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THREE IF BY EQUITY: MAREVA ORDERS &
THE NEW BRITISH INVASION

JEFFREY L. WILSON*

If you live in New York City for any decent amount of time, you are bound to hear stories about things being stolen. Watches, purses, cars, wallets, cargo trucks, you name it. Chances are, if it has value, someone in this town has thought about stealing it. That's no slight, mind you, on New York City's Finest. It's just a fact of life produced by the confluence of eight million people in a single place. Frankly, these stories tend to go in one ear and out the other unless you happen to be the unfortunate one from whom the item is stolen. Another product of big city living.

Even against that backdrop, one would think that making off with a $40 million hotel might make the newspapers. After all, just exactly how does one steal a hotel? Does insurance cover that? Wouldn't there be a lot of witnesses? All of these are reasonable questions. It happened in the summer of 2003, to the Gorham Hotel on 55th Street and Sixth Avenue, just north of Times Square in Manhattan. Not a word of it made the mainstream press. For those of us with a subscription to the NEW YORK STATE LAW DIGEST, however, the larcenous behavior did not go unnoticed.1

The perpetrators did not use a gun. They did not have to. They had access to a weapon of a different kind: a Mareva order. Called a "nuclear weapon of the law,"2 the Mareva order has a

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short but turbulent history, little-known but lethal and catching on fast.\(^3\) Developed in 1975\(^4\) by an English judge with a career as celebrated and criticized as any in the twentieth century,\(^5\) the Mareva order (also called a Mareva "injunction") will come to be viewed by defendants unlucky enough to be subjected to one with all of the regard with which civil libertarians greeted the USA PATRIOT Act\(^6\) or organized crime dons welcomed the RICO Act.\(^7\)

\(^3\) See Grupo, 527 U.S. at 332 (recognizing the atomic appellation); see also Tim Taylor, Worldwide Marevas in the Real Wide World, 86 L. SOCY GAZETTE 22 (1989) (describing Mareva injunction, with Anton Piller order, as "one of the law's two 'nuclear' weapons"). But see Richard Aird, The Scottish Arrestment and the English Freezing Order, INT'L AND COMP. LAW QUART., 51.1(155) (2002) (citing Lord Denning's own appraisal of device as "the greatest piece of judicial law reform in my time").

\(^4\) See Nippon Yusen Kaisha v. Karageorgis, [1975] 1 W.L.R. 1093, 1093 (Eng. C.A.) (creating Mareva injunction); Mareva Company Naviera v. Int'l Bulkcarriers S.A. (The Mareva), [1980] 1 All E.R. 213, 213 (Eng. C.A.) (holding in 1975: "if it appears that the debt is due 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 proper case to grant interlocutory judgment so as to prevent him disposing of those assets); see also Rhonda Wasserman, Equity Renewed: Preliminary Injunctions to Secure Potential Money Judgments, 67 WASH. L. REV. 257, 338 (1992) (stating that in 1975 the Court of Appeal revolutionized English practice).

\(^5\) See In Every Sense a People's Judge – Obituary: Lord Denning, FIN. TIMES (London), Mar. 6, 1999, at 7 (citing Denning's efforts to improve equality of women in press, individual freedoms, and consumer protection); Simon Tegel, Maverick "People's Judge" Lord Denning is Mourned, BIRMINGHAM POST Mar. 6, 1999, at 6 (describing Denning as "one of the most courteous and controversial judges of the century, [inspiring] public affection for being more interested in justice than in the legal niceties"); John Torode, Denning, Defender of Justice and Liberty; Former Master of the Rolls Dies at 100, DAILY MAIL (London) March 6, 1999, at 39 (citing one of Denning's favorite quotes: "be you never so high, you are not above the law.").

\(^6\) Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272. The ACLU, clearly not a proponent of the legislation, states on its webpage: Just 45 days after the September 11 attacks, with virtually no debate, Congress passed the USA PATRIOT Act. Many parts of this sweeping legislation take away checks on law enforcement and threaten the very rights and freedoms that we are struggling to protect. For example, without a warrant and without probable cause, the FBI now has the power to access your most private medical records, your library records, and your student records. . . and can prevent anyone from telling you it was done. American Civil Liberties Union, "USA PATRIOT Act," available at http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=12126&c=207 (last visited Mar. 19, 2005). Whether the ACLU's assessment of threat posed by the USA PATRIOT Act is accurate is, of course, a matter of conjecture and much debate.

A Mareva "injunction" is, technically, an interlocutory judgment which freezes the assets of a defendant to ensure that a plaintiff's final judgment will not go unsatisfied. Though founded in equity, the procedure for obtaining a Mareva injunction is now based in statute, and is, under the statute, called a "freezing injunction." In the usual case, a creditor-

8 See Mareva Compania Naviera, [1980] 1 All E.R. at 213. Lord Denning stated:

In my opinion [the power to protect a party's legal or equitable right] applies to a creditor who has a right to be paid the debt owing to him, even before he has established his 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 him disposing of those assets.

Id. at 213 (emphasis added). There is considerable confusion, even in countries that have adopted the procedure, as to exactly how to classify it. It is not technically an "injunction" in the classical sense, as its recent genesis attests. The High Court of Australia has recognized that the Mareva should not be considered part of the law of injunctions, calling them instead "asset preservation orders." Cardile v. LED Builders Pty Ltd. [1999] 198 C.L.R. 380, 393 (Austl.). The leading professor of remedies law in Australia, however, differs with the High Court's classification, stating, "Not only is [the Mareva's] historical development associated with the law of injunctions, but they are an essential (and controversial) part of the armour of prejudgment enforcement of remedies, a topic which is itself entwined, in a very practical way, with the law of secondary rights." Michael Tilbury, Remedy Discussion Forum: Teaching Remedies in Australia, 39 BRANDEIS L.J. 587, 590 (2001). Another prominent professor of remedies in Australia agrees. Bruce Kercher, Remedy Discussion Forum: Legal History and the Study of Remedies, 39 BRANDEIS L.J. 619, 627 (2001). For the purposes of this Note, the term Mareva "order" is preferred, though there may inevitably be reference to Mareva "injunctions," as well — where so noted, the references should be considered synonymous.

9 See Mareva Compania Naviera, [1980] 1 All E.R. at 213 (holding that Court has jurisdiction in proper case to grant interlocutory judgment so as to prevent debtor disposing of his assets); Third Chandris Shipping Corp. v. Unimarine SA (The Pythia) [1979] 3 W.L.R. 122, 122 (Eng. C.A.) (stating that plaintiff should give some grounds for believing that there is risk of assets being removed before judgment is awarded); see also Jet W. Ltd. v. Haddican [1992] 1 W.L.R. 545, 545 (Eng. C.A.) (suggesting that Mareva injunction is means for preventing dissipation of assets in one way or another).

10 See HAROLD GREVILLE HANBURY & RONALD HARLING MAUDSLEY, MODERN EQUITY 784 (Jill E. Martin ed., 12th ed. 1985) (stating that Mareva injunction is founded in equity); Jeffrey T. Kirshner & Ronald J. Silverman, Mareva Orders: Fact or Fiction in the United States, AM. BANKR. INST. J., Nov. 2002, at 24 (citing well-established general principle that judgment establishing debt was necessary before court of equity would interfere with debtor's use of his property); Alan Seveg, Investment: When Countries Go Bust: Proposals for Debtor and Creditor Resolution, 3 ASPER REV. INTL BUS. & TRADE L. 25, 57 (2003) (stating Mareva injunction is equitable remedy for attaching assets before obtaining final judgment).

11 Though the Supreme Court Act of 1981, §37 (Eng.), codified the procedure into English statutory law and renamed the device the "freezing injunction," American and English courts still refer to it by its common law name. The name "Mareva" has also stuck despite the fact that Mareva Compania Naviera was the second case in which this procedure was implemented. The first case, occurring just one month before Mareva Compania Naviera, issued an identical remedy. See Nippon Yusen Kaisha v. Karageorgis, [1975] 1 W.L.R. 1093, 1093 (Eng. C.A.). The term "Mareva" is also still used to refer to these injunctions in the United States. See, e.g., Grupo Mexicano De Desarrollo v. Alliance Bond Fund, 527 U.S. 308, 342 (1999); Guinness PLC v. Ward, 955 F.2d 875, 878 (4th Cir. 1992).
plaintiff who fears that a debtor-defendant might default on his debt—and secret away his assets to frustrate any future judgment—applies ex parte to an English court for this provisional remedy. The plaintiff must demonstrate a "good arguable case" and a real risk of default, all supported by a full and frank disclosure of material facts, usually in the form of an affidavit by his attorney. All of this takes place quickly and secretly, so as not to tip off the defendant. If the judge agrees,
he can then freeze the known assets of the defendant and impress into service the defendant's bankers\(^\text{17}\) (who are, of course, sworn to secrecy)\(^\text{18}\) to assist the plaintiff in "tracing" any other assets the defendant may have, usually up to the point of the plaintiff's claim, though sometimes beyond.\(^\text{19}\) Only later, sometimes months later,\(^\text{20}\) is the defendant told anything about the order, creating a situation whereby a defendant literally wakes up one morning and finds that everything he owns has been "frozen" by an English court, his confidential fiduciaries have made public his private finances, and he has been placed on an allowance – not unlike that of a child – to pay for his living, business, and legal expenses.\(^\text{21}\)

\(^\text{17}\) See Norwich Pharmacal Co. v. Comm'rs of Customs & Excise, [1974] A.C. 133, 133 (Eng.) (discussing principle for disclosure against person who is not party to action); Zicherman, supra note 16, at 675 (stating that Mareva injunction does not regulate only actions of defendant; it also controls behavior of third parties and prevents them from dissipating defendant's enjoined assets); see also Nation, supra note 16 at 399 (explaining that banks would not be permitted to transfer funds or make other payments that would be in violation of order).

\(^\text{18}\) See generally DAVID BARNARD & MARK HOUGHTON, THE NEW CIVIL COURT IN ACTION, 247 (1993); Alexander, supra note 2, at 490 (explaining that to maintain element of surprise, speed and secrecy are required); Fabano, supra note 2, at 140 (stating that every person who has knowledge of injunction is obliged to do whatever he reasonably can to preserve assets affected by its terms).

\(^\text{19}\) See, e.g., Gidrxmlme Shipping Co. v. Tantomar-Transportes Maritimos Lda, [1995] 1 W.L.R. 299, 299 (Q.B.), where plaintiffs obtained a Mareva order restraining defendants from: "... removing [their] assets from the jurisdiction or disposing of, assigning their rights to, charging, mortgaging, encumbering or otherwise howsoever dealing with any of their assets within the jurisdiction until the Final Award was satisfied, save in so far as the unencumbered value of the assets exceeded US$720,000." See also Cretanor Mar. Co. v. Irish Mar. Mgmt. Ltd., [1978] 1 W.L.R. 966, 966 (Eng. C.A.), where the court issued a Mareva injunction prohibiting defendant from removing assets up to a stated amount out of the jurisdiction. A Co. Ltd. v. Republic of X, [1990] 2 Lloyd's Rep 520, 524 (Q.B.), is a case which issued a Mareva injunction restraining the defendant from removing any of his assets out of the jurisdiction or disposing of, assigning, or otherwise dealing with any of his assets that exceed the judgment.

\(^\text{20}\) See CIBC Mellon Trust Co. v. Mora Hotel Corp., 100 N.Y.2d 215 (2003) (holding that English procedures, although not indistinguishable from those used in New York, are not incompatible with due process); see also Adler v. Fenton, 65 U.S. 407, 411 (1861) (stating that laws accurately determine time and manner in which property becomes the possession of creditors). See generally Perkins & Mills, supra note 16, at 676 (explaining that putting defendant on notice of Mareva injunctions would give him time to hide assets and frustrate their purpose).

\(^\text{21}\) Courts recognize that the Mareva order can be punitive as applied and expend not a few paragraphs on reassuring those involved that defendants will be allowed to maintain their lifestyle in the manner to which they are accustomed. But note the case of PCW Ltd v. Dixon, [1983] 2 All E.R. 158, 158 (Q.B.), where a wealthy man with five children in private education was granted an "allowance" of £100 per week for ordinary living expenses, despite the fact that there was no evidence to suggest he was dissipating his assets or living in a manner any different than he had before the case was filed. This case demonstrates the powerful effect this type of procedure can have on a defendant to consider settling the case against him, regardless of his culpability. See Iraqi Ministry of Def. v. Arcepey Shipping Co. SA (The Angel Bell), [1980] 2 W.L.R. 488, 488 (Q.B.), which...
To add insult to pecuniary injury and privacy invasion, the defendant can expect to disclose the rest of his assets not disclosed by his banks anywhere in the world and, in all likelihood, to go out of business in a matter of weeks. Sometimes, he can expect a knock on his door by the plaintiff’s solicitors, accompanied by local law enforcement, with another court order allowing his adversary to seize papers, records, and any potential evidence that might be required at the future trial. There is no requirement that the defendant own assets in England, conduct business in England, or, for that matter, ever set foot in England. His compliance with this oppressive order is enforced on threat of contempt of court with sanctions ranging from fines, to debarment from defending the merits of the suit, to imprisonment.

states that defendant’s legal expenses, living expenses, and ordinary business expenses will be considered. See also Wasserman, supra note 4, at 348 n.377, in which the author cites multiple cases, all stating that the court will ensure that a defendant will remain able to pay his routine expenses after the implementation of a Mareva injunction against him, though this assumption is questionable in practice.


See Anton-Piller KG v. Manufacturing Processes Ltd., [1976] Ch. 55, 55 (Eng. C.A.) (granting order without notice allowing plaintiff to search defendant’s premises and allowing him to remove documents belonging to plaintiff); see also Hill, supra note 12, at 560 (explaining generally British view of procedural aspects of international commercial transactions); John Hull & Anton Piller Abuses, EURO. INTEL. PROP. REV., 1989, 11(10), at 389 (discussing particular abuses of this invasive procedure).

See Michael Bundock, The Onward March of the Mareva, 139 NEW L.J. 496 (1989) (noting progression of English cases toward world-wide application of Mareva); Taylor, supra note 3, at 2 (discussing how Mareva operates as procedural “back door” to English court jurisdiction). See generally TERENCE INGMAN, THE ENGLISH LEGAL PROCESS 481–82 (9th ed. 2002) (describing how previous limits on Mareva to assets within English territory “can no longer be regarded as good law”).

The U.K. Practice Directions, Part 25, Appendix A provide a sample template Mareva order (or “freezing injunction” as it is now called) to be filled in by plaintiffs and presented ex parte to the court. On its face, it reads, “[If you] disobey this order you may be held in contempt of court and may be imprisoned, fined or have your assets seized.”
Judges, to be sure, are cognizant of the dangers such "remedies" can inflict on defendants.27 No small amount of ink is expended in English decisions cautioning against the unrestrained expansion of this procedure.28 Yet, the demonstrated trend of expansion yields a contrary conclusion. What began as an exception to the general rule that a person's property was his to do with as he saw fit until a legal judgment held otherwise29 has taken on a life of its own, swallowing the rule, moving beyond the borders of the jurisdiction that created

One sanction specifically discussed in Mareva cases is debarment of the defendant from defending the case entirely. Lord Donaldson, in Derby & Co. Ltd v. Weldon (Nos. 3 & 4), [1980] 1 Ch. 65, 81-82 (Eng. C.A.), stated (or, perhaps, understated):

In the context of the grant of the Mareva injunction, I think that a sufficient sanction exists in the fact that, in the event of disobedience, the court could bar the defendant's right to defend. This is not a consequence which it could contemplate lightly as it would become a fugitive from a final judgment given against it without its explanations having been heard and which might well be enforced against it by other courts.

Id.

Another judge, in Coop. Ins. Soc. v. Argyll Stores (Holdings) Ltd, [1998] A.C. 1 (Eng.), discussed the punitive nature of contempt as an enforcement mechanism, noting:

[The] only means available to the court to enforce its order is the quasi-criminal procedure of punishment for contempt. This is a powerful weapon; so powerful in fact as often to be unsuitable as an instrument for adjudicating upon the disputes which may arise over whether a business is being run in accordance with the court's order. The heavy-handed nature of the enforcement mechanism is a consideration which may go to the exercise of the court's discretion in other cases as well, but its use to compel the running of a business is perhaps the paradigm case of its disadvantages.

Id.

27 See, e.g., Grupo Torras SA v. Al-Sabah (No. 1), [1995] 1 Lloyd's Rep. 374, 385 (Q.B.) (explaining that reaction to remedy has been mixed in England, as some see it as unnecessary intervention); see also Kercher, supra note 8, at 628 (noting that potential dangers of Mareva orders to debtors was part of reason Supreme Court refused to allow them in past cases); 'Taylor, supra note 3, at 22, stating:

The conundrum that defeats the fulfillment of that principle in practice is that where a plaintiff obtains and holds a Mareva injunction the overwhelming probability is that no judgment will follow and the existence of the plaintiff's right will never be put to the definitive test of a trial. Instead, the plaintiff can advance his case in affidavit evidence and where the defendant contradicts that evidence the court does not seek to resolve that conflict and will by and large assume that the facts are as described by the plaintiff's affidavits even though they may be denied by the defendant. In the result, it is all too easy for the defendant's rights to suffer in the interests of protecting a right of the plaintiff which in the ultimate analysis may be illusory.

Id.

28 Taylor, supra note 3, at 22; see also Ninemia Mar. Corp. v. Trave Schiffahrtsgesellschaft M.B.H. & Co. K.G., (The 'Niedersachsen'), [1983] 1 W.L.R. 1412, 1412 (Eng. C.A.) (cautioning against "rapid and sustained increase in the number of applications [for Mareva orders]").

29 See, e.g., Lister v. Stubbs, [1890] All E.R. 797, 797 (Eng. C.A.) (stating the long-standing principle); Short v. Berry, [1828] N.S.W.S. Ct. Cas. 38, 38 (Austl.) (describing such "remedies" as "violation of all principle"). See also 1 WILLIAM BLACKSTONE, COMMENTARIES 138 (noting right to dispose of one's property as one saw fit, prior to a court judgment, as an "absolute" in English law).
it, and becoming a recurring insult to nations around the world and a violation of, if not of the letter, certainly the spirit of international law.

If that's not enough, for American defendants, the nightmare has only just begun. As of now, four Justices of the Supreme Court of the United States would allow federal courts to adopt the preliminary injunction in aid of money claims by general creditors. Though five agree that it is beyond the traditional power of federal courts to issue such injunctions, the federal Circuit Courts of Appeal have already found relatively simple avenues around their approach. Those New York defendants who might become subject to the English procedure, likewise, will find little solace in their home courts, who have considered the *Mareva* injunction no obstacle to enforcing the judgments of English courts. Even if that means sanctioning a $330 million contempt of court judgment for violating the terms of a *Mareva* order, the largest in the history of American law. Even if that

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31 *Grupo Mexicano*, 527 U.S. 308 (holding that *Mareva*-style injunctions lay beyond statutory and equitable authority of federal courts); see Fabano, supra note 2, at 135 (summarizing majority opinion in *Grupo Mexicano*); John H. Bae, *Cross Boarder Transactions; Evaporation of the Mareva Injunction and The Need to Protect Debtors and Creditors*, BANKR. STRATEGIST, October 2000, at 1 (commenting that American plaintiffs were permitted to use *Mareva* injunctions until *Grupo Mexicano* was decided in 1999).

