-okeru Minji-soshô-hôten no Hensan* [Drafting the Code of Civil Procedure at the Beginning of Meiji]" (1964) 6 *Sôgô-Hôgaku* 2 at 11-13.

⁷⁸ In 1883, Gustave Emile Boissonade de Fontatabie, who was a French legal scholar and strongly involved in creating the (Old) Civil Code, drafted the Code of Civil Procedure and the Civil Execution Law. But these Acts were not adopted by the Japanese government. The reason is unclear. I presume that German laws had more appeal to the government leaders than French laws, because German laws were more conservative and were not as compatible with many democratic and liberal institutions. See Mukai, *supra* note 77 "*Minji-soshô-hô Hôten Hensan no Sendatsu Tachi* [Pioneers in Japan Drafting the Code of Civil Procedure]" at 20.

⁷⁹ Matsuura Kaoru, "*Hozen Soshô no Enkaku* [The Origin and Development of Civil Preservation Procedure]" in Nakata Junichi *et al.*, *Hozen Shobun Taikei* [The System of Provisional Remedy] vol. 1, (1964, Tokyo Hôritsu Bunka-sha) at 42.

judgment remedy system which provided provisional remedies for pecuniary claims (*Kari-sashiosae*). The Code of Civil Procedure provided that a provisional order for a pecuniary claim (*Kari-sashiosae*) was to be enforced by temporary seizure of a defendant's assets.

In 1898, after a long dispute, the Civil Code was enacted.⁸⁰ The code was generally modeled on the German Civil Code 1888 First Draft, which was itself amended in 1896, and accordingly the German Civil Code is different from the Japanese Civil Code in many respects.⁸¹ Also the Japanese Civil Code was still being influenced by the French Civil Code.⁸² French civil law was to have a lasting effect on Japanese law in two important ways. First, civil execution under the Japanese Civil Code, influenced by the ideology of "freedom of intention" under the French Code instead of the concepts of the German Code, was only allowed when the execution was not accompanied by an order for bodily restraint.⁸³ It is important for this thesis that when the Japanese government drafted the Civil Code it accepted that its courts had no power to order a defendant into custody for non-performance of a duty *to do* or *not to do*. Courts in Germany had, and still have, the power to do so.⁸⁴ The notion to force a defendant to perform a specific act under threat of imprisonment has never been examined in the Japanese legislature.⁸⁵ The second lasting effect of French civil law was that the principle of equality among unsecured creditors was accepted.⁸⁶

⁸⁰ The (Old) Civil Code had been promulgated in 1892, but it was never enforced. The (Old) Civil Code was mainly drafted by Boissonade and modeled on the French Civil Code. Shigematsu, *supra* note 38 at 259.

⁸¹ Hosokawa Kameichi, *Nihon Kindai Hô-sei-shi [The History of Japanese Modern Law]*, (Tokyo: Yûhi-kaku, 1961) at 297. See also Henderson, *supra* note 53 at 434, 435.

⁸² The French Civil Code, upon enactment, was affected strongly by the idea that freedom of decision-making must be respected and not oppressed. Later, the development of "*astreint*" weakened the effect of the ideology. Morita Osamu, *Kyôsei Shikkô no Hôgaku-teki Kôzô [Legal Constitution of Civil Execution]*, (Tokyo: Tokyo Daigaku Shuppan Kai, 1995) at 9.

⁸³ *Ibid.* at 285. Lawson discussed committal for contempt in English law, stating, "French lawyers are astonished to find it possible for a private person to have another private person imprisoned as the result of a merely private lawsuit." Lawson, *supra* note 24 at 9.

⁸⁴ In CPO Article 774, which is a similar provision to ZPO Article 888, it is provided that where the specific performance cannot be carried out by a person other than the defendant, the trial court may order the defendant to perform the specific act under threat of a fine or imprisonment.

⁸⁵ Mikazuki Akira, a noted academic, insisted that the possibility of accepting enforcement by threat of imprisonment had to be examined. Morita, *supra* note 82 at 303, 314.

⁸⁶ Statement of Mikazuki Akira in the Panel for research of the revised draft of the Civil Execution Law. *Kyôsei-shikkô-hôan Yôkô-an Kenkyû-kai [The Society for the Study of the Draft of the Civil Execution Law]*, "*Kyôsei-shikkô-hô Kaisei-yôkô to Minpô [The Draft of the Civil Execution Law and Civil Code]*" (1972) 517 *Jurisuto* 2 at 8.

1.2.3 New Civil Preservation Law and Code of Civil Procedure

In 1925, the Japanese government made an overall revision to the Code of Civil Procedure, with the exception of civil execution law and civil preservation law.⁸⁷ In 1979, the Civil Execution Law was enacted as the law of civil (execution) remedies. Subsequently, in 1989, the Civil Preservation Law was enacted. Before these new laws, the necessity for examination in aid of execution and measures to force a defendant to comply with a court order by threat of imprisonment was recognized by many jurists.⁸⁸ However the newly enacted laws, while they were better organized than the predecessor laws, did not have much impact with respect to these issues. It remains to be seen whether these new systems can be accepted in Japanese jurisprudence.

In 1996, the Code of Civil Procedure was promulgated, and it came into force on 1 January, 1998. This law has significance for Japanese jurisprudence in that it partially adopts the discovery system.

Under the prior law, subject to the application of one party against the opposite party, the courts had authority to issue an order to produce a specific document only in limited circumstances.⁸⁹ In contrast, under Article 163 of the new law,⁹⁰ it has become possible for one party to serve interrogatories on the other, even though there is no sanction against the party who does not reply the interrogatories. Moreover, under Article 220-223,⁹¹ one party can apply

⁸⁷ Ukai vol. 2, *supra* note 70 at 170. Nakano Teiichirô, Matsuura Kaoru, & Suzuki Masahiro eds., *Minji Soshô-hô Kôgi [Lecture of the Code of Civil Procedure]*, 9th ed. (Tokyo: Yûhikaku, 1984) at 27.

⁸⁸ E.g. Ishikawa Akira, "Shittukô ni-okeru Zaisan Kaiji-seido no Dônyu ni-tsuit [Regarding Acceptance of Examination in Aid of Execution]" 45:2 Hôgaku Kenkyu 1. Statement of Mikazuki, *supra* note 86.

⁸⁹ Tanaka Kazuo, "Soshô Shiryô no Aitegata karano Shutoku [Obtaining Facts and Proof from Opposite Party]" 58 Hôgaku Kyôkai Zasshi 307 at 309.

⁹⁰ Article 163 (Inquiry by party): A party may, during the pendency of the litigation, make inquiry in writing to the other party to answer in writing within a reasonable period fixed, with regard to the matters necessary for preparing for assertion or proof. Provided that, this shall not apply if such inquiry falls under any of the following items: (1) Inquiry which is not concrete nor individual; (2) Inquiry to insult or embarrass the other party; (3) Inquiry to overlap with the inquiry already made; (4) Inquiry to request opinions; (5) Inquiry to require unreasonable expenses and time in order that the other party may answer; (6) Inquiry as to the matters similar to such matters as may reject testimony in accordance with the provision of Article 196 or Article 197. For the English translation of the Code, see Nakane Fukio *The Code of Civil Procedure Japan* (Tokyo: Eibun Horeisha, 1998).

⁹¹ Article 220 (Obligation to produce document): A holder of a document may not refuse the production thereof in the following cases: (1) When the party himself is in possession of the document to which he has referred in the litigation; (2) When the person going to prove is entitled to demand from the holder of the document the delivery or the perusal thereof; (3) When the document has been drawn up for the benefit of the person going to prove or for the legal relations between the person and the holder thereof; and (4) In addition to the cases

to the court for an order directing the opposing party to name documents relating to the case and to produce them. If the opposing party does not comply with the order the court may, under Article 224,⁹² deem the assertion of the party who applies for the order to be true.

However, the authority of the Japanese courts in this regard is more limited than that of the English courts. Under Japanese discovery, a party applying for a discovery order has to specify the extent of disclosure. A court cannot issue a discovery order that orders a party to disclose all documents in his possession or control relating to any matter in question in the

mentioned in the preceding three paragraphs, when the document (excluding a document which a government official or a former government official keeps or possesses with regard to his official duties) does not come under any of the followings; (a) A document stating therein the matters provided for in Article 196 as to a holder of the document or a person having relationship mentioned in each item of Article 196 with a holder of the document; (b) A document stating therein the fact provided for in Article 197 paragraph 1 item (2) or the matter provided for in item (3) of the said paragraph which is not exempted from the duty to keep secret; (c) The document to be offered only for the use of a holder of a document. Article 221 (Application for order for production of document): (Paragraph 1) An application for an order for production of a document shall clarify the following matters; (1) Indication of the document; (2) Gist of the document; (3) The holder of the document; (4) The fact to be proved; (5) The ground for obligation for production of the document. (Paragraph 2) An application for an order for production of a document on the ground for the obligation for production of a document arising from the case mentioned in item (4) of the preceding Article, may not be made unless the offering of documentary evidence is required to be made by the application for an order for production of a document. Article 222 (Procedure for specifying document): (Paragraph 1) If, in the case where an order for the production of a document has been applied for, it is extremely difficult to clarify the matter mentioned in item (1) or (2) of paragraph 1 of the preceding Article, at the time of the application it shall be sufficient to clarify, as a substitute for such matter, the matter which enables the holder of a document to distinguish the document under the application. In this case a notice shall be made to the court requesting the holder of a document to clarify the matter mentioned in item (1) or (2) of the said paragraph as to the said document. (Paragraph 2) If a notice under the provision of the preceding paragraph has been made, the court may request the holder of a document to clarify the matters mentioned in the latter part of the said paragraph except when it is clear that an application for an order for production of a document is groundless. Article 223 (Order for production of documents, etc.): (Paragraph 1) The court shall, if it deems the application for an order for production of documents well-founded, order the holder of a document to produce it by ruling. In this case, if the document contains part deemed to be unnecessary to be examined or part not to be deemed to be under obligation for production, the court may order the production of the document except such part. (Paragraph 2) The court intending to order a third person to produce a document shall examine the third person. (Paragraph 3) The court may, if it deems it necessary to decide whether the document under an application for an order for production of a document comes under any of the documents mentioned in a. through c. of item (4) of Article 220, have the holder of the document to present the said document. In this case, no one may request the disclosure of the presented document. (Paragraph 4) An immediate Kokoku-appeal may be filed against the ruling on an application for an order for production of documents. For the English translation of the Code, see *ibid.*

⁹² Article 224 (Effect of party's non-compliance, etc. with order for production of document): The court may, in case a party does not comply with an order for production of document, deem the assertion of the other party relating to the document to be true. For the English translation of the Code, see *ibid.*

action. Moreover, where the document is made for “the only purpose to use it for the benefit of himself”,⁹³ it is a privileged document under Article 220 (4).⁹⁴

Nevertheless, the increasingly favorable attitude towards disclosure which I mentioned earlier has created the type of environment in which acceptance of the Mareva-type order is a possibility.

1.3 Comparison between Equity and Japanese Equitable Notion

I have already mentioned at 1.1.4 that equity in England is an independent body of law not bound to common law and that the remedy based on equity is enforced by imprisonment for contempt of court. As far as an order for specific performance is concerned, the courts have inherent authority to create a new type of injunction in order to afford full protection a plaintiff's rights in keeping with justice and convenience. As such, the injunction system has developed.

The concept of the equitable notion existed in the *Tokugawa* era in Japan.⁹⁵ Justice and convenience, *Dori*, functioned as an equitable notion in courts in the *Tokugawa* era. This Japanese equitable notion was similar to equity in England in that a court could issue an order based exclusively on justice and convenience. Moreover an order by a commissioner in the *Tokugawa* era was also enforced by threat of imprisonment. However this equitable notion did not create independent jurisprudence or a distinguishable remedy.

After the *Meiji* Restoration, since the Japanese government abolished the old Japanese inherent law, and generally accepted European civil code and civil procedure laws, the

⁹³ The meaning of “the only purpose to use it for the benefit of himself” is not clearly set even among authorities. It is argued that it depends on the action and there is no objective norm. Ito Makoto *et al.*, “*Shin Minji Soshô-hô wo Megutte* [Discussion about the new Civil Procedure Law]”, (1997) 1125 *Jurisuto* 107 at 11111, 121, 122.

⁹⁴ For the English translation of the Code, see *supra* note 90.

⁹⁵ Shundai Ryôtei, who was a scholar in the *Tokugawa Shôgunate* era, said that since it was difficult to create such perfect law that covered all matters, law should be interpreted and applied so as to reach the correct conclusion through exercise of a judge's discretion on the basis of love (*Jin*), justice (*Gi*), loyalty to a master or parents (*Chû*), and sympathy for the weak (*Jyo*). Ohtsuki Risai, who was also a scholar in the *Tokugawa* era, said that it was against justice that legal procedure fell into formalism as courts required parties to perform unnecessarily complicated procedures. For example, application by sealed documents was required even though verbal application was enough. See Toyohira Yohichi, “*Tokugawa Jidai no Kôhei-hô Ron* [Equitable Notion in the Tokugawa Era]” 15 *Hôgaku Ronsô* 130.

authority of the courts was limited and remedies were clearly provided by statutes.⁹⁶ The Japanese civil procedure laws have not given the courts such a wide range of authority as to provide that a court order can be issued wherever it appears to the courts to be just and convenient that the order should be made. Only with regard to the applicability of equitable notions was the authority of the courts after the *Meiji* Restoration more restricted than in the *Tokugawa* era.

Although equitable notions are built into the Civil Code of Japan,⁹⁷ the general rule is to interpret a law so that the interpretation fits in with justice and convenience. The courts cannot create a new remedy beyond that provided by the statutes. Moreover, due to the influence of French law, the Japanese civil law remedy is limited to those remedies not to be accompanied by an order for bodily restraint.

From the above, it is clear that when a shortcoming in the law is found, English equity can create a suitable order to overcome the shortcoming. By contrast the Japanese equitable notion may lead to a new interpretation of the relevant article, thereby overcoming the shortcoming but unless Japanese legislators amend the existing article or introduce a new article or law, the court does not have legal authority to remedy the defect of the law.

⁹⁶ I am of the opinion that one of the reasons the Japanese government did not accept English equity was that it did not fit the *Ten-nō* monarchy system established after the *Meiji* Restoration. The absolute monarchy system fits the concept of "king's residual justice". England had been an absolute monarchy for lengthy period between the feudal and modern capitalist orders. In contrast, as, after the feudal system collapsed, the modern capitalist system was rapidly adopted in Japan, the era of absolute monarchy in Japan was very short, or rather, it did not exist. The *Ten-nō* monarchy system after the *Meiji Restoration* was a constitutional monarchy system. Under this system, the *Ten-nō* was not a European-style emperor and did not have actual political power. The *Ten-nō* did not play the role of fountain of justice and could not be a promoter of new rights to cover shortcomings caused by misguided legislation. It is logical that courts were not given the power to perform the "king's residual justice". Courts under this system in Japan could only apply the statute to each case but could not create new law. Henderson indicates: "But so far, most Japanese and Western discussions of 'Tokugawa influences' in modern Japanese law tend to be prefatory and nominalistic or descriptions of ghostly remnants of Tokugawa institutions in modern form, for there is little of the heritage existent today which has not been greatly molded to new uses with the passage of time." Henderson, *supra* note 53 at 392.

⁹⁷ Article 1: (Paragraph 1) All private rights shall conform to the public welfare. (Paragraph 2) The exercise of rights and performance of duties shall be done in faith and in accordance with the principles of trust. (Paragraph 3) No abusing of rights is permissible. For the English translation of the Code, see Nakane Fukio *The Civil Code of Japan* (Tokyo: Eibun Horeisha, 1998).

Chapter Two

Development of Pre-judgment Injunction in England and Canada

When a new type of law is devised, it is closely and strongly connected with pre-existing laws governing in that area. The Mareva injunction is a type of pre-judgment injunction. In the previous chapter I reviewed the history of the injunction. Therefore, in this chapter I will discuss the laws with respect to the pre-judgment remedy in England and Canada.

In common law, generally, there is no rule to prevent debtors from disposing of or dissipating their assets thereby effectively negating any judgment entered against them. English and Canadian jurisprudence did not originally know the notion and concept of a general pre-judgment remedy system for a pecuniary claim. However, not only did English jurisprudence have an old law called foreign attachment used in City of London,⁹⁸ but courts in England and Canada have granted pre-judgment remedies in a large area of law for a non-pecuniary claim or a pecuniary claim based on a special law. In this chapter I will discuss these laws and trace the recent development of the injunction order up to the establishment of the Mareva injunction. Such a review will facilitate a better understanding of the requirements and effects of the Mareva injunction.

As there is no statute to generally grant creditors the power to temporarily seize a debtor's assets before judgment except under limited circumstances in England and Canada, contrary to Japanese law as I mentioned in Chapter I, an interlocutory injunction under equity is the only available relief for creditors facing the risk of debtors disposing of their assets. It is necessary to broadly examine the development of the interlocutory injunction.

In 1975 a court presided over by Lord Denning granted the first Mareva injunction based on pre-judgment provisional and injunction remedies prevalent in English law. Canadian courts basically followed this decision several years later. On the end of this chapter I will illustrate the foundation for a Mareva injunction in England and Canada.

2.1 Attitude of English and Canadian Courts prior to 1975

⁹⁸ In *Pertamina*, *infra* note 169 Lord Denning referred to this jurisdiction to explain the background to grant a pre-judgment remedy for a pecuniary claim.

Prior to 1975 the judicial attitude towards the pre-judgment remedy for a pecuniary claim in England was that there was no inherent power to grant such an order as such would prevent a defendant from disposing of his own property on the grounds of a likelihood that the plaintiff would recover judgment against him, and that there was no statutory provision or rule of court that could be used to support the change of the current attitude. *Lister & Co. v. Stubbs*⁹⁹ was usually cited as the leading authority for this principle.¹⁰⁰ In this case, Cotton L.J. said:

I know of no case where, because it was highly probable that if the action were brought to a hearing the plaintiff could establish that a debt was due to him from the defendant, the defendant has been ordered to give security until that has been established by the judgment or decree.¹⁰¹

An important factor in this case is that the consequence of the order to pay into court was considered unacceptable because it would give a plaintiff priority against other creditors.¹⁰² Cotton L.J. also said:

... if we were to order the defendant to give the security asked for, it would be introducing an entirely new and wrong principle - which we ought not to do, even though we might think that, having regard to the circumstances of the case, it would be highly just to make the order.¹⁰³

⁹⁹ [1886-90] All E.R. Rep. 797 (C.A.). The plaintiffs were silk-spinners and dyers who employed the defendant as their foreman of works. He had the additional responsibility of buying factory material, and was allegedly paid by a supplier company on a commission basis for goods he had ordered on the plaintiff's behalf. It was claimed that he had made over £5,500 this way, and the plaintiffs started an action against him for the sums received fraudulently, as well as damages, an account, and an inquiry. They also asked for an interlocutory injunction to prevent him from dealing with land which he had bought with that money, and for an order that his investments and excess cash be paid to the court. Regarding the summary of the case, see M. S. W. Hoyle, *The Mareva Injunction and Related Orders* (London: Lloyd's of London Press, 1985) at 16.

¹⁰⁰ In contrast, there is attachment in the United States because the American colonies left the Motherland before foreign attachment disappeared in England. W. Tetley, "Attachment, the Mareva injunction and *saisie conservatoire*" (1985) Lloyd's Maritime and Commercial Law 58 at 58.

¹⁰¹ *Supra* note 99 at 799.

¹⁰² It should be noted that leave to defend an action is frequently made conditional on payment of money to the court, even though the case is by no means certain for the plaintiff and this is precisely the type of security objected to. Hoyle, *supra* note 99 at 17.

¹⁰³ *Supra* note 99 at 800.

Our interpretation of this opinion might be that courts can issue an order to prevent a defendant from disposing of his property so long as the order does not give a plaintiff security. It could be said that the Mareva injunction was born only after courts admitted that that kind of order did not always result in the plaintiff obtaining the security.¹⁰⁴ The problem with respect to security, however, continued even after the theory of the Mareva injunction was advanced and its effect was clearly recognized as I illustrate later.

No plaintiff challenged the *Lister v. Stubbs* rule until *Nippon Yusen*¹⁰⁵ either because the sums claimed did not warrant challenging what many practitioners considered too rigid a rule to be changed without statutory intervention, or for other valid reasons. The Payne Report,¹⁰⁶ nevertheless, recommended in 1969 that:

... the court on the application of a creditor before or after judgment should be enabled, if it is satisfied that a debtor is, with the intention of defeating the creditor's claim, about to make any disposition or transfer out of the jurisdiction or otherwise deal with any property, to make an order. . . for restraining the debtor from so doing.¹⁰⁷

Canadian courts generally followed the *Lister v. Stubbs* rule.

2.2 Other Pre-judgment Remedies in England

However, even at the time the *Lister v. Stubbs* decision was rendered the concept of pre-judgment remedies, including those for a pecuniary claim, was not unknown in England. At that time there was a broad range of pre-judgment remedies, some of which were injunctions and others were statutory remedies distinct from an injunction. It may be more accurate to say that the rule in *Lister v. Stubbs* was an exception to the pre-judgment remedy jurisprudence, or at least that it cannot be said which is the principle and which is the exception. Accordingly,

¹⁰⁴ See e.g. *Cretanor Maritime*, *infra* note 181.

¹⁰⁵ *Infra* note 148.

¹⁰⁶ U.K., "Report of the Committee on the Enforcement of Judgment Debts" Cmnd. 3909. (Chairman: Mr. Justice Payne).

¹⁰⁷ *Ibid.* at para. 1253.

the development of the Mareva injunction is not a fundamental deviation from the established principles of the law of England.¹⁰⁸

2.2.1 Injunction

The first exception to the *Lister v. Stubbs* rule was an injunction not for a pecuniary claim but for preservation of the subject-matter of litigation. The English Court of Appeal held in *Polini v. Gray; Sturla v. Freccia*¹⁰⁹ that English courts had jurisdiction to preserve property pending appeal to the House of Lords stating: 'because the principle which underlines all orders for the preservation of property pending litigation is this, that the successful party in the litigation, that is, the ultimately successful party, is to reap the fruits of that litigation, and not obtain merely a barren success.'¹¹⁰ It is clear that the concept of enjoining a debtor from disposing of his property pending the judge's decision was well known in England, when the *Lister v. Stubbs* rule was decided.

The second exception concerned matrimonial property under the statutory power of section 37(2)(a)(b) of the Matrimonial Causes Act 1973,¹¹¹ which provided:

(2) Where proceedings for financial relief are brought by one person against another, the court may, on the application of the first-mentioned person-

(a) if it is satisfied that the other party to the proceedings is, with the intention of defeating the claim for financial relief, about to make any disposition or to transfer

¹⁰⁸ Hoyle, *supra* note 99 at 22.

¹⁰⁹ (1879), 12 Ch. D. 438 (C.A.).

¹¹⁰ *Ibid.* at 443.

¹¹¹ *Matrimonial Causes Act, 1973* (U.K.), 1973, c. 18. The Law Reform (Miscellaneous Provisions) Act 1949 (U.K.), 1949 c.100, s. 5 provided: (1) Where a husband has been guilty of willful neglect to provide reasonable maintenance for his wife or the infant children of the marriage, the court, if it would have jurisdiction to entertain proceedings by the wife for judicial separation, may, on the application of the wife, order the husband to make to her such periodical payments as may be just; and the order may be enforced in the same manner as an order for alimony in proceedings for judicial separation. (2) Where the court makes an order under this section for periodical payments it may, if it thinks fit, order that the husband shall, to the satisfaction of the court, secure to the wife the periodical payments, and for that purpose may direct that a proper deed or instrument to be executed by all necessary parties shall be settled and approved by one of the conveyancing counsel of the court. However, English courts did not grant the order to prevent a husband to dispose of his assets under this provision. See *e.g. Scott v. Scott* [1950] 2 All E. R. 1154 (C.A.). The Matrimonial Causes (Property and Maintenance) Act, 1958 (U.K.), 1958 c.35, s. 2 (2) was similar to the Matrimonial Causes Act 1973 s. 37 (2). The Matrimonial Causes Act, 1965 (U.K.), 1965 c.72, s. 32 (1) was almost identical to the Matrimonial Causes Act 1973 s. 37 (2).

out of the jurisdiction or otherwise deal with any property, make such order as it thinks fit for restraining the other party from so doing or otherwise for protecting the claim;

- (b) if it is satisfied that the other party has, with that intention, made a reviewable disposition and that if the disposition were set aside financial relief or different financial relief would be granted to the applicant, make an order setting aside the disposition;

Thus, the Family Division could issue an injunction for a pecuniary claim not only to freeze a respondent's assets, but also to order the avoidance of transactions designed to frustrate the assessment and enforcement of a claim.¹¹² This was identical to a Mareva injunction, even though it could be issued only in specific situations.¹¹³

2.2.2 Non-injunction Remedy

When the *Lister v. Stubbs* rule was decided, a ship could be arrested for debts or damages concerning the ship even before judgment was rendered under the predecessors to the Supreme Court Act, 1981.¹¹⁴ Although this remedy was distinct from the injunction and the action was against the ship, it showed that a strong pre-judgment remedy for a pecuniary claim was available in the specific situation.¹¹⁵

¹¹² Hoyle says, "Further, the power to freeze assets is exercisable by a Registrar after the main proceedings have been started, whereas an injunction generally is an order for a judge to grant, except in limited cases in the Queen's Bench Division, such as where the order is by consent." Hoyle, *supra* note 99 at 19. Ough says, "In addition, the order under the Act is exercisable by the Registrar whereas a Mareva injunction may be granted only by a judge." R. N. Ough, *The Mareva Injunction and Anton Piller Order*, (London: Butterworths, 1987) at 8.

¹¹³ Hoyle says that a Mareva injunction has a close similarity to the Family Division injunction. Hoyle, *supra* note 99 at 19. Beam says that this order is in effect an Mareva injunction. D. Beam, *Injunctions*, 7th ed. (London: FT Law & Tax, 1996) at 203. Payne Report recommends, "a creditor should have a right comparable to that enjoyed by a spouse under section 32 (1) of the Matrimonial Causes Act 1965". Payne Report, *supra* note 106 at para. 1253.

¹¹⁴ *Supreme Court Act, 1981* (U.K.) 1981, c. 54. The predecessor of the Supreme Court Act, 1981 is the Administration of Justice Act, 1956 (U.K.), 4 & 5 Eliz. 2 c. 46. The Supreme Court of Judicature Act, 1873 (U.K.) 36 & 37 Vict. C. 66 had the similar provision to the section 20(2) of the Supreme Court Act, 1981. The Supreme Court of Judicature Act, 1873 was replaced by the section 24 of the Supreme Court of Judicature (Consolidation) Act, 1925 (U.K.) 15 & 16 Geo. 5 c. 49, which was replaced by the Administration of Justice Act, 1956.

¹¹⁵ Tetley states, "[Lord Denning] really had more authority to revive the moribund Admiralty attachment than to reverse or circumnavigate *Lister v. Stubbs* by promoting the invention of a whole new type of injunction with

The Admiralty Court had always exercised an *in rem* jurisdiction over ships within the English jurisdiction.¹¹⁶ A ship arrested provides security for the plaintiff's claim in the form of a maritime lien, making the plaintiff a secured creditor. It covers a wide range of claims including pecuniary claims against shipowners under section 20(2). One of the subsections provides as follows;

20(2) The questions and claims referred to in subsection (I)(a) are-
(e) any claim for damage done by a ship;

2.3 Other Pre-judgment Remedies in Canada - Pre-judgment Garnishment

The range of pre-judgment remedies in Canadian provinces prior to the early 1980s was basically similar to that of England.¹¹⁷ In addition, there was a pre-judgment garnishment system in some provinces, so jurisprudence in those provinces was more accepting of pre-judgment remedies than was the case in England. The necessity for a Mareva-type injunction was not as strong in Canada as it was in England.

2.3.1 Injunctions

Rule 46 (1) of the Supreme Court Rules of British Columbia¹¹⁸ codifies the principle of injunctions to preserve "subject-matter in litigation",¹¹⁹ and other provinces¹²⁰ have comparable procedural rules as well. Under this principle, the court may order the defendant to deposit the

new rules of its own." Tetley, *supra* note 100 at 73.

¹¹⁶ In comparison, the Mareva injunction is consistent with this traditional legal response to the international nature of commerce and the need to protect innocent parties. Hoyle, *supra* note 99 at 20.

¹¹⁷ Estey J., writing the judgment of the Supreme Court of Canada in *Aetna*, states four exceptions to the *Lister v. Stubbs*. *Infra* note 167 at 106-108. See also C.R.B. Dunlop, *Creditor-Debtor Law in Canada*, 2d. ed. (Toronto: Carswell, 1995) at 158.

¹¹⁸ B.C. Reg. 221/90. The predecessor of the rule is B.C. Reg. 3573/76.

¹¹⁹ However, in *MacMillan Bloedel Ltd. v. Mullin* no procedural rule was referred to, even though the majority granted an interlocutory injunction to prevent logging on Indian land as the claimant Indians would be irreparably harmed if the land were not preserved in its current state pending trial. (1985), 61 B.C.L.R. 145 (B.C.C.A.).

¹²⁰ Ontario codified 45.01(1) of the Rules of Civil Procedure, O. Reg. 560/84.

subject-matter with the court. Accordingly, there is a mixture of both a mandatory injunction and a prohibitory injunction in this category.

Section 67 of the Family Relations Act of British Columbia¹²¹ and some provincial acts e.g. section 19 of the Domestic Relations Act¹²² also have matrimonial law similar to the Matrimonial Causes Act 1973¹²³ in England.

Moreover, in *Cambell v. Cambell*¹²⁴ a pre-judgment injunction was granted in a case of fraudulent conveyancing¹²⁵ in the Court of Chancery of Ontario. In that case, a defendant husband fraudulently conveyed all his land to the co-defendant so as to prevent a plaintiff wife from recovering any alimony, and the Court issued an injunction against the defendants restraining any further disposition. This principle was followed in section 2 of the Fraudulent Conveyances Act¹²⁶ in Ontario as well as in *City of Toronto v. McIntosh*.¹²⁷ In order to obtain an interlocutory injunction under this principle, the plaintiff had to establish that he had a valid claim against the defendant and show a *prima facie* case that the previous conveyance was fraudulent.¹²⁸ Although this remedy was strictly limited to a situation where a plaintiff could prove the previous conveyance had been fraudulent, it was somewhat similar to a Mareva injunction. In fact, after a Mareva injunction was reported and presumably affected the jurisdiction of a pre-judgment remedy in the case of fraudulent conveyance in Canada, the requirement that fraud be proven was liberalized.

¹²¹ R.S.B.C. 1996, c. 128. The predecessor of this section is the Family Relations Act, 1978, R.S.B.C. 1978, c.20, s.53.

¹²² R.S.A. 1980, c. D-37. The predecessors of this section are the Domestic Relations Act, 1927, R.S.A. 1927, c.5, s.20; the Domestic Relations Act, 1942, R.S.A. 1942, c.300, s.19; the Domestic Relations Act, 1955, R.S.A. 1955, c.89, s.20; and the Domestic Relations Act, 1970 R.S.A. 1970, c.113, s.20.

¹²³ *Supra* note 111.

¹²⁴ (1881), 29 Gr.252.

¹²⁵ The plaintiff in a fraudulent conveyance or preference action in Canada may register a *lis pendens* or a caveat against land before judgment. Debra M. McAllister, *Mareva Injunctions*, 2d ed. (Toronto: Carswell, 1987) at 21. Dunlop, *supra* note 117 at note 17 on 159.

¹²⁶ R.S.O. 1970, c.182.

¹²⁷ (1977), 16 O.R. (2d) 257 (Ont. H.C.J.). The defendants were a person who stole money from the plaintiff and his sons to whom he transferred his assets. The plaintiff applied for an interlocutory injunction restraining the defendants from dealing with the lands pending the trial or final disposition of the action. The action was taken against the defendants for damages and for declaration that a conveyance made by one defendant to the other defendants was void as against the plaintiff and all other creditors of the father defendant.

¹²⁸ McAllister, *supra* note 125 at 22.

2.3.2 Non-injunction Remedy

The history of English remedies against the absconding debtor is complicated. Broadly speaking, the main purpose of orders against an absconding debtor was to make him appear in court. A debtor's appearance was necessary for a court rendering judgment because the notion of a default judgment was not generally accepted until 18th century - and devices for this purpose varied from the relatively mild attachment of goods and *distringas* (or "distress infinite") for the further seizure of goods, to the more potent remedies of *capias ad respondendum* (the arrest of the defendant's person) and outlawry. In those days, the attached goods would go to the Crown if the defendant still failed to appear. Then, by the end of the 16th century, English courts had been convinced to permit confiscated property and debts to be paid directly to the creditors, despite the fact that the defendant had not appeared and judgment had not been granted.¹²⁹ However this remedy was not adequate to cope with the problem of preserving a defendant's assets.¹³⁰

On the other hand, American courts and legislatures developed the potent remedies of attachment and garnishment. These served as models for Canadian legislatures and rulemakers. In Canada, modeled on the English absconding law and affected by the rules of attachment in the US,¹³¹ the Absconding Debtors Act was enacted in almost all jurisdictions.¹³² Although the Act is rarely used today and British Columbia has already repealed it, section 2(1) of the act in Ontario provides as follows:

2(1) Where a person resident in Ontario departs therefrom with intent to defraud his creditors or any of them, or to avoid being arrested or served with process, being then possessed of any real or tangible movables therein not exempt by law from seizure under execution, he shall be deemed an absconding debtor, and such property may be seized and taken by an order of attachment for the satisfying of his debts.

¹²⁹ Dunlop, *supra* note 117 at 77-79.

¹³⁰ *Ibid.* at 145.

¹³¹ The remedy enabled courts to assert jurisdiction over a debt action involving a non-resident, either by forcing him to appear and to confer *in personam* jurisdiction over himself or by enabling the court to proceed *quasi in rem* in the event that he did not appear. The attachment remedy, however, had another important purpose, namely, to provide the plaintiff with a provisional security which would ensure that he could satisfy his judgment, once obtained. See *Ibid.* at 194-205.

¹³² *Ibid.*

2.3.3 Pre-judgment Garnishment Order

English legislation has never permitted garnishment by a creditor before judgment, even though under the Mareva injunction English courts can order a defendant not to dispose of a pecuniary claim owed to him by to a third party.

Canadian legislatures had taken a very different approach and most of the provinces accepted the pre-judgment garnishment.¹³³ The pre-judgment garnishment was available in Canada long before the Mareva injunction was created. In Canada the pre-judgment garnishment is the important protection to unsecured creditors against dissipation of a debtor's assets.

There are significant differences in availability between the Mareva injunction and the pre-judgment garnishment order. Whereas the Mareva injunction is said to be an order *in personam*, the pre-judgment garnishment order is an order *in rem*. That is, payment of the debt by a garnishee to a defendant against a garnishment order does not satisfy the garnishment order and a plaintiff still can require the garnishee to make payment to the court. On the other hand, a Mareva injunction merely freezes the debt and gives the plaintiff neither property nor priority.

2.4 *American Cyanamid Co. v. Ethicon Ltd.*

In addition to the problem of "overcoming the *Lister v. Stubbs* rule", there was another problem in the threshold requirements of the interlocutory injunction which inhibited the birth of the Mareva-type injunction. The court found it difficult to grant even an interlocutory injunction for a non-pecuniary claim. *American Cyanamid Co. v. Ethicon Ltd.*¹³⁴

¹³³ In 1869, in Ontario small claims courts, the law permitted creditors who had not gone to judgment to issue a summons against a garnishee owing money to his debtor. In New Brunswick, the 1895 Garnishee or Trustee Process Act was modeled on the Ontario Division Courts Act. Nova Scotia, in 1880, and Prince Edward Island, in 1884, also granted a pre-judgment garnishment order to the County Court. Both the Alberta and the Saskatchewan garnishment provisions find their source in the Northwest Territories Administration of Civil Justice Ordinance of 1878 which was based largely on the Ontario Division Courts Act. In 1875 in Manitoba, the Administration of Justice Act provided that a garnishment remedy was available against all debts which would be due or payable. In B.C., the Attachment of Debts Act, 1904 made the garnishment remedy available before as well as after judgment. In B.C. the Court Order Enforcement Act s. 3 (2)(a) provides that a plaintiff in an action can apply to a judge for a garnishing order. See *Ibid.* at 104-109.

¹³⁴ [1975] A.C. 396 (H.L.). The defendant was the major United Kingdom supplier of surgical sutures, which it

liberalized the stringent rule and opened the path to the Mareva injunction, even though this case was not referred to by *Nippon Yusen*¹³⁵ and *Mareva*.¹³⁶

Prior to 1975, applicants for an interlocutory injunction were required to establish a *prima facie* case of both existence of a legal right and of its infringement.¹³⁷ This meant that the judge assessed the likelihood that the applicant would be granted judgment on the merits if the evidence presented on the motion remained unchanged at trial. Many courts had treated this requirement as a threshold requirement. Failure to clear this hurdle was fatal to the motion.¹³⁸

In *American Cyanamid* the plaintiff applied for an interlocutory injunction restraining the defendant from infringing the plaintiff's patent. This was different from a Mareva-type situation in that the plaintiff did not try to block the defendant's assets for a pecuniary claim, but instead to prevent the defendant from using the "subject-matter of litigation". An application was *inter partes* for a prohibitory injunction.¹³⁹ In this case, Lord Diplock writing for the House of Lords¹⁴⁰ held that there is no rule of law precluding a consideration of the balance of convenience unless a *prima facie* case is established. Rather, the court "must be satisfied that the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried."¹⁴¹ (Emphasis added.) Thus, the threshold test was reduced from that of a *prima facie* case to a substantial question to be tried and a claim which is not frivolous or vexatious. The focus was shifted to the balance of convenience, and the relative strength of the parties' cases was considered only in this context in a limited way.¹⁴²

The change in the traditional law of interlocutory injunctions which was effected by the house of Lords in *American Cyanamid* was accepted relatively quickly in Ontario. The

made from animal tissue known as catgut. Cyanamid held a patent for absorbable sutures made of synthetic polyester which were successful to the extent of capturing 15 per cent of the market over a three-year period. The defendant, which still controlled 80 per cent of the market, developed its own synthetic suture, also made from polyester.

¹³⁵ *Infra* note 148.

¹³⁶ *Infra* note 149.

¹³⁷ See e.g. *Person v. Luck* (1884), 27 Ch. 497 (C.A.) at 505, 506, and *J.T. Stratford & Son Ltd. v. Lindley*, [1965] A.C. 269 (H.L.) at 338.

¹³⁸ *McAllister*, *supra* note 125 at 2, 3.

¹³⁹ *Bean*, *supra* note 113 at 31.

¹⁴⁰ The Court of Appeal dismissed the application on the ground that the plaintiff failed to make out a *prima facie* case of infringement.

¹⁴¹ *Supra* note 134 at 407.

¹⁴² *McAllister*, *supra* note 125 at 4, 5.

Division Court adopted the new approach in *Yule Inc. v. Atlantic Pizza Delight Franchise (1968) Ltd. et al*¹⁴³ approximately two years after the English decision was handed down. In the British Columbia case of *Manousakis v. Manousakis*,¹⁴⁴ which is the case where a wife hoped to get an order under section 8 of the Family Relations Act allocating all or part of her husband's interest in a business to her, the courts, applying *American Cyanamid*, accepted the 'balance of convenience' rule and granted an application for an interlocutory injunction restraining the defendant from disposing of the defendant's shares in the business or voting his shares to effect disposal of the company's assets pending trial. Trainor J. in *Manousakis v. Manousakis* also said *Nippon Yusen*¹⁴⁵ applied to this case. The Federal Court of Canada approved the *American Cyanamid* decision by citing *Yule* in *Aetna*¹⁴⁶ at the same time as it granted a Mareva injunction.

After the *American Cyanamid* decision the law relating to interlocutory injunctions saw important changes, particularly in the field of intellectual property. The guideline shown in this case established the general principles governing interlocutory injunctions.¹⁴⁷ This decision not only liberalized granting interlocutory injunctions for the subject-matter in litigation, but also affected the requirements of the Mareva injunction.

2.5 Birth of the Mareva Injunction

2.5.1 England

In 1975, the English Court of Appeal (Lord Denning M.R., Browne and Geoffrey Lane L. JJ. presiding) finally granted the general pre-judgment injunction for a pecuniary claim in *Nippon Yusen Kaisha v. Karageorgis*,¹⁴⁸ and subsequently in *Mareva Company Naviera S.A.*

¹⁴³ (1977), 17 O.R. (2d) 505 (Ont. H.C.J.).

¹⁴⁴ (1979), 10 B.C.L.R. 21 (B.C.S.C.).

¹⁴⁵ *Infra* note 148.

¹⁴⁶ *Infra* note 167.

¹⁴⁷ F. D. Rose, "The Mareva Injunction Attachment in Personam" (1981) Lloyd's Maritime and Commercial Law 1 at 7.

¹⁴⁸ [1975] 1 W.L.R. 1093 (C.A.). This was decided on May 22, 1975. Japanese shipowners issued a writ against Greek charterers, claiming various sums of hire owing for three ships that had been chartered by the defendants. The plaintiffs feared that the charterers would take steps to remove their funds from the jurisdiction of the English courts. Accordingly, four days after issue of the writ, the shipowners applied *ex parte* to the High Court for an interim injunction restraining the defendants from removing outside those of their assets within the jurisdiction. Donald J refused the shipowner's application. There was an immediate appeal. It came before the Court of Appeal. No cases were cited in argument, and the hearing was again *ex parte*. The circumstances of

v. *International Bulkcarriers S.A.*¹⁴⁹ Those were historical decisions which represented a radical change¹⁵⁰ in English jurisprudence.

Nevertheless, the departure from established practice raises certain questions, such as why it was opportune for the courts to change their practice in the economic and social climate of the 1970s, and why it had previously been thought that there was no power to make such an interlocutory order. Mark S. W. Hoyle explains the reason why the *Mareva* injunction was granted in England as follows:

To allow a defendant to escape his obligation by arranging his affairs so as to leave no worthwhile assets would be to weaken the effectiveness of the English civil legal system, and some protection of litigation is therefore necessary. . . .

The answer must be in the rapid change in commercial and banking practices since World War Two, and the increasing anonymity of international businesses and traders. It is no longer possible to rely on personal knowledge of the parties to transactions, still less to vouch for them to others, and the great competition there is in the shipping and international trade world, together with the profits to be made in carefully constructed deals, present many opportunities for contracts to be broken or debts unpaid. The recovery of damages or debts is made more difficult by the ease with which an unscrupulous litigant can remove his funds from country to country, often in complete secrecy.¹⁵¹

the cases were such that the money was clearly owing, and there was little question of an arguable defence, so that summary judgment was likely. Regarding the summary of the case, see Hoyle, *supra* note 99 at 1,2.

¹⁴⁹ [1975]2 Lloyd's Rep. 509 (C.A.). The shipowners had let the vessel *Mareva* on a time charterparty for a trip to the Far East. The charterers had subchartered her on a voyage charterparty to the President of India and by the terms of that subcharter 90 per cent of the freight was payable against documents issued by the ship, with the remaining 10 per cent payable later. The vessel loaded fertilizer at Bordeaux on May 29, 1975 for carriage to India, and the Indian High Commission paid the freight then due (£174,000 to the charterers in London). The shipowner was paid two installments of the half monthly hire, but was not paid the third installment due on June 12, 1975. Furthermore, the charterers said that they were unable to pay, despite having the funds from the Indian government, and were about to cease trading. The shipowners therefore issued a writ on 20 June, claiming the unpaid hire (US \$30,800) and damages for repudiation. An application was made *ex parte* for an injunction restraining the defendants. This was heard by Donaldson J and he granted the injunction only until 23 June 1975. The decision was appealed to the Court of Appeal. Regarding the summary of the case, see Hoyle, *supra* note 99 at 3,4.

¹⁵⁰ Hoyle, *supra* note 99 at 4.

¹⁵¹ *Ibid.* at 11,12.

In addition to development of international transactions, the Mareva injunction in English jurisprudence might be required for a practical reason. As Kerr J. indicated in *Siskina*,¹⁵² London was a main battlefield of disputes regarding charter-parties. He stated, "The charter-parties will usually have been fixed on the Baltic Exchange and contain London arbitration clauses. The ships are often entered in London Protection and insured on the London market. They are often also managed from London, so that in one way or another bank accounts or other assets may be found here." It was inconvenient and unjust to shipowners and merchants that the courts could not issue pre-judgment remedies for a pecuniary claim derived, although indirectly, from a charter-party. Consequently, although there are some disputes¹⁵³ regarding the legitimacy of the Mareva injunction, it is now a very popular remedy for creditors in England.

In *Nippon Yusen*,¹⁵⁴ the Mareva injunction was granted on the basis of section 45(1) of the Supreme Court of Judicature (Consolidation) Act 1925,¹⁵⁵ which provided:

The High Court may grant a mandamus or an injunction or appoint a receiver, by an interlocutory order in all cases in which it appears to the court be just and convenient to do so.

Based on this section, Lord Denning said, "There is no reason why the High Court should not make an order such as is asked for here. . . .";¹⁵⁶ and Geoffrey Lane L.J. said, "In the circumstances which exist in this case there is no reason why the court should not assist a litigant who is in danger of losing money to which he is admittedly entitled."¹⁵⁷

Subsequently, in *Mareva* Lord Denning also stated his view clearly on the basis of section 45 (1) and the grounds that the *Lister v. Stubbs* principle could be modified as follows:

¹⁵² *Infra* note 177.

¹⁵³ McGill's conclusion is that there is no legitimate cases for a Mareva injunction and therefore such should be created or legitimized by statute. I. McGill, "The Jurisdictional Basis for the Mareva Injunction" (1980) 3 U.N.S.W. Law Journal 434. On the other hand, Lord Denning describes that remedy as an example of judicial law reform. Dunlop, *supra* note 117 at 164.

¹⁵⁴ *Supra* note 148.

¹⁵⁵ *Supra* note 114.

¹⁵⁶ *Supra* note 148 at 1095.

¹⁵⁷ *Ibid.*

It is well summarized in Halsbury's Laws of England, vol. 21, 3rd ed., p. 348, par 729: . . . now, therefore, whenever a right, which can be asserted either at law or in equity, does exist, then, whatever the previous practice may have been, the Court is enabled by virtue of this provision, in a proper case, to grant an injunction to protect that right. In my opinion that principle applies to a creditor who has a right to be paid the debt owing to him, even before he has established this right by getting judgment for it. If it appears that the debt is due and owing - and there is a danger that the debtor may dispose of his assets so as to defeat it before judgment - the court has jurisdiction in a proper case to grant an interlocutory judgment so as to prevent his disposing.¹⁵⁸

Roskill L.J. agreed that the *Lister v. Stubbs* rule was not a matter of jurisdiction but a matter of practice.

According to this view, section 45(1) of the Supreme Court of Judicature (Consolidation) Act 1925¹⁵⁹ gave the courts broad powers to rectify rules established by precedents, if the courts judged the issues to be matters of practice.

In subsequent cases, judges have tended to regard the *Lister v. Stubbs* principle purely as a matter of practice. Although the practice has been firmly established and even though statutory discretion remains to be exercised according to established principles, they have been of the view that they are free to depart.¹⁶⁰ So there was no question regarding a matter of jurisdiction. However, they did not overturn the *Lister v. Stubbs* rule but described the new rule as an exception to the *Lister v. Stubbs* rule. For example, at the initial stage of the development of the Mareva injunction, the courts limited the power to issue the Mareva injunction to the situation where a defendant was a foreigner.¹⁶¹

¹⁵⁸ *Supra* note 149 at 510.

¹⁵⁹ *Supra* note 114.

¹⁶⁰ Rose, *supra* note 147 at 194.

¹⁶¹ In the *Pertamina* case, *infra* note 169, it was clear that the court had in mind the remedy as applicable only to foreign-based defendants. This view must have arisen because of the need to integrate the cases based on *Lister v. Stubbs*. Hoyle, *supra* note 99 at 3,4.

In response to cases developing the Mareva injunction, section 45(1) of the Supreme Court of Judicature (Consolidation) Act 1925¹⁶² was modified by section 37 of the Supreme Court Act 1981,¹⁶³ which clearly forms the basis of the Mareva injunction and reads as follows:

- (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 be just and convenient to do so.
- (2) Any such order may be made either unconditionally or on such terms and conditions as the court thinks just.
- (3) The power of the High Court under subsection (1) to grant an interlocutory injunction restraining a party to any proceedings from removing from the jurisdiction of the High Court, or otherwise dealing with, assets located within that jurisdiction shall be exercisable in cases where that party is, as well as in cases where he is not, domiciled resident or present within that jurisdiction.

2.5.2 Canada

After several years, *Nippon Yusen*¹⁶⁴ and *Mareva*¹⁶⁵ were accepted in Commonwealth countries including Canada, even though pre-judgment garnishment was already available in Canada.

After the development of the practice granting a Mareva injunction in the lower courts of most of the provinces in Canada,¹⁶⁶ the Supreme Court of Canada held in *Aetna Financial*

¹⁶² *Supra* note 114.

¹⁶³ *Ibid.*

¹⁶⁴ *Supra* note 148.

¹⁶⁵ *Supra* note 149.

¹⁶⁶ The first Canadian case in which a Mareva injunction was expressly referred to was *Manousakis v. Manousakis* (1979), *supra* note 144. This was not, although the decision relied upon *Nippon Yusen* as support for the order sought, the case to see whether an interlocutory injunction for a pecuniary claim should be granted or not. The first Canadian case to deal with and grant an application for a Mareva injunction was *B.P. Exploration Co. (Libya) Ltd. v. Hunt* [1981] 1 W.W.R. 209 (N.W.T.S.C.) in 1980, even though in that case the plaintiff had obtained judgment in England for a pecuniary claim and it was enforceable after recognition in the Northwest Territories Supreme Court. In Ontario, a Mareva injunction was granted in *Liberty National Bank & Trust Co. v. Atkin* (1981), 31 O.R. (2d) 715 (Ont. H.C.J.). In the same year, a Mareva order was made in the New Brunswick case of *Irving Oil Ltd. v. Biornstad, Biorn & Co.* (1981), 35 N.B.R. (2d) 265 (N.B.Q.B.). In 1982, the British Columbia Supreme Court recognized in *Dean v. Ford Credit Can. Ltd.* (1982), 43 C.B.R. (N.S.) 14 (B.C.S.C.) that the "Mareva principle" was well established in Canada, but declined to apply it in the circumstances of that case. In the same year, the Nova Scotia Supreme Court granted a Mareva injunction in

*Services Ltd. v. Feigelman*¹⁶⁷ (1985) that the superior courts of every province, including Quebec, have the unquestioned authority to grant Mareva-type injunctions pursuant to their jurisdictional statutes¹⁶⁸ which provide that interlocutory injunctions may be granted where it appears to be just or convenient to do so.

Parmar Fisheries Ltd. v. Parceria Maritima Especanca L. DA. (1982), 141 D.L.R. (3d) 498 (N.S.T.D.). In 1983, the Saskatchewan Court of Queen's Bench held that the court has the same jurisdiction as English courts to grant a Mareva injunction in *Sask-Workwear Inc. v. Ollinik* (1983), 1 W.W.R. 631 (Sask. Q.B.). Examples of the use of the Mareva injunction at the provincial appellate court level include: the New Brunswick Court of Appeal in April of 1982 in the case of *Humphreys v. Buragila* (1982), 39 N.B.R. (2d) 674 (N.B.C.A.), the British Columbia Court of Appeal in December of 1982 in *Sekisui House Kabushiki Kaisha v. Nagashima* (1982), 42 B.C.L.R. 1, 33 C.P.C. 42 (B.C.C.A.), the Manitoba Court of Appeal in 1982 in the case of *Feigelman v. Aetna Financial Services Ltd.* (1982), 143 D.L.R.(3d) 715 (Man. C.A.), and the Ontario Court of Appeal in 1982 in *Chitel v. Rothbart* (1982), 39 O.R.(2d) 513 (Ont. C.A.). In *Chitel*, Mackinnon J. said, "However, like Sir Robert Megarry, I regard the *Lister* principle as remaining the rule with 'the Mareva doctrine as constituting a limited exception'."

¹⁶⁷ [1985] 2 W.W.R. 97 (S.C.C.). The defendant Aetna was a federally incorporated moneylender which factored accounts receivable for its clients on a recourse or non-recourse basis. Aetna had offices in Quebec, Ontario and Manitoba. The Manitoba office, which existed primarily to promote rather than process business, had only two clients, Pre-Vue Company (Canada) Ltd. and Sekine Canada Ltd. In February 1980 Aetna appointed a receiver of Pre-Vue pursuant to a debenture security. In March 1981 Pre-Vue and its shareholders commenced action against Aetna and the receiver, claiming damages for failure to give Pre-Vue an appropriate period of notice in which to cure its default. In August 1981 Aetna appointed a receiver of Sekine, and clearly stated its intention to remove the funds arising from the receivership to its offices in Montreal or Toronto. Pre-Vue was granted an injunction without notice restraining Aetna from removing its assets from Manitoba or disposing of or dealing with its assets within Manitoba insofar as the value of the assets did not exceed the damages claimed by Pre-Vue. The injunction was subsequently varied to restrict the value of assets to an amount slightly less than the proceeds of the receivership. The Manitoba Court of Appeal held that a Mareva injunction was available under the laws of the province, and varied the order to permit its discharge upon positing of security by Aetna.

¹⁶⁸ In the Northwest Territories, the Supreme Court adopted the Mareva doctrine on the basis of section 19(h) of the Judicature Ordinance in *B.P. Exploration*, *supra* note 166. In Ontario, Montgomery J. of the High Court pointed out the similarity between the English and Ontario statutes which confer jurisdiction to grant interlocutory injunctions where it is just and convenient to do so in *Liberty National Bank*, *supra* note 166. In British Columbia, the Court of Appeal granted the Mareva injunction on the basis of British Columbia Law and Equity Act, R.S.B.C. 1996, c. 253, s.36, and Rule 45(1) in *Sekisui House*, *supra* note 166.

The statutory equivalents in other provinces and territories are as follows:

Court of Justice Act, R.S.O. 1990, c.C.43, s.101:

Queen's Bench Act, R.S.S. 1978, c. Q-1, s.45(8):

Queen's Bench Act, R.S.M. 1987, c. C280, s.59(1):

Judicature Act, S.N.S. 1972, c.2, s.39(9):

Judicature Act, R.S.N.B. 1973, c.J-2, s.33, am. 1981, c.6, s.1:

Judicature Act, R.S.N.W.T. 1988, c.J-1, s.41:

Supreme Court Act, R.S.P.E.I. 1988, c.S-10, s.34:

The Judicature Act, R.S.N. 1990, c.J-4, s.105:

The Judicature Act, R.S.N.S. 1989, c.240, s.43(9):

Judicature Act, R.S.Y.T. 1986, c.96, s.26:

Federal Courts Rules C.R.C., c.663, r.469(1):

Note that New Brunswick r.40.03 specifically addresses Mareva injunctions.

2.6 Features of Mareva Injunction Compared with Current Pre-judgment Remedies

The Mareva injunction in England overcomes some shortcomings in the current pre-judgment remedies.

First, it is a general pre-judgment remedy. That means two things; one is that the cause of action is not limited to a special one, *e.g.* the matrimonial case or the admiralty case; the other is that the Mareva injunction does not need special circumstances, *e.g.* the fraudulent conveyance situation. A Mareva injunction can generally be granted where it is just and convenient.

Secondly, the Mareva injunction is available for a pecuniary claim whether the damages are liquidated or unliquidated. Although the English courts granted a remedy for subject-matter in litigation including money remedies *in rem*, there was no pre-judgment remedy for a pecuniary claim. The Mareva injunction overcomes this lacuna of law.

The above applies to the Mareva injunction in Canada as well, except that in all provinces, because of pre-judgment garnishment the pre-judgment remedy for a pecuniary claim was available to some extent without the Mareva injunction.

Chapter Three

Development of Mareva Injunction

In this and the following chapter, I will outline the features of the Mareva injunction in England and Canada, and compare them with those of the Japanese provisional remedy. For this purpose it is necessary first to examine the sources of the jurisdiction to grant a Mareva injunction or a Japanese provisional remedy. That is the topic of this chapter.

When English courts created the Mareva injunction, its jurisdiction was more limited than it is now, because the Mareva injunction was, practically but not legally, strictly an exceptional remedy. Since then the English courts have been expanding the jurisdiction of the Mareva injunction and easing its requirements. Canadian courts have followed suit. As the Mareva injunction has developed, its old requirements have been replaced by new ones.

It is important to note that the requirements have been revised on the grounds of necessity, taking advantage of the flexibility and versatility inherent in the injunction. The worldwide Mareva injunction is a good example of this flexibility and versatility. On the other hand, courts are not always eager to liberalize some threshold requirements. For example, jurisdiction to grant a Mareva injunction, as a type of interlocutory injunction, is limited to the case where there is a cause of action within the court's jurisdiction. This is so even though the Mareva injunction is different from the ordinary interlocutory injunction in that the Mareva injunction is not concerned with the subject matter of the case of action in the proceedings, but rather with the enforcement process for judgment rendered. These represent major issues to be examined in this chapter.

In this chapter I also introduce the requirements for the Japanese provisional pre-judgment remedy. I will show that the jurisdiction of the Japanese courts to grant a provisional remedy is broader than that of the English and Canadian courts.

I categorize requirements for a pre-judgment remedy both in England and Canada and in Japan into three groups:

- (1) the court should have jurisdiction to issue the order;
- (2) there should *prima facie* exist the right for a pecuniary claim;

- (3) there should be the necessity to freeze the defendant's assets.

The protection of a defendant should also be taken into account. I review the requirements in the three countries based on this categorization.

3.1 England

In *Rasu Maritima S.A. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara (Pertamina)*,¹⁶⁹ Lord Denning set the following general guidelines for the exercise of discretion in Mareva cases:

- (1) the defendant must be a foreigner;
- (2) the plaintiff must show that he has a "good arguable case"; and
- (3) Mareva injunctions can be directed not only against money, but against goods as well.

However, these guidelines were not exhaustive of the requirements for a Mareva injunction. As the remedy developed, five general principles were introduced as requirements for the injunction. In *Third Chandris Shipping Corporation v. Unimarine S.A.*¹⁷⁰ Lord Denning led the court in setting out guidelines to be followed when a Mareva injunction was sought:

- (1) The plaintiff should make full and frank disclosure of all matters in his knowledge which are material for judge to know.
- (2) The plaintiff should give particulars of his claim against the defendant, stating the ground of his claim and the amount thereof, and fairly stating the points made against it by the defendant.
- (3) The plaintiff should give some grounds for believing that the defendants have assets here.

¹⁶⁹ [1978] 1 Q.B. 644. [1977] 3 All E.R. 324. [1977] 2 Lloyd's Rep. 397 (C.A.).

¹⁷⁰ [1979] Q.B. 645 (C.A.).

- (4) The plaintiff should give some grounds for believing that there is a risk of the assets being removed before the judgment or award is satisfied.
- (5) The plaintiff must, of course, give an undertaking in damages, in case they fail in their claim or the injunction turns out to be unjustified. In a suitable case this should be supported by a bond or security: and the injunction only granted on it being given, or undertaken to be given.¹⁷¹

On the other hand, apart from the detailed guideline, it was also noted in *Ninemia Maritime Corporation v. Trave Schiffahrtsgesellschaft m. b. H. UND CO. K. G.*¹⁷² as follows;

... the test is whether, on the assumption that the plaintiffs have shown at least “a good arguable case”, the court concludes, on the whole of the evidence then before it, that the refusal of a Mareva injunction would involve a real risk that a judgment or award in favor of the plaintiffs would remain unsatisfied.¹⁷³

These are references to two different things-(1) the cause of action and the merits of the plaintiffs’ case; and (2) the likelihood of a dry judgment.

There is no doubt that a court must first and foremost have jurisdiction over a defendant in order to issue an order. The issues regarding the assets subject to an order are also important; i.e. the kind of assets, ownership of the assets, and the location of the assets.¹⁷⁴ Although the decisions above do not refer to the court’s jurisdiction over a defendant and his assets, it is logical that the court applied to for a Mareva injunction should have (personal and territorial) jurisdiction to issue that injunction.

3.1.1 Jurisdiction

¹⁷¹ *Ibid.* at 668-669.

¹⁷² [1983] 1 W.L.R. 1412 (C.A.).

¹⁷³ *Ibid.* at 1422.

¹⁷⁴ Although the Mareva injunction does not directly affect assets, plaintiffs in many cases specify the assets subject to Mareva injunctions for several reasons. This shows that the initial issue that a court should decide is whether the court can issue a Mareva injunction against the specified assets, because if the specified assets are not described in a Mareva injunction, the plaintiff may not apply for a Mareva injunction. See 3.1.3.2.2, below, for discussion of this issue.

3.1.1.1 Nature of the Proceedings

The Mareva injunction was first granted in commercial cases involving liquidated claims but it has since been extended to damage claims generally, including wrongful dismissal actions, matrimonial disputes and tort actions. The Mareva injunction is not limited to the protection of rights based on equity.¹⁷⁵ Accordingly, jurisdiction for the Mareva injunction is not limited by the nature of a cause of action or the kind of damages.

3.1.1.2 *Siskina*

Since a Mareva injunction acts *in personam*, as I will explain later,¹⁷⁶ a court must have *in personam* jurisdiction over the defendant. Where a defendant is outside the jurisdiction, service for 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 Siskina v. Distos Compania Naviera S.A.*¹⁷⁷ - a landmark decision regarding jurisdiction.¹⁷⁸ The doctrine, which is called the *Siskina* doctrine, clearly stated that the power of courts to order an interlocutory injunction "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".¹⁷⁹ Thus, the presence of money or assets did not in itself give jurisdiction to the courts in the way that the presence of a ship or aircraft gives jurisdiction to the courts in an *in rem* action.¹⁸⁰ In *Cretanor Maritime Co. Ltd. v.*

¹⁷⁵ In the US, it was considered that some states limit the preliminary injunction to the protection of equitable remedies. Now the situation is changing, as the Fifth Circuit stated, in *Productos Carnic, S.A. v. Central Am. Beef & Seafood Trading Co.*, 621 F. 2d 683 (5th Cir. 1980) at 686, "even were [plaintiff's] remedy limited to damages, an injunction may issue to protect that remedy." See also *Republic of the Philippines v. Marcos*, 862 F.2d 1355 (9th Cir. 1988). P. F. Schlosser, "Coordinated Transnational Interaction in Civil Litigation and Arbitration" (1990) 12 Michigan Journal of International Law 150 at 156.

¹⁷⁶ See 4.1.1, below, for a discussion of this issue.

¹⁷⁷ [1979] A.C. 210, [1977] 3 All E.R. 803 (H.L.). 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 an anticipated action in the Genoese courts brought by the cargo owners. The cargo owner also sought leave of the Court to serve the writ on the shipowners in Greece.

¹⁷⁸ See Hoyle, *supra* note 99 at 31

¹⁷⁹ [1979] A.C. 210 (H.L.) at 256.

¹⁸⁰ 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. P. Michell, "The Mareva injunction in Aid of Foreign Proceedings" (1997) 34:4 Osgoode Hall Law

Irish Marine Management Ltd.,¹⁸¹ following the *Siskina* doctrine, the court stated that it is necessary that there be a cause of action between the plaintiff and the defendant which is justiciable in the courts of England. It should be noted that the *Siskina* doctrine may be applied not only to the Mareva injunction but also to other types of interlocutory injunction.

The *Siskina* doctrine contains three related elements; one jurisdictional and two substantive.¹⁸² The first element is that the court must have personal jurisdiction over the defendant. Where the defendant is within the jurisdiction or has submitted himself to the court, the threshold requirement of personal jurisdiction is met. The most difficult cases involve service *ex juris*. Two elements of substantive jurisdiction are the following: (1) the plaintiff must possess a substantive cause of action in the territorial jurisdiction of the court, *viz.* the plaintiff must possess some legal or equitable right which is enforceable in England by a final judgment (the spatial element), and (2) a cause of action must have accrued at the time the Mareva injunction is sought (the temporal element).¹⁸³

Although England obtained the powerful weapon of the worldwide Mareva injunction - it prevent the defendant from dissipating his assets located in a foreign county (as I will mention at 3.1.3.3),¹⁸⁴ the *Siskina* doctrine is one weak point of the Mareva injunction¹⁸⁵ compared with the pre-judgment remedy in civil law countries and the USA.¹⁸⁶ It represents

Journal 741 at 749.