32 See Deckert v. Independence Shares Corp., 311 U.S. 282, 290 (1940) (allowing for temporary injunctions for equitable relief prior to trial, reversible only for abuse of trial court's discretion); Rahman v. Oncology Assocs., 198 F. 3d 489, 492 (4th Cir. 1999) (finding *Deckert* to be leading authority in situations where both money damages and equitable relief were sought). See generally DeBeers Consol. Mines, Ltd. v. U.S., 325 U.S. 212, 220 (1945) (stating circumstances in which preliminary injunctions are appropriate).


34 See *CIBC Mellon Trust Co*, 100 N.Y. 2d at 220.

means "stealing" a $40 million New York hotel to satisfy that judgment.36

Whether one considers the Mareva device to be an indispensable tool to combat rampant international fraud37 or an extortionate tool to force settlement by foreign defendants,38 no one can deny the effectiveness of the procedure. But at what cost to existing balance between the rights of the parties involved does such effectiveness come? At what cost to the sovereignty of nations? These questions and others are addressed below.

PART I of this Note discusses the development of the Mareva procedure, including its later expansion and use on an ever-widening class of defendants. Some technical aspects of the device, including how to apply for application and discharge of a Mareva order, are addressed in PART II. The approach taken by American courts with regard to Mareva-style remedies is the subject of PART III. PART IV considers the extraterritorial, adversarial, due process, and other legal implications of the Mareva order. And, finally, PART V posits some potential solutions to the problems raised by the Mareva procedure.


38 See Z Ltd. v. A-Z and AA-LL, [1982] Q.B. 558, 586 (1982) (Kerr, LJ) (warning "the great value of this jurisdiction must not be debased by allowing it to become something which is invoked simply to obtain security for a judgment in advance, and still less as a means of pressuring defendants into settlements."); Alexander, supra note 2, at 490 (suggesting that Mareva injunctions are successful tool used to convince defendants to settle their cases); Willoughby, supra note 23, at 480 (noting that most businesses quickly fail after imposition of Mareva injunction).
I. DEVELOPMENT OF MODERN ENGLISH PROVISIONAL REMEDIES

A. Avoiding “An Entirely New and Wrong Principle”

This Note addresses only a select set of the modern provisional remedies that are utilized with increasing frequency by English courts in the arena of international litigation. These remedies, founded in equity, represent only recent evolution in a vastly larger body of English judicial thought and consideration. Because these evolutions remain static only briefly, it is important to point out what appear to be wrong turns so that the system’s continued vitality and progress can be preserved. It is one well-intentioned, but flawed turn that this Note addresses: the Mareva injunction.

Though now placed on statutory footing, the Mareva injunction can only be understood in light of broader principles underlying English equity practice. As has confounded first year law students for centuries, the power of a court to pursue justice between the parties does not simply reside in its legal authority. Rather, a court also has an equitable authority which, in some cases, extends further than its legal mandate. A modern


40 It is clearly beyond the scope of this Note to attempt – let alone succeed – in an exhaustive review of English equitable procedures. Both interesting and multi-textured, this development has been the subject of countless volumes of commentary and review by far more skillful scholars in England and the United States and resort to their eminent authority has been made by this author and is encouraged for anyone interested in a depth of discussion not possible in this Note. See, e.g., Barnard & Houghton, supra note 18; Hanbury & Maudsley, supra note 10; Inman, supra note 25; F.W. Maitland, Equity and the Forms of Action at Common Law – Two Courses of Lectures (A.H. Chayter & W.J. Whittaker eds., 1909); Snell’s Principles of Equity (P.V. Baker & T. St. J. Langan eds., 28th ed. 1982); Joseph Story, Commentaries on Equity Jurisprudence (F.V. Balch ed., 11th ed. 1873).

41 See Mareva Compania Naviga, [1980] 1 All E.R. at 213 (holding that Court has jurisdiction in proper case to grant: interlocutory judgment so as to prevent debtor disposing of his assets); Nippon Yusen Kaisha v. Karageorgis, [1975] 1 W.L.R. 1093, 1093 (Eng. C.A.) (creating “Mareva” injunction); Supreme Court Act, 1981, c. 54, §37 (Eng.) (renaming Mareva to “freezing injunction”).

English court wields both powers – legal and equitable – though this was not always the case. Only since mid-1870’s, with the passage of the Judicature Acts of 1873 and 1875, has an English plaintiff been able to secure an equitable remedy – common examples include injunctions, declaratory judgments, and specific performance – without making a separate claim to a court of equity jurisdiction. Prior to this change, equitable jurisdiction rested almost exclusively in the English Court of Chancery.

Today, English courts of equity and law have been merged into the High Court of Justice, which is divided into three divisions: the Queen’s Bench Division, the Chancery Division, and the Family Division. Cases are allocated to the divisions generally based on subject matter, though each is capable of handling any case presented to it. The High Court of Justice has both original and appellate jurisdiction over County Courts in all civil matters.

43 See Supreme Court of Judicature Act, 1873, 36 & 37 Vict., c. 66 (Eng.).
44 See Supreme Court of Judicature Act, 1875, 38 & 9 Vict., c. 77 (Eng.).
45 See generally HANBURY & MAUDSLEY, supra note 10 (discussing development and current status of English equitable law); Lars E. Johansson, The Mareva Injunction: A Remedy in the Pursuit of the Errant Defendant, 31 U.C. DAVIS L. REV. 1091, 1095 (stating plaintiff’s ability to obtain injunctions against defendants); Theuer, supra note 42, at 422 (noting old divisions between law and equity are abolished).
46 By the mid-nineteenth century, some blending of powers was evident. HANBURY & MAUDSLEY, supra note 10. For example, the Common Law Procedure Act of 1854 gave common law courts a certain power to prescribe equitable remedies, Common Law Procedure Act, 1854, 17 & 18 Vict., c. 125 (Eng.). Similarly, the Chancery Amendment Act of 1858, commonly called Lord Cairns’ Act, gave the Court of Chancery the power to award damages, a legal remedy, in addition to or in substitution of equitable remedies, such as injunctions or specific performance, Chancery Amendment Act, 1858, 21 & 22 Vict., c. 27 (Eng.). One of the most vociferous critics of the Chancery Court was Charles Dickens, whose character said in BLEAK HOUSE to “keep out of Chancery, whatever they did. ‘For,’ says he, ‘it’s being ground to bits in a slow mill; it’s being roasted at a slow fire; it’s being stung to death by single bees; it’s being drowned by drops; it’s going mad by grains.” CHARLES DICKENS, BLEAK HOUSE, available at Project Gutenberg, http://www.gutenberg.org/dirs/etext97/blkhsl2h.htm (last visited Mar. 15, 2005).
47 See SNELL’S PRINCIPLES OF EQUITY, supra note 40, at 18 (detailing structure of English court system); Alexander, supra note 2, at 494 (explaining that Mareva injunctions can be brought in any of three divisions); Taylor, supra note 3 (suggesting there may be some measure of strategy in choosing between Queen’s Bench Division and Chancery Division when applying for Mareva order).
48 See generally SNELL’S PRINCIPLES OF EQUITY, supra note 40, at 18 (stating that admiralty cases are assigned to Queen’s Bench Division, though previously had been assigned to Probate, Divorce, and Admiralty Division); Alexander, supra note 2, at 494 (explaining that Mareva injunctions can be handled by any of three divisions, despite subject matter restrictions); Diane P. Wood, Generalist Judges in a Specialized World, 50 SMU L. REV. 1755, 1762 (1997) (noting how three divisions are divided based on subject matter).
and some criminal matters. Appeals from the High Court are heard by the Court of Appeal, which is divided into Civil and Criminal Divisions. Ultimate civil appeal is heard in the House of Lords (for the time being) for cases of general public importance.

Beside the separate structural development, one important distinction continues to distinguish law and equity: the discretion of the presiding judge. In wielding his equitable powers, a judge maintains virtually unfettered, individual discretion. An oft-quoted commentary of Judge Joseph Story persuasively

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49 See generally SNELL'S PRINCIPLES OF EQUITY, supra note 40, at 19 (noting levels of jurisdiction of High Court); Wood, supra note 48, at 1762 (discussing discretionary jurisdiction that High Court has over appeals in civil cases).

50 See generally SNELL'S PRINCIPLES OF EQUITY, supra note 40, at 17–18 (explaining structure of Court of Appeal); Daniel J. Meador, A Challenge to Judicial Architecture: Modifying the Regional Design of the U.S. Courts of Appeals, 56 U. CHI. L. REV. 603, 610 (1989) (explaining that English Court of Appeal judges will hear appeals of High Court cases based on subject matter distinctions); Wood, supra note 48, at 1762 (stating that civil High Court appeals go to civil division of Court of Appeal).

51 Prime Minister Tony Blair has proposed a change in the English legal system which would vest ultimate appeal in a newly formed Supreme Court, rather than in the House of Lords. As of this writing, discussions were on-going about the implementation of that proposed reform, though Blair's proposed reform, and perhaps his hold on the PM seat, seems far from certain. See, e.g., Colin B. Picker, "A Light Unto the Nations"—The New British Federalism, the Scottish Parliament, and Constitutional Lessons for Multiethnic States, 77 TUL. L. REV. 1, 11 (2002); Gwyn Prins, British Political Leadership from Churchill to Blair: A Class Act, 28 FLETCHER F. WORLD AFF. 39, 51 (2004); Philip Webster, et al., This Cheerful Chappie Wants to Change the Way Our Legal System Runs, Lord Woolf and His Learned Friends Will Do All They Can to Stop Him, THE TIMES (London), Mar. 5, 2004, at 13.

52 See generally SNELL'S PRINCIPLES OF EQUITY, supra note 40, at 526 (explaining appeals process in House of Lords); Sofie Geeroms, Comparative Law and Legal Translation: Why the Terms Cassation, Revision, and Appeal Should Not Be Translated, 50 AM. J. COMP. L. 201, 221 (2002) (describing that appeals to House of Lords can be done, but are unusual); Lisa Griffin, The Correction of Wrongful Convictions: A Comparative Perspective, 16 AM. U. INT'L L. REV. 1241, 1268 (2001) (noting that there is no absolute right to appeal to House of Lords).

53 See Grupo Mexicano de Desarrollo v. Alliance Bond Fund, 527 U.S. 308, 331 (1999) (discussing power English judges have when granting Mareva injunctions); Cross, supra note 39, at 209 (explaining that flexibility of equity judges' allowed them to grant awards not available at common law); Theuer, supra note 42, at 425 (noting that English judges have expanded power of Mareva so it can be used in worldwide cases).

54 See generally Grupo Mexicano, 527 U.S. at 331 (explaining power English judges have to craft such remedies as Mareva orders); SNELL'S PRINCIPLES OF EQUITY, supra note 40, at 8 (noting great extent of judges' powers on equity matters); Cross, supra note 39, at 209 (describing equity judges' power to strengthen or weaken a party's legal position).

55 Joseph Story, Associate Justice of the Supreme Court of the United States (1811-45), was an eminent legal scholar and commentator in the early and mid-nineteenth century. In addition to serving as the youngest ever justice on the Court (serving with Chief Justice John Marshall), Justice Story also held positions as a state legislator, U.S. Congressman, and law professor at Harvard College. He wrote comprehensive summaries of (mostly British) case law in addition to commentaries on such topics as the U.S.
summarizes the equitable power of an English judge sitting in equity:

If, indeed, a Court of Equity in England did possess the unbounded jurisdiction, which has been thus generally ascribed to it, of correcting, controlling, moderating, and even superceding the law, and of enforcing all the rights, as well as charities, arising from natural law and justice, and of freeing itself from all regard to former rules and precedents, it would be the most gigantic in its sway, and the most formidable instrument of arbitrary power, that could well be devised. It would literally place the whole rights and property of the community under the arbitrary will of the Judge, acting, if you please, arbitrio boni judicis, and it may be, ex aequo et bono, according to his own notions and conscience; but still acting with a despotic and sovereign authority. A Court of Chancery might then well deserve the spirited rebuke of Seldon; "For law we have a measure, and know what to trust to Equity is according to the conscience of him, that is Chancellor; and as that is larger, or narrower, so is Equity. Tis all one, as if they should make the standard for the measure the Chancellor's foot. What an uncertain measure would this be? One Chancellor has a long foot; another a short foot; a third an indifferent foot. It is the same thing with the Chancellor's conscience."

From such commentary emerges a generally accepted chain of inferences in English and American courts regarding equity. First, the strict and rigid nature of laws can create hardships on parties incompatible with traditional notions of justice, especially as society advances while the law does not. Second, judges can use their equitable power to mitigate both the harshness and severity of the rules of law. Third, equity is rooted in


56 1 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE §19, at 21 (14th ed. 1918).

57 See generally Grupo Mexicano, 527 U.S. at 321 (stating that reforms of present law because of changes in society are better left to Congress, not courts); SNELL'S PRINCIPLES OF EQUITY, supra note 40, at 10 (noting problems that rigid rules can create in regards to seeking justice).

58 See STORY, supra note 56, § 16, at 17 (noting that court at equity boldly undertakes "to correct or mitigate the rigor, and what in a proper sense may be termed
discretion. Fifth, discretion can be abused, creating its own injustice, severity, and rigidity. And, finally, such power must be therefore exercised cautiously for fear it will undermine the very rule of law it is supposed to complement. It is hardly an overstatement to suppose that since the beginning of any system of commerce, there have been debtors who have tried to avoid, for whatever reason, the paying of their debts. Concomitantly, there have been creditors who have rightly demanded repayment. Though one can imagine an infinite variety of methods which have been employed to that end, for our purposes, resort to the courts is one natural approach. It is in this breach that law and equity collide.

See Honorable H. Brent McKnight, How Shall We Then Reason? The Historical Setting of Equity, 45 MERCER L. REV. 919, 939 (1994) (stating that "equity...considers itself competent to intervene deeply in political disputes and to sweep local governments aside if the court finds them inefficient, corrupt, or unjust."). See generally SNELL'S PRINCIPLES OF EQUITY, supra note 40, at 11 (commenting that judges can lessen severity of some rules of law).

See Noland v. Noland, No. 88-CA-000020, 1989 Ohio App. LEXIS 3346, *3 (Ct. App. 1989) (noting that "the term 'abuse of discretion' connotes more than an error of law or judgment; it implies the court's attitude is unreasonable, arbitrary or unconscionable.") (citations omitted); see also Kercher, supra note 8, at 626 (observing that "[e]quity has rigidified over the last century or so."); cf. McKnight, supra note 59, at 944 (concluding that "the framers designed a constitution with a serious view to separating the powers of the legislature...the executive...and the judiciary...[and]...the judges were to have little discretionary power and be the least dangerous branch.").

One American commentator has stated that "it would be hard to argue that equity dispensed by the federal courts is not now a significant force in reducing the importance of state courts and state and local governments." McKnight, supra note 59, at 940. While across the globe, one Australian commentator has discussed the controversy associated with what has been called "discretionary remedialism." Tilbury, supra note 8, at 593-94. Proponents of Mareva-type equitable remedies suggest that they only bolster underlying primary rights. Opponents, on the other hand, suggest that courts too often divorce the remedies from a party's primary rights and impose whatever remedial measure they see fit to apply. Id. Key to both sides' positions, then, is the definition of "discretion." Discretion should be exercised very carefully otherwise it could weaken the laws that are already in place. See generally SNELL'S PRINCIPLES OF EQUITY, supra note 40, at 10.

One can surmise, likewise, an infinite variety of excuses for non-payment of those debts. The common law in England and Australia, until well into the nineteenth century, allowed – as a matter of right to plaintiffs – the arrest of the debtor (not merely his assets) so as to prevent his physical escape from the jurisdiction, called "arrest on the mesne process." Kercher, supra note 8, at 627. The 'mesne process' is when "the sheriff was...required to begin the lengthy process of securing the defendant's appearance." David Millon, Positivism in the Historiography of the Common Law, 1989 WIS. L. REV. 669, 675 (1989). The mesne process more generally has been defined and explained in many articles. See e.g., Bradford E. Biegan, Presidential Immunity in Civil Actions: An Analysis Based Upon Text, History and Blackstone's Commentaries, 82 VA. L. REV. 677,
Prior to the development of the *Mareva* injunction in 1975, a number of general propositions could be asserted with regard to creditor-debtor law in England. One legal thread ran the length of it: that creditors, no matter the merits of their claim, generally possessed no legal rights over the property of their debtors prior to the securing of a legal judgment. Once accomplished, legal and equitable remedies such as damages, attachment, and liens could be brought to bear on the debtor's property. A parallel, practical thread also existed, especially in the mind of the creditor: that defendant-debtors could frustrate potential claims of creditors by simply selling off or dissipating or destroying any assets they maintained prior to judgment. Creditors, then, invoked the equitable powers of the Court of Chancery,
requesting pre-judgment injunctions against potential defendant-debtors to prevent them from making themselves, in effect, "judgment proof." For centuries, that court responded to the requests of creditors with in the resounding negative.

Echoing the traditional view, Lord Cotton refused such an invitation to use the Court's equitable powers and stated in 1890 in *Lister v. Stubbs*:

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 the debt was due from the defendant, the defendant has been ordered to give security until that [debt] has been established by the judgement or decree.

He concluded, "[Such an order] would be introducing an entirely new and wrong principle, even though we might think that, having regard to the circumstances of the case, it would be highly just to make the order."

Lord Lindley's opinion in the same case addresses what he believed to be the inevitable consequences of granting such a pre-judgment injunction—consequences which he regarded as startling. First, he stated that such a possessory right over defendant's property would alter the existing balance between

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67 See INGMAN, supra note 25, at 477-78 (describing recent development of freezing orders in English law); see also Zicherman, supra note 16, at 673 (commenting that "the injunction [would put] the plaintiffs in the same position as they would have been in had the defendants been local residents with permanent assets inside the jurisdiction"); cf. Ostrander, supra note 14, at 546 (observing that pre-judgment attachment remains a controversial issue).

68 See, e.g., *Lister v. Stubbs*, [1890] All E.R. 797, 797 (Eng. C.A.), for a case announcing that the court would not respond to such a request of the creditor. Courts in another common law country, Australia, likewise echoed their disdain for a *Mareva*-type remedy. In *Short v. Berry*, [1828] N.S.W.S. Ct. Cas. 38, 38 (Austl.), an Australian judge stated that such an application "could not be granted for it went to restrain merchants from carrying on trade without any suggestion that they were unable to meet their demands. It was a motion of the first impression; and in violation of all principle." One commentator noted that "courts could not grant an interlocutory order enjoining a defendant from disposing of his assets or removing them from the jurisdiction before judgment was rendered" under the authority of *Lister*. Zicherman, supra note 16, at 669.