¹⁸¹ [1978] 1 W.L.R. 966 (C.A.).

¹⁸² Lord Browne-Wilkinson in *Channel Tunnel* analyzed the possible elements of the *Siskina* doctrine as follows: (i) the court must have personal jurisdiction over the defendants in the sense that they can be duly served either personally or under Order 11; (ii) the plaintiffs have a cause of action under English law; (iii) the interlocutory injunction must be ancillary to a claim for substantive relief to be granted in this country by an order of the English court. *Infra* note 205 at 266. However, he concluded that the third element was not imposed on the power to grant interlocutory injunctions. He stated, "I can see nothing in the language employed by Lord Diplock (or in later cases in this House commenting on the *Siskina*) which suggest that a court has to be satisfied, at the time it grants interlocutory relief, that the final order, if any, will be made by an English court." *Ibid.* at 267.

¹⁸³ Michell, *supra* note 180 at 752.

¹⁸⁴ The Mareva injunction in aid of foreign proceedings is the mirror image of the worldwide Mareva injunction. Michell, *supra* note 180 at 800.

¹⁸⁵ Lord Hailsham stated in *Siskina* even though recognizing inconvenience, that this was a matter of policy.

¹⁸⁶ For example, New York Civil Practice Law & Rules 6201 (McKinney Supp. 1996) provides that the court possesses 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. Art. 3138 C.C.Q. provides, "[a] Québec authority may order provisional or conservatory measures even if it has no jurisdiction over the merits of the dispute." Michell, *supra* note 180 at 786. In Japan, the Civil Preservation Law does not provide this matter as clearly as in Quebec. However, there is no question that the court in which the assets of the defendant are located can issue a provisional attachment order, *Kari-sashiosae*, under Article

weakness because it states that without a cause of action within the jurisdiction, even if the defendant has assets in the jurisdiction, these can never be preserved as they could be under the American *quasi in rem* attachment jurisdiction¹⁸⁷ or the forms of foreign attachment known in many European civil law states and Japan.¹⁸⁸ Since the *Siskina* principle may be inconvenient for a plaintiff compared with *in rem* attachment of those countries, some jurists have tried to liberalize this principle.¹⁸⁹ For example, Lord Browne-Wilkinson in *Channel Tunnel*¹⁹⁰ stated:

Given the international character of much contemporary litigation and the need to promote mutual assistance between the courts of the various jurisdictions which such litigation straddles, it would be a serious matter if the English courts were unable to grant interlocutory relief in cases where the substantive trial and the ultimate decision of the case might ultimately take place in a court outside England.¹⁹¹

3.1.1.3 Personal Jurisdiction.

The issue of personal jurisdiction¹⁹² in the *Siskina* doctrine is whether service *ex juris* on a defendant who is outside the jurisdiction is possible. R.S.C. Order 11, r. 1 (1) (i) and (2) (a) provides as follows:

12 of the Law.

¹⁸⁷ On the contrary, as is clarified in *Marcos*, the American court having personal jurisdiction over Marcos was prevented pursuant to California law, from attaching Marcos' assets within the jurisdiction. More important, because the court lacked jurisdiction *in rem*, it was also precluded from seizing the major part of the former president's assets, which were located in a variety of foreign countries. See Schlosser, *supra* note 175 at 158.

¹⁸⁸ Michell, *supra* note 180 at 749, 750.

¹⁸⁹ There must be no doubt that the underlying view in *Siskina* that the court has no power to grant an interlocutory injunction except in protection or assertion of some legal or equitable right is correct. The question is how this view can be interpreted. Where this view should be interpreted restrictively, the legal or equitable right must be accrued, and the court must possess the cause of action in the jurisdiction, as stated in *Siskina*. See also L. Collins, "The Legacy of The *Siskina*" (1992) 108 The Law Quarterly Review 175 at 179.

¹⁹⁰ *Infra* note 205.

¹⁹¹ *Ibid.* at 266.

¹⁹² Note that there is a close relationship between subject matter jurisdiction and personal jurisdiction in England. 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. However, the presence of assets does have an important practical consequence. It influences the exercise of the court's discretion as to whether to exercise this subject-matter jurisdiction over the defendant. See Michell, *supra* note 180 at 765, 767, 770.

- (1) Provided that the writ . . . is not a writ to which paragraph (2) of this rule applies, service of a writ out of the jurisdiction is permissible with the leave of the Court . . .
 - (i) if in the action begun by the writ an injunction is sought ordering the defendant to do or refrain from doing anything within the jurisdiction (whether or not damages are also claimed in respect of a failure to do or the doing of that thing); . . .
- (2) Service of a writ out of the jurisdiction is permissible without the leave of the court provided that each claim made by the writ is either-(a) a claim which by virtue of the Civil Jurisdiction and Judgment Act 1982 the court has power to hear and determine, made in proceedings to which the following conditions apply-(i) no proceedings between the parties concerning the same cause of action are pending in the courts of any other part of the United Kingdom or of any other Convention territory, and (ii) either-the defendant is domiciled in any part of the United Kingdom or in any other Convention territory

In the *Siskina* doctrine, the sub-rule speaks of “the action” in which a particular kind of relief, “an injunction”, is sought and this pre-supposes the existence of a cause of action on which to found “the action”.¹⁹³ Accordingly, where the defendant has not submitted to the court’s jurisdiction, and where there is no cause of action within the jurisdiction, personal jurisdiction cannot be granted.

On the other hand, a Mareva injunction may be issued to restrain the disposal of a defendant’s assets within the jurisdiction, where a plaintiff obtains a foreign judgment or arbitral award in the forum, and the plaintiff may apply for service *ex juris* for this purpose, namely the foreign judgment creates an action in debt (the Mareva injunction for foreign judgment).¹⁹⁴ However, what if a foreign judgment is pending, but has not yet been rendered? Should service *ex juris* for Mareva injunctions be available in aid of foreign proceedings?

In *Mercedes-benz AG v. Leiduck*,¹⁹⁵ in which it was argued whether service *ex juris* was correct under Order 11, r.1(1)(b) of the Rules of the Supreme Court of Hong Kong, Lord

¹⁹³ Lord Diplock in *Siskina*, *supra* note 177 at 256.

¹⁹⁴ The possibility of enforcement or recognition could be a cause of action after a plaintiff obtained the foreign judgment. See *BP Exploration*, *supra* note 166 and *Hickman v. Kaiser*, *infra* note 334.

¹⁹⁵ [1996] A.C. 284 (P.C.).

Mustill (speaking for the majority of the Privy Council) brought up an important question regarding the nature of the Mareva injunction. He said:

The most that can be said is that whatever its precise status the Mareva injunction is quite a different kind of injunction from any other. The inquiry must begin by recognizing that it is *sui generis* as was the injunction inhibiting foreign proceedings granted in the *South Carolina* case Thus, it is not enough simply to say that since a Mareva injunction is an injunction it automatically falls within Ord. 11, r. 1(1)(b) [An English equivalent is R.S.C. Order 11, r. 1 (1) (i)], and that the special feature that it is not concerned with any rights justiciable within the home territory is merely one of the factors to be taken into account in the exercise of the discretion to grant leave. Rather, it must be asked 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.¹⁹⁶

He demonstrated that Order 11 was confined to claims for substantive relief, and denied that the court had personal jurisdiction over the defendant outside of the jurisdiction in the case of an application for a Mareva injunction in aid of foreign proceedings, stating:

. . . the purpose of Ord. 11, r. 1 is to authorize 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. . . . Absent a claim based on a legal right which the defendant can be called upon to answer, of a kind falling within Or. 11, r. 1(1), the court has no right to authorize 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.¹⁹⁷

Lord Nicholls in his dissenting opinion held that service *ex juris* was possible since there was no valid reason why the cause of action in question had to be one under adjudication

¹⁹⁶ *Ibid.* at 301.

¹⁹⁷ *Ibid.*

in the court from which Mareva relief was being sought. He concluded that a claim for a Mareva injunction may stand alone in an action, as I will discuss below.

It remains to be seen whether English courts can overcome this strict requirement, or whether, as Lord Mustill suggested, legislative resolution may be necessary.¹⁹⁸

In *Duvalier*,¹⁹⁹ the defendant was a resident of France, and there was no evidence that there were assets in England, and no cause of action in England but there was a cause of action in France. Nevertheless, a worldwide Mareva injunction was granted. The important reason underlying this decision was that England and France were party to the Brussels Convention, and subject to this Convention section 25(1) of the Civil Jurisdiction and Judgments Act 1982 was enacted.²⁰⁰ This provision made possible service *ex juris* with the defendant residing outside the jurisdiction and issuance of a Mareva injunction in aid of foreign proceedings. Where a country which does not have a similar treaty with England is concerned, it is difficult to find reasons for issuance of a Mareva injunction where there are no assets in the domestic jurisdiction.

3.1.1.4 Substantive Cause of Action

3.1.1.4.1 Spatial Element.

Under the *Siskina* doctrine, where a defendant is outside a court's jurisdiction, apart from the problem of service *ex juris*, the question arises whether or not a Mareva injunction can be issued to freeze the defendant's assets within the jurisdiction pending resolution of proceedings against the defendant in a foreign country.²⁰¹

¹⁹⁸ Michell, *supra* note 180 at 779.

¹⁹⁹ In *Duvalier* Staughton L.J. affirmed that power to effect service out of the jurisdiction subject to Order 11, r. 1 (2)(a). Regarding the meaning of "claim", he concluded that since the enactment of section 25 of the Civil Jurisdiction and Judgment Act 1982, *either* a claim for interim relief is itself a cause of action, *or* there can be proceedings and a claim without a cause of action. *Infra* note 273.

²⁰⁰ *Civil Jurisdiction and Judgments Act* (U.K.), 1982, c. 27.

²⁰¹ In *Duvalier* Staughton L.J. clearly granted that *Siskina* was superseded in the case where section 25 (1) of the Civil Jurisdiction and Judgments Act 1982 applies, which provides: The High Court in England and Wales or Northern Ireland shall have power to grant interim relief where-(a) proceedings have been or are to be commenced in a contracting state other than the United Kingdom. *Infra* note 273. Michell states, "I also argue that a Mareva injunction should be ordered in aid of foreign proceedings even where those proceedings have not commenced." Michell, *supra* note 180 at 763.

As the law relating to the anti-suit injunction and the injunction in aid of foreign arbitral proceedings developed, some courts recognized the defects of the *Siskina* doctrine and did not follow it.

The anti-suit injunction is the injunction which 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. The anti-suit injunction has a long history and it was available before the Mareva injunction was created. In many cases, an applicant will seek an anti-suit injunction enjoining the commencement or continuation of litigation abroad to enable the applicant to continue litigation in the domestic forum, so that there will be a cause of action in the domestic forum. There are, however, instances where an anti-suit injunction has been sought to prevent litigation from continuing at all,²⁰² or where the applicant is engaged in litigation in a third foreign forum.²⁰³

The availability of anti-suit injunctions demonstrates that there is no requirement for injunctive relief to be ancillary to a substantive cause of action within the court's jurisdiction.²⁰⁴

On the other hand, in *Channel Tunnel Group Ltd. v. Balfour Beatty Construction Ltd.*,²⁰⁵ an injunction in aid of foreign arbitral proceedings was granted. The House of Lords held that an injunction to restrain the defendants from suspending work should be awarded in favor of the arbitral proceedings in Brussels. Lord Mustill stated in this case:

Very often it happens that where there is an arbitration agreement between foreign parties the English court has jurisdiction only because the agreement stipulates that the arbitration shall be held in London, thereby justifying the inference of English law as the substantive proper law of the contract, and hence giving the court jurisdiction over the cause of action under Ord. 11, r. 1(1)(d)(iii). If the seat of the arbitration is abroad this source of

²⁰² See e.g. *Midland Bank PLC v. Laker Airways Ltd.* [1986] 1 Q.B. 689 (C.A.).

²⁰³ See e.g. *Airbus Industrie v. Patel* [1996] N.L.O.R. No. 3805 (C.A.). (July 31 1996).

²⁰⁴ Michell, *supra* note 180 at 755-756. See also M. A. Skene, "Commercial Litigation Beyond the Pale: A Comparison of Extraterritorial Anti-suit and Mareva Jurisdiction Exercised by the Courts of England and British Columbia in Commercial Disputes" (1996) 30:1 U.B.C. Law Review 1.

²⁰⁵ [1993] W.L.R. 262 (H.L.). Although the Supreme Court said nothing directly about the Mareva-type of injunction, the Court's definitive language as to the substantive jurisdiction necessarily implies a similarly relaxed approach to the taking of personal jurisdiction for the purpose of ordering Mareva injunctions. Michell, *supra* note 180 at 783.

jurisdiction is cut off, and the inhibitions created by the *Siskina* authorities will preclude the grant of an injunction. Nevertheless, if the facts are such that the court has jurisdiction in some way other than the one just described I can see no reason why the additional foreign element should make any difference to the residual jurisdiction of the court over the dispute, and hence to the existence of the power to grant an injunction in support.”²⁰⁶

In this case, Lord Mustill concluded that an injunction could be granted where there was a cause of action within a domestic court’s jurisdiction and where the parties agreed that a foreign court had jurisdiction. Subsequently, Lord Mustill in *Mercedes*²⁰⁷ also suggested that it was possible for the courts to have jurisdiction to issue a Mareva injunction in support of a claim pursued in a foreign court, though only if the problem of personal jurisdiction was resolved.

Lord Nicholls in *Mercedes*²⁰⁸ went further and clearly affirmed that English courts have jurisdiction to issue a Mareva injunction in aid of foreign proceedings for a pecuniary claim regardless of whether a defendant is resident within the jurisdiction or not. He held that Mareva relief was not available in aid of the cause of action asserted in the proceedings, but rather in aid of the underlying cause of action and only in the sense that the whole enforcement process can be said to be in aid of that cause of action. Therefore, the cause of action which led to the judgment was irrelevant. Moreover, he said, “It is difficult to see any reason in principle why, in this type of case, where the defendant is within the territorial jurisdiction of the court, the court should decline to give such interim relief as might have been given had the court been determining the substantive dispute.”²⁰⁹ In any event, where there is a defendant and a potential cause of action within a court’s jurisdiction, it may be established that courts have jurisdiction to issue a Mareva injunction in aid of foreign proceedings.²¹⁰

²⁰⁶ *Ibid.* at 286.

²⁰⁷ *Supra* note 195.

²⁰⁸ *Ibid.*

²⁰⁹ *Ibid.* at 311.

²¹⁰ Michell, *supra* note 180 at 768. Briggs says, “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.” A. Briggs, “How Soon is an English Court Seised (Revisited)?” (1994) *Lloyd’s Maritime and Commercial Law Quarterly* 470 at 472.

Lord Nicholls's view is that the Mareva injunction exists for the purpose of future enforcement of judgments and what matters is whether judgments, including those of foreign courts, can be enforced within the jurisdiction of the court which issues a Mareva injunction. If his view is correct, however, it goes further in that it does not matter to the court issuing a Mareva injunction whether or not there is a potential cause of action within its jurisdiction. This means that in order for the court to issue a Mareva injunction it is only necessary for the defendant to have assets within the court's jurisdiction.

Considering the difference in nature between the ordinary interlocutory injunction and the Mareva injunction, Lord Nicholls's view is persuasive because there is no reasonable reason to treat the Mareva injunction differently to the anti-suit injunction or the injunction to preserve a non-pecuniary claim for foreign arbitration. However, it remains to be seen whether courts will grant a Mareva injunction in aid of foreign proceedings, where there is a potential cause of action within the jurisdiction, and, moreover, even where there are defendant's assets but no cause of action at all within the jurisdiction.

Under the *Siskina* doctrine, it is also questionable whether a Mareva injunction can be issued against a related party within a court's jurisdiction against whom a cause of action technically did not lie.²¹¹

In *Mercantile Group (Europe) A.G. v. Aiyela and others*²¹² the plaintiff creditor obtained judgment against a debtor and then applied for a Mareva injunction against a person (the debtor's wife) who held assets in her name which could be attributed to the judgment debtor. The court granted a Mareva injunction, even though there was no cause of action against the third party. Hoffmann L.J. stated, citing remarks of Lord Mustill in *Channel Tunnel*,²¹³ "In this case, the plaintiff's substantive right is a judgment debt owed by Mr. Aiyela. The Mareva injunction against Mrs. Aiyela is incidental to and in aid of the enforcement of that right."²¹⁴ This decision is grounded on the assumption that a judgment debtor is beneficially entitled to assets held by a third party, and therefore a creditor may be entitled to execute upon

²¹¹ Michell, *supra* note 180 at 762.

²¹² [1994] Q.B. 366 (C.A.).

²¹³ *Supra* note 205. Hoffmann L.J. cites as follows, "the doctrine of the *Siskina*, put at its highest, is that the right to an interlocutory injunction cannot exist in isolation, but is always incidental to and dependent on the enforcement of a substantive right, which usually although not invariably takes the shape of a cause of action."

²¹⁴ *Supra* note 212 at 375.

the assets even though there may be a dispute between the creditor and the third party. It remains to be seen whether a Mareva injunction can be granted against a third party where there was no judgment rendered against a debtor.

3.1.1.4.2 Temporal Element.

Another question is whether the rigidity of the *Siskina* doctrine regarding the temporal element can be liberalized or not, i.e. whether a Mareva injunction will be granted not only in the case of an accrued cause of action but also in the case of a cause of action which will inevitably accrue. We must examine where a right vests in a person by lapse of time, or by the determination of a condition precedent, because, in these cases, basic facts which give rise to the right to a pecuniary claim already exist.

In the early stages of the development of the Mareva injunction, *A v. B*²¹⁵ was an exception to the *Siskina* doctrine. Saville J. found that, insofar as the court was satisfied that the plaintiffs would be entitled to relief in the form of a Mareva injunction when the cause of action arose, there was no good reason why the court should not make an order in advance on which the injunction would take effect at that moment. However, this is the only exception. The other courts have followed the *Siskina* doctrine.

*Veracruz Transportation Inc. v. V.C. Shipping Co. Inc.*²¹⁶ is a controversial decision. In this case, the Court of Appeal clarified that an accrued cause of action is necessary for granting the Mareva injunction. The effect of *Veracruz* is that the decision in *A v. B* was discarded because it was inconsistent with *Siskina* and because the court had no jurisdiction to make such orders.²¹⁷

Many commentators disagree with this decision of the Appeal Court,²¹⁸ arguing that it is the courts which have imposed the limitations which led first to a plainly unjust decision of

²¹⁵ [1989] 2 Lloyd's Rep. 423 (Q.B.).

²¹⁶ [1992] 1 Lloyd's Rep. 353 (C.A.).

²¹⁷ See Collins, *supra* note 189 at 178.

²¹⁸ In *South Carolina Insurance Co. v. Assurantie Maatschappij "De Zeven Provinciën"* Lord Goff of Chieveley said, "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 for us now to foresee every circumstance in which it may be thought right to make the remedy available." [1987] A.C. 24 (H.L.) at 40. In Australia, the court held in *Paterson v. BTR Engineering (Aust.) Ltd.* that the justice of the case may require that injunctive relief be granted even before the cause of action arises. (1989) 18 N.S.W.L.R. 319.

the House of Lords. They point out that by legislation dating back to 1873 (now under the Supreme Court Act, 1981) the courts were empowered to grant injunctions when it is "just and convenient" to do so and that there is no reasonable reason not to follow this principle where a cause of action will inevitably accrue.²¹⁹

There are two main bases for their criticism. One is that an injunction is available even in an action for a declaration. The other is that *quia timet* interlocutory injunctions are available, and they have historically been used to prevent an anticipated wrong, rather than simply to deal with its consequences. As the commentators argue, the Mareva injunction must be granted in the case of an application for relief made prior to the cause of action but with cause of action, in practical terms, will inevitably emerges. To say in one case that relief is available and in the other that it is not, purely because the time for performance has passed in the one case but not in the other, would seem to be unjust.²²⁰ However, the courts still are reluctant to change their attitude to this issue.

3.1.1.5 Assets Subject to Injunction

The early Mareva cases had to do with bank accounts, but more recently the remedy has been granted against any kind of property, including future acquired assets, real property and funds in court. It covers land,²²¹ motor-cars and other chattels,²²² bank accounts, ships and aircraft, and even goodwill.²²³ Furthermore, a Mareva injunction is often granted against all of a defendant's property up to a dollar limit, thus permitting the defendant to move assets in and out of the jurisdiction so long as sufficient assets remain to satisfy the Mareva injunction. However, such orders cause difficulty for third parties, especially banks, who are called on to

Michell criticizes that what the House of Lords said in *Siskina* provides no authority for the proposition supposedly derived from the case that an interlocutory injunction can only be granted when claimed in support of an accrued cause of action. Michell, *supra* note 180 at 752. See e.g. D. Wiled, "Jurisdiction to Grant Interlocutory (Mareva) Injunctions: The Veracruz I" (1993) Lloyd's Maritime and Commercial Law Quarterly 309 at 311. Collins, *supra* note 189 at 180.

²¹⁹ Collins, *supra* note 189 at 179.

²²⁰ See e.g. P. Marshall, "The Conditional or Anticipatory Mareva Injunction" (1992) Lloyd's Maritime and Commercial Law Quarterly 161 at 166.

²²¹ See e.g. *Kirby v. Banks*, 1980 Court of Appeal (Civil Division) Transcript 624 (C.A.).

²²² See e.g. *CBS United Kingdom Ltd. v. Lambert and another* [1983] Ch. 37 (C.A.).

²²³ *Darashah v. UFAC (UK) Ltd.*, The Times, 30 March 1982 (C.A.).

administer them. The form of such “maximum sum” orders, which is different from that of orders that specify the assets, was discussed and confirmed in *Z v. A-Z*.²²⁴

Assets must belong to the defendant. But what if a third party holds the interest in assets on behalf of the defendant?²²⁵

The Court of Appeal held, in *SCF Finance Co. v. Masri*²²⁶ in which a bank account to be frozen by a Mareva injunction was in the name of the defendant’s wife, that where the assets apparently belong to a third party, the court should not agree to the invitation without good reason for supposing that the assets were in truth the assets of the defendant. Where the court decides not to accept the assertion that the assets belong to a third party without further inquiry, it may order that the issue between the plaintiff and the third party be tried in advance of the main action, or it may order that the issue await the outcome of the main action. This choice will depend on what is just and convenient.²²⁷

This decision clearly allows the courts to decide whether the defendant or the third party owns the assets which are to be the subject of the Mareva injunction. This is a strong weapon, because prior to an application for a Mareva injunction a defendant often disguises his assets as a third party’s.

Another important point regarding assets is their location. In its early stages, the Mareva injunction was limited to assets within a court’s jurisdiction. However, as the nature of the Mareva injunction came to be clarified as a remedy *in personam*, the Mareva injunction began applying not only to assets inside but also to those outside the court’s jurisdiction. This change is very important. I will examine this in detail under the heading Real Risk in 3.1.3.2.

3.1.2 Merits of Case

²²⁴ *Infra* note 261 at 298.

²²⁵ In *Oceanica S.A.* there was a dispute over the ownership of the deposit, the name of which was not clearly expressed. The court decided it did not belong to the defendant. *Supra* note 163.

²²⁶ [1985] 2 All E.R. 747 (C.A.).

²²⁷ Lloyd L.J. said in *SCF Finance*, “If there is a dispute as to the extent of his living expense, or whether the defendant has other assets out of which he ought to pay his debts, there is a ready solution. Such disputes are resolved every day in the Commercial Court or by the judge in chambers. I can see no difference in principle between a defendant who says, ‘These are my assets and I need them to pay a third party in the ordinary course of business,’ and one who says, ‘These are not my assets at all.’” *Ibid.* at 750.

Nippon Yusen was strong enough for summary judgment, even though Lord Denning said, "There is a strong *prima facie* case that the hire is owing and unpaid."²²⁸ (Emphasis is added.) In *Mareva*, he said, "If it appears that the debt is due and owing",²²⁹ and Roskill LJ said, "it is apparent that the plaintiffs will suffer a grave injustice."²³⁰ *Third Chandris*²³¹ seemed to require the case to be strong enough for summary judgment. In this case Mustill J. said, "The Mareva injunction performed a valuable service in enabling the creditor to detain the asset during the relatively short interval which elapsed before he obtained a judgment either in default of appearance or under RSC Ord 14 [for summary judgment]."²³² There was still confusion regarding the merits of the case.

Subsequently, an applicant for a Mareva injunction had to establish "a good arguable case" against the defendant although not necessarily so strong a case that the plaintiff could obtain summary judgment. For example, in *Pertamina*²³³ while the opinion of Kerr J. was that the plaintiffs' case did not at that stage look strong enough for summary judgment, Lord Denning stated that the plaintiffs had to show a good arguable case, not that success under summary judgment had to be certain or likely.²³⁴ The requirement of a "good arguable case" was thought to conform with the test in *American Cyanamid*.²³⁵ The courts sometimes do take

²²⁸ *Supra* note 148 at 1095.

²²⁹ *Supra* note 149 at 510.

²³⁰ *Ibid.* at 511.

²³¹ *Supra* note 170.

²³² *Ibid.* at 650. English civil procedure has pursued a policy of preventing defendants with unmeritorious defences from benefiting from the delay of litigation. A plaintiff may apply for summary judgment if his defendant has no arguable or legitimate defence. A plaintiff who cannot obtain summary judgment may still be able to obtain quick relief by way of interim payment, if he can demonstrate a high probability of success on the merits. A.A.S. Zuckerman "Mareva Injunctions and Security for Judgment in a Framework of Interlocutory Remedies" (1993) 109 *The Law Quarterly Review* 433 at 448.

²³³ *Supra* note 169. However, Lord Denning ordered the discontinuation of the Mareva injunction, because there was lack of certainty in the title to the goods and the amount was so trifling in the circumstances compared with the immense claim.

²³⁴ *Ibid.* at 661.

²³⁵ *Supra* note 134. However, no such words were used by the House of Lords in that case, and it appears that Lord Denning may have evolved a new test appropriate only to Mareva injunctions. See McAllister, *supra* note 125 at 35. Contrary to this, there is different evaluation. It seems that the Mareva injunction and the Anton Piller order are exceptions to the *American Cyanamid* guidelines. In practice, the guidelines laid down in *American Cyanamid* appear to be irrelevant to the grant of these orders. See Ough, *supra* note 112 at 64. Parker L.J. said in *Derby v. Weldon (No. 1)*, "In my view the difference between an application for an ordinary injunction and a Mareva lies only in this, that in the former case the plaintiff need only establish that there is a serious question to be tried, whereas in the latter the test is said to be whether the plaintiff shows a good arguable case." *Infra* note 277 at 57.

into account the merits of the plaintiff's case and are not satisfied by a mere *prima facie* case. However, I agree with the view that if there is a real and serious risk of evasion, a *prima facie* case should suffice to entitle a plaintiff to protection from the machinations of a defendant bent on placing himself beyond the reach of legal process.²³⁶ This elasticity is similar in Japanese jurisprudence as I will show later.

3.1.3 Risk

3.1.3.1 Foreign-based Defendant

In *Pertamina*²³⁷ it was clear that the court had the remedy in mind as being applicable only to foreign-based defendants. The intention was to reconcile a Mareva injunction with the older *Lister v. Stubbs* line of cases on the grounds that the latter all had to do with domestic defendants.²³⁸ Lord Denning said, "I do not think [the *Lister v. Stubbs* line of cases] should be applied to cases where a defendant is out of the jurisdiction but has assets in this country."²³⁹ In contrast to pre-judgment provisional remedies in civil law countries, which were developed for the purpose of restraining disposition of internal assets, the Mareva injunction was born as an international type of remedy.²⁴⁰

However, in *Chartered Bank v. Daklouché*,²⁴¹ Lord Denning said "If a defendant is likely to leave England at short notice, a Mareva injunction may well be granted." In *Barclay-Johnson v. Yuill*,²⁴² Megarry V.C. extended the Mareva injunction to English defendants not

²³⁶ Zuckerman, *supra* note 232 at 444.

²³⁷ *Supra* note 169.

²³⁸ See e.g. Hoyle, *supra* note 99 at 8. Dunlop, *supra* note 117 at 165.

²³⁹ *Supra* note 169 at 659. This principle was confirmed by *Greb Van Weelde Scheepvaart Kautoor B. V. v. Homeric Marine Services Ltd.* [1979] 2 Lloyd's Rep. 117.

²⁴⁰ Miki Kôichi, "Shôgai-teki Minji-hozen-shudan no Aratana Kanousei [New Possibility of Means for International Civil Preservation]" 65:4 Hôgaku-Kenkyu 57 at 78

²⁴¹ [1980] 1 W.L.R. 107 (C.A.). The defendant who allegedly conspired with her husband, who was also the defendant, to fraudulently convey his assets, stated in the first affidavit that she was a Lebanese citizen and not a resident of the United Kingdom, but in the subsequent affidavit that she was resident here.

²⁴² [1980] 3 All E.R. 190 (Ch.). The case is that the plaintiff discovered that the defendant, who was an English national with an English domicile, had sold his own flat, had gone abroad and was cruising in an ocean-going yacht of which he was a part-owner. Megarry V.C. said subsequently, "Even if the risk of removal is great, no Mareva injunction should be granted unless there is also a danger of default. A reputable foreign company, accustomed to paying its debts, ought not to be prevented from removing its assets from the jurisdiction, especially if it has substantial assets in countries in which English judgments can be enforced." See also Rose, *supra* note 147 at 10.

about to leave the country: "If then, the essence of the jurisdiction is the risk of the assets being removed from the jurisdiction, I cannot see why it should be confined to 'foreigners', in any sense of that term."²⁴³

This requirement got absorbed in the "real risk" requirement. In *Prince Abdul Rahman Bin Turki AL Sudairy v. Abu Taha*,²⁴⁴ the court clarified that the Mareva injunctions could be issued against non-foreign defendants. Moreover, this requirement for the injunction to apply to foreign defendants was abolished by section 37 of the Supreme Court Act 1981.²⁴⁵

3.1.3.2 Real Risk

The Mareva injunction is granted only where there is a real risk that a judgment or award in favor of the plaintiff will remain unsatisfied.²⁴⁶

If the words "a real risk" are interpreted too strictly, it may be unreasonably difficult to prove that such risk exists, and vice versa. For example, to meet the "real risk" requirement, a plaintiff would have to prove not simply that there is a strong possibility that a defendant will remove or dissipate his assets, but he is about to do so. Conversely, since anyone might want to be free from paying his debts, the mere existence of debt might be taken as an indication that there is the danger of removal or dissipation of one's assets. Lawton L.J. stated in *Third Chandris*²⁴⁷ that judges should not expect to be given proof of previous defaults or specific incidents of commercial malpractice before deciding that "a real risk" does exist.²⁴⁸

With respect to the subjective element for "a real risk", it is questionable whether it is required that a plaintiff prove a defendant's nefarious intention. In *Ninemia*,²⁴⁹ Kerr L.J.

²⁴³ *Ibid.* at 194.

²⁴⁴ [1980] 1 W.L.R. 1268 (C.A.). In this case Lord Denning stated: "But neither of them [defendants] gives his 'place of residence'-as under R.S.C., Ord. 41, r.1(4), [Every affidavit must . . . state the place of residence of the deponent . . .] each ought to have done. Why not? It leads me to think that they are not at all trustworthy. Their houses may be in the names of nominees so as to prevent creditors getting their hands on them. At any rate, the circumstances suggest to my mind that there is a risk that, if the plaintiff should get judgment, he may find that before he can issue execution, the defendants may have disposed of their assets. They may have taken them out of the jurisdiction or transferred them to somewhere here." *Ibid.* at 1271.

²⁴⁵ Bean, *supra* note 113 at 130.

²⁴⁶ *Ninemia*, *supra* note 172.

²⁴⁷ *Supra* note 170.

²⁴⁸ *Ibid.* at 672.

²⁴⁹ *Supra* note 172.

clarified that it was not necessary that a defendant dispose of his assets with the object putting them out of the plaintiff's reach.²⁵⁰

It had been said, as stated in *Third Chandris*²⁵¹ and *Ninemia*,²⁵² that "a real risk" meant that the judgment would remain unsatisfied because of the removal of assets or a dissipation of assets within the country. Here, that the assets were within the country is an important element.

In order for a plaintiff to show that a defendant has assets within the country, the plaintiff should, strictly speaking, both specify the defendant's assets and clarify their location. These requirements are strongly connected to each other since real estate, for example, is specified by its location. However movables are sometimes not specified by their location but by in another way, such as by their serial number. In order to better understand "a real risk", I divide its meaning into three elements:

- (1) the possibility of the removal of assets or a dissipation of assets;
- (2) specification of assets; and
- (3) the location of assets.

3.1.3.2.1 Possibility of Removal or Dissipation of Assets.

Many factors go to make up the possibility of removal or a dissipation of assets. Although the removal or a dissipation of assets must be possible, it is difficult to establish clear guidelines to determining the degree of possibility. It has been held that a mere assertion by the

²⁵⁰ *Ibid.* at 1422. He indicated that the question was whether the test was that the defendant would deal with his assets with the object, and not just with the effect, of putting them out of the plaintiff's reach, and subsequently stated: "Thus, we were referred to an unreported judgment of Parker J. in *Home Insurance Co. v. Administratia Asifurarilor de Stat* in which these words were interpreted 'as a requirement that one must show nefarious intent.' However, this interpretation of the emphasized words goes much further than the tenor of the authorities to which we refer below. We also consider that the distinction mentioned by the judge in the present case, which he did not in fact find it necessary to resolve between 'object' and 'effect,' is not the right basis for providing the appropriate test."

²⁵¹ *Supra* note 170

²⁵² *Supra* note 172 at 1423. Kerr. L.J. says, "although most of the reported cases have dealt with the removal of assets from the jurisdiction, Mareva injunctions can, and nowadays frequently are, also granted where there is a danger of a dissipation of assets within this country."

plaintiff, unsupported by evidence, that the defendant will remove or dissipate the assets will not be enough.²⁵³ Factors indication real risk include:²⁵⁴

- (1) a company incorporated in a financial or tax haven overseas;
- (2) the trading history;
- (3) accounts based on artificial inflation, such as the cross-firing of money between linked accounts to create the impression of a solid turnover;
- (4) absence of any available information about the defendant, so long as a thorough search has been made;
- (5) business domicile;
- (6) length of time in business; and
- (7) the appearance of wealth not backed up by known assets.

3.1.3.2.2 Specification of Assets

Since the courts can issue a maximum sum order without identifying the assets subject to a Mareva injunction, specifying the assets is not necessary as far as the content of an order is concerned.²⁵⁵ However, in the past, upon application for a Mareva injunction, the plaintiff had to show that there were assets belonging to the defendant within the court's jurisdiction. In order for the plaintiff to satisfy the court that this requirement had been met, it might have been necessary to state what the defendant's assets were, and then to show that they were located within the jurisdiction. There are no cases in which an application for a Mareva injunction has been dismissed because of insufficient specification of a defendant's assets when a plaintiff can show that the assets are within the court's jurisdiction. However, in some cases, the extent to which specification of the defendant's assets was required, was the subject of discussion.

In *Third Chandris*,²⁵⁶ a Mareva injunction was issued as the plaintiff showed that there was a bank account in the court's jurisdiction even though the account was in large overdraft. Lord Denning set a guideline: "(iii) The plaintiff should give some grounds for believing that

²⁵³ Ough, *supra* note 112 at 72.

²⁵⁴ (1)-(4) are listed in Hoyle, *supra* note 99 at 37 and (5)-(7) are described in *Third Chandris*, *supra* note 170.

²⁵⁵ See 3.1.1.5, above, for a discussion of this issue.

²⁵⁶ *Supra* note 170.

the defendants have assets here. . . ."²⁵⁷ He also said that the requirement was put too high in *MBPXL Corporation v. Intercontinental Banking Corporation*,²⁵⁸ and the existence of a bank account in England was enough, whether or not it was in overdraft.²⁵⁹ It must be difficult to state that a large overdraft account is a defendant's specified asset which can be disposed of or dissipated unless a Mareva injunction is issued.

Mustill J. said in the original judgment in *Third Chandris*, which was sustained in the Court of Appeal:

I do not however believe that [*Pertamina* and *MBPXL*] can be read as requiring the plaintiff to produce concrete proof of precisely what assets are present within the jurisdiction. . . . All that can reasonably be asked, where moneys are the subject matter of the attachment, is that a *prima facie* case is made out inferring that such moneys exist and where they may be found.²⁶⁰

In *Z Ltd. v. A-Z and AA-LL*,²⁶¹ regarding the extent of specification, Kerr. L.J. stated as follows:

To the extent to which the assets are known or suspected to exist, there should be identified even if their value is unknown; and if it is known or suspected that they are in the hands of third parties, in particular of banks, everything should be done to define their location to the greatest possible extent. . . (for) bank accounts, the plaintiff should make every effort to try

²⁵⁷ See the beginning of 3.1, above, for a discussion of this issue.

²⁵⁸ 1975 Court of Appeal (Civil Division) Transcript 411 (C.A.). An application for the Mareva injunction was dismissed because it should only be granted on clear evidence that the defendant had movable assets situate within the jurisdiction. The Court of Appeal suggested that an interest in land could not be the subject of a Mareva injunction.

²⁵⁹ Mustill J., who was a judge to render the original judgment of *Third Chandris* took a different approach. He stated such a general rule as if only assets consists of a credit balance, and no such balance exists, the requirements of *MBPXL* were not satisfied. Nevertheless, he granted a Mareva injunction because although the defendant should have said that there was nothing in the account and explained the reason, the defendant did not.

²⁶⁰ *Supra* note 170 at 651.

²⁶¹ [1982] 2 W.L.R. 288 (C.A.).

to indicate (a) which bank or banks hold the accounts in question, (b) at which branches, and (c) if possible, under what numbers.²⁶²

From the remarks of Kerr L.J. it can be interpreted that a plaintiff only has to specify the assets subject to a Mareva injunction as clearly as possible.

3.1.3.2.3 Location of Assets

Another element of the “real risk” requirement is that it is these assets within the jurisdiction that are subject to possible removal or dissipation. As the theory of the Mareva injunction developed, the question arises whether a plaintiff was required to show in all cases that there were some grounds for believing that the defendant had assets within the jurisdiction. A further question arose as to whether it was reasonable that the assets subject to a Mareva injunction should be confined to those within the jurisdiction. Thus a new type of Mareva injunction, called the “worldwide Mareva injunction” because of the location of the assets, became a topic for discussion.

In *Ashtiani v. Kashi*,²⁶³ Dillon L.J. in the Court of Appeal dismissed the application for a worldwide Mareva injunction with a disclosure order on the basis of settled practice, even though he suggested that there might be jurisdiction to grant discovery of worldwide assets.²⁶⁴ As the reasons for this settled practice, he referred to the guidelines for “a real risk” stated by Lord Denning in *Third Chandris*²⁶⁵ and the suggestion regarding “a real risk” by Kerr L.J. in *Ninemia*.²⁶⁶ He also referred to the wording of section 37(3) of the Supreme Court Act 1981 which provides, “assets located within that jurisdiction shall be exercisable”.²⁶⁷

However, the reasons for his decision were not persuasive or logical. The question to be examined is whether or not a judgment or award in favor of the plaintiff can go unsatisfied.²⁶⁸ In *Ashtiani* Dillon L.J. suggested that there is no reasonable reason why “a real

²⁶² *Ibid.* at 309.

²⁶³ [1987] 1 Q.B. at 888 (C.A.).

²⁶⁴ See D. Capper “Worldwide Mareva Injunctions” (1991) 54:3 The Modern Law Review 329 at 331.

²⁶⁵ *Supra* note 170.

²⁶⁶ *Supra* note 172 at 419.

²⁶⁷ *Ashtiani*, *supra* note 263 at 9901.

²⁶⁸ In *Derby v. Weldon (No.3 and 4)* Lord Donaldson stated that the grant of an extraterritorial Mareva

risk” is limited to the removal of assets from the jurisdiction or the disposal of assets within it,²⁶⁹ and that the limitation of “a real risk” was merely settled practice and not jurisdictional.²⁷⁰ He also suggested section 37(1) of the act as opposed to section 37(3), was broad enough to give jurisdiction to the High Court to grant a worldwide Mareva injunction. Furthermore, in my opinion since the Mareva injunction is an order *in personam*, it is not logical that the court’s power should not extend to any property in any county. The Mareva injunction is the order against a defendant *not to do*, and is not enforced by physical seizure. The sanction against a defendant who does not comply with it is contempt of court only. Legally at least, if not emotionally, there is no conflict with any foreign jurisdiction. In *Ashtiani*, Lord Neill stated so in *obiter dictum*, even though he did not grant issuance of the worldwide Mareva injunction because it was considered too broad in that particular case.

Soon after *Ashitani* was decided, its decision was overruled and the worldwide Mareva injunction was granted. The worldwide Mareva injunction raises two issues. One is an issue regarding “a real risk”, and the other an issue regarding assets subject to a Mareva injunction (3.1.1.5). Whether there is “a real risk” is logically separate from the question of what assets are bound by a Mareva injunction. However, practically, those two issues are strongly connected. If “a real risk” is met where the judgment will remain unsatisfied because of the removal of assets or a dissipation of assets abroad, a Mareva injunction can be issued to prevent a defendant from disposing of or dissipating his assets abroad. Accordingly, I will examine in the next section of this chapter (3.1.3.3) the issue of the worldwide Mareva injunction without distinguishing the view of “a real risk” from that of assets subject to the Mareva injunction.

3.1.3.3 Worldwide Mareva Injunction²⁷¹

injunction in an appropriate case is consistent with the underlying purpose of the Mareva jurisdiction, which is to prevent the court’s orders being rendered ineffective by the defendant’s disposal of assets. *Infra* note 274 at 76, 93.

²⁶⁹ Rogers states, “Again, it was illogical that restraining a defendant from committing an abuse of the court’s function by disposal of assets should be restricted to removing assets from the jurisdiction of the court.” Justice A. Rogers, “The Extra-territorial Reach of the Mareva Injunction” (1991) *Lloyd’s Maritime and Commercial Law Quarterly* 231 at 232.

²⁷⁰ See Capper, *supra* note 264 at 330.

²⁷¹ By creating the Mareva injunction, English jurisprudence finally obtained a general pre-judgment order

In a series of cases the English Court of Appeal held that the worldwide Mareva injunction could be granted either after judgment (*Babanaft International Company S.A. v. Bassatne and another*²⁷²) or before judgment (*Republic of Haiti v. Duvalier*,²⁷³ *Derby and Co. Ltd. v. Weldon (No.3 and 4)*²⁷⁴). Where there were no assets or not enough assets within the jurisdiction for the amount sought, English Court of Appeal decisions have permitted injunctions against assets outside of the United Kingdom.²⁷⁵ In *Bananaft*, the court stated that the courts have the power to order the defendant to refrain from disposing of his assets held outside of their jurisdiction and to disclose the whereabouts of those assets. It also stated, with respect to the principle outlined in *Ashtiani*, that this reflected no more than the extent of the court's practice at that time and did not impose any jurisdictional bar.²⁷⁶ In *Derby v. Weldon (No.3 and 4)*, the court established that it might issue an order against assets outside its

system equivalent to the systems in civil law countries. Jurists in the civil law countries did not think it was a significant device and they were surprised to see that while civil law countries have had a general pre-judgment order system since the 18th or 19th century, such a system was not introduced into English jurisprudence until the end of the 20th century. However, with time, the Mareva injunction has developed many excellent features and now jurists from civil law countries, especially those in continental Europe admire it and plaintiffs there would like to have access to this magic weapon. Peter F. Schlosser, (translated into Japanese by Sakahara Masao & Koshiyama Kazuhiro) (1991) 64:9 Hôgaku Kenkyû "Ryôiki-gai-teki na Sayô wo Yûsuru Kari no Kenri-hogo ni-tsuitenô Kinji no Sho-mondai [*The Recent Issues regarding Pre-judgment Relief ex juris*]" at 106. See also Schlosser, *supra* note 175 at 150-152.

²⁷² [1990] Ch. 13 (C.A.). The plaintiffs obtained judgment for over \$15m against the defendants, two Lebanese nationals, one of whom lived mainly in Switzerland and the other mainly in Greece. They were brothers who led a walking lifestyle and carried on business in a secretive manner through a network of family companies. They had some assets in England but not nearly enough to meet a judgment for \$15m. When the defendants failed to satisfy the judgment, Vinelott J granted an injunction restraining them from dealing with their assets outside the jurisdiction. In this case, after the examination procedure commenced the plaintiff applied for a worldwide Mareva injunction. Under the examination procedure, courts have no power to order a defendant to disclose his assets abroad.

²⁷³ [1990] QB 202 (C.A.). The Government of Haiti sued a former president of the country and members of his family for \$12m allegedly embezzled while the former president was in office. Proceedings were instituted in France where the Duvalier family were resident, and an application was brought in England for interim protective measures under section 25 of the Civil Jurisdiction and Judgment Act 1982 in the form of a Mareva injunction covering the defendants' assets wheresoever situated. The injunction was granted because of the defendants' plan and admitted intention to move their assets out of the reach of all courts of law (alleging that the litigation was an international conspiracy against them), the skill and resources they had shown in doing that, and the vast sums of money involved.

²⁷⁴ [1990] Ch. 48 (C.A.). The plaintiffs sued the defendants for breach of contract, conspiracy and fraudulent breach of fiduciary duty arising out of the collapse of a company owned by the plaintiffs and managed by the first and second defendants. The first and second defendants had insufficient assets for judgment in England and Wales. Worldwide Mareva injunctions were granted because of the insufficiency of the defendants' assets within the jurisdiction, the existence of substantial foreign assets, and the high degree of risk that the defendants would dispose of them in the face of an adverse judgment.

²⁷⁵ Dunlop, *supra* note 117 at 176.

jurisdiction, even though the defendant had no assets within the court's jurisdiction. Thus, the requirement for domestic location of the assets was set aside and now, in order for it to be deemed that "a real risk" exists, a plaintiff must show that any judgment in her favor will go unsatisfied because the defendant's foreign assets will be dissipated or be secreted away.²⁷⁷

It is questionable whether there is any difference between a domestic Mareva injunction and a worldwide Mareva injunction with regard to the extent to which a plaintiff should prove "a real risk". Generally, it has been said that the granting of a worldwide Mareva injunction will be rare, and that special circumstances must be shown to justify its issuance. If that is correct, the threshold of "a real risk" required to be shown for a worldwide Mareva injunction would be higher than for a domestic Mareva injunction. However, the jurisdiction to grant Mareva injunctions is broad, the circumstances in which it will be exercised are still being worked out and hence one should not attempt to state them too precisely or too narrowly.²⁷⁸ As Lord Donaldson M.R. observed in *Derby v. Weldon (No. 3 and 4)*,²⁷⁹ "special circumstances" means that the court should go no further than necessity requires. This is not different from the rationale under which a domestic Mareva injunction has been granted in the past.²⁸⁰

It is said that the worldwide Mareva injunction is more oppressive to a defendant than the domestic Mareva injunction. Since it is logical that an injunction must not be too oppressive to a defendant, special consideration may be necessary to issue a worldwide Mareva injunction. As I will mention at 4.3.2, the oppressive situation unique to a worldwide Mareva injunction may be seen most clearly in the case of discovery for the location of a defendant's assets.

Another question arises as to whether enforceability is considered a threshold requirement for granting a worldwide Mareva injunction. One may ask, for example, whether the court can dismiss an application for a worldwide Mareva injunction simply because the injunction cannot bind an appropriate third party, such as a custodians of a defendant's assets, to comply with the order. On this matter, Kerr L.J. said in *Babanaft* that the worldwide Mareva injunction can be granted where there is international reciprocity for the recognition and

²⁷⁶ *Supra* note 272 at 242.

²⁷⁷ *Derby & Co. Ltd. v. Weldon (No. 1)* [1990] Ch 48 at 57, 62 (C.A.).

²⁷⁸ *Derby v. Weldon (No. 1)* *supra* note 277 at 59. *Derby v. Weldon (No. 3 & 4)* *supra* note 274 at 95.

²⁷⁹ *Derby v. Weldon (No. 3 & 4)* *supra* note 274 at 79.

²⁸⁰ *Ibid.* See also Capper, *supra* note 264 at 339.

enforcement for the injunction.²⁸¹ This was accepted in the *Duvalier*²⁸² and *Derby v. Weldon (No. 1)*.²⁸³

With respect, existence of international reciprocity should not be considered a requirement. I question whether the problem of enforceability is unique to the worldwide Mareva injunction. Enforceability of an order *in personam* is always reliant on the attitude of the people affected by the order. The foundation of an order *in personam* is the hope that the order will be complied with. This problem is not also unique to the worldwide Mareva injunction.

Moreover, where the assets subject to a worldwide Mareva injunction are not specified, the court and plaintiff may have little knowledge about the location of the assets. It might be difficult, especially in an *ex parte* hearing, to decide whether or not there is reciprocity between the jurisdiction country and the foreign country.

In *Derby v. Weldon (No. 3 and 4)*,²⁸⁴ Lord Donaldson suggested that when considering whether to grant an extraterritorial Mareva injunction courts generally should not consider whether third parties can be compelled to observe its terms.²⁸⁵ It is not reasonable for the court to decide on enforceability of an order before issuing it.

3.1.3.4 Mareva injunctions after judgment

Mareva injunctions were originally developed as pre-judgment remedies designed to freeze assets until judgment could be obtained and a writ of execution issued. It is self-evident that the possibility of dissipation of a defendant's assets is stronger in the pre-judgment situation than in the post-judgment situation. *Orwell Steel (Erection & Fabrication) Ltd. v. Asphalt & Tarmac (U.K.) Ltd.*²⁸⁶ is now authority that an injunction obtained before judgment

²⁸¹ *Supra* note 272 at 244.

²⁸² *Supra* note 273 at 274.

²⁸³ *Supra* note 277 at 59.

²⁸⁴ *Supra* note 274.

²⁸⁵ *Ibid.* at 80-82. See also Capper, *supra* note 264 at 336, 337. However, he states that an order should only be refused if there were real doubt about whether an order would be obeyed and that if it were not obeyed there would be no real sanction.

²⁸⁶ [1985] 3 All E.R. 1097 (Q.B.) The case is as follows: After the plaintiff obtained judgment, he issued a writ of *feri facias* to the sheriff but this proved ineffective. The plaintiff was aware that the defendant owned a number of asphalt laying machines and vans and according to the evidence there was reason to believe that in order to avoid execution the defendant would dispose of those vehicles and its other assets by transferring them

may be continued in force after judgment and that a new injunction can be issued for the first time after judgment.

Not only can a Mareva injunction bring great pressure on a defendant not to dispose of assets before they are seized, but it can take effect on a defendant faster than writ of seizure and sale.²⁸⁷ This is because the Mareva injunction requires no action by a sheriff. The plaintiff has simply to send a letter or fax informing the defendant of issuance of the order.

3.1.4 Protection of Defendant

Undertaking and full disclosure by the plaintiff are required as safeguards to protect the defendant primarily, and sometimes third parties.²⁸⁸

3.1.4.1 Undertaking

The plaintiff applying for a Mareva injunction is usually required to give an undertaking in damages. However, the English Court of Appeal has granted an injunction to a plaintiff receiving legal aid whose undertaking might well be worthless.²⁸⁹ Although, where appropriate, a plaintiff's undertaking should be supported by a bond or security,²⁹⁰ it is not usual for the court to require a bond or other security to support the undertaking.²⁹¹

The jurisdiction to award damages under a cross-undertaking will normally follow the principles of damages in contract. Accordingly, the defendant has to prove that he has suffered loss due to the freezing of his assets and to establish the financial extent of the loss.²⁹² This is a heavy burden because it is difficult to prove that a loss has been caused by the freezing of his assets and to calculate dollar value of the loss.

to another company. Farquharson J. stated that this type of Mareva injunction is granted where there are grounds for believing that the judgment debtor will dispose of his assets to avoid execution. *Ibid.* at 1100. See also *Stewart Chartering Ltd. v. C & O Managements S.A.; The Venus Destiny* [1980] 1 All E.R. 718.

²⁸⁷ Farquharson J. stated in *Orwell Steel*, "In this context it would have the effect of preserving the defendant's goods until execution could be levied upon them; and the remedies of injunction and execution can take effect side by side." *Ibid.* at 1100.

²⁸⁸ See e.g. Ough, *supra* note 112 at 4. MacAllister, *supra* note 125 at 47.

²⁸⁹ See e.g. *Allen v. Jambo Holdings Ltd.* [1980] 2 All E.R. 502 (C.A.).

²⁹⁰ Rose, *supra* note 147 at 3.

²⁹¹ Ough, *supra* note 112 at 70.

²⁹² Zuckerman, *supra* note 232 at 440.

3.1.4.2 Full and Frank Disclosure

In an *ex parte* application for any interlocutory injunction the plaintiff must make a full and frank disclosure of all material matters including all relevant information about the defendant,²⁹³ otherwise the order may be set aside without regard to its merits.²⁹⁴ The guidelines stated in *Third Chandris* reconfirm this. In order for a Mareva injunction to be discharged, the lack of full and frank disclosure need not be deliberate or even affect the merits of the claim.²⁹⁵ In *Siporex Trade SA v. Comdel Commodities Ltd.*,²⁹⁶ Bingham J. stated, "It is no excuse to say that [the plaintiff] was not aware of the importance of matters he has omitted to state."²⁹⁷

However, it is wholly unrealistic to expect an applicant to put the case for his opponent. Not only does the plaintiff's duty to full disclosure offer meager protection, but the sanctions for dereliction of this duty are problematic. There is a reluctance to investigate at an interlocutory stage whether there has been culpable non-disclosure in the *ex parte* application. Some judges feel that, when the defendant applies to have the injunction discharged for non-disclosure of material facts, what matters is not so much whether the plaintiff has been guilty of non-disclosure as whether there is still a valid justification for continuing the injunction.²⁹⁸

3.2 Canada

In Canada, although the requirements set by the English cases for the Mareva injunction were basically accepted, the courts took a somewhat different approach and sometimes adopted a different expression or explanation. The court adopted the *Third Chandris* guidelines and expanded them, mainly regarding the merits of the case. They are as:²⁹⁹

- (1) The plaintiff should make full and frank disclosure of all material matters within his or her knowledge.

²⁹³ See e.g. *R v. Kensington Income Tax Comrs*, [1917] 1 K.B. 486 at 504 (C.A.)

²⁹⁴ See e.g. *Boyce v. Gill* (1918) 64 L.T. 828.

²⁹⁵ Hoyle, *supra* note 99 at 50. See e.g. *Thermax Ltd. v. Schott Industrial Glass Ltd.* [1981] F.S.R. 289.

²⁹⁶ [1986] N.L.J. Rep 538.

²⁹⁷ *Ibid.* at 539.

²⁹⁸ Zuckerman, *supra* note 232 at 438.

²⁹⁹ *Chitel*, *supra* note 166. See McAllister, *supra* note 125 at 88.

- (2) The plaintiff must give particulars of the claim, including the grounds and the amount claimed, and must fairly state the points made to the contrary by the defendant. The material presented under items (1) and (2) must establish a *prima facie* case on the merits.
- (3) The plaintiff must give grounds for believing that the defendant has assets within the jurisdiction. The assets should be established with as much precision as possible so that, in appropriate cases, the injunction may be directed against specific assets. The court will be reluctant to tie up all of the assets of a defendant who is a Canadian citizen and resident in the jurisdiction.
- (4) The plaintiff must persuade the court that the defendant is removing, or that there is a risk that he or she is about to remove, assets from the jurisdiction in order to avoid a possible judgment. Alternately, it may be shown that the defendant is disposing of assets in a manner out of the ordinary course of business or living, so as to make tracing of assets remote or impossible.
- (5) As with all interlocutory injunctions, the plaintiff must give an undertaking as to damages.

3.2.1 Jurisdiction

For several years, Canadian courts adopted the *Siskina* principle wholeheartedly as was stated in *Elesguro Inc. v. Ssangyong Shipping Co.*³⁰⁰ Yet, some courts have expressed sentiments which put into question the continuing dominance of the *Siskina* principle.³⁰¹

In *United States v. Friedland*,³⁰² Spencer J., of the British Columbia Supreme Court, granted leave to serve the defendant with the *ex juris* originating process for the Mareva injunction in aid of foreign proceedings for a pecuniary claim under the Supreme Court Rules r.

³⁰⁰ (1980), 19 C.P.C. 1 (F.C.T.D.). The charterparty was entered into outside Canada by the plaintiff and the defendant, both of whom were foreign corporations and neither carried on business in Canada. The charterparty's alleged breach occurred outside Canada. The plaintiff sought an order for service *ex juris* and a Mareva injunction restraining the defendant from removing the vessel, which happened to have come to Vancouver from the jurisdiction. While Collier J. stated: "The fact that there may be no geographical connection in Canada with the cause of action is just one of many matters to be considered. The lack of connection will not automatically debar service *ex juris*.", he concluded that the fact that there was the existence in the forum (the Federal Court) of assets to be subject to the injunction was not a compelling or persuasive reason to conclude forum convenience in favor of Canada, and to permit service *ex juris*,

³⁰¹ Michell, *supra* note 180 at 780.

³⁰² *United States v. Friedland* (20 August 1996), Vancouver 2845/C 963067 (B.C.S.C.).

13 (3), on grounds that there was no cause of action in the jurisdiction but there were about to be assets in it, as there was a real and substantial connection between the defendant and the province. From this decision, it can clearly be understood that in considering ex-jurisdiction service of a Mareva injunction the issue becomes not whether the court possesses a cause of action, but whether there is a real and substantial connection between the defendant and the jurisdiction. At least, in British Columbia, the *Siskina* principle regarding an ex-jurisdiction service of writ has been set aside.

However, in *Friedland*, Spencer J. indicated, "Mr. Friedland has invoked the jurisdiction of this court by commencing proceedings to enforce privilege between himself and his Colorado solicitors."³⁰³ It is, therefore, still unclear whether ex-jurisdiction service can be granted only if there are a defendant's assets within the jurisdiction.

The Supreme Court of Canada has apparently swept out the *Siskina* principle as to one of its substantive element.³⁰⁴ In *BMW v. Canadian Pacific Ltd.*,³⁰⁵ upon granting an interlocutory injunction to restrain the company from changing the existing work schedule of its employees, McLachlin J. held that the court has jurisdiction to order an interim injunction even in the absence of a cause of action seeking final relief, as any restrictions stemming from *Siskina* as to the courts' power to make such orders had been removed by the Law Lords in *Channel Tunnel*.³⁰⁶ Furthermore, in *Friedland*,³⁰⁷ the British Columbia Supreme Court said, "since the *BMW* case, it is now clear that interlocutory assistance can be granted to proceedings in a foreign court without an underlying cause of action."³⁰⁸ This line of decision was soon followed in *Adler, Coleman Clearing Corp. (Trustee of) v. Roddy Diprima Ltd.*³⁰⁹

³⁰³ *Ibid.* para. 26.

³⁰⁴ Michell, *supra* note 180 at 781.

³⁰⁵ [1996] 2 S.C.R. 495

³⁰⁶ *Supra* note 205.

³⁰⁷ *Supra* note 302.

³⁰⁸ *Ibid.* at para. 27.

³⁰⁹ (1997), 28 B.C.L.R. (3d) 181 (B.C.S.C.). It is argued whether the Mareva injunction can be granted where there is no cause of action which is justiciable in British Columbia. The British Columbia Supreme Court accepted the decision in *BMW*, which says "the absence of a cause of action claiming final relief in the Supreme Court of British Columbia did not deprive the court of jurisdiction to grant an interim injunction", and granted the Mareva injunction. One of the reasons of this decision is that as a Mareva injunction acts *in personam* and that once the defendant or his agents or transferees come into the province, they will be subject to the *in personam* jurisdiction of the court.

Thanks to these decisions, the Supreme Court of Canada has set aside in a non-Mareva case the rigid threshold requirements which were stated in *Siskina* and which British Columbia courts had allowed in Mareva cases.³¹⁰

3.2.2 Merit of Case

Canadian courts do not clearly set the threshold requirement for the merit of case. They respectively adopt a "*prima facie* case", a "substantive cause of action", a "good arguable case" or a "strong *prima facie* case".

In *Elesguro v. Ssangyong*,³¹¹ the court pointed out that the material in support should show a good cause of action against the defendant.³¹² The Ontario Court of Appeal in *Chitel*³¹³ approved "a strong *prima facie* case" requirement. However, the Supreme Court of Canada in *Aetna*³¹⁴ missed the opportunity to settle this controversy. Estey J. refers to the "strong *prima facie* test" promulgated in *Chitel*, but only in the context of his historical account of the development of Canadian law.³¹⁵

In a British Columbia case, *Bache Halsey Stuart Shields Inc. v. Charles*,³¹⁶ the Mareva injunction was granted and the court held that the plaintiffs had satisfied the court that they had "an arguable claim". But in *City Sheet Metal (1976) Ltd. v. Enright Engineering Ltd.*³¹⁷ the British Columbia Supreme Court adopted the strong *prima facie* case test as set out in *Chitel*. On another occasion, in *Picotte Insulation Inc. v. Mansonville Plastics (B.C.) Ltd.*³¹⁸ the court

³¹⁰ Regarding requirements for the Mareva injunction in aid of foreign proceedings, see Michell, *supra* note 180 at 792-794. He says, "*Siskina* is dead in Canada." *Ibid.* at 805.

³¹¹ *Supra* note 300.

³¹² *Ibid.* at 14.

³¹³ *Supra* note 166. However, in this case, a Mareva injunction was dismissed because the plaintiff failed to make the necessary full and frank disclosure of all the relevant facts and of the expected position of the defendant.

³¹⁴ *Supra* note 167.

³¹⁵ Dunlop *supra* note 117 at 175.

³¹⁶ (1983), 49 B.C.L.R. 396 (B.C.S.C.).

³¹⁷ B.C.S.C., Robinson L.J.S.C., 23 Apr. 1985, summarized (1985), 33 A.C.W.S. (2d) 217.

³¹⁸ (1985), 48 C.P.C. 169 (Ont. H.C.J.). The applicant argued that the previous judge had erred in treating the matter as an application for a Mareva injunction when there was insufficient evidence of an intention to move the goods out of the province to justify granting one. Reid J. replied to this, "In my respectful opinion the error, if there was one, was to treat the application as one of the Mareva type at all for the plaintiff's object here is to enjoin the very goods that are the subject-matter of the suit, not some other goods or assets." Subsequently he said, "The difference for our purposes on this application is to make it unnecessary for the applicant to show a strong *prima facie* case." *Ibid.* at 171.

held that in order to preserve the subject-matter in litigation, the plaintiff need only satisfy the *American Cynamid* test, which is a “serious question to be tried”, rather than the more stringent Mareva guidelines, in which a strong *prima facie* case was required.

3.2.3 Risk

3.2.3.1 Foreign Based Defendant-Federal Concern

In *Dean v. Ford*³¹⁹ in British Columbia, because the defendant was a Canadian resident, a Mareva jurisdiction was not granted. Afterwards, while the requirement for the defendant to be a foreigner was set aside and absorbed in “a real risk” as in England, there was a somewhat different approach to this issue in Canada. This was called “the federal concern” or “the federal fact”, which weighs against the granting of a Mareva injunction. Thus, in *Aetna* Estey J. questioned whether “the principles, as developed in the United Kingdom courts, survive intact a transplantation from that unitary state to the federal state of Canada?”³²⁰ He stated as follows:

In the Canadian federal system, the appellant [the defendant Aetna] is not a foreigner, nor even a non-resident in the ordinary sense of the word. It is capable of ‘residing throughout Canada and did so in Manitoba. It is subject to execution under any Manitoba judgment in every part of Canada. . . . In some ways, ‘jurisdiction’ extends to the national boundaries, or, in any case, beyond the provincial boundary of Manitoba. . . . The Mareva consideration arising in this appeal is the effect of a rightful removal of assets in the ordinary course of business by a resident defendant to another part of the federal system. This by itself will not trigger such an exceptional remedy as it well might do in the United Kingdom where the jurisdiction of the court and the boundaries of the country coincide.³²¹

In *Aetna*, the court required that the “federal fact” be taken into consideration with all other relevant factors in determining whether there is a real risk that, if the defendant deals with

³¹⁹ *Supra* note 166.

³²⁰ *Supra* note 167 at 124.