69 [1890] 45 Ch.D. 1 (C.A.)

70 Id. at 13.

71 Id. at 14.

72 Id. at 15.

73 *Lister v. Stubbs*, [1890] 45 Ch.D. 15 (C.A.) (stating that holding as plaintiffs request "would involve consequences which, I confess, startle me.").
competing creditors should the defendant go bankrupt. By giving the plaintiff a pre-judgment property right, the court would in effect be removing substantial assets from the reach of other potential creditors in bankruptcy proceedings, giving the first creditor to apply for such an injunction preferential access to the debtor's assets. Second, any profits made prior to the judgment with the funds sought to be frozen by injunction would theoretically belong to the plaintiff-creditor as a matter of right. In essence, this type of injunction transferred ownership – and its profit potential – to the plaintiff prior to legal judgment. Lord Lindley concluded that "confounding ownership with obligation" in such a manner was unsound.

B. Embracing "An Entirely New and Wrong Principle"

A testament to the truth of Justice Story's observations, hundreds of years of legal precedent and judicial restraint were radically altered in 1975 with the stroke of an English judge's pen. That summer, one of the most controversial – and

74 Id. (finding that "if Stubbs were to become bankrupt, this property acquired by him with the money paid to him by Messrs. Varley would be withdrawn from the mass of his creditors and be handed over bodily to Lister & Co.").

75 Id. (noting that it is necessary to again look at premises to see if they are sound, because result would be unfair).

76 Id. (noting that if these results remained, then court would "be doing what [Lord Lindley] conceives to be very great mischief").

77 Id. (discussing absurd consequences that would follow from such prejudgment injunction); see Kirshner & Silverman, supra note 10, at 24 (stating that U.S. courts view prejudgment injunctions with disfavor); see also Craig Rotherham, Restitution and Unjust Enrichment: Restitution and Property Rites: Reason and Ritual in the Law of Proprietary Remedies, 1 THEORETICAL INQ. L. 205, 210 (2000) (describing that prejudgment injunction confounds "ownership with obligation").


79 See 1 STORY, supra note 56, § 19, at 21 (noting the "uncertainty" of conscience in minds of courts of equity); see also Alexander, supra note 2, at 491 (stating that, before 1975, English courts did not issue injunctions "where an order was sought to restrain a defendant from disposing of its property on the grounds of a likely recovery by a plaintiff in a civil action"). See generally Peter S. O'Driscoll, Performance Bonds, Bankers' Guarantees and the Mareva Injunction, 7 NW. J. INT'L. L. & BUS. 380, 398 (1985) (discussing history of Mareva injunction).

80 Lord Denning, for example, believed – though later was forced to capitulate – that neither the prior decisions of the House of Lords nor his own Court of Appeals had any precedential value to a judge presiding over a case. Regardless of the thoughtful approach of judges faced with similar situations in the past, Lord Denning felt he should be subject to no constraint in his efforts to do what he perceived to be justice for the parties before him. Needless to say, the House of Lords and other Court of Appeal judges
popular judges in the English Court of Appeal's twentieth century history, Lord Denning, charged headlong twice down the did not share his disdain for *stare decisis*. In *Conway v. Rimmer*, [1968] AC 910, [1968] 1 All ER 874, HL, Lord Denning wrote,

> [M]y brethren today feel that we are still bound by the observations of the House of Lords in *Duncan v Cammell, Laird & Co. Ltd.* ... I do not agree. The recent statement of Lord Gardiner LC has transformed the doctrine of precedent. This is the very case in which to throw off the fetters.

Lord Halisham, writing for The House of Lords, responded,

> [I]t is not open to the Court of Appeal to give gratuitous advice to judges of first instance to ignore decisions of the House of Lords in this way and, if it were open to the Court of Appeal to do so, it would be highly undesirable. ... The fact is, and I hope it will never be necessary to say so again, that, in the hierarchical system of courts which exists in this country, it is necessary for each lower tier, including the Court of Appeal, to accept loyally the decisions of the higher tiers.

After the Lords' rebuke, Lord Denning later applied his theory to the precedents of the Court of Appeal when he stated in *Gallie v. Lee*, [1969] 1 All ER 1062, CA,

> I do not think we are bound by prior decisions of our own, or at any rate, not absolutely bound. We are not fettered as it was once thought. It was a self-imposed limitation: and we who imposed it can also remove it. The House of Lords have done it. So why should not we do likewise?

After a number of similar pronouncements by Lord Denning, the House of Lords (this time by Lord Diplock) again castigated Denning by saying in *Davis v. Johnson* [1979] AC 264, [1978] 1 All ER 1132,

> [T]he rule as it had been laid down in the *Bristol Aeroplane* case had never been questioned thereafter until, following upon the announcement by Lord Gardiner LC in 1966 that the House of Lords would feel free in exceptional cases to depart from a previous decision of its own, Lord Denning MR conducted what may be described, I hope without offence, as a one-man crusade with the object of freeing the Court of Appeal from the shackles which the doctrine of *stare decisis* imposed upon its liberty of decision. ... In my opinion, this House should take this occasion to reaffirm expressly, unequivocally and unanimously that the rule laid down in the *Bristol Aeroplane* case as to *stare decisis* is still binding on the Court of Appeal.

For the purposes of this Note, it is worthwhile to emphasize that this rebuff came after the *Nippon Yusen Kaisha* and *Mareva Compania Naviera* cases.

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81 See *In Every Sense a People's Judge*, supra note 5 (citing Denning's efforts to improve equality of women in press, individual freedoms, and consumer protection); see Tegel, supra note 5, at 6 (describing Denning as "one of the most courteous and controversial judges of the century, [inspiring] public affection for being more interested
path Lords Cotton and Lindley were unwilling to tread in 1890: first, in *Nippon Yusen Kaisha v. Karageorgis* and then one month later in *Mareva Compania Naviera S.A. v. International Bulkcarriers S.A.*

In *Nippon Yusen Kaisha*, defendants, John and George Karageorgis, chartered three ships from large Japanese ship-owner, Nippon Yusen Kaisha, but failed to pay for the charters and subsequently disappeared. Plaintiff believed defendants to have funds in English banks which it feared would be transferred out of the jurisdiction. It applied *ex parte* to the High Court for an injunction restraining defendants from removing their assets from the jurisdiction. Mr. Justice Donaldson refused the application in the High Court. Plaintiff appealed, also *ex parte*, to the Court of Appeal. In granting the request, Lord Denning stated,

> We are told that an injunction of this kind has never been done before. It has never been the practice of the English Courts to seize assets of a defendant in advance of judgment, or to restrain the disposal of them... It seems to me that the time has come when we should revise our practice.

Lord Denning cited no case authority for his ruling and failed to even consider the precedent of *Lister v. Stubbs*, if only to distinguish it. Instead, he held the freezing injunction to be warranted by § 45 of the Judicature Act of 1925 allowing the High Court to grant a mandamus or injunction or appoint a
receiver by an interlocutory order in "all cases where it appears to the Court to be just or convenient to do so."92

In *Mareva Compania Naviera S.A. v. International Bulkcarriers S.A.*, defendants, International Bulkcarriers S.A., chartered the vessel *Mareva* from the plaintiff ship-owners, Mareva Compania Naviera S.A., on a time-charter basis.93 The ship was delivered to the defendants who thereafter sub-chartered the *Mareva* to the President of India to deliver a cargo of fertilizer to India.94 The Indian High Commission paid, in accordance with the sub-charter contract, £174,000 to a London bank account of International Bulkcarriers.95 Defendants paid two of three installments to plaintiff.96 While the ship was en route to India, the defendants exchanged telexes with plaintiff, informing them that they would be unable to pay the third installment, amounting to roughly $30,800.97 Plaintiff considered this a repudiation of the original charter agreement and filed a writ for the unpaid amount and damages.98 Additionally, in light of *Nippon Yusen Kaisha*, they applied *ex parte* to the High Court for an injunction to restrain the removal of the money in the London bank.100 Mr. Justice Donaldson felt he was bound by the precedent of *Lister v. Stubbs* and had no power to grant the requested injunction, but in deference to the Court of Appeal's recent decision, he issued a temporary injunction for the Court of Appeal to reconsider their previous ruling in light of *Lister v. Stubbs*.101 When Mr. Justice Donaldson refused to extend the temporary injunction, plaintiff appealed to the Court of Appeal for a continuance.102

Lord Denning, in his decision, again ignored *Lister v. Stubbs*, opting instead to expand – or justify – his rationale grounded in §

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93 [1980] 1 All E.R. 213 (Eng. C.A.)
94 See id. (stating that "[Mareva Compania Naviera S.A.] let [the vessel Mareva] to...International Bulkcarriers S.A. on a time charter").
95 See id. (noting that defendants subchartered *Mareva* to President of India).
96 Id.
97 Id.
99 Id.
100 Id.
101 Id.
102 Id.
45 of the Judicature Act of 1925. § 45 of the 1925 Judicature Act repeats § 25(8) of the Judicature Act of 1875 which states, "A mandamus or an injunction may be granted or a receiver appointed by an interlocutory order of the court in all cases in which it shall appear to the court to be just or convenient." In construing the 1875 Act, English courts had broadly interpreted § 25(8), giving a wide, general power to judges. Lord Denning cited with approval Beddow v. Beddow, in which Sir George Jessel stated, "I have unlimited power to grant an injunction in any case where it would be right or just to do so." This unlimited, arbitrary power has but one qualification: an injunction will not be granted to protect a person who has no legal or equitable right whatever. As such, Lord Denning held:

In my opinion [the power to protect a party's legal or equitable right by injunction] applies to a creditor who has a right to be paid the debt owing to him, even before he has established his 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 him disposing of those assets.

The "Mareva injunction" was born in those words.

Both decisions alluded to the right of defendants — upon notice of the injunction — to apply for discharge of the injunction but failed to elaborate on what grounds such a discharge would be granted — and whether or not such a defendant could even

104 Id.
105 Id. See generally Des Salles d'Epinoix v. Des Salles d'Epinoix, [1967] 1 W.L.R. 553 (Eng. C.A.) (referring to section 25(8) and stating that words of rule should be construed to apply to any injunction that defendant deems himself entitled to); Robinson v. Robinson, [1964] 3 W.L.R. 935 (Eng. P.) (stating that section's terms are very wide, and widest possible construction should be attributed to that section).
106 [1878] 9 Ch.D. 89 (Eng.).
107 Id. (emphasis added).
receive a “just” review of his request, considering to grant a discharge is tantamount to the issuing judge admitting his interlocutory judgment was erroneous.110

Irrespective of the correctness of the decisions,111 they raised three important considerations that affect later courts and the use of these injunctions today. First, the decisions failed to adequately appreciate the controversial nature of the right asserted, i.e., that a defendant is completely constrained from dealing with his assets where a putative plaintiff asserts a claim for legal damages112 under English jurisdiction. Lord Roskill, in Mareva Compania Naviera, indicated some understanding of the controversy but, beyond simply recognizing it, failed to address it further.113 Second, between two conflicting lines of precedent, Lord Denning opted for the one conferring “unlimited power” over the one conferring no power on the reviewing judge.114 The eminent standing in which Lord Denning was held at the time,115

110 The issuance of the “preliminary judgment” itself indicates that the granting judge has – with the evidentiary support of one side only – determined it was necessary to restrain the defendants from hiding their assets. Any future variation on that order would necessarily mean his initial judgment was incorrect, unfair, or at the very least, ill-founded. To think that judges in these cases are not making “judgments” is erroneous. For example, in Derby & Co. v. Weldon, [1989] 1 All E.R. 469 (Eng. C.A.), Judge Parker commented that, “the defendants are clearly sophisticated operators who have amply demonstrated their ability to render assets untraceable or delay execution of the judgment.” Whether true or not, such pronouncements should be reserved, if only in the interest of fairness, to the post-evidentiary period of a trial, after both sides have given testimony.

111 Whether or not an English judge has correctly or incorrectly expanded his authority in light of or in spite of English precedent is not the focus of this Note. How these injunctions affect American defendants remains the issue, one which does not require any commentary on the propriety of England’s course of action with regard to its own legal system.

112 This is the particular feature of the Mareva injunction that was revolutionary. There was never hesitation to freeze assets that were the subject of an equitable action – e.g., specific performance. Indeed, it was not uncommon to do so before trial to ensure that the res remained available to satisfy the judgment. Using equity to secure claims seeking only money damages may seem like a natural extension of the doctrine, but in fact it fundamentally erodes the distinction between law and equity and wreaks havoc on the existing balance between creditors, debtors, and financial institutions going forward.


114 One can only imagine the eloquent disdain with which Charles Dickens would have received Lord Denning’s Mareva decision, given his loathing for English courts of equity.

115 At the time of this decision, Lord Denning had gained a fair measure of popularity and reverence within and without the legal community (see, e.g., Lord Denning’s widely published report regarding the Profumo affair, a national scandal which implicated high officers in the British government). Patrick Fitzgerald, A Very Public Stripping Off; Investigation into British Arms Sales to Iraq, NEW STATESMAN & SOCIETY, Feb. 2, 1996, at 20. Further, at the time of these decisions, Lord Denning held the post of Master of the
coupled with his forceful pronouncements in these cases, emboldened later judges to extend the Mareva methodology beyond the boundaries of England. Finally, because of the ex parte nature of the procedure, the Nippon Yusen Kaisha and Mareva Compania Naviera decisions dramatically altered the adversarial balance of power between plaintiffs and defendants, the effects of which are discussed in PART IV.

C. Grounding “An Entirely New and Wrong Principle” in Statute

Three years later, in 1978, the Court of Appeal heard argument from a defendant when considering the propriety of the Mareva procedure. It reaffirmed its earlier decisions and the procedure itself. In 1981, Parliament passed the Supreme Court Act of 1981, § 37(1) of which stated in broad language, “The High Court may by order (whether interlocutory or final) grant an injunction or appoint a receiver in all cases in which it appears to the court to be just and convenient to do so.” This statutory foundation arguably takes the procedure out of the equitable arena and places it squarely in the legal one. One would be hard-pressed, however, to claim that later expansions of this procedure have their true justification in statutory interpretation rather than the procedure’s historical equitable and discretionary underpinnings.

Rolls, the most senior civil judge in the English court system. See also Cecil Lyon, In the Trenches: Evolution or Devolution of the Law, LAW. WKLY., Nov. 22, 2002, at 1; Denning Myths Debunked, LAW. WKLY., Jun. 15, 2001, at 1.


117 See Helen Pines Richman, Mareva Injunction: Important Tactical Tool, N.Y. L.J., Jul. 7, 1994, at 2 (stating that Mareva injunction “enables the seizure of assets so as to preserve them for the benefit of the creditor but not to give a charge in favour of any particular creditor”); Michael Brandon, Recent Developments in English Law Affecting International Transactions, 15 INT'L LAW. 629, 629 (1981) (noting that Mareva injunctions are orders for pre-judgment attachment of assets to prevent removal by defendants of assets from jurisdiction); Lawrence W. Newman, International Judgment Enforcement – Thinking Outside the Box, N.Y. L.J., Oct. 29, 2001, at 3 (noting that Mareva injunctions restrain defendant from removing assets from jurisdiction or otherwise restrain him from dealing with his assets).


119 Id.

120 Supreme Court Act of 1981, § 37(1) (Eng.)

121 Supreme Court Act of 1981, § 37(1) (Eng.) (emphasis added)
More importantly, the Supreme Court Act of 1981 laid the groundwork for the modern provisional measures,\(^{122}\) including interlocutory injunctions which preserve the status quo prior to trial,\(^{123}\) security measures such as \textit{in rem} attachment\(^{124}\) and "modern" \textit{Mareva} interlocutory judgments,\(^{125}\) and investigative orders which serve to aid plaintiffs in securing pre-trial disclosure of defendants' assets.\(^{126}\) These investigative devices are discussed in further detail in \textsc{PART I-E}.

\textbf{D. Expanding "An Entirely New and Wrong Principle"}

On the facts of \textit{Nippon Yusen Kaisha} and \textit{Mareva Compania Naviera}, there was considerable debate in the cases that followed whether it was a requirement that the defendant be a foreign company or a foreign resident before an English court could issue a \textit{Mareva} injunction.\(^{127}\) That is, did the \textit{Mareva} injunction serve

\(^{122}\) See \textsc{Hill}, supra note 12, at 559 (explaining rationale for provisional remedies); Tung-Pi Chen et al., \textit{Order Amid Chaos: Security Devices for Secured Transactions in China}, 24 \textsc{Int'l Law.} 21, 24 (1990) (noting that provisional measures have been expanded to secured transactions in countries like China); Daniel G. Murphy, \textit{Business Transactions and Disputes: International Litigation}, 35 \textsc{Int'l Law.} 491, 491 (2001) (noting that lack of internationally recognized provisional measures has led to litigation in several jurisdictions).

\(^{123}\) Interlocutory injunctions seek to ensure that justice can be done when the dispute is ultimately decided, \textit{i.e.}, to maintain the status quo. \textsc{Hill}, supra note 12, at 559-60. Like all injunctions, they either restrain or mandate that a party do a particular thing. \textit{Id.} For example, a plaintiff employer may request an injunction to force a defendant contractor to cease work on a construction project. \textit{Id.}

\(^{124}\) Security measures are designed to secure the ultimate judgment or award, rather than to maintain the status quo – though they may have similar effects. \textsc{Hill}, supra note 12, at 560. They prevent, for example, a defendant from selling off his assets prior to the final judgment. \textit{Id.} The simplest form of a security measure is attachment – literally a seizing of the underlying asset, such as a ship – in admiralty proceedings. \textit{Id.}

\(^{125}\) The \textit{Mareva} order is a type of security measure. Because it is technically an interlocutory "judgment," it is not designed to maintain the status quo but rather to restrain a defendant – by freezing his assets – from frustrating the potential satisfaction of plaintiff's claim. \textsc{Hill}, supra note 12, at 560. The significant distinction between interlocutory judgments and interlocutory injunctions is primarily grounded in the threshold showing required of a plaintiff for a court to issue one. \textit{Id.} at 560-61. The requirements of interlocutory injunctions are governed by the principles set out in \textit{Am. Cyanamid Co. v. Ethicon Ltd.}, [1975] \textsc{A.C.} 396, 408 (Eng.). \textsc{Hill}, supra note 12, at 560-61. The granting of \textit{Mareva} injunctions are governed less clearly by a combination of statutory and case law interpretations discussed in \textsc{PART II-A}.

\(^{126}\) See \textsc{Hill}, supra note 12, at 560. \textit{Anton Piller} orders, which permit plaintiffs to enter the premises of the defendant to secure evidence, and \textit{Norwich} orders, which compel third parties, usually banks, to assist plaintiffs in the tracing of defendant assets, are two relatively common examples of investigative orders. \textit{Id.}; \textsc{John Jaffey}, \textit{Court Dissolves Mareva Injunction Granted U.S. Trade Commission}, \textsc{Law. Wkly.}, Oct. 17, 2003, at 1.

\(^{127}\) See \textsc{Hill}, supra note 12, at 563; Lawrence W. Newman & Michael Burrows, \textit{Lessons from English Mareva Injunctions}, \textsc{N.Y. L.J.}, Aug. 19, 1998, at 3 (citing Babancft Int'l Co. S.A. v. Bassatine [1988] \textsc{W.L.R.} 232, 242 ("in appropriate cases, though these may
as a limited exception to the general rule of *Lister v. Stubbs* solely when a foreign defendant who might remove his assets from the jurisdiction was involved? Cases decided in 1980 answered that question in the negative, applying *Mareva* injunctions for the first time to English residents.\(^{128}\)

The expansion of the procedure occurred most dramatically in 1989.\(^{129}\) In *Babanaft International Co. S.A. v. Bassatne*,\(^ {130}\) the *Mareva* procedure was extended extraterritorially to defendants who maintained assets within English territorial jurisdiction.\(^ {131}\) It was applied to third parties outside of English jurisdiction in *Republic of Haiti v. Duvalier*.\(^ {132}\) Whatever limitation, self-imposed or otherwise, that had existed before by applying the *Mareva* injunction only to assets within English jurisdiction was eliminated in *Derby & Co., Ltd. v. Weldon (No. 1)*.\(^ {133}\) *Derby* required defendants, on threat of contempt,\(^ {134}\) to make full disclosure of their assets worldwide and applied the *Mareva* well be rare, there is nothing to preclude our courts from granting *Mareva* type injunctions against defendants which extend to their assets outside the jurisdiction.\(^ {128}\) Richman, *supra* note 117, at 2 (noting that *Mareva* injunction is allowed over assets of anybody, foreign or otherwise, where there is risk of dissipation of assets in jurisdiction or elsewhere).


\(^ {131}\) *Id.*; Brad Daisley, *B.C. Justice sets Precedent by Granting Worldwide Mareva Injunction*, LAW. WKLY., Dec. 16, 1994, at 1 (stating that there was nothing precluding courts "from granting *Mareva*-type injunctions against defendants which extends to their assets outside the jurisdiction."); Newman, *supra* note 117, at 3 (noting that "courts may grant *Mareva* injunctions to restrain judgment debtors from dealing with their assets outside the original jurisdiction . . .")

\(^ {132}\) [1989] 2 W.L.R. 261 (Eng. C.A.)

\(^ {133}\) [1989] 2 W.L.R. 278 (Eng. C.A.)

\(^ {134}\) Like all equitable remedies, these injunctions are enforced solely by the court's contempt power which can subject a contemnor to fine, imprisonment, the drawing of unfavorable inferences based on existing evidence, discovery sanctions, and ultimately default judgment (inability to argue on the merits). *See* Doug Rendleman, *Choices of Law and Remedy: Irreparability Irreparably Damaged. The Death of The Irreparable Injury Rule*, 90 MICH. L. REV. 1642, 1642 (1992), which emphasized that the contempt doctrine is an important tool of injunction enforcement.
injunction to those assets, wherever situated, and regardless of enforcement by courts where such assets were located. The only qualification was that the plaintiff had to consult the issuing court before seeking enforcement of the Mareva injunction beyond the jurisdiction of the English courts. By 2003, English courts were regularly issuing *ex parte* Mareva injunctions in aid of foreign proceedings and to assets and defendants with little or no relationship to England.

**E. Enforcing “An Entirely New and Wrong Principle”**

Technically, the Mareva order only “freezes” a defendant’s assets so that they cannot be dissipated or destroyed prior to a legal judgment. To effectuate the spirit and letter of the Mareva order, English courts utilize three ancillary enforcement orders also punishable by contempt.

The first order, a simple disclosure order, requires the defendant to disclose all of his worldwide assets, which naturally implies that the defendant has been made aware of the Mareva

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135 *See Derby & Co., Ltd. v. Weldon (No. 1),* [1989] 2 W.L.R. 278 (Eng. C.A.) (holding that Mareva injunction can freeze defendant’s assets overseas); *see also* Alexander, *supra* note 2, at 499 (stating that Derby decision applied Mareva injunction to defendant’s assets worldwide); Taylor, *supra* note 3, at 22 (“Lord Justice Neill (cutting the ribbon on the floodgates) pronounced ‘that the time had come to state unequivocally that in an appropriate case the court had power to grant an interlocutory injunction on a worldwide basis against any person who was properly before the court.’”).

136 *See Derby & Co., Ltd. v. Weldon (No. 1),* [1989] 2 W.L.R. 278 (Eng. C.A.) (holding that plaintiff has to get approval of English court before attempting to enforcing injunction abroad); *see also* Alexander, *supra* note 2, at 500 (1997) (stating that foreign court will have to declare injunction enforceable before Mareva injunction can have any extraterritorial effect); George A. Ber, *Provisional Relief in Transnational Litigation,* 35 COLUM. J. TRANSNAT’L L. 553, 583 n.84 (1997) (noting that plaintiff had to obtain permission by English court before enforcing injunction abroad).

137 *See, e.g.,* Motorola Credit Corp. v. Uzan, [2004] W.L.R. 113 (Eng. C.A.); CIBC Mellon Trust Co. v. Mora Hotel Corp., 743 N.Y.S.2d 408, 411 (App. Div.). In both cases, plaintiffs resorted to English jurisdiction after being denied the relief they sought in the United States. See also Andrew Lenon, *Mareva Injunctions in Support of Foreign Proceedings,* 147 NEW L.J. 1234 (1997), which noted the increasing popularity of Mareva injunctions.

138 *See generally* BARNARD & HOUGHTON, *supra* note 18, at 249–50 (describing effects of Mareva injunction); *see also* Alexander, *supra* note 2, at 512 (stating that Mareva injunction is used to freeze assets before trial); Wasserman, *supra* note 4, at 339 (noting that Mareva injunction is used to freeze defendant’s assets).

139 *See* Aird, *supra* note 3; Johansson, *supra* note 43, at 1098, which describes the courts’ ancillary powers in terms of the Mareva injunction. *See generally* SNELL’S *PRINCIPLES OF EQUITY,* *supra* note 40, at 647–50. These orders have their own historical development and may be used individually as the presiding judge sees fit. Custom has indicated, however, that they are often issued to assist in effectuating Mareva orders.
Where it is presumed that the threat of contempt may not sufficiently motivate a defendant or simply to avoid tipping off the defendant to the plaintiffs' course of action, the court can issue what has come to be called a Norwich order, based on the inherent jurisdiction of English courts, requiring third parties, usually banks, to provide "full information" about the defendant's assets to plaintiffs. These third parties are enlisted to assist plaintiffs' asset tracing activities prior to notification of the defendants of the issuance of the Mareva order. The final order, called an Anton Piller order, is the most egregious. This order creates an injunction permitting plaintiff's attorneys to search the defendant's premises and seize items and documents.

140 See Johansson, supra note 43, at 1097 (stating that court has ancillary power to issue disclosure order); see also Alexander, supra note 2, at 497–98 (noting that discovery order can be granted to determine defendant's assets); Peter F. Schlosser, Coordinated Transnational Interaction in Civil Litigation and Arbitration, 12 MICH. J. INT'L L. 150, 165–71 (1990) (examining ancillary disclosure orders).

141 Named after Norwich Pharmacal v. Comm'rs of Customs & Excise, [1974] A.C. 133 (Eng.); see Paul Magrath, THE INDEPENDENT (London) Aug. 12, 1993 (stating that the court in Mareva was influenced by Norwich decision); see also Jaffey, supra note 126, at 1 (opining that both Mareva and Norwich orders are extraordinary measures).

142 See, e.g., Ashworth Hosp. Auth. V. MGN Ltd, [2002] 4 All E.R. 193 (Eng. H.L.), which described the justification for Norwich orders:

In my opinion, accordingly, the respondents, in consequence of the relationship in which they stand, arising out of their statutory functions, to the goods imported, can properly be ordered by the court to disclose to the appellants the names of persons whom the appellants bona fide believe to be infringing these rights, this being their only practicable source of information as to whom they should sue, subject to any special right of exception which the respondents may qualify in respect of their position as a department of state. It has to be conceded that there is no direct precedent for the granting of such an application in the precise circumstances of this case, but such an exercise of the power of the court seems to be well within broad principles authoritatively laid down. That exercise will always be subject to judicial discretion, and it may well be that the reason for the limitation in practice on what may be a wider power to order discovery, to any case in which the defendant has been "mixed up with the transaction", to use Lord Romilly MR's words, or "stands in some relation" to the goods, within the meaning of the decision in [Post v Toledo, Cincinnati and St Louis Railroad Co (1887) 11 NE Rep 640], is that that is the way in which judicial discretion ought to be exercised.

Ashworth Hosp. Auth. V. MGN Ltd, [2002] 4 All E.R. 193 (Eng. H.L.). See also Dr. Mark S.W. Hoyle, The Mareva Injunction and Related Orders, 39 VA. J. INT'L L. 503, 511 (1999) (describing bank's duty to cooperate with court's order in determination of defendant's assets); see also Fabano, supra note 2, at 140 (noting that bank which becomes aware of injunction is not allowed to transfer defendant's assets).

143 See O'Driscoll, supra note 79, at 402 (noting that plaintiff may request bank conduct search for defendant's assets); Hoyle, supra note 142, at 511 (stating that disclosure order can require third parties to reveal all of defendant's assets); see also Fabano, supra note 2, at 140 (stating that notice to defendant should be bypassed).

144 Anton-Piller KG v. Manufacturing Processes Ltd., [1976] 1 Ch. 55 (Eng.). See generally Alexander, supra note 2, at 488 (describing Anton Piller orders); Hoyle, supra note 142, at 503, (stating Anton Piller orders allow plaintiff to search defendant's premises and seize items or documents which might become evidence at trial).
which might constitute evidence in the plaintiff's action against the defendant.\textsuperscript{145}

The four orders, especially when used together, have rightly been called the "nuclear weapons of the law."\textsuperscript{146} An arsenal, which is, notably, only at the plaintiff's disposal, the existence of which may only become known to a defendant after "detonation."

II. TECHNICAL ASPECTS OF THE WORLDWIDE MAREVA PROCEDURE

A. Application for a Mareva Order

As an initial matter, a plaintiff seeking to secure a Mareva order in support of a legal claim must apply for one – usually in the form of a standard, fill-in-the-blank proposed order provided in the U.K. Practice Directions,\textsuperscript{147} the precise wording of which depends on the scope of assets sought to be covered by the order.\textsuperscript{148} Recognizing the draconian nature\textsuperscript{149} of the procedure and its potential for abuse,\textsuperscript{150} English courts have recognized some procedural safeguards and requirements for the issuance of such orders.\textsuperscript{151} Whether these requirements actually afford any

\textsuperscript{145} See Hoyle, supra note 142, at 504 (stating that purpose of the Anton Piller order is to prevent defendant from destroying evidence before trial); see also Alexander, supra note 2, at 503 (noting that the Anton Piller order is very controversial). See generally SNELL'S PRINCIPLES OF EQUITY, supra note 40.

\textsuperscript{146} See Grupo Mexicano de Desarrollo v. Alliance Bond Fund, Inc., 527 U.S. 308, 332 (1999) (recognizing atomic appellation); see also Taylor, supra note 3, at 22 (describing Mareva injunction, with Anton Piller order, as "one of the law's two 'nuclear' weapons.").

\textsuperscript{147} U.K. CIV. P. R., Practice Directions, Part 25 (Feb. 2002).

\textsuperscript{148} For the purposes of this Note, only the "worldwide Mareva" will be considered. Mareva injunctions which apply to assets in England (i.e., a "domestic Mareva") do not present the same extraterritorial difficulties. A plaintiff seeking to secure a Mareva order simply chooses the language in the sample Practice Directions template designed to reach the assets he seeks to freeze – i.e., assets outside of England require a different order than those within its borders. U.K. CIV. P. R., Practice Directions, Part 25 (Feb. 2002).

\textsuperscript{149} See Arena Corp. v. Schroeder, [2003] E.W.H.C. 1089, ¶ 173 (Eng. Ch.) (calling Mareva injunction draconian in nature); see also Fabano, supra note 2, at 137 (noting that due to extreme nature of measure it is often called creditor's "nuclear weapon"); Jaffey, supra note 126 (characterizing Mareva order as extraordinary measure).

\textsuperscript{150} See Ninemia Mar. Corp. v. Trave Schiffahrtsgesellschaft M.B.H. & Co., [1983] 2 Lloyd's Rep. 600, 603 (Eng. Q.B.) (stating remedy could be used as "vehicle for oppression"); see also; Nation, supra note 16, at 399-400 (describing criticism of Mareva orders); Theuer, supra note 42, at 466 (noting that Eleventh Circuit's fear of extreme nature of Mareva order has led to refusal to adopt it and instead seek alternative remedies).

\textsuperscript{151} See Fabano, supra note 2, at 141-44 (describing "limits" of Mareva injunction); see also Hoyle, supra note 142, at 509-13 (analyzing procedural limitations of Mareva
measure of protection has been the subject of debate. The general application process for a Mareva order is laid out in the Practice Directions but it is best appreciated with resort to case law.

Apropos of its discretionary equitable origins, what is required of an applicant for a Mareva order varies based on who is being asked to issue it. Depending upon the case consulted or the treatise relied upon, one judge's "requirement" is another's injunction); Johansson, supra note 43, at 1104 (noting that in their decision to grant Mareva injunctions, courts should balance the need to protect plaintiffs' interests against "the risk of inflicting legally unjustified harm on defendants").

See Willoughby, supra note 23, at 480; see also Johansson, supra note 43, at 1104 (noting that despite procedural limitations courts should use measure sparingly due to countervailing concerns); Nation, supra note 16, at 371 (addressing issue whether Mareva injunction is abuse of discretion despite limitations).


One commentator stated that given the relatively recent development of the Mareva order, some judges will have never had any practice experience with defending them, i.e., before they were judges and, as such, may not consider all of the implications it has for a defendant. See Taylor, supra note 2, at 22. It is also important to note that once a judge decides, within his discretion, to issue a Mareva order, "the court would not ordinarily interfere with [the decision], absent any misdirection." Polly Peck Int'l v. Nadir (No. 2), [1992] 2 Lloyd's Rep. 238, 242 (Eng. C.A.).

The issuing of a Mareva order may also depend on which branch of the civil court from which the plaintiff requests the order. One commentator suggested this is not a miniscule concern by stating:

In the Chancery Division, in contrast, the plaintiff will only exceptionally enjoy the luxury of an order granted ex parte until trial and often has to await the generally automatic inter partes hearing which follows the granting of the ex parte order before an order requiring the defendant to disclose his assets will be made. Furthermore, the plaintiff may be treated to the sight (some would say rare in the Queen's Bench Division) of the judge who hears the ex parte application reading not just the affidavits but the exhibits as well and having the temerity to interfere with the form of the order drafted by the plaintiff's advisers.

Taylor, supra note 2, at 22. The procedure to be followed in seeking a Mareva order also differs based on which branch of the civil court is called upon. See SNELL'S PRINCIPLES OF EQUITY, supra note 40, at 646-47.

Author Jonathan Hill articulates two requirements for a Mareva order, a good arguable case and a real risk of default. Hill, supra note 12, at 582. In addition, he indicates that evidence is required but yet he makes no mention of the "full and frank
mere "consideration." Lord Denning best explained this variation in approach when - fittingly - he said, "when a statute gives a discretion, the courts must not fetter it by rigid rules from which a judge is never at liberty to depart." A recent case, Arena Corp. Ltd. v. Schroeder, utilized what appears to be the generally accepted three threshold requirements a successful applicant will be required to fulfill in order to obtain a Mareva order.

First, an applicant for a Mareva order must present to the court with a "good arguable case." This requirement is disclosure" of all material facts, including potential defenses. Id. MODERN EQUITY cites Denning's eight considerations (see below). HANBURY & MAUDSLEY, supra note 10, at 733–43. SNELL'S PRINCIPLES OF EQUITY lists five prerequisites: disclosure, statement of nature of case, assets in England, risk of removal, and undertaking in damages. SNELL'S PRINCIPLES OF EQUITY, supra note 40, at 648. Arena Corp. v. Schroeder gives the main three. Id. E.W.H.C 1089, ¶ 114 (Eng. Ch.).

Lord Denning later articulated a different set of requirements to prevent the Mareva injunction from being "stretched too far": disclosure, a particular statement of the claim, grounds for believing the defendant has assets, reasons why there is a danger of the assets being moved before satisfaction of the judgment and an assessment of damages. See Third Chandris Shipping Corp. v. Unimarine S.A., [1979] Q.B. 645, 668–69 (C.A.). Sir Robert Megarry discussed the two lines of authority for the Mareva injunction and identified the two major components as a "good arguable case" and "the risk of the defendant moving his assets from the jurisdiction. Barclay-Johnson v. Yuill, [1980] 1 W.L.R. 1259, 1262 – 1265 (Eng. Ch.).

See Rasu v. Perusahaan (“The Pertamina”) [1978] 1 QB 644, 661 (Eng. C.A.) (asserting that "an order restraining removal of assets can be made whenever the plaintiff can show that he has a 'good arguable case'"; see also Polly Peck Int'l v. Nadir (No. 2), [1992] 2 Lloyd's Rep. 238, 242 (Eng. C.A.) (expressing that "[a] Mareva injunction could not ever be justified unless at least a fair arguable case for liability could be shown"); Ninemia Maritime Corp., [1983] 2 Lloyd's Rep. at 603–604 (quoting Lord Denning's requirement of "good arguable case"); Barclay-Johnson, [1980] 1 W.L.R. at 1265 (reiterating the need for a "good arguable case"); Establissement Esefka Int'l Anstalt, [1979] 1 Lloyd's Rep. at 448 (restating that Mareva injunctions "should at least [require] a good arguable case for the plaintiffs that the money is going to become due to them").
intended to prevent the use of the court's authority to aid vexatious or frivolous claims,\textsuperscript{162} so applicants need not demonstrate that their claim could withstand summary judgment.\textsuperscript{163} In fact, the standard does not rise anywhere near that of a preponderance.\textsuperscript{164} Mr. Justice Lloyd, in \textit{Ninemia Maritime Corporation v. Trave Schifffahrtsgesellschaft M.B.H. und Co. K.G., (The 'Niedersachsen')},\textsuperscript{165} described the relatively minimal standard as one where the applicant's claim must be "more than barely capable of serious argument."\textsuperscript{166}

Second, there must be a "real risk that a judgment or award in favour of the plaintiffs would remain unsatisfied."\textsuperscript{167} Cases have held that the mere fact that the defendant is a foreigner is not sufficient\textsuperscript{168} and that risk of \textit{removal} of assets from the jurisdiction, by itself, does not satisfy this requirement.\textsuperscript{169} The

Lord Denning "moved the goal posts" as far as threshold criteria for securing a \textit{Mareva} injunction were concerned, since what was conceived originally as a much higher standard had been made significantly lower).