³²¹ *Ibid.* at 124, 125.

the assets in the manner complained of, the plaintiff will in the end have an unenforceable judgment.³²²

Subsequently, the Ontario High Court of Justice examined in *NEC Corp. v. Steintron Int. Electronics Ltd.*³²³ how effectively the reciprocal enforcement mechanism works in the context of facts which would normally support a Mareva injunction. In this case, the court held that while under the Reciprocal Enforcement of Judgments Act the court had no jurisdiction to entertain the motion for an injunction, the court could grant a Mareva injunction on the basis that the plaintiff could commence an action to enforce the British Columbia judgment instead.³²⁴

This framework has been followed in Canada even after the worldwide Mareva injunction was granted in *Mooney v. Orr*,³²⁵ and this rule was confirmed in several subsequent cases. This "jurisdiction" for the purposes of a Mareva injunction in the federal context is broad enough to include assets located anywhere in Canada and it has been confirmed in *First Choice Capital Fund Ltd. v. First Canadian Capital Corp.*³²⁶ that "the domestic Mareva injunction" applied when assets are located in province other than that in which the application for the injunction has been made.

3.2.3.2. Real Risk

Saunders J. clearly put the problem regarding "a real risk" in *Bank of Montreal v. James Main Holdings Ltd.*³²⁷ He said: "The problem is that they are met in most cases in which

³²² McAllister, *supra* note 125 at 100.

³²³ B.C.S.C. Southin J., 10 Sept. 1985, and see (1985), 5 C.P.C. (2d) 182 (Ont. H.C.J.). A Japanese company commenced an action in British Columbia against a Canadian purchaser for the price of electronic goods sold and delivered. The plaintiff moved for judgment and an order continuing the Mareva injunction which had been obtained earlier. Judgment was granted on September 10, 1985, but the Mareva order was not continued since various other enforcement mechanisms were available to the judgment creditor. Three days later, the British Columbia judgment was registered in Ontario pursuant to an order under the Reciprocal Enforcement Act. On the same day a notice of appeal was served, as a result of which a writ of execution could not be served. Three days later the defendant sold its warehouse in Ontario and, at the same time moved to set aside registration of the judgment. The plaintiff, in turn, moved for a Mareva injunction pending the outcome of the appeal in British Columbia. The court dismissed the application. Subsequent to the decision the defendant moved truckloads of inventory from its warehouse to an unknown destination and conducted inventory clearance sales. The plaintiff commenced an action in Ontario two days after the decision in British Columbia and then moved for a Mareva injunction.

³²⁴ *Ibid.* at 205.

³²⁵ (1994), 98 B.C.L.R. (2d) 318 (B.C.S.C.), (1994), 100 B.C.L.R. (2d) 335 (B.C.S.C.).

³²⁶ [1997] 9 W.W.R. 177 (Sask. Q.B.).

³²⁷ (1982), 26 C.P.C. 266 (Ont. H.C.J.).

money judgments are sought from which would follow that most plaintiffs may be entitled to Mareva injunctions. Except in the case of affluent defendants with firm roots in the jurisdiction, there would seem to me to always be some risk that assets will be removed or disposed of so as to render a defendant judgment proof.”³²⁸ He concluded that what must be proved is some unusual circumstance related to the risk of removal or disposition.³²⁹

Regarding the degree of risk, Ontario High Court judges, Osborne J. and Osler J., took a stricter approach in evaluating evidence of real risk than the English courts suggested, so in *Caisse Populaire Laurier D'Ottawa Ltée v. Guertin*,³³⁰ the application for a Mareva injunction was dismissed.

In *MacIssac, Clark & Co. v. Koopmans*,³³¹ the court held that if the only evidence was an affidavit deposing the law firm's belief in a real danger of disposal of the only assets, it was not enough to convince the court of “a real risk”.

In *Leaton Leather & Trading Co. v. Ngai*,³³² the court discussed whether the plaintiff is required to prove not only that there is a real risk that the defendant's assets will be disposed of or dissipated before trial, but further that the purpose of this disposition or dissipation is reproachable. The British Columbia Supreme Court referred to these two lines of cases and stated:

“As doing justice between the parties in some cases will not be accomplished by requiring that wrongfulness be proven with respect to the dissipation or disposal of assets, in my view

³²⁸ *Ibid.* at 273.

³²⁹ In *Adler v. Fundex Int. Ltd.* the court dismissed the application for the Mareva injunction since the plaintiff had not shown a real risk that the assets of either defendant would be removed from the jurisdiction. (1982), 14 A.C.W.S. (2d) 147.

³³⁰ (1983), 36 C.P.C. 63 (Ont. H.C.J.).

³³¹ (1983), 50 B.C.L.R. 8 (B.C. Co. Ct.).

³³² (1997), 32 B.C.L.R. (3d) 14 (B.C.S.C.). This case is in the special circumstance where the evidence shows that the defendant's assets could well be disposed of or dissipated before the trial but falls short of providing that the purpose of that dissipation or disposition would be to avoid payment of the judgment. The court indicated that although the defendants had not moved there to avoid paying the judgment nor had they sold assets solely to avoid paying the defendants, they had taken no steps to pay the judgment although they knew that it existed (Although the Hong Kong courts had awarded the plaintiff judgment against Maple Fur and against the defendants as guarantors of Maple Fur, the defendants insisted that there had been procedural defects.), or to correct the situation, having concluded that it was wrongly and unfairly decided (namely, they did not appeal the decision). From this decision it can be concluded that unusual conduct of a defendant is strong proof for the court to grant “a real risk”.

the *Mooney* line of authority (the court must 'balance the interests of the two parties having regard to all the relevant factors in each case, to reach a just and convenient result. Included in such factors will be evidence that establishes . . . a real risk of their disposal or dissipation so as to render nugatory any judgment') is more in keeping with the exercise of this jurisdiction than is the more restrictive approach set out in the other line of authority."³³³

3.2.4 Mareva Injunction after Judgment

In *Hickman v. Kaiser*,³³⁴ the B.C. Supreme Court agreed with the decision in *Orwell Steel*³³⁵ citing the remarks of Farquharson J.: "There is accordingly, in my judgment, power to grant an interlocutory injunction between final judgment and execution. If there is such a power, there seems to be no logical reason why a Mareva injunction should not be used in aid of execution."³³⁶

3.3 Japan

As I mentioned in Chapter I, the Japanese pre-judgment remedy system was modeled on the German system. Under German law of the 14th century onward, it was considered that a pecuniary claim was secured by all the assets of a debtor. In other words, a creditor had a general interest in all of his debtor's assets even in the absence of a breach of duty by the debtor. Temporary seizure of a debtor's assets came to be granted by the courts on the basis of potential debtor insolvency. Japanese law accepted this concept.³³⁷ Therefore, the Japanese provisional attachment (*Kari-sashiosae*) is different from the Mareva injunction in that the authority of the Japanese courts to grant a provisional attachment is broader than that provided in England and Canada by the Mareva injunction.

3.3.1 Kinds of Pre-judgment Remedy

³³³ *Ibid.* at 17.

³³⁴ (1995) 39 C.P.C. (3d) 364.

³³⁵ *Supra* note 286.

³³⁶ *Supra* note 334 at para. 14.

³³⁷ Matsuura, *supra* note 79 at 51.

The content of the Civil Preservation Law 1989 is similar to that of its predecessor. The provisional remedy (*Hozen-meirei*) is provided therein. There are two types of provisional remedy generally translated as "provisional attachment" (*Kari-sashiosae*) and "provisional disposition" (*Kari-shobun*).

The order of provisional attachment (*Kari-sashiosae*) temporarily attaches a defendant's property.

The order of provisional disposition (*Kari-shobun*) consists of a wide range of orders, i.e. (1) *Keisôbutsu ni-kansuru* (with respect to a subject matter in dispute) *Kari-shobun*: an order temporarily enjoining a defendant from disposing of (usually specific) asset(s), (2) *Kari no Chii wo Sadameru* (with respect to the establishment of provisional status) *Kari-shobun*: an order directing a defendant temporarily to deliver or return a specific asset to a plaintiff or a third party, an order directing a defendant temporarily to perform or to refrain from performing a specific act,³³⁸ an order to establish temporarily a legal relationship involved in the dispute, and so on.³³⁹

Both provisional attachment (*Kari-sashiosae*) and provisional disposition with respect to a subject matter in dispute (*Keisôbutsu ni-kansuru Kari-shobun*) are orders to prevent a defendant from disposing of his assets. Provisional attachment (*Kari-sashiosae*) is for a pecuniary claim and provisional disposition with respect to a subject matter in dispute (*Keisôbutsu ni-kansuru Kari-shobun*) is for complaints in regard to a right and property other than money.³⁴⁰ Provisional attachment (*Kari-sashiosae*) may be equivalent to the Mareva

³³⁸ Article 23 (Paragraph 2): Order for provisional disposition with respect to the establishment of provisional status may be issued in a case where it is deemed necessary in order to avoid remarkable damage or urgent danger occurring to the creditor with respect to the relationship of rights in a dispute. For the English translation of the Law, see *infra* note 343. Amongst this category of provisional disposition, an order to do or not to do a specific performance prior to wrongdoing is similar to the injunction *quia timet*, because they both are to prevent an apprehended legal wrong, though none has yet occurred. However, they are different in that a sanction against a defendant who does not comply with the Japanese provisional disposition order is that, with the leave of the court the plaintiff can execute the order against the defendant; namely, the plaintiff can do the specific performance or undo what the defendant did. Where the performance can be done only by the defendant, the plaintiff's only recourse is to apply to the court for damages in Japan. In England and Canada the sanction is contempt of court. See generally regarding injunction *quia timet*, Bean, *supra* note 113 at 3.

³³⁹ A typical example of provisional disposition (*Kari-shobun*) would be an order to enjoin a defendant from transferring title of property which is the subject of the contract, or an order to pay wages to employees, lay-off of whom is in dispute.

³⁴⁰ This principle has been repeatedly affirmed. See e.g. the Supreme Court, December 19, 1932. (*Min-shû*, 11-22-2359)

injunction in that they are both designed to preserve a defendant's assets for judgment regarding a pecuniary claim. On the other hand, provisional disposition with respect to a subject matter in dispute (*Keisôbutsu ni-kansuru Kari-shobun*) may also be similar to the Mareva injunction in its wording since they both order a defendant not to dispose of her assets, but provisional disposition with respect to a subject matter in dispute (*Keisôbutsu ni-kansuru Kari-shobun*) is exercised by seizure or registration of the assets as is provisional attachment (*Kari-sashiosae*).³⁴¹ The Mareva injunction, however, is a remedy *in personam*.³⁴² Provisional attachment (*Kari-sashiosae*) and provisional disposition with respect to a subject matter in dispute (*Keisôbutsu ni-kansuru Kari-shobun*) can be issued *ex parte* under Article 3 and Paragraph 4 of Article 23 of the Civil Preservation Law (hereinafter, where I write an article number, the provision is that of this act). Note that the courts have no authority to issue an order to prevent a defendant from disposing all of his assets up to a yen limit.

In the Civil Preservation Law, provisions relevant to jurisdiction for courts issuing provisional attachment (*Kari-sashiosae*) and provisional disposition with respect to a subject matter in dispute (*Keisôbutsu ni-kansuru Kari-shobun*) are as follows:

Article 20 for *Kari-sashiosae*

(Paragraph 1) Order for provisional attachment may be issued with respect to a claim with the object of paying money in a case where it is determined that a compulsory execution cannot be conducted or remarkable difficulties occurs in conducting a compulsory execution.

(Paragraph 2) Order for provisional attachment may be issued even in a case where conditions are attached or a term is established to a claim.

Article 23 for *Keisôbutsu ni-kansuru Kari-shobun*

(Paragraph 1) Order for provisional disposition with respect to a subject matter in dispute may be issued in a case where it is determined that a creditor cannot carry out his/her rights or remarkable difficulties occurs in fulfilling his/her rights.³⁴³

³⁴¹ See 4.4.1, below, for a discussion of this issue.

³⁴² See 4.1.1, below, for a discussion of this issue.

³⁴³ For the English translation of the Law, see Research and Training Institute in Ministry of Justice, *Civil Preservation Law* (Tokyo: 1990).

3.3.2 Jurisdiction

Under Paragraph 1 of Article 12,³⁴⁴ in order to obtain provisional attachment (*Kari-sashiosae*) or provisional disposition with respect to a subject matter in dispute (*Keisôbutsu ni-kansuru Kari-shobun*), a plaintiff must apply to the court which has jurisdiction over the cause of action³⁴⁵ or within whose jurisdiction an asset to be subject to the order is located. Accordingly, even where there is no cause of action in Japan, Japanese courts can issue a provisional order - provided a defendant's asset is located within the court's jurisdiction.

Moreover, although a provisional order must be served on a defendant subject to Article 17, and if he is in a foreign country it must be served on him under the Hague Convention, a court or bailiff can execute the provisional order under Paragraph 1 of Article 43 even if its service is not completed.

The orders both for provisional attachment (*Kari-sashiosae*) and for provisional disposition with respect to a subject matter in dispute (*Keisôbutsu ni-kansuru Kari-shobun*) cover real estate, tangible movables and intangible assets, including intangible movables and intellectual property. These orders are issued against an asset belonging to a defendant. For protection of the defendant, where there are assets other than a bank account, provisional attachment (*Kari-sashiosae*) against the bank account is generally not granted, because seizing a defendant's bank account severely affects his ordinary course of business and life.³⁴⁶

3.3.3 Substantive Requirements

The Japanese courts are fairly liberal in issuing both the order of provisional attachment (*Kari-sashiosae*) and the order of provisional disposition with respect to a subject

³⁴⁴ Article 12(Paragraph 1): Cases of preservative order shall be conducted by the competent court on the merits of a case or the District Court having competence over the place where the matter to be provisionally attached or the subject matter in dispute is located. For the English translation of the Law, see *ibid*.

³⁴⁵ It was judged regarding the analogous provision in the preceding act by the Supreme Court of Japan under the Constitution 1890, *Taishin-in*, that where an action has been commenced, another court which possesses cause of action within the jurisdiction cannot issue a pre-judgment provisional order. The Supreme Court, August 28 1930, (*Minshû* 19-1509).

³⁴⁶ *Tokyo Chisai Hozen Kenkyû-kai* [Society for the Study of Provisional Remedy in the Tokyo District Court] "*Yokin-saiken ni-taisuru Kari-sashiosae* [Provisional Attachment against Bank Account]" (1985) 1162-3 *Hanrei-jihô* 3 at 4.

matter in dispute (*Keisôbutsu ni-kansuru Kari-shobun*) where there is a chance that a judgment may not be carried out because of disposition of a defendant's assets. In over 40 percent of "ordinary" lawsuits filed with District Courts, the plaintiff will make an application for such relief.³⁴⁷

Under Article 13,³⁴⁸ Article 20 and Article 23, in order for a court to issue either an order of provisional attachment (*Kari-sashiosae*) or an order of provisional disposition with respect to a subject matter in dispute (*Keisôbutsu ni-kansuru Kari-shobun*), there must be two grounds. First, there must be a reasonable chance that a favorable judgment for the plaintiff would lose its practical effect unless the provisional remedy is ordered ("a real risk"). Second, there must be reasonable grounds on which the plaintiff can win the case ("merits of case"). A plaintiff is also usually required to deposit money in the court. The requirements of the Mareva injunction, "merits of case", "a real risk", and "undertaking" are common to the Japanese system. In addition to these, specification of land and intangible movables can be a threshold requirement in the Japanese system.

A plaintiff often shows "a real risk" and "merits of case" by submitting his or a lawyer's report in which the relevant matters are explained.³⁴⁹ For this report, the plaintiff is required, for example, to research the financial situation of the defendant. However, as this report is not an affidavit, even if a plaintiff represents false information, she is not punished for her conduct. She is merely responsible for damages suffered by a defendant because of the false information. Moreover, in Japan a plaintiff is not required to give full and frank disclosure. This may be one of the reasons a provisional remedy is more easily granted in Japan than in England and Canada. A plaintiff in Japan can submit evidence exclusively favorable to his case with respect to "a real risk" and the "merits of case".

³⁴⁷ Davis, *supra* note 41 at 208.

³⁴⁸ Article 13: (Paragraph 1) A person for preservative order shall be made by clarifying the gist, rights or relationship of rights to be preserved and the necessity of preservation. (Paragraph 2) Rights or relationship of rights to be preserved and the necessity of preservation shall be clearly explained. For the English translation of the Law, see *supra* note 343.

³⁴⁹ *Tokyô Chihô Saiban-sho Minji Dai 9-bu* [the Tokyo District Court, 9th Department of the Civil Division] "*Minji Hozen-hô no Unyô-jyôkyô* [Current Application of Civil Preservation Law]" (1992)1416-3 *Hanrei-jihô* 3 at 5.

3.3.3.1 Specification of the Assets

In the past it was considered that a provisional attachment order (*Kari-sashiosae*) applied to all of the defendant's assets. Under the old law, it was unnecessary to specify the assets to be frozen upon issuing the order, but necessary to do so upon execution of the order.³⁵⁰ However, in practice, the courts issued an order in which the real estate and intangible movables³⁵¹ subject to it were specified, because this form was convenient for rapid execution. The court issuing the order for real estate or intangible movables usually had jurisdiction to execute the order. The court could issue the order to grant temporary attachment over real estate or intangible movables and an order for execution of the temporary attachment at the same time. This saved the court from having to issue a separate order for execution.³⁵²

An applicant for provisional disposition with respect to a subject matter in dispute (*Keisôbutsu ni-kansuru Kari-shobun*) may specify the assets subject to the order, because the cause of action of this type of order is usually the right to trace specified assets. By contrast, although under Article 21³⁵³ an applicant for a provisional attachment order for real estate or intangible movables should specify them, an applicant for provisional attachment (*Kari-sashiosae*) for tangible movables still does not have to specify the defendant's assets until the time of execution.

Japanese courts take it for granted that orders both of provisional attachment (*Kari-sashiosae*) and of provisional disposition with respect to a subject matter in dispute (*Keisôbutsu ni-kansuru Kari-shobun*) must be issued against assets within the country. Otherwise, a court or bailiff could not execute the order and without execution the order would not be effective for preserving the defendant's assets as I will mention later. Although there is no clear provision in the Civil Preservation Law for the assets in question to be located within

³⁵⁰ Supreme Court, January 31, (*Minshû* 11-1-188). Takeshita Morio & Fujita Kôzô eds., *Minji Hozen Hô* [*The Civil Preservation Law*], vol. 1 (Tokyo: Seirin Shoin, 1996) at 202.

³⁵¹ Proceedings for execution over intellectual property like patent follows those over intangible movables under Article 50(4).

³⁵² Suzuki Masahiro, "23 *Kari-sashiosae Meirei ni-okeru Mokuteki-zaisan no Tokutei-hyôji* [Specification of assets subject to provisional attachment]" (1969) 22 *Bessatsu Juristo* 52.

³⁵³ Article 21: Order for provisional attachment shall be issued for certain matters. However, order for provisional attachment with respect to movables may be issued without specifying the object. For the English translation of the Law, see *supra* note 343.

the court's jurisdiction, it is clear that assets subject to an order must be within the court's jurisdiction.³⁵⁴ Thus, the worldwide order is impossible.

3.3.3.2 Merits of Case

The degree to which "merits of the case" to be proven can be said to be similar to that of the Mareva injunction in England; i.e. likely success on the "a good arguable case" basis. Where the plaintiff's right is founded on a foreign law, the question arises as to whether Japanese courts can properly judge the merits of the case. The answer is yes. Japanese courts have authority to interpret a foreign law, apply it to the case, and decide whether or not the case is "a good arguable case" and they have that same authority even where a foreign court possesses jurisdiction over the cause of action. Provisional attachment (*Kari-sashiosae*) and provisional disposition with respect to a subject matter in dispute (*Keisôbutsu ni-kansuru Kari-shobun*) in aid of foreign proceedings are always granted. Moreover, it is clearly provided under Paragraph 2 of Article 20 that a provisional attachment order may be awarded even where a right has not vested in the plaintiff for the simple reason that sufficient time has not elapsed or a condition precedent has not been satisfied.

Generally speaking, the "merits of case" are more important than "a real risk" for granting a pre-judgment provisional order. Where the "merits of case" are established, courts are not reluctant to grant provisional attachment (*Kari-sashiosae*) even if it seems that the defendant has sufficient assets, because the financial situation of the defendant could change time over time and it is always possible that the defendant might become insolvent, even though courts would hesitate to issue the order against a big company, such as Sony or Tokyo-Mitsubishi Bank.

Japanese courts are less reluctant to issue an order for provisional disposition with respect to a subject matter in dispute (*Keisôbutsu ni-kansuru Kari-shobun*) because since the subject matter is likely to be specific goods or real estate, the damage suffered by a plaintiff in

³⁵⁴ In my opinion, where a plaintiff applies for an order against tangible movables, if she *prima facie* shows that a defendant's assets outside Japan are not sufficient for her claim and a defendant's assets in Japan have not been found, a provisional attachment order (*Kari-sashiosae Meirei*) can be granted against a defendant's tangible movables in Japan. The courts, however, have never had a chance to try this issue.

the case where the subject matter is disposed of is less easily recoverable in another way than would be the case with a pecuniary claim.

In special circumstances courts can grant an order against a third party. Article 423 of the Civil Code of Japan provides:

(Paragraph 1) An obligee may, in order to protect his claim, exercise the rights belonging to the obligor; however, this shall not apply to such rights as are strictly personal to the obligor.

(Paragraph 2) So long as the claim is not yet due, the obligee cannot exercise the rights mentioned in the preceding paragraph except by judicial subrogation; however, this shall not apply to an act of preservation.³⁵⁵

A plaintiff can obtain a cause of action against a third party under this provision and the court can issue an order to freeze the third party's assets in a situation similar to *Aiyela*.³⁵⁶

3.3.3.3 Real Risk

Courts may issue an order of provisional attachment (*Kari-sashiosae*) where the execution of a judgment cannot be carried out or where it is feared that there will be considerable difficulty in carrying out the execution of a judgment unless the order is granted under Article 20.³⁵⁷ This requirement is possibly met in cases where a defendant may dissipate, dispose of, or conceal his assets and so on, or where research of a defendant's assets becomes difficult because of absconding or frequent changes of her residence.³⁵⁸ Under the old law, "a real risk" was always assumed where a plaintiff had to enforce a Japanese judgment in future in a foreign country.³⁵⁹ This is considered as one of the elements to show "a real risk" under the newly enacted Civil Preservation Law.³⁶⁰

³⁵⁵ For the English translation of the Code, see *supra* note 97.

³⁵⁶ *Supra* note 212.

³⁵⁷ For the English translation of the Article, see 3.3.1 above.

³⁵⁸ The Legal Training and Research Institute, *Minji Bengo no Tebiki (Hozen-shobun Kankei)* [Guidance for Civil Litigation (Concerning the Provisional Remedy)] 5th ed. (Tokyo: 1988) at 15.

³⁵⁹ Article 738 (repealed): Provisional attachment may be effected in case, if it is not done, the execution of the decision can not be carried out or there is a fear of a considerable difficulty in carrying out the execution of the decision, or especially, it may be to be carried out in a foreign country. For the English translation of the Code,

For an order of provisional disposition with respect to a subject matter in dispute (*Keisôbutsu ni-kansuru Kari-shobun*) "a real risk" should relate to the assets subject to the litigation. It does not matter whether the defendant has assets sufficient to cover the damages suffered by the plaintiff as the result of the breach of the order. Accordingly, it is possible that "a real risk" requirement is met in all cases where the subject assets may be dissipated, disposed of, concealed and so on.³⁶¹

It is as difficult to set clear guidelines for "a real risk" under the Japanese law as I have shown it to be under English and Canadian law in my discussion of the English Mareva injunction. Similar factors are taken into consideration in Japanese courts. Issuance of the order after judgment generally has no value for a plaintiff because execution proceedings of a judgment and a civil preservation order are usually the same, and the plaintiff cannot expedite seizure of assets by obtaining the preservation order.³⁶² A plaintiff generally shows "a real risk" by submitting his or a lawyer's report in which the financial situation of the defendant is explained.³⁶³ For this report, a plaintiff is required to research the financial situation of a defendant. However, since this report is not an affidavit, even if the plaintiff makes false representations, she is not punished for her conduct. She is only responsible for damages suffered by the defendant because of her misrepresentations.

3.3.4 Undertaking

When courts grant either type of provisional relief, provisional attachment (*Kari-sashiosae*) or provisional disposition with respect to a subject matter in dispute (*Keisôbutsu ni-*

see Nakane Fukio, *The Code of Civil Procedure of Japan* (Tokyo: Eibun Hôrei-sha, 1983).

³⁶⁰ The issue repeatedly discussed with respect to the issue of "a real risk" is whether "a real risk" is granted in the case where the pecuniary claim is secured. Generally speaking, "a real risk" is granted even where the pecuniary claim is guaranteed by a guarantor, whereas, "a real risk" is not granted where the pecuniary claim is secured by mortgage. See, the Tokyo District Court, September 3, 1975. (*Hanrei-jihô* 814-130); the Tokyo High Court, November 25, 1992. (*Hanrei-jihô* 1444-76).

³⁶¹ The Legal Training and Research Institute, *supra* note 358 at 16.

³⁶² However, there are some exceptions. See Yoshikawa Daijirô, *Hozen-shobun no Kenkyu* [The research of Provisional Remedy] (Tokyo: Kobun-dô, 1937) at 67.

³⁶³ *Tokyô Chihô Saiban-sho Minji Dai 9-bu* [the Tokyo District Court, 9th Department of the Civil Division], *supra* note 349 at 5.

kansuru Kari-shobun), under Article 14³⁶⁴ the judge may require the plaintiff to submit a substantial bond or other form of security to compensate the defendant if the temporary relief is later reversed. Such a bond is normally satisfied by a bank guarantee instead of lodging the entire amount with the court.

³⁶⁴ Article 14(Paragraph 1): Preservative order may be issued by furnishing security, or under the condition of implementing preservative execution that security is furnished within the fixed period deemed appropriate or without furnishing security. For the English translation of the Law, see *supra* note 343.

Chapter Four

Effect of Mareva Injunction

It makes sense, after examining the applicability of a law, to examine the effect of that law. Generally speaking, the effect of a law is clearly defined by statute or case law. In the case of an order, the effect is determined by the provisions of that order - assuming the court has the authority to issue such an order. This chapter examines what kind of order a court can issue to freeze a defendant's assets. At the same time, since it is not uncommon for an order to fail to specify what remedies are available against a violator of the order, there is a need to interpret the law surrounding or underlying that order.

The Mareva injunction is an equitable remedy, and as a result of this, the Mareva injunction acts *in personam*. As the Japanese provisional attachment or provisional disposition with respect to a subject matter in dispute work directly against assets, it may be said that the Japanese remedy acts *in rem*. Although it might be difficult to identify the differences between the two orders by looking only at this dichotomy, I hope to illustrate the effects that the respective conceptual underpinnings have on the way in which the orders operate. In a situation where the defendant has no creditors other than the plaintiff, or a third party with an interest in the defendant's assets, the difference between the two types of remedy is not apparent. The difference between their effects arises with respect to: (1) how the order affects a defendant's ability to transfer his assets; and (2) to what extent the order may affect the third party. I will examine these questions in this chapter.

One of the features of the Mareva injunction in England and Canada that differs from the Japanese pre-judgment provisional remedy is that the courts have authority to issue an order ancillary to the Mareva injunction in order to make the original injunction more effective. I will, therefore, in this chapter, review the process of development of the order ancillary to the Mareva injunction.

4.1 Effect

4.1.1 Remedy *in personam* or *in rem* ?

A typical wording of the Mareva injunction is as follows:

It is ordered and directed that the defendant by their officers, agents or servants or otherwise be restrained and an injunction is hereby granted restraining them from removing from the jurisdiction or otherwise disposing of any of their assets, including and in particular any moneys forming an account in the name of the defendant standing at the Bank of Credit and Commerce International SA, 100 Leadenhall St., London EC3, save in so far as the sum exceeds US\$91,087.25.³⁶⁵

In England, the first creditor who commences execution against the defendant's assets has priority over other creditors. Accordingly, if the above order had the effect of attaching the defendant's assets after getting judgment, the plaintiff who had obtained a Mareva injunction could rank prior to another creditor. However, in *Cretanor Maritime*,³⁶⁶ Buckley L.J. stated:

It seems to me. . . that it is not the case that any rights in the nature of a lien arise when a Mareva injunction is made. Under such an injunction the plaintiff has no rights against the assets. He may later acquire such rights if he obtains judgment and can thereafter successfully levy execution upon them, but until that event his only rights are against the defendant personally.³⁶⁷

The Mareva injunction never gives the plaintiff priority over another creditor, and its breach makes the contravening party liable for contempt of court.³⁶⁸

Moreover, the Mareva injunction does not affect a third party's rights, e.g. the rights of a mortgagor under a mortgage contract. In *Iraqi Min. of Defence v. Arcepey Shipping Co. S.A.*,³⁶⁹ the court held that a pre-existing equitable mortgage ranks ahead of the Mareva injunction, saying "the purpose of the Mareva jurisdiction was not in any way to improve the

³⁶⁵ Hoyle, *supra* note 99 at 7,8. The courts prefer to grant this type of "maximum sum" order like the last line of the above. A "maximum sum" order, however, may create problems for the banks if the assets in question are in more than one branch.

³⁶⁶ *Supra* note 181.

³⁶⁷ *Ibid.* at 977.

³⁶⁸ Hoyle, *supra* note 99 at 61.

³⁶⁹ [1980] 1 All E.R. 480, [1980] 1 Lloyd's Rep. 632 (Q.B.). See also *Wagner v. Barnes*, (1984), 58 B.C.L.R. 187 (B.C.S.C.).

position of claimants in an insolvency but simply to prevent the injustice of a . . . defendant removing his assets from the jurisdiction which otherwise might have been available to satisfy a judgment.”³⁷⁰

This decision brings up several noteworthy points. First, a plaintiff with a judgment against the defendant can enforce it against his assets, whether or not these assets are covered by the Mareva, but he can do so only subject to the rights other persons have in the property.³⁷¹ Secondly, while a Mareva injunction is in effect, any person with a claim against the defendant can proceed to judgment and enforce such judgment against assets frozen by the injunction. Thirdly, pre-existing liabilities of third parties will, especially in the case of banks, be respected even if these liabilities are still not legally enforceable *e.g.* set-off (as I will mention later). Finally, third party *bona fide* purchasers for value without notice of the injunction will get good title regardless of the legal restrictions on the defendant with respect to the assets.³⁷² All of the above are features of a remedy *in personam*. A remedy *in personam* is enforceable by the sanction of contempt of court, under which a debtor who fails to comply with the order can be punished by a fine up to an unlimited amount, and/or imprisonment.³⁷³

However, in *Z v. A-Z*³⁷⁴ Lord Denning said that: “a Mareva injunction is a method of attaching the asset itself. It operates *in rem* just as the arrest of a ship does.” Lest this should be misunderstood, Lord Denning later said that: “It enables the seizure of assets so as to preserve them for the benefit of the creditor; but not to give a charge in favor of any particular creditor.”³⁷⁵ From these words, it can be interpreted that the Mareva injunction allows plaintiffs to seize specific assets owned by defendants.

This decision seems to present two inconsistent lines of reasoning. The basic problem is the vague and equivocal meanings given to “*in rem*”.³⁷⁶ There seem to be three interpretations given to “*in rem*”, depending on the context.³⁷⁷ These are:

³⁷⁰ *Ibid.* at 73.

³⁷¹ *Cretanor Maritime* is the case that the debenture holder successfully applied for the discharge of the injunction. *Supra* note 181.

³⁷² Hoyle, *supra* note 99 at 61. However, “legal disability” is a confusing phrase, here. The plaintiff can lawfully transfer his assets to the third party. There are no obstacles from the point of view of the transaction.

³⁷³ Hoyle, *supra* note 99 at 101.

³⁷⁴ *Supra* note 261.

³⁷⁵ *Ibid.* at 295.

³⁷⁶ Ough, *supra* note 112 at 3 says, “The Mareva injunction. . . are. . . made *in personam* but operating *in rem*

- (1) The effect of restraining the defendant from disposing of his assets.³⁷⁸
- (2) The effect of enabling the plaintiff to deny the validity of a disposition of assets conducted against the order.
- (3) The effect of ranking the plaintiff prior to other creditors.

Lord Denning seemed to use “*in rem*” in accordance with “(1)”, above, in order only to explain that the order takes effect on a third party upon her receipt of the notice regardless of whether the order is served on a defendant or not. Accordingly, his words are not inconsistent with the effect *in personam* of the Mareva injunction.³⁷⁹ In *Babanaft*,³⁸⁰ Kerr L.J. also stated that: “although Mareva injunctions are orders made *in personam* against defendants, they also have an *in rem* effect on third parties. It shows that, . . . the order is binding on third parties who have notice of the injunction.”³⁸¹

4.1.2 Effectiveness of Mareva Injunction

Although it is a fact that the Mareva injunction never creates security or prior ranking among creditors, the question may be asked whether a contract executed in breach of a Mareva injunction is always invalid.³⁸² Generally speaking, a Mareva injunction will not affect any interest which is transferred to a third party by a defendant. Thus a defendant seller who transfers goods to a third party under a contract of sale should not be in breach of the implied terms as to title under the Sale of Goods Act in England and Canada.³⁸³ However, it is open to

without creating rights *in rem*. . . .”

³⁷⁷ Miki Kôichi, “*Shôgai-teki Minji-hozen-shudan no Aratana Kanousei* [New Possibility of Means for International Civil Preservation]” 65:5 Hôgaku-Kenkyu 25 at 30-31. The Japanese provisional attachment has the effect of “(2)” and the German provisional attachment has the effect of “(3)”.

³⁷⁸ A Mareva injunction although made *in personam* operates *in rem* taking effect from the moment it is pronounced on every asset of the defendant which it covers. See Ough, *supra* note 112 at 75.

³⁷⁹ Miki, *supra* note 377 at 30. Hoyle says, “[a Mareva injunction] operates against the assets of the defendant, and so can be said to be *in rem*, but it does not create rights *in rem*.” Hoyle, *supra* note 99 at 61.

³⁸⁰ *Supra* note 272.

³⁸¹ *Ibid.* at 240.

³⁸² A. L. Tyree, “Mareva Injunctions: The Third Party Problem” (1982) Dec. Australian Business Law Review 375 at 377. He only says, “A purchaser who takes with notice will himself be in contempt.”

³⁸³ Rose, *supra* note 147 at 190. Hoyle states that the plaintiff has no right to apply to set aside any disposition that has been made, because of the contempt, although suggesting a possibility that the court could/might

discussion not only whether a third party is responsible for her willful conduct, but also whether she is liable to the plaintiff for damages in negligence where she pays the price directly to the defendant in return for the acquisition of an interest in the assets and enables the defendant to remove the proceeds from the jurisdiction.³⁸⁴

The question also arises as to whether there is a way to prevent a third party from taking part in a contract such as the above. In *Stockler v. Fourways Estates Ltd.*,³⁸⁵ the question arose as to whether the plaintiff could proceed to register a Mareva injunction against the defendant's title to his land under the section 6(1) of the Land Charges Act 1972³⁸⁶ which provides: "(1) There may be registered in the register of writs and orders affecting land-(a)any writ or order affecting land issued or made by any court for the purpose of enforcing a judgment or recognizance." The court held that the injunction was not "an order made for the purpose of enforcing a judgment" within the meaning of the statute, and therefore could not be registered.³⁸⁷ Nevertheless, it may be possible to register a Mareva injunction against title to land under section 57 (1) of the Land Registration Act 1925,³⁸⁸ which provides that: The court . . . may . . . issue an order or make an entry inhibiting for a time, or until the occurrence of an event to be named in such order or entry, or generally until further order or entry, the

declare the transaction is invalid where there was a lack of good faith on the part of the buyer, and/or clear notice of the contempt, or sale at an obvious undervalue sufficient to put a reasonable purchaser on notice. Hoyle, *supra* note 99 at 112.

³⁸⁴ Rose, *supra* note 147 at 190. He states that the third party may possibly be liable, because he defeats the plaintiff's "security". Contrary to this, Hoyle states, "There is, however, no right for a person to sue a contemnor for damages for the contempt *per se*, because the breach is of the court's order, and not of a personal right of the other party" and cites *Re Hudson, Hudson v. Hudson* [1966] Ch. 209. Hoyle, *supra* note 99 at 102.

³⁸⁵ [1983] 3 All E.R. 501. (Q.B.).

³⁸⁶ *Land Charges Act, 1972* (U.K.) 1972 c. 61. Burn states: "Any writ or order affecting land issued by a court for the purpose of enforcing a judgment or recognizance (*e.g.* an order of the court charging the land of a judgment debtor with payment of the money due), any order which appoints a receiver or sequestrator of land, and any bankruptcy order, whether it is known to affect land or not, is void against a purchaser for value of the land unless it is registered." E. H. Burn, *Modern Law of Real Property*, 14th ed. (London: Butterworths, 1988) at 721.

³⁸⁷ Ough states, "It would presumably be possible to register a notice or caution in the case of registered land if the property is named." Ough, *supra* note 112 at 13.

³⁸⁸ *Land Registration Act, 1925* (U.K.) 15 & 16 Geo 5, c. 21. Burn states: "An inhibition is also hostile, and is entered on the application of a person interested. Such an entry prevents any dealings with the registered land, either generally or for a given time or until the occurrence of a specified event. This is an extreme step to take and should be considered only in exceptional circumstances, as, for instance, where it is suspected that there has been or is likely to be a fraudulent dealing. Inhibitions are very rarely encountered except for the bankruptcy inhibition automatically entered by the Registrar." Burn, *supra* note 386 at 767.

registration or entry of any dealing with any registered land or registered charge. An order issued pursuant to this section will generally take the following form:

No entry is to be made in the register which contravenes an Order of the High Court of Justice (Queen's Bench Division) dated 10th February 1997 in an action entitled *John Bull v. Shifti Enterprises SA* except under a further Order of the Court or of the Registrar.³⁸⁹

By virtue of the Land Registration Act 1988,³⁹⁰ the register is now open to inspection. Accordingly, a third party has sufficient resources to check the land for encumbrances. In the case of unregistered land the plaintiff has to rely on less scientific methods such as notification to estate agents and solicitors.³⁹¹

In some special circumstances, an additional order can be made for delivery up³⁹² of the defendant's chattels or for appointment of a receiver so that they are in the safe custody of someone who will not allow them to be dissipated. In *CBS United Kingdom Ltd. v. Lambert*,³⁹³ Lawton L.J. stated as follows:

We had to consider whether there is any jurisdiction in the Supreme Court of Judicature to include these requirements in a Mareva injunction and, if there is, whether this was an appropriate case for doing so. The purpose of this judgment is to set out our reasons for

³⁸⁹ Bean, *supra* note 113 at 241.

³⁹⁰ *Land Registration Act, 1988* (U.K.) 1988 c. 3. Under this act the register is open to inspection by the public for the first time. It is possible for any person to discover whether or not a particular plot of land is registered by searching the index map and parcels index.

³⁹¹ Bean, *supra* note 113 at 129, 241.

³⁹² It is held that the order must not authorize the plaintiff to enter the defendant's premises or to seize the defendant's property save by permission, even though the refusal of such consent is contempt of court. In *Grenzservice Spedition GmbH v. Jans*, where the plaintiffs searched the defendants' ranch subject to the order by the court to search the defendants' premises, and the plaintiffs' lawyer failed to keep the search within the terms of the order, the court to which the defendants applied for the order to set aside the injunction granted to set aside the injunction and suggested that the defendants might have a claim at trial for damages against the plaintiffs in regard to the faulty execution of the search order. (1995), 15 B.C.L.R.(3d) 370 (S.C.).

³⁹³ [1983] 1 Ch 37 (C.A.). Even before this case the Australian trial judge in *Pivivaroff v. Chernabaeff*, although it was overruled on appeal, restrained the defendant from disposing of land "except by way of sale and for the best price reasonably obtainable" and restrained dealings with the proceeds except in paying the expenses of sale, in discharging the registered mortgages and in depositing the balance of the proceeds in a bank on one month's call or investing them in authorized trustee investments. (1978), 16 S.A.S.R. 329. See Rose, *supra* note 147 at 183.

making the order. . . . It follows, in our judgment, that this is the kind of case in which both defendants should be ordered to disclose the value, nature and whereabouts of their assets, including bank or other accounts. This, in our judgment, was a clear case for ordering both discovery of assets and the delivery up pending trial of a particular kind of asset.³⁹⁴

Moreover, in *Derby & Co. Ltd. v. Weldon (No.6)*,³⁹⁵ wherein, in order to make a future judgment less effective the sophisticated defendants tried to keep their assets in Switzerland to avail themselves of a Swiss law which did not allow a Swiss court to recognize or enforce an English injunction. The court ordered that the defendants transfer assets located in a foreign country to England and that the transferred assets be held to the sole order of a receiver. Dillon L.J. stated:

To regard the grant of a Mareva injunction not as a matter of territorial jurisdiction to be exercised court by court throughout the various countries of the world where it may be appropriate but as a matter of unlimited jurisdiction *in personam* of the English court over persons who have properly been made parties, under English procedure, to proceedings pending before the English court is consistent with the approach of the English court to the appointment of receivers of the British and foreign assets of English companies. The court has always been ready to appoint a receiver over the foreign as well as British assets of a English company, even though it has recognized that in relation to foreign assets the appointment may not prove effective without assistance from a foreign court. . . . Moreover where a foreign court of the country where the assets are situate refuses to recognize the

³⁹⁴ *Ibid.* at 40, 44. Subsequently, he set the guidelines as follows: First, there should be clear evidence that the defendant is likely, unless restrained by an order, to dispose of or otherwise deal with his chattels in order to deprive the plaintiff of the fruits of any judgment he may obtain. Moreover, the court should be slow to order the delivery up of property belonging to the defendant unless there is some evidence or inference that the property has been acquired by the defendant as a result of his alleged wrong-doing. Secondly, no order should be made for the delivery up of a defendant's wearing apparel, bedding furnishings, tools of his trade, farm implements, live stock or any machines (including motor vehicles) or other goods such as materials or stock in trade, which it is likely he uses for the purposes of a lawful business. Thirdly, all orders should specify as clearly as possible what chattels or classes of chattels are to be delivered up. Fourthly, the order must not authorize the plaintiff to enter on the defendant's premises or to seize the defendant's property save by permission of the defendant. Fifthly, no order should be made for delivery up to anyone other than the plaintiff's solicitor or a receiver appointed by the High Court. Sixthly, the court should follow the guidelines set out in *Z Ltd. v. A-Z and AA LL* in so far as they are applicable to chattels in the possession, custody or control of third parties. Finally, provision should always be made for liberty to apply to stay, vary or discharge the order.

³⁹⁵ [1990] W.L.R. 1139 (C.A.).

receiver appointed by the English court, the English court will, in an appropriate case, do what it can to render the appointment effective by orders *in personam* against persons who are subject to the jurisdiction of the English court.³⁹⁶

He proceeded, after stating the object of a Mareva injunction, to cite *Derby v. Weldon (No.3 & 4)*³⁹⁷ and *Ninemia*,³⁹⁸ as follows:

I see no reason why [the object of a Mareva injunction] should not extend, in principle and in an appropriate case, to ordering the transfer of assets to a jurisdiction in which the order of the English court after the trial of the action will be recognized, from a jurisdiction in which that order will not be recognized and the issues would have to be relitigated. . . .³⁹⁹

In Canada, in *Mooney v. Orr*⁴⁰⁰ the British Columbia Supreme Court suggested that the court has authority to issue an order for defendants to transfer assets located in a foreign country to a receiver. Similarly, in *Hamza v. Hamza*,⁴⁰¹ a matrimonial case, the Alberta Court of Appeal ordered the party concerned to bring the property to the province. In these cases, the sanction is indicated to be, in addition to contempt of court, that a defendant who does not comply with the order is barred from defending the action.

Thus registration of a Mareva injunction against title to property can be supplemented by the Land Registration Act 1925⁴⁰² in England, and disposition of a defendant's assets to a third party can be physically restricted by additional orders ancillary to the original-type Mareva injunction in England and Canada. This is not *per se* inconsistent with the concept of a remedy *in personam*. The assets subject to a delivery-up order or in the custody of a

³⁹⁶ *Ibid.* at 1150.

³⁹⁷ *Supra* note 274.

³⁹⁸ *Supra* note 172.

³⁹⁹ *Supra* note 395 at 1151.

⁴⁰⁰ *Supra* note 325.

⁴⁰¹ [1997] 9 W.W.R. 592 (Alta. C.A.). While the order was issued against a third party which was a Swiss society, a legal entity under Swiss law, controlled by the husband who tried to conceal matrimonial funds, the court stated regarding the Matrimonial Property Act, R.S.A. 1980, c. M-9 ("the M.P.A.") that even if a trial judge were to find that the property was now owned by other distinct legal entities, the wife could still receive an unequal division of the husband's existing assets; and in addition the M.P.A. does provide for setting aside improper transfers.

⁴⁰² *Supra* note 388.

receiver are not seized. The defendant still can sell these assets to a third party and the third party may be able to obtain title to them prior to the plaintiff. However, these orders make it difficult for the defendant to dispose of his assets because they are out of his possession.

4.1.3 Protection of Defendant

If a defendant establishes that payment is not merely a way to evade the underlying purpose of the order, variation of the Mareva injunction can be granted⁴⁰³ and the defendant can spend his assets in the usual course of business, living, or as payment for legal advice and representation.⁴⁰⁴

Furthermore, the defendant can pay his debts to another creditor with the assets.⁴⁰⁵ This issue was discussed for the first time in *Iraqi M. O. D.*⁴⁰⁶ In this case Goff J. stated, "I find it difficult to see why, if a plaintiff has not yet proceeded to judgment against a defendant but is simply a claimant for an unliquidated sum, the defendant should not be free to use his assets to pay his debts."⁴⁰⁷

⁴⁰³ With respect to the forum of appeal in England, before going to the Court of Appeal, an application by the defendant for his discharge or variation of the order should be made to the Court that granted the order. It was inherent in the provisional nature of any *ex parte* application that the High Court had power to review, discharge or vary such an order. It was therefore difficult to think of circumstances in which it would be proper to appeal to the Court of Appeal against an *ex parte* order without first giving the judge who made it, or, if he was not available, another High Court judge, an opportunity to review it in the light of argument from the defendant.

⁴⁰⁴ See *A. v. B.* [1983] 2 Lloyd's Rep. 532 (Q.B.). However, the Court of Appeal held in *Campbell Mussels v. Thompson* that there is no rule that a Mareva injunction will not be modified absent evidence that the defendant owes money and has no other assets from which to pay the debt. Rather, each case must be decided on its own facts, keeping in mind that the plaintiff does not acquire the status of a secured creditor as a result of the Mareva order. (30 May 1984, *The Times*) See also *Van Brugge v. Arthur Frommer Int. Ltd.* ((1982), 35 O.R. (2d) 333 (H.C.)). In this case, the court held that there was reason to doubt the correctness of the decision that a plaintiff claiming unliquidated damages could deprive the defendant of its right to carry on business pending determination of the action. See also Ough, *supra* note 112 at 16, 17.

⁴⁰⁵ In Canada, in *Quinn v. Marsta Cession Services Ltd.*, Anderson J. accepted as a general proposition that a Mareva injunction should not be granted where its effect would be to prevent the payment of a debt. (1981), 16 B.L.R. 126. See McAllister, *supra* note 125 at 77.

⁴⁰⁶ *Supra* note 369. While one of the disputes in the action was whether the intervener was prior to a the plaintiff, the court allowed, without deciding this issue, that the intervener be paid the insurance proceedings. It is noteworthy that although the defendant had maintained that such moneys should be paid to the intervener, the intervener, not the defendant, applied for variation of the Mareva injunction.

⁴⁰⁷ *Supra* note 369 at 72. Subsequently, he said, "Of course, if the plaintiff should obtain a judgment against a defendant company, and the defendant company should be wound up, its previous payments may thereafter be attacked on the ground of fraudulent preference, but this is an entirely different matter which should be dealt with at the stage of the winding up." And moreover "A reputable businessman who has received a loan from another person is likely to regard it as dishonorable, if not dishonest, not to repay that loan even if the

Accordingly, even though a Mareva injunction is granted, not all the defendant's assets are always frozen.⁴⁰⁸ When the plaintiff obtains judgment and tries to execute it, it may be that the defendant has no assets. This result is validated because the plaintiff does not acquire the status of a secured creditor as a result of the Mareva injunction.

A Mareva injunction is sometimes so broad that, without this variation it is unfair to the defendant. However, it is questionable whether the defendant can make payment of his debts to creditors other than the plaintiff when a Mareva injunction is in effect. The prospect of deterioration of defendants' resources pending proceedings confers on defendants a strong motive for delay and a powerful lever with which to exercise pressure on plaintiffs to the detriment of their entitlements.⁴⁰⁹ This is another disadvantage of the Mareva injunction.

The *Iraqi* decision has generally been followed in Canadian courts.⁴¹⁰ It should be noted, however, that in some provinces of Canada *pro rata* distribution is provided for under the execution procedure, as it is under the British Columbia Creditors Assistance Act.⁴¹¹

As can be seen in *Imperial Oil v. Gibson*,⁴¹² in British Columbia, this approach is followed in principle. Although, under the jurisprudence of *pro rata* distribution, courts may restrictively allow payment by a defendant for his usual course of business, living, or legal advice and representation, it remains to be seen to what extent such payment will be granted.

4.2 Discovery

4.2.1 Granting Discovery Order

The procedure for obtaining a *perpetual* injunction does not differ greatly from the procedure in any claim for damages. The action is almost invariably begun by writ and its basic

enforcement of the loan is technically illegal by virtue of the Moneylenders Act." Here, it is clear that he did not consider the equality among creditors at the insolvency situation.

⁴⁰⁸ Ough, *supra* note 112 at 16.

⁴⁰⁹ Zuckerman, *supra* note 232 at 433. However, he worries whether protection for a defendant is not enough at 439 and 440.

⁴¹⁰ See e.g. *Van Bfugge v. Atthur Frommer Int. Ltd.* (1982), 35 O.R. (2d) 333, 16 B.L.R. 143 (Ont. H.C.J.).

⁴¹¹ *Creditors Assistant Act*, R.S.B.C. 1996, c. 83. The predecessors of this act are *Creditors Assistance Act*, R.S.B.C. 1979, c. 80; *Creditors Relief Act*, R.S.B.C. 1960, c. 85; *Creditors Relief Act*, R.S.B.C. 1948, c. 81; *Creditors Relief Act*, R.S.B.C. 1936, c. 64; *Creditors Relief Act*, R.S.B.C. 1924, c. 59; *Creditors Relief Act*, R.S.B.C. 1911, c. 60; *Creditors Relief Act*, R.S.B.C. 1902, c. 17.

⁴¹² (1992) 72 B.C.L.R. 195 (B.C.C.A.). However, Goldie J. A. did not refer to the relationship between the Creditors Assistance Act and variation of a Mareva injunction in order not to prevent a defendant from doing ordinary course of business, living, or legal advice and representation.

sequence includes discovery and inspection of documents, discovery by interrogatories, and oral evidence with cross-examination.⁴¹³ English Order r. 24 and British Columbia Order r. 26 provide for discovery and inspection, and English Order r. 26 and British Columbia Order r. 29 provide for discovery by interrogatories.

But do these rules apply to the Mareva injunction, which is an interlocutory injunction? This is an important question because a defendant and his colleagues or advisers often have information vital to a plaintiff. In *A.J. Bekhor & Co. v. Bilton*,⁴¹⁴ although it was agreed that courts can issue a discovery order ancillary to a Mareva injunction, Ackner L.J. clearly argued that these rules were limited to discovery or interrogatories with respect to "matters in question in the cause or matter."⁴¹⁵ As the information sought pertained mainly to the location of the defendant's assets, the rules did not apply to the case. Accordingly, although there may be some similarities between a discovery order ancillary to a Mareva injunction and one under the Order of the Procedure, there is no common basis. The practice granting a discovery order in a tracing case (a plaintiff's proprietary case) was established prior to that of granting a discovery order ancillary to a Mareva injunction.⁴¹⁶ However the basis for a discovery order in a tracing case is that a plaintiff has in equity a right to follow the assets (including money). Thus the jurisdiction to grant orders for discovery in tracing operations and in pure Mareva injunctions is similar, but clearly based on different grounds.⁴¹⁷

A discovery order ancillary to a Mareva injunction was granted for the first time in *A and Another v. C and others*.⁴¹⁸ Subsequently, this jurisprudence was confirmed in the English Court of Appeal in *Bekhor v. Bilton*. These decisions are considered to be based on section 45 of the Supreme Court of Judicature (consolidation) Act, 1925 (now section 37 of the Supreme

⁴¹³ Bean, *supra* note 113 at 69.

⁴¹⁴ [1981] 2 All E.R. 565, [1981] 1 Lloyd's Rep. 491 (C.A.).

⁴¹⁵ *Ibid.* at 939.

⁴¹⁶ See e.g. *Bankers Trust Co. v. Shapira* [1980] 1 W.L.R. 1274 (C.A.). In *Mediterranea Raffineria Siciliana Petroli SpA v. Mabanaft GmbH*, Templeman LJ said, "A court of equity has never hesitated to use the strongest powers to protect and preserve a trust fund in interlocutory proceedings on the basis that, if the trust fund disappears by the time the action comes to trial, equity will have been invoked in vain. That is why orders of this sort were made long before the recent orders for discovery, and they are at the heart of the Chancery Division's concern, and it is the concern of any court of equity, to see that the stable door is locked before the horse has gone." (1978) Court of Appeal (Civil Division) Transcript 816.

⁴¹⁷ Hoyle, *supra* note 99 at 93.

⁴¹⁸ [1981] 1 Q.B. at 956 (Q.B.).

Court Act, 1981) or on the inherent power of the court, or both.⁴¹⁹ In any event, the basic idea can commonly be expressed as the court having power to effect a remedy it has power to render. Without such an order the Mareva injunction itself might be ineffective because it does not take effect on sufficient assets since some assets have been skillfully hidden from the plaintiff.⁴²⁰ Accordingly, if necessary in order to make a Mareva injunction effective, the courts can also issue a discovery order against a third party such as a bank.⁴²¹

A discovery order is an interlocutory mandatory injunction carrying the contempt sanction for non-compliance.⁴²² While courts have full discretion, it should be noted that such an order is not to be used to police the Mareva injunction to see if there has been a breach.⁴²³

It is generally accepted that information obtained by any order of a court is confidential and cannot be used in other proceedings without leave; nor can it be published.⁴²⁴

⁴¹⁹ Regarding the basis of discovery ancillary to the Mareva injunction, there are three kinds of approach; (1) the power is found in the Rules of Procedure; (2) the power is derived from equity: (i) under section 37 of the Supreme Court Act (section 45 of the Act 1925) and/or the inherent jurisdiction of the court, (ii) only by the inherent jurisdiction of the court. In *A. v. C. Goff J.* based the order on section 45 of the Act 1925, referring to the sections of the Rules of Procedures. In *A.J. Bekhor*, Ackner L.J. said regarding section 45, "To my mind there must be *inherent in that power*, the power to make all such ancillary orders as appear to the court to be just and convenient, to ensure that the exercise of the Mareva jurisdiction is effective to achieve its purpose"; and subsequently regarding the inherent jurisdiction to the court, "If I am wrong in concluding that section 45 provides the basis for the jurisdiction to make the type of ancillary order referred to above. . . . where the power exists to grant the remedy, there must also be inherent in that power the power to make ancillary orders to make that remedy effective. This I have accepted." *Ibid.* at 940, 942. In this case Griffiths L.J. said regarding section 45, "it may be necessary to order discovery to make the injunction effective and I would hold that the court has the power to make such ancillary orders as are necessary to secure that the injunctive relief given to the plaintiff is effective." *Ibid.* at 949. On the other hand, in the same case, Stephenson L.J. advocated the difference between the order by section 45 and that from the inherent jurisdiction to the court. He said, "It is therefore, in my judgment, an order which the court is empowered to make by section 45 unless indirectly and by implication. . . . I am therefore of opinion that we can only affirm the judge's order on a ground . . . namely the inherent jurisdiction." *Ibid.* at 952, 953.

⁴²⁰ It is of course logical that if the court should have the power to make an injunction, it should be able to make it effective. J. C. Harrison *The Mareva Injunction*, (Institute of Comparative Law, McGill University, 1991) at 34.

⁴²¹ See e.g. *Duvalier*, *supra* note 273.

⁴²² Bean, *supra* note 113 at 132.

⁴²³ Ackner L.J. in *Bekhor v. Bilton* states: "Mr. Stamler submits that Parker J. was seeking, by his order, to 'police' the Mareva injunction which he had granted and that this was therefore an order made 'in aid of' the Mareva injunction. I cannot accept this view. If the plaintiffs, or the court of its own volition, desired to 'police the order,' then the plaintiffs could have applied for an order for the cross-examination of the defendant on his affidavit, or the court itself could have made such an order: see Ord. 38, r.2." *Supra* note 414 at 944. In this case, the plaintiffs applied for discovery of the defendant's assets at the time of the original order and for details of disposal of the assets. This application was finally dismissed since the discovery was not intended to assist in the future administration of the Mareva injunction by determining what assets existed, but was to assist in punishing the defendant for past violations.

Nevertheless, information obtained under a Mareva injunction may be exempt from this rule. Discovery ancillary to a Mareva injunction is more akin to examination by a judgment creditor than to discovery under the Order of the Procedure.⁴²⁵ The purpose of an examination or a Mareva ancillary order is to use the information obtained in order to fully realize the original order, i.e. the judgment or the Mareva injunction.⁴²⁶ Whereas the purpose of a discovery order under the Order of the Procedure is to submit the information obtained to the court. The grounds for these two types of discovery order are completely different. Accordingly, the restriction for a discovery order under the Order of the Procedure does not apply a discovery order ancillary to a Mareva injunction.

In Canada, in *Sekisui House Kabushiki Kaisha v. Nagashima*,⁴²⁷ the British Columbia Court of Appeal in December 1982 granted an order to examine the defendants on oath as to their assets in the jurisdiction. The Court commented as follows:

The plaintiff has an injunction. . . . This has little value if one does not know either the amounts or whereabouts of these assets. It is an untenable situation for a litigant to have a court order yet find it impossible to enforce. It is also an untenable situation to have prospective third parties, e.g., financial institutions, put in the position of breaking the order because of lack of specificity, i.e., identification of the fund as part of the general order.

⁴²⁴ This is so whether the information has been read out in court or not, except that comment on it is permitted unless the court orders otherwise See *Home Office v. Harman*. [1983] 1 AC 280 HL at 230.

⁴²⁵ Zuckerman, *supra* note 232 at 437. He says "Such discovery is not confined to matters relevant to the litigation, as it would be in discovery under R.S.C., Order 24, rule 1. Rather, it is comparable to the kind of information that a plaintiff armed with a judgment can obtain from a defendant who is examined as a judgment debtor in execution, under R.S.C., Order 48, rule 1. Furthermore, whether or not a Mareva order contains a disclosure provision, the defendant is expected to make a full disclosure of his assets if he wishes to be allowed to draw upon the frozen funds for his living and other expenses."

⁴²⁶ Ough states, "For example, in certain circumstances it may be used for further action against the defendant or for the purpose of commencing a tort action against a third party." Moreover, he states regarding an Anton Piller order: "The right of the plaintiff to use evidence obtained under an Anton Piller order in further action against the defendant or third parties was established in *Sony Corp'n v. Anand* ([1981] FSR at 398) and followed in *Roberts v. Fump Knitwear Ltd.* ([1981] FSR at 527). These cases decide that information obtained under an Anton Piller order may be used for the purpose of pursuing third parties since there is no implied undertaking that the information will be used solely for the purpose of the existing action. Therefore, it is unnecessary to apply to the court for leave to use it for that purpose, unless the order specifically contains a restriction on such use of information." Ough, *supra* note 112 at 49. In contrast, Hoyle states, "There is an implied undertaking on the recipient's part to obey this rule, breach of which is contempt of court. Therefore, leave of the court is necessary for any use of such documents in any other proceedings." Hoyle, *supra* note 99 at 107.

⁴²⁷ 33 C.P.C. at 42 (B.C.C.A.).

What, then can be done in these particular circumstances? In my view, to order a general examination at this time would be premature. However, in order to breathe some life into the injunction, I would order that a list of assets and their location as of the date of the injunction be set out in affidavit form by the defendants and delivered to counsel for the plaintiff forthwith.⁴²⁸

4.2.2 Worldwide Discovery Order

The primary effect of a worldwide Mareva injunction is a worldwide order for discovery, even though a worldwide discovery order should be made only where a worldwide Mareva injunction is granted. Plaintiffs in several cases in which a worldwide Mareva injunction was granted, *e.g. Duvalier*,⁴²⁹ were primarily seeking and did obtain a discovery order. The following is an example of the order:

The Defendant must inform the Plaintiff in writing at once of all his assets whether in or outside England and Wales and whether in his own name or not and whether solely or jointly owned, giving the value, location and details of all such assets. The Defendant may be entitled to refuse to provide some or all of this information on the grounds that it may incriminate him. [This sentence may be inserted in cases not covered by the Theft Act 1968, s.31.] The information must be confirmed in an affidavit which must be served on the Plaintiff's Solicitors within [] days after this Order has been served on the Defendant.⁴³⁰

Special consideration is necessary for a worldwide discovery order. This type of discovery order may be more oppressive to the defendant than a domestic discovery order because, for example, a worldwide discovery order may lead to the plaintiff obtaining security in some foreign jurisdiction.⁴³¹ The restriction of the use of information obtained by a worldwide discovery order is more necessary than that obtained by a domestic discovery order.

⁴²⁸ *Ibid.* at 47.

⁴²⁹ *Supra* note 273.

⁴³⁰ Bean, *supra* note 113 at 229.

⁴³¹ *Ashtiani supra* note 263 at 901. See also Capper, *supra* note 264 at 335.

In a domestic Mareva injunction, as I mentioned at 4.2.1, a plaintiff's undertaking not to use information obtained by discovery is not a general qualification for the order. In a worldwide Mareva injunction, however, this undertaking should be, and is usually, expressly required.⁴³² That an unqualified order is too oppressive to a defendant was one of the reasons why the courts were reluctant to grant the worldwide Mareva injunction.

Our next step in analyzing the world-wide discovery order made available by the Mareva injunction is to review what kind of terms should be added to the order to protect the defendant. In *Ashtiani*,⁴³³ Dillon L.J. said that if the discovery of foreign assets was ordered the plaintiff should be required to give an express undertaking not to use any information disclosed in any way without the consent of the defendant or the leave of the court. In *Derby v. Welson (No. 1)*,⁴³⁴ Nicholls L.J.⁴³⁵ states:

Here also the undertaking being offered by the plaintiffs is in terms which will preclude them from making any use of information so disclosed in proceedings abroad against the first and second defendants without the leave of the English court. Here again, therefore, reasonable protection for the defendants is being built into the order⁴³⁶

Thus, in such cases, the plaintiff is required to undertake not to use the information disclosed without the leave of the court and, alternatively, the court orders the plaintiff not to do so. There is a clear statement in the judgment of Parker L.J. in this case that if it would, considering all the circumstances, be oppressive to make an order, the order will be refused.

⁴³² See *Babanaft*, *supra* note 272.

⁴³³ *Supra* note 263.

⁴³⁴ *Supra* note 277. May L.J. says regarding a worldwide disclosure order, "In my judgment such a term (to leave any decision whether action should be taken by [a plaintiff] in any foreign jurisdiction in respect of any of the assets of the two defendants to the English court) or undertaking should generally be part of any worldwide pre-judgment Mareva obtained in circumstances not dissimilar from those in this or the *Duvalier* case." *Ibid.* at 55. Parker L.J. said that it is necessary for justification for a worldwide Mareva injunction that it is provided by undertaking or proviso or a combination of both, that the defendants are protected against the misuse of information gained from the ordinary order for disclosure in aid of the Mareva injunction. *Ibid.* at 57.

⁴³⁵ In *Babanaft*, which was a post-judgment case where the use of the information obtained by discovery would be less restricted than in a pre-judgment case, Nicholls L.J. suggested that in some cases the court could spell out in advance of disclosure the uses to which the information disclosed could be put. *Supra* note 272. Capper, *supra* note 264 at 342.

⁴³⁶ *Supra* note 277.