\textsuperscript{162} See \textit{Am. Cyanamid Co. v. Ethicon Ltd.}, [1975] A.C. 396 (Eng.) (laying out framework for interlocutory injunctions and rationale regarding misuse of court's authority, which also applies to \textit{Mareva} orders); see also \textit{HANBURY \\& MAUDSLEY, supra note 10, at 731 (maintaining that "the court must be satisfied that the plaintiff's case is not frivolous or vexations and that there is a serious question to be tried"). See \textit{generally Willoughby, supra note 23, at 485 (arguing that \textit{Mareva} injunction is "a vital instrument of justice when properly applied for, properly granted and properly administered," and yet "[i]n the absence of any of these elements, it is capable of being the cruellest of tyrannies").}\n
\textsuperscript{163} See \textit{Pertimina} [1978] 1 Q.B. at 661 (finding summary judgment to be too high a standard); see also \textit{HANBURY \\& MAUDSLEY, supra note 10, at 733 (calling standard required, "a real prospect of success at the trial"); Willoughby, supra note 23, at 480 (noting that in \textit{Pertimina, "Lord Denning held that \textit{Mareva} injunctions should not be limited to those cases exhibiting the certainty demanded in order to obtain summary judgment").}\n
\textsuperscript{164} See \textit{Ninemia Maritime Corp., [1983] 2 Lloyd's Rep. at 604 (announcing that plaintiff must "do substantially more than show that the case is merely 'arguable,' yet 'need not go so far as to persuade the Judge that he is likely to win"); see also \textit{Pertimina, [1978] 1 Q.B. at 661 (commenting that "[t]he defendant may put in an affidavit putting forward a specious defence sufficient to get him leave to defend, conditional or unconditional . . . [b]ut when the case actually comes to the Court for trial, he throws his hand in"). See \textit{generally Willoughby, supra note 23, at 480 (stressing that we need to revise standard to an "extremely strong prima facie case").}\n
\textsuperscript{165} [1983] 2 Lloyd's Rep. 600 (Eng. C.A.).\n
\textsuperscript{166} Id. at 605.\n
\textsuperscript{167} Id. at 617.\n
\textsuperscript{168} See id. at 605 (establishing that "[t]he mere fact that a defendant having assets within the jurisdiction is a foreigner or a foreign corporation cannot, . . . , by itself justify the granting of a \textit{Mareva} injunction"); Third Chandris Shipping Corp. v. Unimarine S.A., [1979] Q.B. 645, 669 (Eng. C.A.) (reaffirming that \textit{Mareva} injunctions cannot automatically be imposed on foreign companies). See e.g., Z Ltd v. A-Z, [1982] 1 All E.R. 556, 572 (Eng. C.A.) (illustrating application of \textit{Mareva} injunctions to foreign companies).\n
\textsuperscript{169} See \textit{Ninemia Maritime Corp., [1983] 2 Lloyd's Rep. at 605-06 (emphasizing need for additional facts beyond mere risk of removal of assets); see also Z Ltd., [1982] 1 All E.R
pertinent question appears to be whether there is a risk of default, leaving plaintiff without a satisfied judgment, to which risk both the status as a foreigner and the likelihood of removal are certainly components. Implicit in this is the notion that the defendant will seek to avoid judgment, i.e., default, though evidence of any such “nefarious intent” has been explicitly disclaimed as a requirement. Another implicit idea in this requirement is that the defendant have assets to freeze, but some commentators insist courts nevertheless require plaintiffs to demonstrate this in the material supporting their application.

556, at 572 (highlighting that “the danger of assets being removed from the jurisdiction is only one facet of the ‘ploy’ of a defendant to make himself ‘judgment-proof’”); INGMAN, supra note 25, at 480 (acknowledging that plaintiff must show that defendant’s assets will not be available at time of judgment).

The necessity of a real risk of removal of assets prior to a judgment being awarded has been widely recognized. See HILL, supra note 12, at 580. Justice Lloyd noted that “[t]here must be facts from which the Commercial Court, like a prudent, sensible commercial man, can properly infer a danger of default if assets are removed from the jurisdiction.” Ninemia Maritime Corp., [1983] 2 Lloyd’s Rep. at 605–06.

In Derby & Co. Ltd. v. Weldon (Nos. 3 & 4), Lord Donaldson suggested, “[the] existence of sufficient assets within the jurisdiction is an excellent reason for confining the [Mareva] jurisdiction to such assets, but other considerations apart, the fewer the assets with the jurisdiction the greater the necessity for taking protective measures in relation to those outside of it.” Derby & Co. Ltd. v. Weldon (Nos. 3 & 4), [1990] Ch. 65, 79 (Eng.). The clear implication of this statement is that, while neither status is of itself determinative, a plaintiff who demonstrates any combination of the two — being foreign and keeping an insufficient amount of assets in the jurisdiction — will probably provide an issuing court with sufficient proof to pass on this requirement.

See Ninemia Maritime Corp., [1983] 2 Lloyd’s Rep. at 617. It is clearly established that a plaintiff does not need to prove “nefarious intent.” See id; Willoughby, supra note 23, at 480. However, there still lies the principle that “[c]ourts will not permit the course of justice to be frustrated by a defendant taking action, the purpose of which is to render nugatory or less effective any judgment or order which the plaintiff may thereafter obtain.” Polly Peck Int’l v. Nadir (No. 2), [1992] 2 Lloyd’s Rep. 238, 249 (Eng. C.A.). Therefore, though there is no requirement that plaintiff demonstrate that the defendant actually “intends” to place his assets beyond the reach of the plaintiff and the court, it is certainly permissible to provide anecdotal evidence of the defendant’s business practices, operations, and past transactions in order for the issuing judge to infer such an intent, thereby satisfying this requirement. Ninemia Maritime Corp., [1983] 2 Lloyd’s Rep. at 606.

See Third Chandris Shipping Corp., [1979] Q.B. at 668 (suggesting that plaintiff should state some grounds for belief that defendant has assets within jurisdiction, though only indications of assets will suffice). See also SNELL’S PRINCIPLES OF EQUITY, supra note 40, at 648 (noting that plaintiff can state some grounds for belief that defendant has assets within jurisdiction but does not have to precisely identify assets); Alexander, supra note 2, at 495 (stating that plaintiff must only evince reasonable belief that defendant have assets within court’s jurisdiction).

See, e.g., HANBURY & MAUDSLEY, supra note 10, at 786 (stating that plaintiff should give court grounds for belief that defendant has assets within jurisdiction); INGMAN, supra note 25, at 480 (asserting that plaintiff must satisfy court that defendant has assets within or without jurisdiction); Zicherman, supra note 16, at 673 (suggesting
Finally, the plaintiff's application must be supported by a "full and frank disclosure"\textsuperscript{174} of all material matters, supported by affidavits,\textsuperscript{175} including the particulars of his claim and its amount.\textsuperscript{176} The evidence should draw the court's attention to the factual, legal, and procedural aspects of the plaintiff's case.\textsuperscript{177} The applicant is also expected to have undertaken all practicable, relevant inquiries.\textsuperscript{178} As this is an \textit{ex parte} proceeding, plaintiff is also obligated to "fairly" state the arguments the defendant is likely to make.\textsuperscript{179} Material non-disclosures of facts or potential

\textsuperscript{174} Arena Corp. v. Schroeder [2003] E.W.H.C. 1089, ¶ 113 (Eng. Ch.).

\textsuperscript{175} Id. at ¶ 115. In Arena v. Schroeder, the court identifies affidavits as part of plaintiff's application. \textit{Id.} See Samuel K. Alexander, III, \textit{The Mareva Injunction and Related Orders}, 39 VA. J. INT'L L. 503, 509 (1999) (book review). The author states that plaintiff is required to submit affidavits in support upon application for \textit{Mareva} injunction. \textit{Id.} at 509. As has been the practice, affidavits are usually sworn to by plaintiff's attorneys as affiants. \textit{See} Alexander, supra note 2, at 495–96. The author notes that affidavits in support must accompany application and affidavits can be sworn by individual plaintiff, senior officer of plaintiff corporation, or plaintiff's solicitor. \textit{Id.} at 495–96.

\textsuperscript{176} \textit{See}, e.g., Gidraxslme Shipping Co. v. Tantomar-Transportes Maritimos Ltda. where plaintiffs obtained a \textit{Mareva} order restraining defendants from: "... removing [their] assets from the jurisdiction or disposing of, assigning their rights to, charging, mortgaging, encumbering or otherwise howsoever dealing with any of their assets within the jurisdiction until the Final Award was satisfied, save in so far as the unencumbered value of the assets exceeded US $720,000." [1994] 4 All ER 507 (Eng. Q.B.). The plaintiff's claim is generally used as the upper limit of defendant's assets over which the order applies, though this is not necessarily required. \textit{See Third Chandris Shipping Corp. [1979] Q.B. at 668. In Third Chandris, the court noted that plaintiff's disclosure of amount of claim is merely required for consideration of injunction application. \textit{Id.} at 668.}

\textsuperscript{177} Arena Corp. v. Schroeder [2003] E.W.H.C. 1089, at ¶ 116 (quoting Memory Corp. PLC v. Sidhu, [2000] 1 WLR 1443, 1459) (stating that plaintiff should "draw the court's attention to significant factual, legal and procedural aspects of the case"); \textit{see} Alexander, supra note 175, at 509–10 (summarizing recommended and required application material); \textit{see also} Manuel Juan Dominguez, \textit{Using Prejudgment Attachments in the European Community and the U.S.}, 5 J. TRANSNAT'L L. & POLY 41, 52 (1995) (outlining information plaintiff should provide upon injunction application).

\textsuperscript{178} Arena Corp., [2003] E.W.H.C. at ¶ 115. In Arena Corp. v. Schroeder the court states that a plaintiff must investigate the nature of the cause of action asserted. \textit{Id.} at ¶ 115. Where a plaintiff claims that the risk of dissipation is great and thus time is of the essence, this part of the requirement is greatly relaxed. \textit{See} Alexander, supra note 175, at 510. The author suggests that plaintiff ensure all undertakings have been completed when application is submitted. \textit{Id.} at 510. \textit{See also} Eric S. Rein, \textit{International Fraud: Freeze, Seize, and Retrieve}, 116 BANKING L.J. 144, 147, where the author outlines responsibilities expected of plaintiff upon application for injunction.

\textsuperscript{179} Arena Corp., [2003] E.W.H.C. at ¶ 114 (stating, "[e]qually, in fairness to the defendant, the plaintiff ought to disclose, so far as he is able, any defence which the defendant has indicated in correspondence or elsewhere. It is only if such information is put fairly before the court that a \textit{Mareva} injunction can properly be granted."); \textit{see Third Chandris Shipping Corp. [1979] Q.B. at 668 (stating that plaintiff should account for points made against his claim by defendant in applying for \textit{Mareva} injunction); Dominguez, supra note 177, at 52 (noting that plaintiff is required to provide court with defendant's applicable affirmative defenses).
defenses do not by themselves defeat an application but instead are subject to a fact-sensitive balancing test. Judges, though cognizant of the implications, are nevertheless free to grant the Mareva order despite the plaintiff’s breach of duty to fully inform the court.

As a means of ameliorating potential hardship on defendants and, perhaps, to avoid abuse of the procedure by plaintiffs, some judges may require the applying party to post a security bond sufficient to cover defendant’s costs of compliance with the Mareva order’s disclosure obligations. There is disagreement as to whether this is to be considered a “requirement” or merely an optional safeguard.

B. Effect on Defendant’s Assets

PENAL NOTICE:

180 Arena Corp., [2003] E.W.H.C. at ¶ 213 (highlighting guidelines for recommended balancing test for judges); Alexander, supra note 2, at 496 (suggesting that judges are more likely to approve applications when plaintiff provides as much information as possible); Alexander, supra note 175, at 510 (stating that plaintiffs should provide more information than required to avoid omissions which may result in rejection of application).


182 Arena Corp., [2003] E.W.H.C ¶ 215. In Arena Corp. v. Schroeder there were six material non-disclosures by the plaintiff in his application for the Mareva order, and the court refused to continue it, but nonetheless left it in place until the court conducted further hearings[!] Id. at ¶ 215. This author wonders if there is a timepiece accurate enough to measure the speed with which an English court would hold a defendant in contempt were he to make “six material non-disclosures” to the court when subject to a Mareva order. See Third Chandris Shipping Corp., [1979] Q.B. at 669. In Third Chandris the court notes that although plaintiff’s submission of more details is preferred, judges may find submission of few details sufficient for granting injunction. Id. at 669. See also Rachel Davies, No Mareva for Non-UK Assets, FIN. TIMES (London), June 24, 1988 at 15. The author states that the court ultimately considers whether approval of application is fair and just, despite amount of details provided. Id. at 15.

183 See, e.g., HANBURY & MAUDSLEY, supra note 10, at 786 (stating that plaintiff must post security in case action is unsuccessful); see Fabano, supra note 2, at 142 (posing that plaintiff is required to post security upon application in case injunction is erroneously granted); Zicherman, supra note 16, at 673 (noting that plaintiff should post security to in case claim fails or injunction is unjustified).

184 See, e.g., INGMAN, supra note 25, at 481. The author argues that such a bond is not a pure “requirement” because the justification for issuing the order is one of justice and convenience, not the financial condition of the claimant. Id. at 481. Given the “loser pays” system in England, one would think it should be a requirement. See Nation, supra note 16, at 399–401. The author suggests that a judge may or may not require plaintiff to post form of security. Id. at 401. See also Wasserman, supra note 4, at 347–48. The author cites posting of security as a possible method for reducing risks posed to defendants. Id. at 348.
IF YOU [Insert Name of Respondent] DISOBEY THIS ORDER YOU MAY BE HELD TO BE IN CONTEMPT OF COURT AND MAY BE IMPRISONED, FINED OR HAVE YOUR ASSETS SEIZED.

ANY OTHER PERSON WHO KNOWS OF THIS ORDER AND DOES ANYTHING WHICH HELPS OR PERMITS THE RESPONDENT TO BREACH THE TERMS OF THIS ORDER MAY ALSO BE HELD TO BE IN CONTEMPT OF COURT AND MAY BE IMPRISONED, FINED OR HAVE THEIR ASSETS SEIZED.\textsuperscript{185}

These are the words of admonition a defendant is greeted with upon receipt of a typical Mareva order. While the bold-typeface, capitalized text of the standard form cover page seems menacing enough, the real nightmare for an unsuspecting defendant is in the pages that follow.\textsuperscript{186}

After being informed of the application against him, the party making the application, and the fact that a hearing has already been held in his absence, the defendant is then informed of the effect of the order upon his assets.\textsuperscript{187} A defendant must not "in any way dispose of, deal with or diminish the value of any of his assets whether they are in or outside England and Wales . . ."\textsuperscript{188} Paragraph 6 further clarifies the scope of the order:

Paragraph 5 applies to all the Respondent's assets whether or not they are in his own name and whether they are solely or jointly owned. For the purpose of this order the Respondent's assets include any asset which he has the power, directly or indirectly, to dispose of or deal with as if it were his own. The Respondent is to be regarded as having

\textsuperscript{185} U.K. Civ. P. R., Practice Directions, Part 25 – Annex – Sample Freezing Injunction, cover page [hereinafter “Sample Freezing Injunction”]. Use of the Sample Freezing Injunction is common practice and, indeed, variation from its language (without notice to the issuing judge) could potentially provide grounds for rescinding the order in its entirety or modifying it as appropriate. See BARNARD & HOUGHTON, supra note 18, at 251–52, where the authors note that care should be exercised in drafting the affidavits and order so as not to provide defendants with grounds to discharge once they are served.

\textsuperscript{186} For the purposes of this Note, the “worldwide” freezing injunction language will be utilized. Slight variation in the language is used where the assets subject to the order are entirely within English jurisdiction. The effects and requirements are identical, however. See Sample Freezing Injunction, Para. 5. There is only slight variation in language between a freezing injunction limited to assets in England and Wales and a “worldwide” injunction. Id.

\textsuperscript{187} Sample Freezing Injunction, paras. 5–8 (describing what defendant may or may not do with his assets once order has been served).