However, while May L.J. indicated in this case that a defendant may suffer oppression from a worldwide discovery order because the defendant is involved in legal proceedings in many courts throughout the world, and his privacy is invaded, these are not sufficient or persuasive enough reasons to restrict the use of the information. Because it is the defendant who has scattered his assets all over the world it is he who must be prepared for legal proceedings in any country in which he has assets. The problem of invasion of privacy is not unique to the worldwide Mareva injunction - it can be an issue in any disclosure order. Accordingly, courts should in principle grant the use of the information.

4.3 Effect on Third Party

4.3.1 Contempt of Court against Third Party

It is important for a Mareva injunction to take effect on a third party in order to produce material results, since a defendant's assets are often in the custody of a third party and any contract transferring title between the defendant and a third party is valid. It is essential to enlist the cooperation of third parties, notably banks, who may hold or deal with the assets to be preserved.⁴³⁷ A third party who, knowing of the terms of a Mareva injunction, willfully assists in its breach is liable for contempt of court. This must be so whether or not the defendant himself has had notice of the injunction.⁴³⁸ However, we should examine why the Mareva injunction, notwithstanding the fact that it is an order *in personam* and is addressed only to the defendant, takes effect on third parties.

In *Z v. A-Z*,⁴³⁹ Lord Denning said "Every person who has knowledge of it must do what he reasonably can to preserve the asset. He must not assist in any way in the disposal of it. Otherwise he is guilty of contempt of court."⁴⁴⁰ (Emphasis added.) In this case, Eveleigh L.J. clarified that a third party is liable for contempt of court committed by himself, citing the

⁴³⁷ A. Malek and C. Lewis, "Worldwide Mareva Injunction: the Position of International Banks" (1990) *Lloyd's Maritime and Commercial Law Quarterly* 88 at 88.

⁴³⁸ It was argued that if the ground for a third party's liability was that he was aiding and abetting a contempt by the Mareva defendant, the third party could not be in contempt until the defendant himself had notice of the terms of the injunction. That argument was rejected in *Z v. A-Z*, *supra* note 261.

⁴³⁹ *Supra* note 261.

⁴⁴⁰ *Ibid.* at 295.

following remarks of Lindley L.J. in *Lord Wellesley v. Earl of Mornington*:⁴⁴¹ "He is bound, like other members of the public, not to interfere with, and not to obstruct, the course of justice."⁴⁴² Accordingly, as was decided in *T.D.K. Distributors (U.K.) Ltd. v. Videochoice Ltd.*,⁴⁴³ a third party has a complete defence if he can prove that he did not realize that the contract was in breach of the order provided that he *should not have known* of the existence of a Mareva injunction. A third party who unreasonably or willfully disregards the possible existence of a Mareva injunction will be held responsible for his actions. The effect on a third party does not derive from the *content* of the Mareva injunction, but rather from the fact that an injunction exists against the defendant.⁴⁴⁴

4.3.2 Effect of Worldwide Mareva Injunction on Third Party

In the case of a domestic Mareva injunction, a plaintiff can generally expect a third party's cooperation because she is forced to comply with the order by threat of imprisonment for contempt of court.⁴⁴⁵

The greatest difficulty regarding enforceability involves the worldwide Mareva injunction. In the past this difficulty was considered insurmountable. The problem here is that any attempt to enforce such an injunction against a third party outside its jurisdiction may

⁴⁴¹ (1848) 11 Beav. 180.

⁴⁴² *Supra* note 261 at 302. Tyree states, "The third party attracts 'primary liability' since breach of the terms of the injunction will be conduct which knowingly interferes with the administration of justice by causing the order of the court to be thwarted." Tyree, *supra* note 382 at 379.

⁴⁴³ [1986] 1 W.L.R. 141 (Q.B.). A defendant was ordered to file an affidavit of his assets, but, when he did so, subject to the advice of his solicitors, he negligently failed to disclose of an endowment policy mortgage. Only one of solicitors, an employee of the firm who ought to have known the lack of disclosure of the defendant's assets, was judged to have committed contempt of court. The other solicitors, who were partners of the firm were, acquitted as they had taken all reasonable care by employing an apparently competent solicitor. There are special circumstances in this case; namely, that a solicitor breached the injunction, even though not willingly; and that the solicitors firm obtained the balance of the policy returned to the defendant as legal fee.

⁴⁴⁴ An injunction consists of both the criminal and civil concept in the sense that the breach of an order regarding a civil proceeding is considered a destruction of order and justice as well as non-realization of a private right, namely a public wrong as well as civil wrong, if this dichotomy is allowed in common law jurisprudence. It is reasonable that every person is required not to conduct a public wrong. The necessity for *mens rea* on the part of a third party, emphasized by Eveleigh L.J., can easily be understood in this context. Moreover, unlike the way that it applies to the criminal code where ignorance of the law is no excuse, *mens rea* here means that the person knows both the intention and the specifics of the injunction. On the other hand, in Germany, only the defendant in proceedings and the addressee of a court's order can be fined or imprisoned for contempt. Schlosser, *supra* note 175 at 160.

⁴⁴⁵ *Derby v. Weldon (No.3 & 4)*, *supra* note 274 at 82.

involve the assertion by an English court of an unreasonable extraterritorial jurisdiction. The injunction, if made binding on a third party, could be seen as an attempt to restrain the third party from doing something quite lawful under the laws of another country or, conversely, compliance with the injunction could result in a breach of his legal obligations in that country.

In *Babanaft*,⁴⁴⁶ the solution adopted was to make the injunction binding only on the defendants personally. In that decision Kerr L.J. suggested that a term be added to the order specifying the extent to which foreign courts are to give effect to the order against third parties dealing with foreign assets. ('*Babanaft*' proviso).⁴⁴⁷ This assumed that a worldwide Mareva injunction took effect against a third party abroad. This proviso was basically followed by *Duvalier*⁴⁴⁸ but modified so that a worldwide Mareva injunction might be effective on individuals (i.e. natural persons) who were resident in England and Wales.

On the other hand, Lord Donaldson in *Derby v. Weldon (No. 3 & 4)*⁴⁴⁹ brought up the important question of whether an action by the foreign branch of an English corporation was to be regarded as contempt.⁴⁵⁰ He did not state that any conduct against a worldwide Mareva injunction by a third party in a foreign country was free from the injunction. Instead he concluded as follows: "Whether any particular third party is indirectly affected, depends upon whether that person is subject to the jurisdiction of the English courts."⁴⁵¹ His remarks suggest that the enforceability of a worldwide Mareva injunction does not necessarily extend beyond the English jurisdiction.

Here, it is questionable what "a person subject to the jurisdiction" means. If the words are interpreted broadly, the defects of the *Babanaft* proviso cannot be resolved. This proviso should be interpreted as narrowly as possible because if a Mareva injunction ordered a third party to refrain from doing what is perfectly valid or something a defendant is obliged to do in

⁴⁴⁶ *Supra* note 272.

⁴⁴⁷ See Capper, *supra* note 264 at 335, 344, 345.

⁴⁴⁸ *Supra* note 273.

⁴⁴⁹ *Supra* note 274.

⁴⁵⁰ See *ibid.* at 83. He also stated, "If [a third party] is wholly outside the jurisdiction of the court, he is either not to be regarded as being in contempt or it would involve an excess of jurisdiction to seek to punish him for that contempt." *Ibid.* at 82.

⁴⁵¹ *Ibid.* at 83. He formulated the proviso as follows; (b) persons who are subject to the jurisdiction of this court and (i) have been given written notice of this order at their residence or place of business within the jurisdiction, and (ii) are able to prevent acts or omissions outside the jurisdiction of this court which assist in the breach of the terms of this order.

the foreign jurisdiction, the order could indirectly infringe on the sovereignty of the foreign country.⁴⁵²

In my opinion, courts should take a fundamentally different approach, adding a proviso as follows: "this Order does not apply to a third party's conduct in a foreign country". Regarding how to decide whether the conduct of a third party is done in a foreign country, the location of assets should be an important element. Regardless of where the third party becomes involved in the transaction, the Mareva injunction should not take effect on the third party in a transaction involving the defendant's assets located in a foreign country. Because the development of electronic communications makes it possible to complete a transaction without going to the place where the assets are located, it is meaningless to determine where the third party makes an offer to the defendant or receives communication of the defendant's intentions.

My proposal above is open to the criticism that we cannot expect the worldwide Mareva injunctions to be effective if a third party can freely participate in transactions involving a defendant's assets which are located in a foreign country. However if the restriction on the use of the information obtained under discovery about the defendant's assets in a foreign country were to be liberalized, this criticism could be refuted. Where the plaintiff can easily obtain leave of the court to apply for a pre-judgment provisional order under a foreign procedure, the above mentioned problem would be solved in a manner that is not too oppressive to the defendant.

In other words, I consider in my proposal that discovery is the main function of the worldwide Mareva injunction, and that the effectiveness of the worldwide Mareva injunction relies largely upon the pre-judgment provisional remedy of the foreign country where the defendant's assets are located. Basically, it is for the foreign court to decide whether or not the defendant's assets should be frozen.

⁴⁵² Under English law, the head office of a bank and its branches are generally regarded as parts of one legal entity. On this basis a plaintiff might argue that the whole entity is "subject to the jurisdiction". It is proposed to add to the *Derby v. Wilson (No.3 & 4)* proviso by Malek and Lewis that provided that in the case of banks served with this Order with branches or subsidiaries outside the jurisdiction of this Court nothing in this Order shall require the bank in question or its subsidiaries: (a) to infringe the laws and regulations of any foreign country or state; or (b) to refuse to act on the instructions of a customer in relation to account(s) outside the jurisdiction so long as the bank or its subsidiaries have reasonable grounds for believing that the instruction is lawful under the laws of the foreign country or state where the relevant account(s) is located or under the proper law governing the account in question. Malek and Lewis, *supra* note 437 at 93, 94.

4.3.3 Protection of Third Party

A Mareva injunction sometimes places a substantial burden in terms of cost and trouble on third persons who are affected by the order. The English courts have laid down extensive rules intended to minimize the impact of the remedy on outsiders.⁴⁵³ Particularly, compliance by banks with a Mareva injunction is acknowledged as expensive and time consuming.⁴⁵⁴ Thus, the order as it relates to them should identify clearly, on an *ex parte* hearing, what assets are covered and to what extent.⁴⁵⁵ It is not proper to have a broad order at the outset on the grounds that a later hearing can narrow its scope. Case law subsequent to *Z v. A-Z*⁴⁵⁶ supports this point of view. The following is my summary of the guidelines developed by this case law regarding the protection of third parties.

- (1) the plaintiff should give as much information as possible about the defendant's assets so that, for example, a national bank need not search all its branches to determine whether the defendant has an account or accounts;
 - (2) other conditions should be attached to draft orders to reduce the burden on third persons as far as is reasonable;
 - (3) the draft order should include an undertaking by the plaintiff to pay reasonable costs incurred by third persons in their effort to comply with the injunction;
- and

⁴⁵³ Eveleigh L.J. attempted to resolve this third party problem by means of the theory of third party obligation founded on the *mens rea* required before a third party can be found to be in contempt. He said, "the fact that a bank is under an obligation to others to make a payment should be strong evidence that the bank was not contumacious where that obligation emanates from a relationship between the bank and such other people as was established before the making of the order." But this approach is criticized as it is not clear from this theory why the bank should then be entitled to proceed to debit the defendant's account. See Tyree, *supra* note 382 at 383, 384.

⁴⁵⁴ After notice has been given, a bank may not honor cheques unless the transaction occurred before service of the order. However, credit cards and cheque cards must be honored. The injunction does not prevent the bank from making payment under instruments which obligate the bank, as opposed to the defendant, such as letters of credit and bank guarantees. See McAllister, *supra* note 125 at 60.

⁴⁵⁵ Ough, *supra* note 112 at 17.

⁴⁵⁶ *Supra* note 261.

- (4) the third party may apply to vary the Mareva injunction to provide that money subject to the order be used to pay overdrafts of the defendant or debts incurred in the ordinary course of business.⁴⁵⁷

4.3.4 Variation of Mareva Injunction in favor of Third Parties

Third parties may, in an appropriate case, apply to vary or set aside the injunction or to oppose its continuation where it substantially affects the outsider's business, assets or rights. If such application is successful, the plaintiff may have to pay the expenses incurred by the third party.⁴⁵⁸ The fact that the plaintiff has undertaken to provide to the third party a guarantee against loss or damage is no answer to the problem.⁴⁵⁹

Regarding "(1)" above, the plaintiff should, if at all possible, identify the assets to be affected by the injunction. Accordingly, the order, as I illustrated in the sample, above, often describes the assets which the order restrains the defendant from disposing of. Nevertheless, courts sometimes issue an order which restrains the defendant from disposing of all assets, or a "maximum sum" order. Since in these cases the Mareva injunction can be more complicated and time consuming for third parties, courts will not be reluctant to vary its terms.

A third party may be in possession of the defendant's assets, and in complying with the Mareva injunction, may be put to expense or inconvenience. Sometimes, the Mareva injunction interferes with the right of the third party to go about its business. In *Galaxia Maritime S.A. v. Mineralimportexport; The Eleftherios*,⁴⁶⁰ based on the application for variation by the third party, the court dismissed the application for the Mareva injunction concluding that even though the plaintiff undertook to pay the lost income and administrative costs of the port authority as well as the reasonable costs of the third party, the right of the third party to go about its business could not be interfered with in this way. In this case Kerr L.J. states:

. . . where the effect of service [of the injunction] must lead to interference with the performance of a contract between the third party and the defendant which relates specially

⁴⁵⁷ Dunlop, *supra* note 117 at 185.

⁴⁵⁸ Rose *supra* note 147 at 13.

⁴⁵⁹ Dunlop, *supra* note 117 at 185.

⁴⁶⁰ [1982] 1 All E.R. 796 (C.A.).

to the assets in question, the right of the third party in relation to his contract must clearly prevail over the plaintiff's desire to secure the defendant's assets for himself against the day of judgment.⁴⁶¹

4.3.5 Set Off

Banks sometimes have a right of set off against funds frozen by a Mareva injunction. In *Project Development Co. S.A. v. KMK Securities Ltd.*,⁴⁶² the Mareva injunction was varied to permit the bank to set off a specified sum in the defendant's account against amounts owed by the defendant to the bank. In *Oceanica Castelana Armadora S.A. of Panama v. Mineralimportexport*,⁴⁶³ the court held that the bank was entitled to exercise its right of set-off against the funds on deposit for payment of interest falling due. Subsequently, the court held that it was unnecessary for the bank to disclose its client's information on application for variation, since such a requirement would be an infringement on the rights of the third party, the bank. In these cases, the banks applied for variation of the Mareva injunction. Regarding the necessity of applying for variation, Lloyd J., affirming this necessity based on the current form of wording, suggested that all Mareva injunctions which are intended to be served on banks should contain a suitable proviso such as follows: "Provided that nothing in this injunction shall prevent Barclays Bank International Ltd. from exercising any rights of set-off it may have in respect of facilities afforded by Barclays Bank International Ltd. to the defendants prior to the date of this injunction."⁴⁶⁴

4.3.6 Recovery of Cost

⁴⁶¹ *Ibid.* at 800.

⁴⁶² [1982] 1 W.L.R. 1471 (Q.B.).

⁴⁶³ [1983] 1 W.L.R. 1294 (Q.B.). Note that the court considered this issue as not only a third party's right but also as protection of a defendant. Lloyd J. said, "If the defendant can thus, in a suitable case, draw on his bank account to pay his ordinary creditors, notwithstanding a Mareva injunction, why should he not be free to pay his bank? Why should the bank be in a worse position than other ordinary creditors, just because it is the bank which holds the funds in question?" *Ibid.* at 1300. To the contrary, while the right of set-off by a third party is granted under the Japanese law, that is considered only as a third party's substantive right provided in Article 505 of the Civil Code of Japan. For the English translation of the Code, see *infra* note 474.

⁴⁶⁴ *Ibid.* at 1302.

In *Project Development v. K.M.K.*,⁴⁶⁵ the court also held that an innocent third party which is affected by a Mareva injunction and is successful in getting a variation is entitled to recover all costs reasonably incurred, so long as they are not unreasonable in amount. (Refer to (3) above) The burden of establishing reasonableness in this context rests on the third party.

4.4 Effect of Japanese Pre-judgment Attachment

4.4.1 Remedy *in rem*

Both provisional attachment (*Kari-sashiosae*) and provisional disposition with respect to a subject matter in dispute (*Keisôbutsu ni-kansuru Kari-shobun*) are fully enforceable by registration, service of notice of seizure and, under special circumstances, real seizure depending on the kind of property.⁴⁶⁶ These methods of enforcement are open to the public.

Before registration or seizure of assets subject to the order, the order has no effect against a defendant or a third party even if they are aware that the order has been issued.⁴⁶⁷ The order is effective only after registration or seizure of the assets. After registration or seizure, the order affects even a third party who does not know of its issuance. After a plaintiff has seized a defendant's assets and rights, the defendant cannot transfer them to a third party, and if the defendant does so, the plaintiff can ignore the transaction.⁴⁶⁸ Under the law, there are few problems regarding the effectiveness of the order against a third party.

⁴⁶⁵ *Supra* note 462.

⁴⁶⁶ Article 47: (Paragraph 1) Execution of provisional attachment for immovables stipulated in the provision of Paragraph 1 of Article 43 of the Civil Execution Law (including matters deemed to be immovables in accordance with the provision of Paragraph 2 of the said Article) shall be conducted by a method where provisional attachment is registered or a method of compulsory administration. These methods may be jointly applied. Article 49: (Paragraph 1) Execution of provisional attachment shall be conducted by a method where an executor takes possession of the subject matter. Article 50: (Paragraph 1) Execution of provisional attachment for claims stipulated in Article 143 of the Civil Execution Law shall be conducted by a method where the court of preservative execution issues an order prohibiting a garnishee from paying to an obligor. Article 52: (Paragraph 1) Execution of provisional disposition shall fall under cases of execution of provisional attachment or compulsory execution, in addition to provisions stipulated in this chapter. Article 53: (Paragraph 1) Execution of provisional disposition for prohibiting disposition in order to preserve a right to claim registration (excluding provisional registration) with respect to a right relating to immovables (hereinafter referred to as a "claim of registration") shall be conducted by a method where registration for prohibiting of disposition is made. For the English translation of the Law, see *supra* note 343.

⁴⁶⁷ Provided: if a defendant transfers a property to a third party who knows of the issuance of the order, the third party may be responsible for her fraudulent conveyance or performance, and/or accused as she will be in violation of Article 96-2 of the Penal Code of Japan.

⁴⁶⁸ Regarding provisional attachment (*Kari-sashiosae*), see the Supreme Court, July 7, 1960 (*Min-shû*, 14-11894). Regarding provisional disposition, Paragraph 1 of Article 58 provides: Acquisition of rights or

Accordingly, the effect of the provisional attachment (*Kari-sashiosae*) and provisional disposition with respect to a subject matter in dispute (*Keisôbutsu ni-kansuru Kari-shobun*) is *in rem*. However, a plaintiff in favor of whom a court renders a provisional attachment (*Kari-sashiosae*) order cannot obtain all the proceeds of the assets or rights prior to other creditors, but must obtain distribution on the *pro rata* basis under Article 489 (4) of the Civil Code of Japan (the principle of equality among creditors).⁴⁶⁹

Since there is no system of contempt of court in Japanese civil law, a person who fails to comply with the order is not imprisoned for her conduct.⁴⁷⁰ However, it should be noted that fraudulent conveyance or performance prior to judgment can be a crime in special circumstances. Article 96-2 of the Penal Code of Japan provides as follows:

A person, who conceals, damages, destroys, or fictitiously transfers property or bears obligation for the purpose of avoiding compulsory execution, shall be punished with penal servitude for not more than two years or a fine of not more than five hundred thousand yen.

⁴⁷¹

4.4.2 Absence of Discovery

There is no system of pre-judgment disclosure under the Civil Preservation Law with one exception. Nor is there disclosure in aid of execution under the Civil Execution Law. The discovery system under the Code of Civil Procedure cannot be applied to locate the assets belonging to a defendant, because the system only applies to causes of action. Article 147 of

restriction of disposition pertaining to registration made after the registration for prohibition of disposition stipulated in Paragraph 1 of Article 53 shall not set up against a creditor in a case where the creditor of the provisional disposition stipulated in the said paragraph makes a registration pertaining to a claim for registration to be preserved, within the limits of being contrary to acquisition or extinction of a right with respect to the registration. For the English translation of the Law, see *supra* note 343.

⁴⁶⁹ Article 489: If the parties make no appropriation of performance, it shall be done in the following manner: . . . (4) The performance of obligations which are equal in respect of the particulars mentioned in the preceding two items shall be appropriated in proportion to the amount of each obligation. For the English translation of the Code, see *supra* note 97. Statement of Mikazuki, *supra* note 86 at 11 is that only bankruptcy acts and the Japanese and French civil execution systems accepted equality among unsecured creditors: provided that there is no general bankruptcy act in France.

⁴⁷⁰ See 1.3, above, for a discussion of this issue.

⁴⁷¹ For the English translation of the Code, see Nakane Fukio *The Penal Code of Japan* (Tokyo: Eibun Horeisha, 1996).

the Civil Execution Law, regarding a disclosure order against a third party in the case of a garnishment order, applies to the pre-judgment situation under Article 50 of the Civil Preservation Law. Article 147 of the Civil Execution Law provides as follows:

(Paragraph 1) If the execution creditor makes a petition, the court clerk shall, in serving the attachment order, give a notice to the third-party obligor that he should make statements on whether the claim related to attachment exists and on other matters prescribed in Supreme Court rules within two weeks from the date of service of the attachment order.

(Paragraph 2) If failing to make statements or making false statements to the notice given under the preceding paragraph intentionally or through negligence, the third-party obligor shall assume liability to compensate for damages caused thereby.⁴⁷²

However, a plaintiff must specify the garnishee on application for a garnishment order. In many cases, when a plaintiff applies for a pre-judgment garnishment order against the defendant's bank account, the plaintiff must name the branch where the defendant has the account.⁴⁷³

4.4.3 Protection of Defendant

After the order has been issued, the defendant's need to expend assets in her usual course of business, living, or legal advice and representation is not a valid basis for seeking its variance. Although it is possible for the defendant to convince the court to vary the order because it is necessary to dispose of the assets it covers, she will be required to provide alternative security.

4.4.4 Protection of Third Party

Where a defendant and a third party are bound to each other by obligations whose subjects are of the same kind, a third party can be relieved of her obligation by a set-off under

⁴⁷² For the English translation of the Law, see Research and Training Institute in Ministry of Justice, *Civil Execution Law* (Tokyo: 1980).

⁴⁷³ Service of a garnishment order against a bank account in a branch of the bank on its headquarters can be valid. Kagawa Yasukazu *et al.*, *Minji Shikkô-hô [The Civil Execution Law]*, vol. 6 (Tokyo: Kinzai, 1995) at 56.

Paragraph 1 of Article 505 of the Civil Code⁴⁷⁴ even if the obligation owed by a defendant becomes due after those orders are issued.

Complying with the order does not place a great burden on a third party since the property to be seized or registered must be specified. For example, in the case of a bank account, the relevant branch must be named. There is, therefore, no need for the bank to research the defendant's account.

⁴⁷⁴ Article 505 (Paragraph 1): If two persons are bound to each other by obligations whose subjects are of the same kind and both of which are due, each obligor may be relieved of his obligation by a set-off to the extent of the amount corresponding to that of his obligation; except, however, where the nature of the obligations does not so admit. For the English translation of the Code, see *supra* note 97.

Chapter Five

Conclusion

(Analysis and Comparison - Availability of a Mareva-type injunction under Japanese Jurisprudence)

In the preceding chapter I have reviewed the history, requirements and effect of the Mareva injunction in England and Canada and of the Japanese provisional remedy. In this chapter I will clarify the merits and demerits of the Mareva injunction compared with the Japanese provisional attachment (*Kari-sashiosae*). My comparisons are made in three areas: (1) the effectiveness of the remedies in preventing non-effective judgments; (2) the protection of a defendant; and (3) the protection of third parties.

Effectiveness can be assessed according to the following three points: (i) the extent to which assets can be preserved with certainty; (ii) what assets can be preserved; and, (iii) how a defendant's assets can be located. Broadly speaking, in comparison with the Japanese provisional attachment (*Kari-sashiosae*), the Mareva injunction is, because of the orders for discovery, superior in regard to point (iii) above. It is inferior in regard to point (i) because it is powerless against people who are outside a court's jurisdiction so that a defendant can, without any encumbrance, deal with a third party in the subject assets even though they are at locations known to the plaintiff and within the jurisdiction of the court. Point (ii) depends on the case in hand.

Any comparison of protection afforded to a defendant by the respective systems must examine the objectives of each system closely. The objective of a pre-judgment remedy is two folds. It is a means of preventing fraud and evasion and also serves to reduce the risk of a judgment being rendered nugatory.⁴⁷⁵ Both the Mareva injunction and the Japanese provisional remedy have been established to further these two ends. The question is not one of "black or white", but of weight.

As mentioned in *Iraqi M. O. D.*,⁴⁷⁶ English courts consider that the purpose of the Mareva injunction is simply to prevent the injustice which would result if a defendant were to

⁴⁷⁵ Zuckerman, *supra* note 232 at 444. See also *Leaton v. Nagi*, *supra* note 332.

⁴⁷⁶ *Supra* note 369. The court says, "For my part I do not believe that the Mareva jurisdiction was intended to

remove his assets from the court's jurisdiction. The Mareva injunction places the most weight on preventing a defendant from illegally disposing of assets. Fairness among creditors is hardly taken into account and little attention is paid to the fact that a Mareva injunction is usually sought in a situation where the defendant is or is about to become insolvent, even though the plaintiff cannot initiate bankruptcy proceedings against him. Canadian courts seem to adhere to this position.

In perfect contrast, the purpose of the Japanese law is to prevent a defendant from disposing of his assets and using the proceeds to pay other creditors or for his own purposes, even though such disposition of the assets is not fraudulent conveyance. This fundamental difference between the remedies has major implications for their effectiveness. Moreover, because of this difference, the Mareva injunction is still issued in special cases whereas the Japanese pre-judgment provisional remedy is so popular, as I mentioned at Chapter III, that it precedes almost half of the "ordinary" civil cases.

Next, I will examine the possibility of incorporating the best features of the Mareva injunction into Japanese law while avoiding the injunctions shortcomings. As discussed above, the main difference between the Mareva injunction and the Japanese provisional attachment (*Kari-sashiosae*) is that one is an *in personam* remedy while the other is an *in rem* remedy. Many of the shortcomings of the Mareva injunction are not present in the Japanese provisional attachment (*Kari-sashiosae*) and vice versa; similarly, for the strengths of these remedies.

We must consider whether the adoption into Japanese jurisprudence of the Mareva-type order, complete with the order for discovery and the order over worldwide assets, enforced by threat of imprisonment for contempt of court, would serve to make the Japanese pre-judgment system more effective and better suited to the present highly globalized environment. As an alternative, we should examine the potential for use of a provisional disposition with respect to a subject matter in dispute (*Keisôbutsu ni-kansuru Kari-shobun*) applicable to worldwide assets and of a disclosure order to be based on the provisional

rewrite the English law of insolvency in this way. Indeed it is clear from the authorities that the purpose of the Mareva injunction was not in any way to improve the position of claimants in an insolvency but simply to prevent the injustice of a foreign defendant removing his assets from the jurisdiction which otherwise might have been available to satisfy a judgment." *Ibid.* at 71.

disposition with respect to the establishment of provisional status (*Kari no Chii wo Sadameru Kari-shobun*).

5.1 Effectiveness for Future Judgment

5.1.1 Certainty of Asset Preservation

As has been confirmed by several cases, the Mareva injunction is a remedy *in personam*. It is widely accepted, as I explained in 4.1.1, that the Mareva injunction does not take effect directly against an asset or a contract⁴⁷⁷ and that a third party who does not know that the order has been issued will not be held in contempt of court for its breach. A Mareva injunction works well in so far as the defendant complies with it. However, where the defendant is prepared to accept imprisonment for contempt of court, then the effectiveness of the injunction depends on whether it can prevent a third party from participating in a transaction in which the defendant disposes of his assets or can cause a third party holding the defendant's assets to comply with its terms. Two points need to be considered. They are: (1) how easily a plaintiff can prove a third party's knowledge of the issuance of a Mareva injunction, and (2) how effectively a plaintiff can restrict a third party, especially one outside the court's jurisdiction, from participating in a transaction involving the defendant's assets.

A third party's knowledge of the existence of a Mareva injunction is normally proven by a notice sent to the third party by a plaintiff. Compliance is sometimes ensured by the third party. For instance, if a bank account within the court's jurisdiction is to be preserved and the plaintiff can specify and notify the bank, the injunction will be effective because no bank will risk being held in contempt of court.

However, when the defendant transfers an asset to a *bona fide*, unknown third party, the Mareva injunction will not work because it is impossible for the plaintiff to send a notice to an unknown third party, and thus prove that he knew of the injunction.

⁴⁷⁷ Rose states, "It remains for Parliament to consider, however, whether the procedure should be extended to provide the plaintiff with real security for, as will be seen, the procedure in principle creates no interest in the assets in question and so may afford minimal protection where the defendant and anyone in possession of them are prepared to risk being in contempt of court and to disappear out of the jurisdiction with the assets." Rose, *supra* note 147 at 183.

Moreover, a Mareva injunction does not take effect against a third party who found out about it after contracting for but before receiving the asset. For example, where a contract for sale of assets is executed and the buyer pays the defendant seller before becoming aware of the issuance of the injunction, although she, the buyer, has not yet obtained possession of the assets or her title to the asset has not yet been registered, she has, nevertheless already obtained title to it and, in order to perform his contractual obligation, the defendant seller has to deliver possession to her.

By conspiring with a transferee to backdate a contract, therefore, a defendant seller can avoid a Mareva injunction. It is a defect of the Mareva injunction that its effectiveness, if there has been a transfer of assets, depends on the true date of the transfer since the date is not a matter of public record and is not verifiable by independent means. Accordingly, it is very difficult for a plaintiff to prove that a transferee knew of the issuance of the injunction at the time of or prior to execution of the contract.

Another problem arises where a third party resides outside the court's jurisdiction but the defendant's assets are located within its jurisdiction. If the defendant and third party enter into a contract for sale of the assets outside the jurisdiction of the court, the third party has not committed contempt of court because he is not subject to the court's jurisdiction. Lord Donaldson's remarks in *Derby v. Weldon (No.3 & 4)* attest to this.⁴⁷⁸ Therefore, the contract will be valid and enforceable and the third party will be entitled to the assets. So the Mareva injunction is not effective in this type of situation either.

In order to overcome these shortcomings, the courts can issue an order for registration, delivery-up or appointment of a receiver as I indicated in 4.1.2 but issuance of these order is the exception rather than the rule and they are not always granted even where there is the risk that a defendant might dispose of his assets.

By contrast, once execution over assets is completed under the Japanese provisional remedy, the public has access to the information as to which assets are subject to the order. It takes effect against all parties to a transaction in the subject assets except third parties who participated prior to the attachment. Third parties who participate in such transactions after

⁴⁷⁸ *Supra* note 451.

execution is completed are affected by the order whether or not they know of its existence. In this respect, the Japanese provisional remedy is more effective than the Mareva injunction.⁴⁷⁹

5.1.2 Extent to Which Assets Can Be Frozen

In England, an applicant for a Mareva injunction still faces a significant obstacle. That is, the court must possess a cause of action within its own jurisdiction (as I reviewed in 3.1.1). In British Columbia this is no longer a requirement (as I mentioned in 3.2.1). Where this requirement is maintained, a defendant's assets cannot be frozen in a jurisdiction where there is only an *ex juris* cause of action. On the other hand, insofar as the assets are located in Japan, Japanese courts do not need to possess a cause of action there in order to grant provisional attachment (*Kari-sashiosae*). There is no problem similar to the one encountered with the Mareva injunction in aid of foreign proceedings.

The best feature of the Mareva injunction as a remedy *in personam* is that a defendant's worldwide assets can be frozen. However, since the effect on a third party is limited, as evinced by the *Babanaft* proviso⁴⁸⁰ and the *Derby v. Weldon (No.3 & 4)* proviso,⁴⁸¹ effectiveness of the worldwide Mareva injunction is not as strong as that of the domestic Mareva injunction. But at least it is effective to the extent that a defendant is restrained from disposing of his worldwide assets. Japanese provisional remedies are limited to assets within Japan.⁴⁸² And it is impossible to adopt a worldwide order there. However, given the present trend towards globalization, the means must be found to extent Japanese provisional remedies to assets held outside the country. This matter is further discussed in 5.4.

As is clarified in *SCF Finance*,⁴⁸³ a court may issue a Mareva injunction against a defendant and a third party to freeze assets held by the third party. Under Japanese law, although the court has authority to exercise discretion in deciding whether the assets belong to the defendant or to a third party, it is rare for the court to do so. Ownership is normally attributed to the registered owner, the person in possession of the assets, the contractual owner

⁴⁷⁹ See 4.4.1, above, for a discussion of this issue.

⁴⁸⁰ See 4.3.2, above, for a discussion of this issue.

⁴⁸¹ See 4.3.2, above, for a discussion of this issue.

⁴⁸² See 4.4.1, above, for a discussion of this issue.

⁴⁸³ *Supra* note 226.

or on some other objective basis. So once the defendant has hidden his assets prior to execution of one of the Japanese pre-judgment remedies, it is difficult to preserve the assets. The lack, in Japan, of discovery in aid of execution makes it more difficult to freeze assets in this type of situation.

5.1.3 Pursuit of Assets

The discovery order ancillary to a Mareva injunction, especially the discovery order against a third party and the worldwide discovery order, plays an important function in preserving a defendant's assets. These types of discovery order provide the plaintiff with valuable information in furtherance of her objective to preserve assets. *A v. C*⁴⁸⁴ and *Duvalie*⁴⁸⁵ is a case in point. A plaintiff who, through a worldwide discovery order, obtains information regarding the whereabouts of a defendant's worldwide assets can, with leave of the court, make use of foreign proceedings. These proceedings may seize the asset itself but will not create security. It is my opinion, which will discuss further at 5.4, that this system should be adopted in Japan also.

5.2 Protection of Defendant

The courts in England and Canada are reluctant to issue a Mareva injunction for fear of unduly interfering with a defendant's ability to proceed with his usual course of business or day-to-day life. Additionally, in order to avoid oppressing the defendant a court may vary the terms of an injunction which has been issued. Such caution is predicated on the fundamental principle of freedom of disposition of assets. This principle is observed not only in common law countries but also in civil law countries. However, as I mentioned in 4.4.3, Japanese courts place less importance on this than do the English and Canadian courts. It should be noted that while the Mareva injunction may freeze all of the defendant's assets, the Japanese provisional attachment freezes only specified assets. Generally speaking, the Japanese provisional attachment, *Kari-sashiosae*, interferes less with defendant's ability to proceed with his usual course of business or day-to-day life than the Mareva injunction. This is one of the reasons

⁴⁸⁴ *Supra* note 418.

⁴⁸⁵ *Supra* note 273.

why, once a Japanese provisional attachment order has been issued, the assets subject to the order are frozen until judgment is rendered - unless the defendant has deposited a bond at court.

I am of the opinion that the emphasis which the courts in England and Canada⁴⁸⁶ place on protecting the defendant is unwarranted in Japan, since Japanese civil execution law does not provide for examination in aid of execution, the plaintiff is not normally able to hunt down assets which the defendant has secreted. And even if Japan were to adopt the system of examination in aid of execution, the English and Canadian practice of allowing the defendant to pay her debt to a creditor other than the plaintiff in order to carry on her business is inconsistent with the principle of equality of creditors.⁴⁸⁷

5.3. Protection of Third Party

The cooperation of third parties is essential to make a Mareva injunction effective. A third party may be required to perform various activities such as the review and disclosure of a defendant's assets. A third party who fails to comply with the injunction may be imprisoned under the charge of contempt of court. The most serious problem is the potential conflict between the order of a domestic court issuing worldwide Mareva injunction and a foreign law. I already proposed in 4.3 how this problem could be avoided or at least ameliorated.

Under Japanese law, a court is not allowed to issue a discovery order against a third party. Moreover, no third party has to review the assets of the defendant, because the property that is subject to the order is specified. All that the third party has to do under Japanese law is to refuse return of the specified assets to the defendant; *e.g.* a bank only has to refuse to pay back the deposit in the account specified in the order. Since the Japanese provisional attachment order does not place a burden on third parties, there is no need for a third party to

⁴⁸⁶ There are some proposals even in England to rectify the imbalance between plaintiffs and defendants, not always according to the Mareva injunction. Among them, there is a proposal of security for judgment. Security for judgment, subject to the proposer, should confer no priority over other creditors. If an application for security brings to light a situation of insolvency, no room for security will be left. On the other hand, the interim payment, by another proposal, does confer rights on the plaintiff who obtains full ownership. In British Columbia, as there is the Creditors Assistance Act, it is not necessary to create a new legal system. Courts only have to freeze the assets of the defendant. Then creditors apply for participation in delivery of proceeds of assets. Zuckerman, *supra* note 232 at 454.

⁴⁸⁷ See 4.4.1, above, for a discussion of this issue

apply for a variation of the order, except where the third party complains that the property specified in the order belongs to him.

5.4 Can the Mareva-type of Order be Adopted in Japan?

The features of the Mareva injunction which it would be beneficial to introduce into the Japanese system are the worldwide scope of the order and discovery for location of assets. The first question to be asked is whether, under current laws, Japanese courts can issue a pre-judgment discovery order or a pre-judgment remedy over a defendant's worldwide assets, and, if not, whether they can be allowed to issue these types of order by creating a new law consistent with other Japanese legal principles. Finally, if it would be possible to issue these types of order by creating a new law, we must determine what kind of sanction(s) can be imposed on a person who does not comply with the order.

5.4.1 Discovery

Despite their different objects, discovery ancillary to the Mareva injunction is very similar to discovery under civil procedure and examination in aid of execution.⁴⁸⁸ This similarity extends to the terms and the effect of the two types of discovery order. In England and Canada, the Acts under which the Mareva injunction is granted give the courts broad authority to grant these ancillary orders through which information is obtained in pre-judgment situations.

Japanese courts do not have this broad jurisdiction. There is no provision for examination in aid of civil execution⁴⁸⁹ nor is there a general discovery system and even though the newly enacted Code of Civil Procedure has partially accepted discovery, the issuance of an order to produce documents is limited to a cause of action.⁴⁹⁰

Is it possible for the courts to issue a provisional disposition order with respect to the establishment of provisional status (*Kari no Chii wo Sadameru Kari-shobun*)⁴⁹¹ for disclosure of defendant's assets? The answer is no. Because while the purpose of this type of provisional

⁴⁸⁸ See 4.2.1, above, for a discussion of this issue.

⁴⁸⁹ Accordingly, under the current Japanese system not only a pre-judgment creditor, but also a judgment creditor cannot apply for an order of disclosure of a defendant's assets.

⁴⁹⁰ See 1.2.3 and 4.4.2, above, for a discussion of this issue.

⁴⁹¹ See 3.3.1, above, for an explanation of this type of order.

disposition is to preserve a plaintiff's substantive right against infringement by a defendant, a debtor does not owe to anybody the duty to disclose his assets, except under such special circumstances as bankruptcy. Case law show that this type of provisional disposition has been never granted.⁴⁹²

There are no grounds on which a Japanese court can issue an order requiring a defendant to disclose the location of his assets. Current laws do not permit general acceptance of a discovery order ancillary to Japanese pre-judgment provisional remedies. New legislation is required.⁴⁹³

It is for legislators, not the courts, to create a system to force a debtor to disclose his assets to a pre-judgment creditor (hereinafter "pre-judgment assets-disclosure system"). It would be difficult and is inappropriate to subject a debtor to the sort of statutory asset disclosure that, under Article 155 of the Bankruptcy Act, a bankrupt must make to a trustee of a bankrupt. An appropriate solution would be to allow the courts, under the Civil Preservation Law, the discretion to order a defendant to disclose information regarding his assets. Such an order would be similar to the discovery order ancillary to a Mareva injunction.

The criteria for issuance of a "pre-judgment assets-disclosure" order should reflect the fact that a remedy *in rem* is more oppressive to the defendant than a remedy *in personam*. For example, application by the defendant for variation of such order on the grounds that it interferes with his ordinary course of business or life will not be permitted (as I mentioned in

⁴⁹² See e.g. the Tokyo District Court, December 26, 1951, (*Kakyû Min-shû* 2-12-1504). This decision says, "The purpose of provisional disposition with respect to the establishment of provisional status (*Kari no Chii wo Sadameru Kari-shobun*) is to temporarily give to a plaintiff the same result as upon execution of judgment rendered in her favor." A creditor does not have a substantive right to require a debtor to disclose his assets. Accordingly the requirement of disclosure cannot have a cause of action in litigation. See also Takeshita & Fujita, *supra* note 350 at 288.

⁴⁹³ However, a discovery order against a defendant is permissible only under special circumstances. Article 155 of the Bankruptcy Act provides that the court in which the petition for bankruptcy is filed may issue pre-declaration attachment and injunction type of orders with discretion. The powers given to the bankruptcy courts are broad and not exhaustively itemized. Subject to this authority, the court can issue a broad range of orders necessary in order to facilitate the bankruptcy procedure. This clearly includes the authority to issue a discovery order. The court sometimes issues an order prohibiting a defendant from paying any debt or requiring him to file financial statements before the declaration of bankruptcy. The problem is that the plaintiff has to have applied for the bankruptcy procedure and has to have proven at the inception that the defendant is *prima facie* insolvent. He also has to deposit considerable amount of money at the court. Considering that the plaintiff has not yet obtained judgment, this may be very difficult. Even though so, this is a good example of the discovery system for location of defendant's assets.

5.2). Therefore, these criteria should be clear and precise. Before a court can issue the order a “*prima facie* case” and “real risk” must be strictly proved. Furthermore, a large value bond should be deposited in court by a plaintiff in order to cover damages payable to the defendant if the plaintiff loses the case. It may be necessary to provide that a plaintiff cannot use the information disclosed by a “pre-judgment assets-disclosure” order except by leave of the court which issued the order. The payment of damages to the defendant resulting from the plaintiff’s breach of the duty not to use the information is covered under the tort law.

How the proposed order should be worded is closely linked to the problem of applicable sanctions. As I will mention later, the law should allow the court to order a defendant to appear in court and testify as to where his assets are located. Since there is no affidavit system in Japan, an oral statement will be necessary. Regarding a “pre-judgment assets-disclosure” order against a third party, Article 50 of the Civil Preservation Law is not sufficient authority because it requires a plaintiff to specify the garnishee.⁴⁹⁴ A search for the defendant’s assets would be fruitless. It is hoped that a court also has discretionary jurisdiction to order a third party to appear in court and testify as to where defendant’s assets are located.

5.4.2 Sanction against Non-compliance with Discovery

The problem is how to ensure that a defendant will comply with a “pre-judgment assets-disclosure” order. It is clear that monetary sanctions, such as the award of damages to the plaintiff for the defendant’s breach of the order, would be useless. Contempt of court may be a useful tool. However, Japanese law regarding the measures of civil execution is influenced by French law, and as I mentioned in Chapter I, Japanese law does not permit civil execution to be granted if accompanied by an order for bodily restraint.⁴⁹⁵ This derives from the idea that a person can never dispose, under a contract with another person, of his right to freedom of the body and it has been accepted as a general principle. This principle, as a matter of course, applies to the pre-judgment provisional remedy.

⁴⁹⁴ See 4.4.4, above, for an explanation of this type of order.

⁴⁹⁵ There is the Law for Maintenance of Order in Court Room, etc., but this Act is applied only to conduct such as an act of violence disturbing the order in a court room.

However, we should reconsider whether this principle must apply in all situations. In an employment contract, especially in the case where wages are paid in advance, the employee cannot be forced to work by threat of imprisonment. The employee can only be required to pay damages. Acceptance of this French ideology was useful in Japan at the time when civil laws were being enacted and consideration had to be given to human rights. However, in the contract of sale for a specific good, does the person who breaches the contract and hides the specific good need to be protected from enforcement of performance by threat of bodily restraint? In at least one circumstance, that of a bankrupt who fails to disclose, the law obliges a person to disclose information regarding his assets under threat of imprisonment. Where she does not give full information regarding her financial situation to the trustee in bankruptcy, a bankrupt may be imprisoned under Article 382 of the Bankruptcy Act. Enforcement of an order by threat of custody in limited cases is not necessarily prohibited by the principle that civil execution cannot be granted where it is accompanied by enforcement against the body, as this principle does permit exceptions.⁴⁹⁶

Where a "pre-judgment assets-disclosure" order can be enforced by threat of imprisonment, what terms are appropriate for inclusion in the order? As there is no concept of civil contempt of court in Japanese jurisprudence, non-compliance with an order of a court *per se* is not valid grounds for imprisonment. It should be noted that the duty under the Bankruptcy Act is imposed on a bankrupt generally, and not by specific order of the court.

With respect to this issue, the German "guaranty in stead of oath" is worthy of examination. Under that system, a defendant is ordered to disclose his assets with a "guaranty in stead of oath", which is submitted (stated) in front of a commissioner. If a defendant does not appear in court, he may be fined or imprisoned. If he discloses false information, he will be punished for perjury.

In Japan, under the Code of Civil Procedure, there are provisions which impose on a witness a duty to appear in court and give testimony under oath,⁴⁹⁷ and under the Penal Code

⁴⁹⁶ Statement of Mikazuki, *supra* note 86 at 121 is that acceptance of this type of enforcement or contempt of court in Japanese jurisprudence must be reviewed. However, the other members of the panel stated that it would be difficult to accept that kind of enforcement in Japan, regardless the necessity of it.

⁴⁹⁷ Article 192 (Non-penal fine for non-appearance): (Paragraph 1) If a witness does not appear without justifiable reasons, the court may order him by ruling, to bear the court costs incurred thereby, and further, impose upon him a non-penal fine not exceeding a hundred thousand yen. (Paragraph 2) An immediate

perjury is punished by imprisonment.⁴⁹⁸ The problem is that those provisions apply only to a witness but not to the party herself. The sanction against a party who gives a false statement is that she shall lose the case and/or be given a civil fine under the Code of Civil Procedure.⁴⁹⁹ On the other hand, in matrimonial cases, the provisions relating to witnesses apply to a party under the Law of Procedure in Actions relating to Personal Status.⁵⁰⁰ This is because it is insufficient for the purpose of effecting justice for the court to deem the assertions of either party to be true. This notion can apply to a “pre-judgment assets-disclosure” situation as well.

Accordingly, when legislators draft the law governing the “pre-judgment assets-disclosure” system, they should include the following provisions:

Kokoku-appeal may be made against the ruling mentioned in the preceding paragraph. Article 193 (Fine, etc. for non-appearance): (Paragraph 1) A witness who does not appear without justifiable reasons shall be liable to a fine not exceeding a hundred thousand yen or detention. (Paragraph 2) A person who has committed the offense mentioned in the preceding paragraph shall be liable to a fine and detention both according to the circumstances. (With respect to “detention”, Article 16 of the Penal Code provides: Penal detention shall be for not less than one day or less than thirty days, and shall be a confinement in a house of detention (*Koryujo*).) Article 200 (Sanction against refusal of testimony): The provisions of Articles 192 and 193 shall apply *mutatis mutandis* to the case where a witness refuses to testify without due reason after the judgment adjudicating the refusal of testimony groundless has become final and conclusive. Article 201 (Oath): (Paragraph 1) A witness shall be caused to take an oath, except as otherwise provided. . . . (Paragraph 5) The provisions of Articles 198 and 199 shall apply *muttis mutandis* to the case where a witness refuses to take an oath; and those of Articles 192 and 193, to the case where a witness refuses to take an oath without due reason after the judgment adjudicating the refusal of an oath groundless has become final and conclusive. For the English translation of the Code, see *supra* note 90.

⁴⁹⁸ Article 169: When a witness, who has been sworn in accordance with law, gives false testimony, he shall be punished with penal servitude for not less than three months nor more than ten years. For the English translation of the Code, see *supra* note 471.

⁴⁹⁹ Article 208 (Effect of non-appearance, etc.): The court may, if the party does not appear in court or refuses to take oath or to make a statement without good reason, admit the truth of the assertion of the other party relating to the queries. Article 209 (Non-penal fine against false statement): (Paragraph 1) When a party who took oath has made a false statement, the court shall impose upon him by means of ruling a non-penal fine not exceeding a hundred thousand yen. (Paragraph 2) An immediate *Kokoku*-appeal may be made against the ruling mentioned in the preceding paragraph. (Paragraph 3) In the case mentioned in paragraph 1, the court may, when the party himself who made a false statement has admitted his statement to be false during the pendency of a suit, revoke the ruling mentioned in the said paragraph according to the circumstances. For the English translation of the Code, see *supra* note 90.

⁵⁰⁰ Article 12: (Paragraph 1) In a matrimonial case the court may order the parties to attend in person and may take their testimony as to the facts alleged by the parties or by the public procurator. (Paragraph 2) If a party is unable to appear or lives at a distance, the court may cause his testimony to be taken by a commissioned judge or by a requisitioned judge. (Paragraph 3) The provisions of the Code of Civil Procedure as to witnesses who fail to attend apply *mutatis mutandis* to parties who fail to attend. For the English translation of the Law, see Nakane Fukio *Law of Procedure in Actions Relating to Personal Status* (Tokyo: Eibun Horeisha, 1997).

- (1) Where a court issues a pre-judgment assets-disclosure order, the court may order the defendant to attend in person and may take the defendant's testimony as to the location and nature of his assets if the plaintiff requests that this information be disclosed.
- (2) If a defendant is unable to appear or lives at a distance, the court may cause his testimony to be taken by a commissioned judge or by a requisitioned judge.
- (3) The provisions of the Code of Civil Procedure as to witnesses who fail to attend apply *mutatis mutandis* to a defendant who fails to attend hereunder.

5.4.3 Worldwide Order

The worldwide order is effective even before a plaintiff obtains information regarding the location of a defendant's assets under a disclosure order. As I mentioned above, obtaining the information is the most important objective of the worldwide Mareva injunction.⁵⁰¹ However, the worldwide restrictive injunction is also useful, to some extent, in preserving a defendant's assets. In Peter F. Schlosser's opinion, under the German law, no matter where the assets are located, the courts have the authority to issue a pre-judgment provisional disposition order to prevent a defendant from disposing of the assets.⁵⁰² Article 23 of the Civil Preservation Law provides that the courts can issue a provisional disposal order affecting a *subject-matter* and only the *subject-matter*. Where the court interprets "a *subject-matter*" as including a defendant's assets by which judgment for a pecuniary claim can be realized, it is possible for it to issue an order against the defendant restraining him from disposing of his foreign assets. However, this idea contravenes Japanese convention. As I mentioned earlier, the Japanese word for "a subject matter" is *Keisôbutsu* and the right regarding *Keisôbutsu* excludes a pecuniary claim.⁵⁰³

It is also the role of the legislature to create laws giving a court the power to issue an order to enjoin a defendant from disposing of his assets outside of the domestic jurisdiction. The problem is that there is no way to execute such an order under the Civil Preservation Law. Remember that my proposal regarding discovery is based on testimony proceedings. My

⁵⁰¹ See 4.2.2, above, for a discussion of this issue.

⁵⁰² *Supra* note 272 at 112.

⁵⁰³ Kikui Yûdai & Muramatsu Toshio, *Kari-sashiosae, Kari-shobun* [Provisional Attachment, Provisional Disposition], rev. ed. (Tokyo: Seirin Shoin Shin-sha, 1965) at 176. Takeshita & Fujita, *supra* note 350 at 222.

proposal can be considered to be an extension of the current law. However, to force a defendant to comply with the order by threat of imprisonment may be inconsistent with the concept currently adopted by Japanese jurisprudence. An order for specific performance restraining a defendant from disposing of his assets, enforced by threat of imprisonment is identical to an injunction and, generally speaking, it is impossible to accept the injunction system in Japanese jurisprudence. Furthermore, even if bodily restraint is acceptable in limited circumstances it is problematic for the order to take effect on a third party. It is generally considered sufficient that courts can order a defendant to appear in court and testify as to where his assets are located - wherever they are located.

Bibliography

1 English Book

- Bean, David, *Injunctions*, 7th ed. (London: FT Law & Tax, 1996)
- Burn, E. H., *Modern Law of Real Property*, 14th ed. (London: Butterworths, 1988)
- Davis, Joseph W.S. *Dispute Resolution in Japan* (Den Haag: Kluwer Law International, 1996)
- Dunlop, C. R. B., *Creditor-Debtor Law in Canada*, 2d. ed. (Toronto: Carswell, 1995)
- Henderson, Dan Fenno, "Law and Political Modernization in Japan", in R. Ward ed, *Political Development in Modern Japan* (New Jersey: Princeton University Press, 1968)
- Henderson, Dan Fenno, *Conciliation and Japanese Law: Tokugawa and Modern*, vol. 1 (Seattle: University of Washington Press, 1965)
- Hoyle, Mark S. W., *The Mareva Injunction and Related Orders* (London: Lloyd's of London Press Ltd., 1985)
- Ishii, Ryôsuke, *Japanese legislation in the Meiji Era* trans. William J. Chambliss (Tokyo: Pan-pacific Press, 1958)
- Lawson, F. H., *Remedies of English Law*, 2d ed. (London: Butterworths, 1980)
- Maitland, F. W., *Equity, also The Forms of Action at Common Law (Two Courses of Lectures)*, (London: Cambridge University Press, 1916)
- McAllister, Debra M., *Mareva Injunctions*, 2d ed. (Toronto: Carswell, 1987)
- Ough, Richard N. *The Mareva Injunction and Anton Piller Order* (London: Butterworths, 1987)
- Plucknett, Theodore, *A Concise History of the Common Law*, 4th ed. (London: Butterworths, 1948)
- Steenstrup, Carl, *A History of Law in Japan until 1868* (Leiden: E.J. Brill, 1991)
- Wigmore, John Henry, *Law and Justice in Tokugawa Japan* (Tokyo: The Japan Foundation, 1975)

2 English Article

- Adams, George Burton, "The Origin of English Equity" (1916) 16 Columbia Law Review 87.

- Andrew, Justice Rogers, "The Extra-territorial Reach of the Mareva Injunction" (1991) Lloyd's Maritime and Commercial Law Quarterly 231.
- Barbour, Willard, "Some Aspects of Fifteenth-century Chancery" (1917) 31 Harvard Law Review 834.
- Beale, Joseph H. Jr., "Contempt of Court, Criminal and Civil" (1908) 21 Harvard Law Review 161.
- Briggs, A., "How Soon is an English Court Seised (Revisited)?" (1994) Lloyd's Maritime and Commercial Law Quarterly 470.
- Capper, David, "Worldwide Mareva Injunctions" (1991) 54:3 The Modern Law Review 329.
- Harrison, Jhon Conacher, "The Mareva Injunction" (1991) Institute of Comparative Law, McGill University.
- Malek, Ali & Lewis, Caroline, "Worldwide Mareva Injunction: the Position of International Banks" (1990) Lloyd's Maritime and Commercial Law Quarterly 88.
- McGill, Ian, "The Jurisdictional Basis for the Mareva Injunction" (1980) 3 U.N.S.W. Law Journal 434.
- Michell, Paul, "The Mareva injunction in Aid of Foreign Proceedings" (1997) 34:4 Osgoode Hall Law Journal 741.
- Pollock, Frederick, "The King's Justice in the Early Middle Ages" (1898) 12 Harvard Law Review 227.
- Rose, F. D., "The Mareva Injunction Attachment in Personam" (1981) Lloyd's Maritime and Commercial Law 1.
- Schlosser, Peter F., "Coordinated Transnational Interaction in Civil Litigation and Arbitration" (1990) 12 Michigan Journal of International Law 150.
- Skene, Michael Andrew, "Commercial Litigation Beyond the Pale: A Comparison of Extraterritorial Anti-suit and Mareva Jurisdiction Exercised by the Courts of England and British Columbia in Commercial Disputes" (1996) 30:1 U.B.C. Law Review 1.
- Tyree, Alan L., "Mareva Injunctions: The Third Party Problem" (1982) Dec. Australian Business Law Review 375.
- Tetley, William, "Attachment, the Mareva Injunction and *Saisie Conservatoire*" (1985) Lloyd's Maritime and Commercial Law 58.
- Zuckerman, A.A.S., "Mareva Injunctions and Security for Judgment in a Framework of Interlocutory Remedies" (1993) 109 The Law Quarterly Review 433.

3 Japanese Book

- Hosokawa, Kameichi, *Nihon Kindai Hô-sei-shi [The History of Japanese Modern Law]* (Tokyo: Yûhi-kaku, 1961)
- Kagawa, Yasukazu *et al.*, *Minji Shikkô-hô [The Civil Execution Law]*, vol. 6 (Tokyo: Kinzai, 1995)
- Kikui Yûdai & Muramatsu Toshio, *Kari-sashiosae, Kari-shobun* [Provisional Attachment, Provisional Disposition], rev. ed. (Tokyo: Seirin Shoin Shin-sha, 1965)
- Kobayakawa, Kingo, *Kinsei Minji Soshô-hô Seido no Kenkyû [Research of Civil Procedure System in the Latter Part of Feudalism]* (Tokyo: Meisho Fukyû Kai, 1988) at 68.
- Matsuura, Kaoru, "Hozen Soshô no Enkaku [The Origin and Development of Civil Preservation Procedure]" in Nakata Junichi *et al.*, *Hozen Shobun Taikei [The System of Provisional Remedy]* vol. 1, (Tokyo: Hôritsu Bunka-sha, 1964)
- Morita, Osamu, *Kyôsei Shikkô no Hôgaku-teki Kôzô [Legal Constitution of Civil Execution]* (Tokyo: Tokyo Daigaku Shuppan Kai, 1995)
- Nakano, Teichirô, Matsuura, Kaoru, & Suzuki, Masahiro eds., *Minji Soshô-hô Kôgi [Lecture of the Civil Procedure Act]*, 9th ed. (Tokyo: Yûhikaku, 1984)
- Shigematsu, Kazuyoshi, *Nihon Hôseishi Kôyô [Japanese Legal History]* (Tokyo: Keibundô, 1987)
- Sugiyama, Haruyasu, *Gaisetsu Nihon-hô-shi [Outline of Japanese Legal History]* (Tokyo: Keibundô, 1987)
- Takakubo, Sadato, *Igirisu-hô Nyûmon [Introduction to English Law]*, 3d ed. (Tokyo: Chûou Daigaku Shuppan Bu, 1990)
- Takeshita, Morio & Fujita, Kôzô eds., *Minji Hozen Hô [The Civil Preservation Law]*, vol. 1 (Tokyo: Seirin Shoin, 1996)
- The Legal Training and Research Institute, *Minji Bengo no Tebiki (Hozen-shobun Kankei)* [Guidance for Civil Litigation (Concerning the Provisional Remedy)] 5th ed. (Tokyo: 1988)
- Ukai, Nobunari, Fukushima, Masao, Kawashima, Takenori, & Tsuji, Kiyoaki eds., *Nihon Kindai-hô Hattatsu-shi [The History of Japan's Modern Law]* vol. 1, 2d ed. (Tokyo: Keisô Shobô, 1974)
- Ukai, Nobunari, Fukushima, Masao, Kawashima, Takenori, & Tsuji, Kiyoaki eds., *Nihon Kindai-hô Hattatsu-shi [The History of Japan's Modern Law]* vol. 2, 3d ed. (Tokyo:

Keisô Shobô, 1979)

Ukai, Nobunari, Fukushima, Masao, Kawashima, Takenori, & Tsuji, Kiyoaki eds., *Nihon Kindai-hô Hattatsu-shi [The History of Japan's Modern Law]* vol. 6, 2d ed. (Tokyo: Keisô Shobô, 1973)

Yoshikawa, Daijirô, *Hozen-shobun no Kenkyu* [The Research of Provisional Remedy] (Tokyo: Kobun-dô, 1937)

4 Japanese Article

Ishikawa Akira, “*Shittukô ni-okeru Zaisan Kaiji-seido no Donyu ni-tsuit* [Regarding Acceptance of Examination in Aid of Execution]” 45:2 *Hôgaku Kenkyu* 1.

Kaibara, Fumio, “*Eikoku Kouhei-hô no Shingen* [The Origin of English Equity] (1)” (1957) 3:1 *Kanazawa Hôgaku* 79.

Kaibara, Fumio, “*Eikoku Kouhei-hô no Shingen* [The Origin of English Equity] (2)” (1958) 4:1 *Kanazawa Hôgaku* 42.

Kaibara, Fumio, “*Eikoku Kouhei-hô no Shingen* [The Origin of English Equity] (3)” (1958) 4:2 *Kanazawa Hôgaku* 117.

Kaibara, Fumio, “*Eikoku Kouhei-hô no Shingen* [The Origin of English Equity] (4)” (1960) 6:1 *Kanazawa Hôgaku* 69.

Kyôsei-shikkô-hôan Yôkô-an Kenkyû-kai [The Society for the Study of the Draft of the Civil Execution Law], “*Kyôsei-shikkô-hô Kaisei-yôkô to Minpô* [The Draft of the Civil Execution Law and Civil Code]” (1972) 517 *Juristo* 2.

Miki, Kôichi, “*Shôgai-teki Minji-hozen-shudan no Aratana Kanousei (1)* [New Possibility of Means for International Civil Preservation]” 65:4 *Hôgaku-Kenkyu* 57.

Mukai, Ken, “*Meiji Shonen niokeru Minji-soshô-hôten no Hensan* [Drafting the Code of Civil Procedure at the Beginning of Meiji]” (1964) 6 *Sôgô Hôgaku* 2.

Mukai, Ken, “*Minji-soshô-hô Hôten Hensan no Sendatsu Tachi* [Pioneers in Japan Drafting the Code of Civil Procedure]” (1991) 971 *Juristo* 18

Schlosser, Peter F., “*Ryôiki-gai-teki na Sayô wo Yûsuru Kari no Kenri-hogo ni-tsuitenô Kinji no Sho-mondai* [the Recent Issues regarding Pre-judgment Relief ex juris]” trans. Sakahara Masao & Koshiyama Kazuhiro (1991) 64:9 *Hôgaku Kenkyû* 106.

Suzuki, Masahiro, “*Kari-sashiosae Meirei ni-okeru Mokuteki-zaisan no Tokutei-hyôji* [Specification of Assets subject to Provisional Attachment]” (1969) 22 *Bessatsu Juristo* 52.

Tanaka, Kazuo, "*Soshô Shiryô no Aitegata-karano Shutoku* [Obtaining Facts and Proof from Opposite Party]" 58 Hôgaku Kyôkai Zasshi 307.

Tokyo Chisai Hozen Kenkyû-kai [Society for the Study of Provisional Remedy in the Tokyo District Court] "*Yokin-saiken ni-taisuru Kari-sashiosae* [Provisional Attachment against Bank Account]" (1985) 1162-3 *Hanrei-jihô* 3.

Tokyô Chihô Saiban-sho Minji Dai 9-bu [the Tokyo District Court, 9th Department of the Civil Division], "*Minji Hozen-hô no Unyô-jyôkyô* [Current Application of Civil Preservation Law]" (1992) 1416-3 *Hanrei-jihô* 3.

Toyohira, Yohichi, "*Tokugawa Jidai no Kôhei-hô Ron* [Equitable Notion in the Tokugawa Era]" 15 Hôgaku Ronsô 130.

Ito, Makoto *et al.*, "*Shin Minji Soshô-hô wo Megutte* [Discussion about the New Code of Civil Procedure]", (1997) 1125 *Jurisuto* 107.

5 Japanese Law Materials (English)

Nakane, Fukio, *The Civil Code of Japan* (Tokyo: Eibun Hôrei-sha, 1998)

Nakane, Fukio, *The Code of Civil Procedure Japan* (Tokyo: Eibun Hôrei-sha, 1998)

Nakane, Fukio, *Law of Procedure in Actions Relating to Personal Status* (Tokyo: Eibun Hôrei-sha, 1997)

Nakane, Fukio, *The Penal Code of Japan* (Tokyo: Eibun Hôrei-sha, 1996)

Research and Training Institute in Ministry of Justice, *Civil Preservation Law* (Tokyo: 1990)

Research and Training Institute in Ministry of Justice, *Civil Execution Law* (Tokyo: 1980)