\textsuperscript{188} Sample Freezing Injunction, para. 5.
such power if a third party holds or controls the assets in accordance with his direct or indirect instructions.\textsuperscript{189}

The order can encompass either the totality of the defendant’s assets\textsuperscript{190} or a subset of them corresponding to a specified sum, often identical to the amount the plaintiff surmises his claim is worth.\textsuperscript{191} Some consideration is given by issuing courts to allow for reasonable living\textsuperscript{192} and legal expenses of defendants.\textsuperscript{193} One court stated that “[i]t is not the purpose of a \textit{Mareva} injunction to prevent a defendant acting as he would have acted in the absence of a claim against him.”\textsuperscript{194} That assertion is questionable at best,

\textsuperscript{189} Sample Freezing Injunction, para. 6.
\textsuperscript{190} Willoughby, \textit{supra} note 23, at 481 (describing \textit{Mareva} order which was signed by judge despite it applying to entirety of defendant’s assets, though it followed specimen order in all other respects); see Fabano, \textit{supra} note 2, at 140 (acknowledging power of \textit{Mareva} injunction to encompass entirety of defendant’s assets); Nation, \textit{supra} note 16, at 400 (suggesting that orders encompassing entirety of defendant’s assets are possible, if rarely justified).
\textsuperscript{191} See Gidrxmlme Shipping Co. v. Tantomar-Transportes Maritimos Lda, [1994] 4 All E.R. 507 (Eng. Q.B.) (discussing \textit{Mareva} order which restrained defendants from “removing [their] assets from the jurisdiction or disposing of, assigning their rights to, charging, mortgaging, encumbering or otherwise howsoever dealing with any of their assets within the jurisdiction until the Final Award was satisfied, save in so far as the unencumbered value of the assets exceeded US$720,000”); see also William Tetley, \textit{Arrest, Attachment, and Related Maritime Law Procedures}, 73 TUL. L. REV. 1895, 1955 (1999) (noting \textit{Mareva} orders can freeze “any or all” of defendant’s assets). \textit{See generally Lord Denning, Forward to the First Edition of STEVEN GEE, MAREVA INJUNCTIONS \& ANTON PILLAR RELIEF, at xix (2d ed. 1990) (explaining \textit{Mareva} injunctions with unlimited scope are rarely granted and suggesting limited \textit{Mareva} orders more closely reflect purported goal of \textit{Mareva} orders which is to preserve adequate assets to protect plaintiff’s potential judgment).}
\textsuperscript{192} See Willoughby, \textit{supra} note 23, at 481–82 (noting courts recognize punitive potential of \textit{Mareva} orders and therefore typically assure defendants subject to \textit{Mareva} orders – after the fact, obviously - that they can continue to live in manner in which they are accustomed). \textit{But see PCW Ltd. v. Dixon, [1983] 2 All E.R. 158 (Eng. Q.B.) (demonstrating how \textit{Mareva} orders persuade defendants to consider settling their cases, regardless of guilt or innocence, through explanation of case in which wealthy man with five children was granted £100 per week for ordinary living expenses under \textit{Mareva} order despite absence of evidence suggesting he was dissipating assets or living in a manner any different than he had before case was filed). \textit{See generally Iraqi Ministry of Def. v. Arcepey Shipping Co. SA The Angel Bell, [1981] 1 Q.B. 65 (Eng.).}
\textsuperscript{193} See Willoughby, \textit{supra} note 23, at 481–82 (noting defendant must get permission from plaintiff’s solicitors when seeking legal representation, suggesting “approved” limits may burden defendant’s choice of legal representatives such permission requirement may further heighten expenses, and describing, as an example, six-figure case in which considerable inter-solicitor correspondence resulted from solicitors’ refusal to allow defendant to pay £200 phone bill); see also \textit{Bank not Liable for Suspicious Customers, TIMES (London), July 18, 2000, at Features (describing \textit{Mareva} order granting defendant access to sufficient funds for legal expenses). \textit{See generally Solicitors Risk Claim of Constructive Trust, TIMES (London), Dec. 15, 1997, at Features (highlighting that proviso in \textit{Mareva} injunction which permitted defendant to use assets otherwise frozen for reasonable legal expenses was not a breach of order).}
\textsuperscript{194} Polly Peck Int’l Plc. v. Nadir, [1992] 2 Lloyd’s Rep. 238, 249 (Eng. C.A.) (emphasizing \textit{Mareva} injunction is meant only to restrain defendant from “indulging in a
considering the order itself was founded on grounds which were meant to demonstrate that a defendant would jeopardize a plaintiff's claim \textit{precisely} by acting as he had been in the absence of the claim.\footnote{See Ninemia Mar. Corp. v. Trave Schiffahrtsgesellschaft M.B.H.\underline{und} Co. K.G., [1983] 2 Lloyd's Rep. 600, 617 (Eng. Q.B.) (explaining plaintiff must prove there exists substantial risk defendant will not satisfy judgment before obtaining \textit{Mareva} order and adding plaintiff may provide anecdotal evidence of defendant's business practices, operations, and past transactions in order to prove such risk); see also Selva Kumar, \textit{Insurance Pay-Out Allowed to Satisfy Debts Despite \textit{Mareva} Injunction}, BUS. TIMES SING., Sept. 10, 2004, at Shipping News (noting \textit{Mareva} injunctions are generally utilized when it appears to court that plaintiff's claim would be jeopardized without such injunction).} Courts and commentators take great pains to clarify that, like an injunction, the \textit{Mareva} order operates only \textit{in personam} on the defendant;\footnote{See Timothy Portwood, \textit{Effect of \textit{Mareva} Injunction on a Debtor}, J. OF INT'L BANKING L., 4(2), N68–69 (1989) (discussing \textit{in personam} effect of \textit{Mareva} orders); see also Babanaft Int'l Co. v Bassatne [1989] 1 All E.R. 433, 438 (Eng. C.A.).} it is not an \textit{in rem} attachment of the property itself.\footnote{See generally Invoking Asset-Freezing Jurisdiction, TIMES (London), Apr. 1, 1999, at Features (emphasizing \textit{Mareva} orders are ordinarily not utilized unless defendant is known, on evidence of plaintiff only, to participate in bad faith financial transactions).} Given the broad sweep of the prohibitions outlined in the order and the debilitating effect the mere imposition of the order has on conducting business,\footnote{See generally \textit{Mareva} injunctions operate \textit{in personam} and not \textit{in rem}.} it is doubtful that the distinction is of any meaningful, practical significance to a defendant. The importance of the distinction comes into clearer focus, however, when the \textit{Mareva} order is applied to assets located in other sovereign nations, beyond the reach of English jurisdiction, which will be considered in further detail in PART IV.

C. Application for Discharge or Variation of a Mareva Order

Lord Denning’s 1975 opinions in Nippon Yusen Kaisha and Mareva Compania Naviera both indicated that a defendant could apply to the court for a discharge of the injunction but failed to elaborate on the grounds for such a discharge. The standard form order is no more informative:

Anyone served with or notified of this order may apply to the court at any time to vary or discharge this order (or so much of it as affects that person), but they must first inform the Applicant’s solicitors. If any evidence is to be relied upon in support of the application, the substance of it must be communicated in writing to the Applicant’s solicitors in advance.

This all presumes, of course, that the defendant has been “served with or notified” of the Mareva order itself. Like many of the provisional remedies, one important aspect is the element of surprise. The very fear that underlies the necessity of the order—that the defendant will secret away his assets—militates against making him aware of the proceedings. By quickly freezing the assets and compelling third parties to disclose information about the defendant’s assets, the Mareva

199 See Jane Andrewartha & Michael Swangard, English Maritime Law Update:1999, 31 J. MAR. L. & COM. 471, 500 (2000) (exemplifying uncertainty regarding grounds for Mareva order discharge by describing case in which judge discharged Mareva order due to plaintiff’s non-disclosure of material facts in connection with Mareva application but simultaneously emphasized that such material non-disclosure did not necessarily warrant discharge); see also Bishop et al., supra note 198, at 647 (noting defendants are “rarely able to discharge a Mareva order”). See generally Alexander, supra note 175, at 506 (emphasizing rarity of Mareva order discharges).

200 Sample Freezing Injunction, para. 13. Note, also, that the discharge, unlike the order itself, cannot be secured ex parte.

201 See Hill, supra note 12, at 587; see also Alexander, supra note 175, at 506 (suggesting element of surprise in Mareva order is integral). See generally Alexander, supra note 2, at 490 (adding ex parte order necessary for Mareva injunctions because element of surprise is crucial).

202 See Hill, supra note 12, at 587; see also Alexander, supra note 2, at 490 (suggesting speed and secrecy in freezing defendant’s assets are necessary for successful Mareva injunction). See generally Alexander, supra note 175, at 506 (emphasizing importance of quickness in maintaining Mareva order’s element of surprise).

injunction is indeed a powerful weapon against the feared dissipation of assets. The underlying assumption is that the fear of a single, nervous creditor somehow justifies such a substantial invasion of defendant’s privacy and, in the case of worldwide Mareva injunctions, a potential invasion of another country’s sovereignty. Justifications aside, in reality, a defendant may not receive notice of the freezing of his assets until months after the order is issued.

As with everything involving this process, the discharge and variation procedures are without clear guidelines. What is more troubling is that, even if a defendant is successful, it may be too late to avert the crippling effect the initial grant of the order had on his business. As Mr. Justice Lloyd pointed out in

as banks, must not confuse Mareva orders with discovery and need not disclose all material information regarding defendants’ assets in response to Mareva orders).

See Grupo Torras SA v. Al-Sabah, [2001] Lloyd’s Rep. PN 117 (Eng. C.A.); see also Alexander, supra note 175, at 507 (explaining that since Mareva orders are granted ex parte and defendants have no opportunity to object to plaintiff’s Mareva request, U.S. lawyers sometimes view Mareva orders as violating basic principles of due process which require notice and hearing before defendants may be deprived of property). But see Aloe, supra note 36, at 849–50 (discussing case in which New York court upheld Mareva order against due process challenge because “English justice comports with due process”).

See Alexander, supra note 2, at 499 (emphasizing English judiciary’s historical hesitancy to grant worldwide Mareva orders); see also Bishop, supra note 198, at 648 (suggesting worldwide Mareva orders are rarely issued due to their “broad and obtrusive nature”). See generally Alexander, supra note 175, at 523 (commenting that worldwide Mareva orders should only be utilized in extraordinary cases where defendants have been “most egregious and underhanded in trying to frustrate the legitimate claims of plaintiffs in English courts”).

See Brief for Appellants at 15, CIBC Mellon Trust Co. v. Mora Hotel Corp., N.V., 100 N.Y.2d 215, (2002) (No. 47) (noting defendant not served with Mareva order until nine months after it was issued); see also Alexander, supra note 2, at 490 (suggesting plaintiffs’ goal in using Mareva injunction is to prevent defendant from being put on notice of fact that assets will be frozen). See generally Perkins & Mills, supra note 203, at 562 (emphasizing plaintiffs’ desire to prevent defendant from learning of asset freezing).

See Tetley, supra note 191, at 1953 (noting Mareva orders may be discharged when they adversely affect rights of innocent third parties and when such discharge will benefit defendant yet will not frustrate initial purpose of Mareva); see also Law Report: Procedure for Discharging Orders Granted to One Side, TIMES (London), May 5, 1988, at Issue 63073 (describing judge’s refusal to discharge Mareva order at interlocutory hearing although defendant alleged plaintiff was liable for damages in cross-undertaking). See generally Mark Steene, Disgraced Magistrate Peter Liddy Has Failed to Have a Court-Imposed Freeze on His Assets Lifted, ADVERTISER, Nov. 13, 2002, at 16 (summarizing judge’s refusal to lift Mareva order due to defendant’s history of underhanded acts).

See Alexander, supra note 2, at 496 (explaining two permissible variations in Mareva orders including defendant’s request for living expenses and either parties’ request for alteration in original amount of frozen assets); see also Bishop, supra note 198, at 648 (summarizing typical variations). See generally Alexander, supra note 175, at 511 (noting variations regarding original amount of assets frozen may be asserted by either party in an inter partes hearing).

See Willoughby, supra note 23, at 479; see also Aviva Golden, Digest of Hilary Term Cases, FIN. TIMES (London), May 1, 1992, at 12 (describing judge’s decision to

The damage done by the over-hasty grant of an injunction may well be irretrievable, since an application for the discharge of the injunction may come too late to save a defendant whose liquidity has been abruptly shut down. The cross-undertaking in damages is of no consolation to a company which has been ruined. This being so, there may perhaps be something to be said for imposing stricter requirements at the ex parte stage than are called for by the current practice, if this useful remedy is not to be a vehicle for oppression. 210

From the cases and commentary, there are three grounds upon which a defendant who has been made aware of the Mareva order against him may argue for discharge of the injunction. 211 One ground is a counter-allegation (supported by evidence) of fraud on the plaintiff's part. 212 A showing of fraud would demonstrate that the initial grant of the Mareva injunction was per se inequitable. 213 Another ground attacks the underlying policy of the Mareva procedure itself – avoiding the risk of default. 214 A

discharge Mareva order because plaintiff's cause of action was speculative and order had interfered with defendant's normal course of business. See generally Asset-Freezing Injunction Rarely Appropriate Against Banks, TIMES (London), Mar. 24, 1992, at Features (explaining that freezing assets of bank inherently runs risk of interfering with bank's ordinary course of business since bank's stock in trade is generally money borrowed from depositors).


211 See BARNARD & HOUGHTON, supra note 18, at 249 (laying out requirements for applications to discharge or vary Mareva orders); INGMAN, supra note 25, at 484–86 (discussing case law history of discharge and variation applications); see also Ninemia Mar. Corp., [1983] 2 Lloyd's Rep. 60 (entire case); Zicherman, supra note 16, at 675 (noting grounds that may exist for which Mareva injunction may be discharged).

212 BARNARD & HOUGHTON, supra note 18, at 249 (1993) (discussing grounds for Mareva injunction); Alexander, supra note 175, at 518 (noting that full and fair disclosure is requirement to obtain Mareva injunction); Zicherman, supra note 16, at 675 (stating ground for discharge of injunction is failure to disclose all material facts to court).

213 Fraud in the plaintiff's application implicates any number of "equity maxims," including "equity follows the law," "he who seeks equity must do equity," and "he who comes into equity must come with clean hands." See SNELL'S PRINCIPLES OF EQUITY, at 30–33.

214 Alexander, supra note 175 at 504 (stating that purpose of injunction is to prevent defendant from withdrawing all assets from jurisdiction to prevent payment of judgment); Seveg, supra note 10, at 58 (explaining that purpose of Mareva injunction is to prevent defendant from defrauding court by moving assets); Zicherman, supra note 16, at 698 (noting that one reason for adopting Mareva injunctions is to keep defendant from removing all assets in jurisdiction).
defendant who can demonstrate that there is no such risk should be entitled to a discharge of the *Mareva* order.\textsuperscript{215} Corollary to that, a defendant who is willing to place at the court's disposal a security large enough to guarantee plaintiff's claim is also likely to succeed in a discharge application.\textsuperscript{216} Large, reputable companies with substantial assets would likely have little problem meeting either of these burdens.\textsuperscript{217} Smaller companies in a less credit-worthy position, however, may have a more difficult time satisfying this standard.\textsuperscript{218}

The final ground on which a defendant might base a discharge application is more complex. A defendant who can show that the plaintiff made material misstatements or non-disclosures in his initial request for the *Mareva* order and that the weight of the plaintiff's evidence, absent his breach of duty, would have been insufficient to support a granting of the injunction in the first instance\textsuperscript{219} might have some success.\textsuperscript{220} Misstatements or non-

\textsuperscript{215} \textsc{Barnard \& Houghton, supra} note 18, at 249. \textit{See generally Alexander, supra} note 175, at 504 (discussing purpose of injunction being to prevent removal of assets); \textsc{Seveg, supra} note 10, at 58 (explaining that purpose of injunction is solely to ensure presence of property within jurisdiction).

\textsuperscript{216} \textsc{Barnard \& Houghton, supra} note 18, at 249 (discussing reasons defendant can get injunction discharged). \textit{See generally Alexander, supra} note 175, at 511 (stating that in issuing injunction court should allow defendant use of assets above claim amount while injunction is in place); \textsc{Zicherman, supra} note 16, at 676 (explaining that court will normally only grant injunction for assets required for payment of potential claim, not all assets of defendant).

\textsuperscript{217} \textit{See, e.g., Ninemia Maritime Corporation, [1983] 2 Lloyd's Rep. at 605 (stating "No one would wish any reputable foreign company to be plagued with a *Mareva* injunction simply because it has agreed to London arbitration."); Alexander, supra} note 175, at 522 (noting that worldwide *Mareva* injunctions are usually only cost effective when there is large claim involved); \textsc{Seveg, supra} note 10, at 59 (discussing financial risks involved in *Mareva* injunction application).

\textsuperscript{218} \textit{See generally Alexander, supra} note 175, at 522 (discussing cost-benefits of obtaining *Mareva* injunction); \textsc{Seveg, supra} note 10, at 59 (stating that both parties have financial interests at stake in obtaining a *Mareva* injunction); \textsc{Zicherman supra} note 16, at 668 (explaining different approaches to *Mareva* injunctions in United States and United Kingdom).

\textsuperscript{219} \textsc{Barnard \& Houghton, supra} note 18, at 249 (discussing requirement that plaintiff show likely success of action to obtain injunction); Alexander, \textit{supra} note 175, at 522 (noting that plaintiff must show "good arguable case on the merits" to obtain injunction); \textsc{Zicherman, supra} note 16, at 673 (stating requirement that plaintiff show "good arguable case" to obtain injunction initially).

\textsuperscript{220} There are no guarantees where *Mareva* orders are concerned. \textit{See Ingman, supra} note 25, at 477, 485–86 (noting that *Mareva* injunctions are not always granted even when bare requirements are met); \textsc{Zicherman, supra} note 16, at 673 (discussing conditions under which court should, but not must, grant *Mareva* injunction). \textit{But see Alexander, supra} note 175, at 509 (stating that commentators have noted that use of *Mareva* injunctions has become quite common in England).
disclosures can regard either the facts or potential defenses. The court retains a broad discretion in applications on this ground to modify, continue, or discharge the Mareva order. One concern is conducting what would in effect be a “trial within a trial” on the merits. Analyzing the evidence in support of the defendant’s application and that of the plaintiff’s original application (and rebuttal) could consume a significant amount of time and resources of the court.

Any one of the stated grounds could be used in an application to vary the terms of the Mareva order as well. Variation applications are invariably fact- and context-sensitive. Such terms as allowable living, business, and legal expenses achieve more meaningful estimation only after a defendant has demonstrated them to the court, rather than reliance on plaintiff’s speculation or approximation of what defendant may, or may not, need or use. There are two competing considerations facing a court on an application for variation.

221 See BARNARD & HOUGHTON, supra note 18, at 249 (stating requirements for applications to discharge or vary Mareva orders); INGMAN, supra note 25, at 484–86 (discussing history of discharge and variation applications for Mareva injunctions). But see Alexander, supra note 175, at 506 (explaining that discharge applications are rare, making injunction itself more forceful tool during settlement negotiations).

222 See generally BARNARD & HOUGHTON, supra note 18, at 249 (noting court may grant injunction, and then modify it in order to fit actual requirements of case); Alexander supra note 175, at 522 (discussing requirements for order initially, change of any of which could be grounds to modify order); Zicherman, supra note 16, at 673 (explaining that court has discretion in whether to grant injunction initially).

223 See BARNARD & HOUGHTON, supra note 18, at 249 (noting requirement that plaintiff show probable success on the merits to meet their burden of proof); Alexander supra note 175, at 522 (explaining that plaintiff must argue merits of case in order to obtain injunction initially); Zicherman, supra note 16, at 673 (discussing requirement the plaintiff show “good arguable case” in order for court to grant Mareva injunction).

224 Ninemia Mar. Corp., [1983] 2 Lloyd’s Rep. at 603 (noting potential time and resource use while hearing discharge petition could be high). See generally Alexander, supra note 175, at 522 (discussing requirements for granting of injunction); Zicherman supra note 16, at 673 (stating requirements without which Mareva injunction should not be granted).

225 See Ninemia Mar. Corp., [1983] 2 Lloyd’s Rep. at 619 (noting that any decision to vary or discharge initial grant of Mareva order is almost exclusively based on an inter partes hearing where both sides produce evidence, regardless of whether initial grant, based only on plaintiff’s evidence, was proper). See generally Alexander, supra note 175, at 522 (noting that original order is based on plaintiff’s estimation only); Zicherman supra note 16, at 673 (stating that since hearings are ex parte defendant does not get to present any evidence before injunction is granted).

226 BARNARD & HOUGHTON, supra note 18, at 249 (noting that court must take into consideration likelihood of defendant removing all assets from jurisdiction in order to avoid paying potential judgment); Alexander, supra note 175, at 511 (stating that in issuing injunction court should consider whether it is likely defendant will remove assets from jurisdiction); Zicherman, supra note 16, at 676 (discussing requirement that court only freeze assets sufficient to pay potential claim against plaintiff).
On one hand, the reviewing judge has already made a determination, based on plaintiff's "full disclosure," that there is a real risk that the defendant will seek to undermine his authority by failing to satisfy a judgment.\textsuperscript{227} It would be entirely inconsistent with that holding to allow the defendant too much access to his assets, even for such things as living expenses. On the other hand, there is oppression in the details.\textsuperscript{228} The limits of the order effect real hardship on defendants who, to this point, are merely suspected of wrongdoing.\textsuperscript{229} To allow plaintiffs to determine what is or is not a "reasonable" expense by the defendant defies common sense and fundamentally undermines the appearance of fairness in the proceedings. Lord Justice Kerr recognized this problematic area in \textit{Ninemia Maritime Corporation} when he stated,

Further, it must always be remembered that if, or to the extent that, the grant of a \textit{Mareva} injunction inflicts hardship on the defendants, their legitimate interests must prevail over those of the plaintiffs, who seek to obtain

\textsuperscript{227} BARNARD \& HOUGHTON, supra note 18, at 249 (discussing purpose of injunction is to keep assets in jurisdiction); Alexander, supra note 175, at 504 (explaining that court, once it takes into account plaintiff's papers, must make determination that defendant is likely to withdraw assets from jurisdiction); Zicherman, supra note 16, at 698 (noting that purpose of injunction is to ensure that assets remain in jurisdiction).

\textsuperscript{228} BARNARD \& HOUGHTON, supra note 18, at 249 (discussing that defendant's assets are to be frozen in order to satisfy potential judgment, not as punishment); Alexander, supra note 175, at 511 (stating that in issuing injunction court should allow defendant use of assets above claim amount while injunction is in place); Zicherman, supra note 16, at 676 (explaining that court will normally only grant injunction for assets required for payment of potential claim, not all assets of defendant, though claim may exceed total of all defendant assets).

\textsuperscript{229} See Ninemia Mar. Corp., [1983] 2 Lloyd's Rep. at 620 (acknowledging that \textit{Mareva} injunction can inflict hardship on defendants, and that defendant's interests are paramount); see also Taylor, supra note 3, at 22, stating that:

The conundrum that defeats the fulfillment of that principle in practice is that where a plaintiff obtains and holds a \textit{Mareva} injunction the overwhelming probability is that no judgment will follow and the existence of the plaintiff's right will never be put to the definitive test of a trial. Instead, the plaintiff can advance his case in affidavit evidence and where the defendant contradicts that evidence the court does not seek to resolve that conflict and will by and large assume that the facts are as described by the plaintiff's affidavits even though they may be denied by the defendant. In the result, it is all too easy for the defendant's rights to suffer in the interests of protecting a right of the plaintiff which in the ultimate analysis may be illusory.

Taylor, supra note 3, at 22.

See generally Willoughby, supra note 23 (noting that, where defendant does not actually have assets, "the \textit{Mareva} is in place for considerably longer than is justifiable, and probably long enough to destroy his business").
security for a claim which may appear to be well-founded but which still remains to be established at the trial.\textsuperscript{230}

It must also be remembered that in the case of worldwide \textit{Mareva} injunctions, a defendant who wishes to make either a discharge or variation order must do so in an English court located perhaps very far away from his home or business.\textsuperscript{231} This will necessarily entail securing English solicitors, who might naturally exhibit some pause when considering whether to accept as a client one whose assets are frozen (and potentially unavailable to satisfy their fees) and who has already been made the subject of at least one adverse order by the judge before whom they would have to argue the application.\textsuperscript{232} The practical ramifications of worldwide \textit{Mareva} orders are more fully considered in PART IV.

III. AMERICAN APPROACH TO \textit{MAREVA}-STYLE REMEDIES

Because the American legal system shares a common lineage with that of England,\textsuperscript{233} it is worthwhile to examine the approach


\textsuperscript{231} \textit{See} Theuer, supra note 42, at 438 (recognizing that worldwide \textit{Mareva} injunctions give courts "a large personal jurisdiction net," and that law allows for use of a \textit{Mareva} injunction over defendant without assets in jurisdiction, permitting worldwide service of process on defendant). See generally Fabano, supra note 2, at 143–46 (weighing positive and negative aspects of worldwide \textit{Mareva} injunction); Tetley, supra note 191, at 1951 (describing worldwide \textit{Mareva} injunctions and "consternation" they have caused among many jurists).

\textsuperscript{232} \textit{See} Virginia G. Maurer et al., \textit{Attorney Fee Arrangements: The U.S. and Western European Perspectives}, 19 NW. J. INT'L L. & BUS. 272, 314 (1999) (noting that "it is unlikely that a private solicitor will choose to fund any truly high risk cases, regardless of their social merit, since he does not share proportionately in the gain from taking the risk"); \textit{see also} John F. Vargo, \textit{The American Rule on Attorney Fee Allocation: The Injured Person's Access to Justice}, 42 AM. U.L. REV. 1567, 1609 (1993) (recognizing that English solicitors often choose to avoid legal aid cases "because of increased paperwork, reduced income, and perceived time delays"). See generally Janice Toran, \textit{Settlement, Sanctions, and Attorney Fees: Comparing English Payment into Court and Proposed Rule 68}, 35 AM. U.L. REV. 301, 313–14 (1986) (describing role of solicitor in English legal system).

taken by American courts with regard to remedies such as the Mareva injunction. England, after all, has no monopoly on either equity jurisdiction or jittery creditors seeking prompt repayment. The power of the Mareva order is undeniable, and it was only a matter of time before industrious American plaintiffs sought to secure this equitable weapon of mass destruction, this "nuclear weapon of the law."

As the law stands now, a federal court has no authority to grant a pre-judgment injunction to prevent defendants from dissipating their assets in a case where a plaintiff has made only legal claims, e.g., claims for money damages.

Thus, the classic Mareva scenario was explicitly foreclosed by the Supreme Court of the United States in 1999 in Grupo Mexicano de Desarrollo v. Alliance Bond Fund.

Justice Scalia's opinion in Grupo Mexicano concluded that federal courts were constrained with regard to available equitable remedies by the Judiciary Act of 1789 which limited equitable remedies to those which were "being administered by the English Court of Chancery at the time of the separation of the two countries." In reaching the decision of the Court to reverse the grant of such a preliminary remedy by the United

many states, New Jersey's court system was based on English common law and equity principles".


See JSC Foreign Econ. Ass'n Technostroyexport v. Intl'l Dev. & Trade Servs., 295 F. Supp. 2d 366, 388 (S.D.N.Y. 2004) (holding that "this Court's equitable power to issue a preliminary injunction to prevent a defendant from transferring assets does not extend to an action for money damages where the plaintiff claims no lien or equitable interest in the assets sought to be enjoined"); see also Travelers Cas. & Sur. Co. of Am. v. Beck Dev. Corp., 95 F. Supp. 2d 549, 552 (E.D. Va. 2000) (explaining that "a district court lacks the power... to issue an injunction preventing the transfer of assets in an action solely for money damages where the party seeking the injunction has no lien or equitable interest in the property"); Silverman & Kirshner, supra note 10, at 24 (recognizing that American courts have "looked with disfavor upon the use of prejudgment injunctions that restrain a defendant in a suit from dissipating or transferring assets where the plaintiff simply seeks money damages and claims no interest in specific property belonging to the defendant").

States District Court for the Southern District of New York and affirmed by the Second Circuit. Justice Scalia noted that federal equity courts had typically rejected this form of relief. He reiterated the rule (as exemplified in England by *Lister v. Stubbs* and in numerous American cases) that "a general creditor (one without a judgment) had no cognizable interest, either at law or in equity, in the property of his debtor, and therefore could not interfere with the debtor's use of that property." Justice Ginsburg's dissent posited that the increasing complexity of international transactions required an invocation of the "grand aims of equity," conferring an expansive power in the federal courts to craft new remedies to deal with new problems. Justice Scalia, in response, did not dispute the inherent flexibility of equitable remedies to deal with emerging problems but he did take issue with allowing that flexibility to extend beyond the "broad boundaries of traditional

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238 Id. at 312–13 (concluding that preliminary injunction restrained petitioners from "dissipating, disbursing, transferring, conveying, encumbering, or otherwise distributing or affecting any right to, interest in, title to or right to receive or retain" any of assets of defendant).

239 Id. at 319–20 (citing several historical cases confirming "well established" general rule restricting right to bring creditor's bill only to those creditors who had already obtained judgment establishing debt); *see, e.g.*, Hollins v. Brierfield Coal & Iron Co., 150 U.S. 371, 378-379 (1893) (stating that, where creditors' claims had not been reduced to judgment and had no express lien, "such creditors cannot come into a court of equity to obtain the seizure of the property of their debtor"); Nat'l Tube Works Co. v. Ballou, 146 U.S. 517, 521 (1892) (holding that creditor "must do all that he can at law to obtain his rights," and only "if he is then still without remedy" will court of equity hear case).

240 *Grupo Mexicano*, 527 U.S. at 319–20 (citing Chancellor Kent's description of rule's purpose as seeking to prevent unnecessary and possibly fruitless or oppressive interference with rights of debtor); *see, e.g.*, Adler v. Fenton, 65 U.S. 407, 411–13 (1861) (holding that court of chancery "will not interfere to prevent an insolvent debtor [sic] from alienating his property to avoid an existing or prospective debt, even when there is a suit pending to establish it"); Shufeldt v. Boehm, 96 Ill. 560, 564 (1880) (insisting that rule forbidding interposition of court of equity in such cases until judgment at law is first obtained was "founded upon the wisest policy" because, if law were otherwise, debtors "would be constantly exposed to the greatest hardships and grossest frauds, for which the law would afford no adequate remedy").

241 *Grupo Mexicano*, 527 U.S. at 319–20 (stating that rule requiring judgment was product of both procedural and substantive law).

242 Id. at 342 (Ginsburg, J. dissenting) (concluding that "[n]o countervailing precedent or principle holds the federal courts powerless to prevent a defendant from dissipating assets, to the destruction of a plaintiff's claim, during the course of judicial proceedings").

243 Id. at 322 (conceding that "[w]e do not question the proposition that equity is flexible"); *see also* Brown v. Bd. of Education (II), 349 U.S. 294, 300 (1955) (stating that "[t]raditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs."). *See generally* New York v. Cathedral Acad., 434 U.S. 125, 129 (1977) (recognizing "unique flexibility of equity").
equitable relief."\(^{244}\) Further, he observed that the scenario of debtors seeking to avoid payment of their debts and creditors seeking prompt repayment was certainly not a new problem, let alone one which required a "wrenching departure from past practice."\(^{245}\)

Having decided it was beyond the power of the federal courts to issue a *Mareva*-style injunction, the Court did not need to reach a conclusion as to whether it would be an advisable remedy to adopt.\(^{246}\) Nevertheless, Justice Scalia examined England’s *Mareva* procedure explicitly\(^{247}\) and articulated the arguments for and against creation of a *Mareva*-style remedy.\(^{248}\) Importantly, he asserted several "weighty considerations"\(^{249}\) against a *Mareva*-style injunction. First, he asserted the traditional rule that unsecured creditors had no rights in the property of the debtor before judgment.\(^{250}\) Citing a well-known treatise writer, he agreed that any remedy that changed that rule "would manifestly be susceptible of the grossest abuse. A more powerful weapon of oppression could not be placed at the disposal of unscrupulous litigants."\(^{251}\) Second, he stated that such a remedy could radically alter the balance between the respective rights of

\(^{244}\) *Grupo Mexicano*, 527 U.S. at 322 (refusing to extend boundaries of equitable flexibility to "a type of relief that has been specifically disclaimed by longstanding judicial precedent").

\(^{245}\) *Id.* at 322 (indicating that "we suspect there is absolutely nothing new about debtors’ trying to avoid paying their debts, or seeking to favor some creditors over others").


\(^{247}\) *Grupo Mexicano*, 527 U.S. at 327–29 (reasoning that "[a]s further support for the proposition that the relief accorded here was unknown to traditional equity practice, it is instructive that the English Court of Chancery, from which the First Congress borrowed in conferring equitable powers on the federal courts, did not provide an injunctive remedy such as this until 1975").

\(^{248}\) *See id.* at 329–30 (balancing factors that weigh in favor of *Mareva* remedy, including simplicity and uniformity of procedures, prevention of inequitable conduct on part of defendant, and preserving United States as center of financial transactions, against considerations against remedy, chiefly, traditional principle that unsecured creditor has no right at law or in equity in property of his debtor and that remedy could easily be abused by unscrupulous litigators as tool of oppression).

\(^{249}\) *Id.* at 330.

\(^{250}\) *See id.* at 319 (stating that "[i]t was well established...that as a general rule, a creditor's bill could be brought only by a creditor who has already obtained a judgment").

\(^{251}\) *Id.* at 330 (citing WAIT, FRAUDULENT CONVEYANCES § 73, at 110-11).
creditors and debtors which has been developed over centuries through many laws, including those relating to bankruptcy, fraudulent conveyances, and preferences.\textsuperscript{252} Third, and most important, he impliedly asserted that the \textit{Mareva} procedure in England may be expanding faster than can be controlled by the judges who are responsible for administering it. Justice Scalia noted the application of the \textit{Mareva} procedure in an "ever-increasing set of circumstances" and to an "ever-expanding number of plaintiffs."\textsuperscript{253} The fact that the procedure was now subject to a "steady flow" of litigants making applications in English courts for \textit{Mareva} orders, numbering in excess of a thousand per month, was cited as further evidence.\textsuperscript{254}

Concluding that the Supreme Court had no authority to "craft a nuclear weapon of the law like the one advocated here,"\textsuperscript{255} Justice Scalia succinctly summed up the Court's holding as follows:

[F]ederal courts in this country have traditionally applied the principle that courts of equity will not, as a general matter, interfere with the debtor's disposition of his property at the instance of a nonjudgment creditor. We think it incompatible with our traditionally cautious approach to equitable powers, which leaves any substantial expansion of

\textsuperscript{252} \textit{Id.} at 331 (stating that "the new rule could radically alter the balance between debtor's and creditor's rights which has been developed over centuries through many laws—including those relating to bankruptcy, fraudulent conveyances, and preferences").

\textsuperscript{253} See \textit{id.} at 331 (noting that "since 1975, the English courts have awarded \textit{Mareva} injunctions to freeze assets in an ever-increasing set of circumstances both within and beyond the commercial setting to an ever-expanding number of plaintiffs") (citing Wasserman, \textit{supra} note 4, at 339); see also Taylor, \textit{supra} note 3, at 22 (stating that "the courts have become clogged with the business of obtaining, varying and discharging \textit{Mareva} injunctions"). See generally Howard Johnson, \textit{Mareva Injunctions: Practice Makes Perfect}, INT'L \textit{BANKING AND FIN. L.}, 13(7), 74-76 (1994) (calling it "expanding and potentially draconian remedy").

\textsuperscript{254} See \textit{Grupo Mexicano}, 527 U.S. at 331–32 (highlighting that "[a]s early as 1984, one observer stated that "there are now a steady flow of such applications to our Courts which have been estimated to exceed one thousand per month."); see also Ninemia Mar. Corp. v. Trave Schiffahrtsgesellschaft mbH & Co. KG, [1983] 2 Lloyd's Rep. 600, 602 (Eng. C.A.) (highlighting that "these developments have been accompanied by a rapid and sustained increase in the number of applications for \textit{Mareva} relief"); Silverman & Kirshner, \textit{supra} note 10, at 24 (describing requests for \textit{Mareva} remedies as "commonplace"). See generally John Goldring, \textit{Consumer Protection, Globalization, and Democracy}, 6 \textit{CARDozo J. INT'L & COMP. L.} 1, n.208 (1998) (positing that such orders are now "usual" in English and Australian courts).

\textsuperscript{255} \textit{Grupo Mexicano}, 527 U.S. at 332.
past practice to Congress, to decree the elimination of this significant protection for debtors.256

Almost immediately,257 the federal courts distinguished the Grupo Mexicano decision and limited it to its contextual basis—requests under the federal courts' traditional equitable powers for preliminary injunctions where only legal claims for money damages were asserted. In doing so, the lower federal courts have established three broad exceptions to the Grupo Mexicano rule, exceptions which effectively obliterate the rule.

The first exception addresses the authority of the issuing court. While Grupo Mexicano states that the "traditional" equitable authority of a federal court does not countenance a Mareva-style remedy, it does not foreclose a court to issue such a remedy where it does so under the authority of a statute. For example, state258 and federal259 laws specifically grant courts the ability to issue temporary restraining orders and preliminary injunctions to aid in enforcement of the statutory scheme, especially in aid of racketeering and securities violations.260 Federal courts have not

256 Id. at 329.
257 See Rahman v. Oncology Assoc's., 198 F.3d 489, 496 (4th Cir. 1999) (limiting holding in Grupo Mexicano to premise that "the general equitable powers of the federal courts do not include the authority to issue preliminary injunctions in actions solely at law"); see also Fairview Mach. & Tool Co. v. Oakbrook Int'l, Inc., 77 F. Supp. 2d 199, 202 (D. Mass. 1999) (finding that "Grupo Mexicano's holding ... is limited to cases where a creditor plaintiff has no lien or equitable interest in defendants assets"). See generally Walczak v. EPL Prolong, Inc., 198 F.3d 725, 730 (9th Cir. 1999) (confining holding in Grupo Mexicano to prohibition of injunctions that completely prohibit Appellants from taking any action with regard to their assets).
259 See Newby v. Enron Corp., 188 F. Supp. 2d 684, 702 (S.D. Tex. 2002) (concluding that there was appropriate authority to grant preliminary injunction under Securities Exchange Act of 1934); see also Michael S. Kelley, "Something Beyond": The Unconstitutional Vagueness of RICO's Pattern Requirement, 40 CATH. U.L. REV. 331, 339 (1991) (noting that, under RICO, district court has authority to issue injunction or temporary restraining order against those allegedly involved in alleged pattern of racketeering). See generally Alexander, supra note 2, at 512 (noting that as part of its broad authority to issue injunctive relief, Rule 65 of the Federal Rules of Civil Procedure authorizes U.S. district courts to issue temporary restraining orders to freeze assets when those assets are subject matter in dispute).
260 See Rep. of the Philippines v. Marcos, 862 F.2d 1355, 1357 (9th Cir. 1988) (arising from RICO claim in which district court issued, and 9th Circuit Court of Appeals affirmed, an in personam freezing injunction — no different from Mareva order — preventing defendants from dissipating assets not within United States territorial
hesitated to issue *Mareva*-style freezing injunctions under that authority. Likewise, at least two bankruptcy courts and one circuit Court of Appeals have discounted *Grupo Mexicano*’s precedential value as a limit on the equitable powers of bankruptcy courts. A corollary exception might also exist where the plaintiff is seeking to vindicate the public interest. Courts have held that, in such cases, the “traditional” equity power of the federal courts is expanded and that “courts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to when only private interests are involved.” The Court in *Grupo Mexicano* did not address whether this “public interest” truly expands – and if so, to what extent – the authority of court.

The second exception occurs where the plaintiff seeks only equitable remedies. The Fourth Circuit’s decision in *Rahman v.*
Oncology Associates concluded that the Grupo Mexicano decision is inapposite in such cases, relying instead on the Supreme Court's holding in Deckert v. Independence Shares Corp. which authorized a preliminary injunction freezing assets in aid of a claim for rescission. The third exception follows close on from the second, allowing preliminary injunctions where a plaintiff asserts a combination of legal and equitable claims.

Thus, with some "artful" pleading, it has been suggested that a plaintiff in an American federal court may entirely avoid the holding of Grupo Mexicano and secure a Mareva-style remedy. To avoid making Grupo Mexicano an entirely hollow holding, avoidable with the mere assertion of some equitable remedy in a case predominantly founded in money damages, the federal courts have utilized the existing requirements for the

265 198 F. 3d 489 (4th Cir. 1999).
266 311 U.S. 282 (1940).
267 See Deckert v. Independence Shares Corp., 311 U.S. 282, 290 (1940) (holding injunction to be reasonable measure within discretion of trial court); Rahman, 198 F.3d at 498–99 (finding justification for preliminary injunction where claim fell squarely within court's traditional equitable power, even though money damages were also sought); see also Hoxworth v. Blinder, Robinson & Co., Inc., 903 F.2d 186, 196 (3d Cir. 1990) (discussing permissibility of issuing preliminary injunction by referring to Deckert rationale).
268 Federal courts have taken essentially one of two approaches with regard to the precedential effect of Grupo Mexicano, and it is still uncertain which approach will be the dominant one. The first is a more limited approach that simply confines Grupo Mexicano to cases that present claims for money damages only, e.g., Rahman v. Oncology Assoc. P.C., 198 F.3d at 498–99, while the other is a more flexible approach that adheres to both the spirit and letter of the Grupo Mexicano decision by employing a "primarily legal" versus "primarily equitable" categorization, e.g., Algonquin Power Corp., Inc. v. Trafalgar Power, Inc., No. CIVA5: 00CV1246, 2000 U.S. Dist. LEXIS 20331, at *1, *54 (N.D.N.Y. Nov. 8, 2000). To avoid a plaintiff's attempt to "draft around" Grupo Mexicano, the reviewing court determines the predominant remedy sought in the case as an initial matter, applying Grupo Mexicano if the remedy is "primarily legal," e.g., JSC Econ. Ass'n Technostroyexport v. Int'l Dev. & Trade Svcs., Inc., 295 F. Supp. 2d 366, 388 (S.D.N.Y. 2003).
269 See Rahman, 198 F.3d at 495 (detailing defendants' contention that any skilled pleader could circumvent Grupo Mexicano in suit at law through inclusion of equitable claim); Newby, 188 F. Supp. at 701 (discussing defendants' contention that plaintiff's claim is primarily for money damages rather than equitable relief); see also Silverman & Kirshner, supra note 10, at 24 (demonstrating how plaintiffs can "plead around" Grupo Mexicano by including equitable claims in addition to existing predominant legal claims when arguing for adoption of Mareva remedy).
270 See Walczak v. EPL Prolong, Inc., 198 F.3d 725, 730 (9th Cir. 1999) (stating how injunction at issue simply restrained appellants from liquidating their assets as opposed to more prohibitive injunction seen in Grupo Mexicano); Rahman, 198 F.3d at 497–98 (permitting preliminary injunction where claims in both law and equity were asserted in single action); see also Newby, 188 F. Supp. 2d at 708–09 (permitting court to consider prejudgment restraint on assets of defendant, but denying temporary injunction due to failure to fulfill necessary requirements based on record).
granting of preliminary injunctions.\textsuperscript{271} These require plaintiffs to establish four elements before receiving such relief: 1) a substantial likelihood of success on the merits, 2) a substantial threat that plaintiff will suffer irreparable injury\textsuperscript{272} if the injunction is denied, 3) that the threatened injury outweighs any damage that the injunction might cause defendants, and 4) that the injunction will not disserve the public interest.\textsuperscript{273}

Another potential minefield for defendants is presented by Rule 64 of the Federal Rules of Civil Procedure.\textsuperscript{274} Each state has established its own statutory scheme for providing authority for its state courts to issue prejudgment relief.\textsuperscript{275} The ability of federal courts to utilize the remedies available to the state courts

\textsuperscript{271} See Charlesbank Equity Fund II v. Blinds to Go, Inc., 370 F.3d 151,163 (1st Cir. 2004) (denying preliminary injunction due to lack of irreparable harm shown); JSC Foreign Econ. Ass'n Technostroyexport, 295 F. Supp. 2d at 390–91 (denying injunctive relief in line with Grupo Mexicano, but also stating that failure to fulfill preliminary injunction requirements also occurred); Newby v. Enron Corp., 188 F. Supp. 2d 684, 708–09 (S.D. Tex. 2002) (denying preliminary injunction because of plaintiff's inability to fulfill necessary requirements).

\textsuperscript{272} JSG Trading Corp. v. Tray-Wrap, Inc., 917 F.2d 75, 79 (2d Cir. 1990) ("Irreparable injury is one that cannot be redressed through a monetary award. Where money damages are adequate compensation a preliminary injunction should not issue."); Jackson Dairy, Inc. v. H. P. Hood & Sons, Inc., 596 F.2d 70, 72 (2d Cir. 1979) (stating that irreparable injury cannot be remedied through monetary award); see JSC Foreign Econ. Ass'n Technostroyexport, 295 F. Supp. 2d at 389 ("[A] showing of probable irreparable harm is the single most important prerequisite for the issuance of a preliminary injunction." (quoting Reuters Ltd. v. United Press Int'l Inc., 903 F.2d 904, 907 (2d Cir. 1990))); Blackwelder Furniture Co. of Statesville, Inc. v. Selig Mfg. Co., Inc., 550 F.2d 189, 196 (4th Cir. 1977) (determining that irreparable injury is one of two most important factors in deciding whether to grant injunctive relief).

\textsuperscript{273} See Charlesbank Equity Fund II, 370 F.3d at 162 (applying four elements in preliminary injunction analysis), Reuters Ltd., 903 F.2d at 909–10 (granting preliminary injunctive relief based on fulfillment of four requirements); Newby, 188 F. Supp. 2d at 707 (analyzing four elements in denying preliminary injunctive relief).

\textsuperscript{274} The rule reads:

At the commencement of and during the course of an action, all remedies providing for seizure of person or property for the purpose of securing satisfaction of the judgment ultimately to be entered in the action are available under the circumstances and in the manner provided by the law of the state in which the district court is held.

FED. R. CIV. P. 64.

\textsuperscript{275} See, e.g., CAL. CIV. PROC. CODE §§ 484.010-090 (2004) (stating that state courts in California can issue prejudgment relief if, "(1) The claim is one where attachment can be issued. (2) The plaintiff has established the probable validity of the claim upon which the attachment is based. (3) The attachment is not sought for a purpose other than the recovery on the claim upon which the attachment is based. (4) The amount to be secured by the attachment is greater than zero."); CONN. GEN. STAT. §§2-278(a)-(g) (2004) (detailing various requirements in seeking prejudgment relief); 735 ILL. COMP. STAT. 5/4-101 (2004) (allowing Illinois state courts to issue order of attachment against property of debtor at time of action's commencement in variety of situations when claim exceeds twenty dollars including where debtor is non-resident of Illinois or attempts to prevent service of process upon them).
in the districts in which they sit will potentially create 50 separate “federal” decisional rules with regard to prejudgment remedies, some or none of which may correspond to Grupo Mexicano. For example, an Illinois federal court has recently held that the state prejudgment attachment statute can be extended to assets not within the jurisdiction granting the authority, apparently a “constructive attachment” of sorts, in advance of judgment, in aid of a legal claim for damages.

Not all state courts have been as quick to expand the equitable power of their courts. New York, for example, has specifically endorsed the Grupo Mexicano decision, restraining New York state courts from issuing Mareva-style relief in cases claiming

276 In re Fredeman Litig., 843 F.2d 821, 826 (5th Cir. 1988) (concluding that attachment was unavailable to plaintiffs under Texas state law because defendants were available for personal service within Texas and plaintiffs’ claims were unliquidated); EBSCO Indus., Inc. v. Lilly, 840 F.2d 333, 336 (6th Cir. 1988) (finding attachment inadequate under Ohio state law due to various reasons including large monetary sum necessary to fulfill statutory bond requirement), cert. denied, 488 U.S. 825 (1988); Jeri T. Moskovitz, Equity—Hoxworth v. Blinder, Robinson & Co., Inc.: Use of a Preliminary Injunction to Secure a Future Damage Remedy, 21 MEM. ST. U. L. REV. 773, 777–78 (1991) (observing that certain state statutes may not permit attachment due to type of relief demanded in underlying suit).

277 See M.S. Distrib. Co. v. Web Records, Inc., No. 00 C 1436, 2003 U.S. Dist. LEXIS 9092, at *1, *10 (N.D. Ill. May 29, 2003), for a curious situation where the court cited Grupo Mexicano as a source of authority for granting this Mareva-style remedy. See also the opinion in Philips Med. Sys. Int’l B.V. v. Bruetman, 8 F.3d 600, 604 (7th Cir. 1993), which authorized an order for defendant to deposit money into court prior to final judgment in order to protect such judgment once final. Compare Sec. Ins. Co. of Hartford v. Trustmark Ins. Co., Civ. No. 3:01cv2198 (PCD), 2003 U.S. Dist. LEXIS 25343, at **1, **7 (D. Conn. Jan. 31, 2003), where Grupo Mexicano’s decision is described as “rather narrow” and, though the court refused to do so pursuant to Connecticut statute, a federal court is not barred from issuing such relief if granted under state substantive law. In effect, the court reduces Grupo Mexicano to a decision less about the general equitable powers of federal courts than merely an explication of Fed. R. Of Civ. P. Rule 65(a), dealing with the issuance of preliminary injunctions. Id.

278 See M.S. Distrib. Co., 2003 U.S. Dist. LEXIS 9092, at *4, where an Illinois statute required the sheriff to attach only property “found in the county” – the classic attachment scenario – which, even though such attachment could not be accomplished in the case at issue, the court deemed this a mere “complication.” The court theorized that since state law granted it power to force defendants to bring assets into the jurisdiction for attachment, it could restrain disposition of those assets outside of the jurisdiction with equal authority, clearly demonstrating the lengths a court can and will go to grant this type of relief. Id.

money damages.\textsuperscript{280} Whether state courts will become the new litigation battlefield for extension down this path remains to be seen, but appears inevitable.

So, in sum, while American courts have not embraced the “nuclear weapon” of the \textit{Mareva} injunction \textit{per se}, they are not without other devastating devices in practice.\textsuperscript{281} They can also, in appropriate cases, issue preliminary injunctions to freeze the assets of defendants in advance of judgments, despite the hardships it may place on them.\textsuperscript{282} For some commentators,\textsuperscript{283} at least one circuit of the Court of Appeals,\textsuperscript{284} and four Justices of the Supreme Court,\textsuperscript{285} even these means remain insufficient.

\textsuperscript{280} \textit{See Credit Agricole Indosuez}, 94 N.Y.2d at 551 (2000) (commenting that deciding in contrast to \textit{Grupo Mexicano} could have drastic ramifications on current balance between debtors’ and creditors’ rights); \textit{see also JSC Econ. Ass’n Technostroyexport}, 295 F. Supp. 2d at 366 (refusing to enjoin assets of potential third party alter egos in primarily legal claim pursuant to \textit{Grupo Mexicano}); Kuriakose v. Gray, 302 A.D.2d 434, 434 (N.Y. App. Div. 2003) (abiding by \textit{Grupo Mexicano} holding in denying injunction).

\textsuperscript{281} \textit{See M.S. Distrib. Co.}, 2003 U.S. Dist. LEXIS, at *4 (eviscerating \textit{Grupo Mexicano} holding by resorting to Illinois substantive prejudgment attachment statute to restrain defendant from dealing with assets located outside of Illinois); \textit{Philips Med. Sys. Intl B.V.}, 8 F.3d at 604 (7th Cir. 1993) (affirming order on defendant to deposit money into court prior to final judgment by noting that federal courts have power to issue orders “necessary and proper to protect the enforceability of a judgment before it becomes final, provided only that the forum state equip its own courts with such remedies.”); \textit{cf. JSC Econ. Ass’n Technostroyexport}, 295 F. Supp. 2d at 393 (suggesting that plaintiffs are not hesitant to utilize state practices in federal court to make “end run” around \textit{Grupo Mexicano} decision due to possibility of success in court).

\textsuperscript{282} \textit{See In re Estate of Ferdinand Marcos}, Human Rights Litig., 25 F.3d 1467, 1478 (9th Cir. 1994) (affirming temporary injunction to enjoin Estate from transferring, secreting, or dissipating Estate’s assets \textit{pendente lite}); Rep. of the Philippines v. Marcos, 882 F.2d 1355, 1364 (9th Cir. 1989) (affirming freezing injunction to prevent defendants from dissipating assets not within United States territorial jurisdiction); \textit{see also Fed. Trade Comm’n v. Verity Int’l}, 00 Civ. 7422, 2001 U.S. Dist. LEXIS 6097, at *4, *10 (S.D.N.Y. May 14, 2001) (denying defendant’s motion to vacate or modify preliminary injunction).

\textsuperscript{283} \textit{See David D. Siegel, News, N.Y. L.J., Sept. 2, 2003, at s3 (stating that “[T]he whole Mareva procedure can serve as an inspiration for what any American court might do in similar circumstances,” perhaps with proper legislative assistance) (alteration in original); Silverman & Kirshner, supra note 10, at 24 (suggesting that Mareva-style injunctions should be used domestically); Wasserman, supra note 4, at 348 (advocating for adoption of Mareva-style injunctions in United States).

\textsuperscript{284} \textit{See Alliance Bond Fund, Inc. v. Grupo Mexicano de Desarrollo}, 143 F.3d 688, 696 (2d Cir. 1998) (complimenting England’s successful use of \textit{Mareva} injunctions), \textit{rev’d}, 527 U.S. 308 (1999). \textit{But see Rosen v. Cascade Intl Inc.}, 21 F.3d 1520,1522 (11th Cir. 1994) (refusing to issue \textit{Mareva}-type injunction); \textit{In re Fredeman Litig.}, 843 F.2d 821, 831 (5th Cir. 1988) (denying \textit{Mareva}-type injunction to preserve assets unrelated to litigation).

\textsuperscript{285} \textit{See Grupo Mexicano de Desarrollo v. Alliance Bond Fund}, 527 U.S. 308, 342 (1999) (Ginsburg, J. dissenting) (jointed by Justices Stevens, Breyer, and Souter) (contending that federal courts need to flexibly protect rights of parties involved in both legal and equitable situations); \textit{see also David B. Stratton, \textit{Equitable Remedies in Bankruptcy Court: Grupo Mexicano, Substantive Consolidation and Beyond}}, 22-2 AM. BANKR. INST. J. 24, 25 (2003) (expressing concern for majority’s “narrow view” towards federal courts’ ability to issue equitable remedies); J. Maxwell Tucker, Grupo Mexicano
A. Extraterritorial Abuse of Sovereignty

"By international law every sovereign state has no sovereignty beyond its own frontiers." The worldwide Mareva injunction certainly should be considered in light of this admonition – as should all exercises of extraterritorial jurisdiction, by every nation. It is a bedrock principle of international law. All the more ironic, of course, is that these are the words of Lord Denning, and it is his creation that stands out as a glaring violation of this very principle.

What makes it permissible to order a defendant who is not a resident of England, who has never been to the country, and who maintains no assets there to "freeze" all activities related to his property? Why, then, is it equally impermissible to simply "seize" those assets abroad? Is it a distinction between the legal effect of "freezing" and "seizing"? Is there any distinction at all? The answers to all of these questions lie in the ethereal world of equity, a world in which judges – English and American – reside, a world, of course, where no one else lives.


287 Unfortunately, such consideration of extraterritorial effect is very rarely a salient consideration, even in American courts. See George A. Bermann, Provisional Relief in Transnational Litigation, 35 COLUM. J. TRANSNatl L. 553, 565–66 (1997), which examines American cases which have frozen or considered freezing extraterritorial assets, concluding that the "extraterritorial" nature of the action was of little moment. See also THE RESTATEMENT (SECOND) OF CONFLICT OF LAWS 53 (1971), echoing this principle: "A state has power to exercise judicial jurisdiction to order a person, who is subject to its judicial jurisdiction, to do an act, or to refrain from doing an act, in another state." See generally Stephen B. Burbank, The Bitter with the Sweet: Tradition, History, and Limitations on Federal Judicial Power - A Case Study, 75 NOTRE DAME L. REV. 1291, 1338 (2000), discussing "the powers of a court of equity to fasten on jurisdiction over the person of the defendant and thence to derive power to fashion relief having extraterritorial effect on property.

288 See In re State of Norway's Application, [1990] A.C. 723 (citing Attorney-General of New Zealand v. Ortiz [1984] A.C. 1, 21) (quoting Lord Denning: "By international law every sovereign state has no sovereignty beyond its own frontiers. The courts of other countries will not allow it to go beyond the bounds. They will not enforce any of its laws which purport to exercise sovereignty beyond the limits of its authority. "); see also Attorney General of Canada v. R.J. Reynolds Tobacco Co., 268 F.3d 103, 112 (2d Cir. 2001) (stating "As Lord Denning explained ... By international law every sovereign state has no sovereignty beyond its own frontiers"). See generally Michael Tilbury, Remedy Discussion Forum: Teaching Remedies in Australia, 39 BRANDEIS L.J. 587, 589 (2001) (explaining Mareva injunctions were invented in 1975 by the English Court of Appeal under Lord Denning).
This justification alluded to earlier is rooted in the distinction between a court’s authority to act in rem versus its authority to act in personam.\textsuperscript{289} Simply put, they are both forms of jurisdiction; they differ only as to the subject matter over which that jurisdiction applies.\textsuperscript{290} In rem actions apply directly to the “res” – the “thing” – and so where those “things” are located is important.\textsuperscript{291} In personam actions apply to the “person” who has been made subject to a court’s jurisdiction.\textsuperscript{292} Where he or she is

\textsuperscript{289} See generally Burbank, supra note 287, at 1338 (arguing when court of equity exercises jurisdiction over defendant and derives power to fashion relief having extraterritorial effect on property, there is no harm done, “so long as one does not pretend that this exercise of power in personam is any less an exercise of power in rem than any exercise of power in rem is an exercise of power in personam”); James Crawford, Execution of Judgments and Foreign Sovereign Immunity, 75 AM. J. INT’L L. 820, 868 (1981) (explaining while Mareva injunctions operate formally in personam, their effect on property is similar to conditional attachment); Bethany Kohl Hipp, Defending Expanded Presidential Authority to Regulate Foreign Assets and Transactions, 17 EMORY INT’L L. REV. 1311, 1345–46 (2003) (explaining distinction between vesting assets and freezing assets: “[f]reezing . . . is not taking assets; rather it is a short-or long-term deprivation of the assets or the usage thereof. Freezing does not involve a transfer of title. . . . The blocking, or freezing, and vesting of foreign assets have never been held to be unconstitutional.

\textsuperscript{290} See Matthew C. Solomon, The Perils of Minimalism: United States v. Bajakajian in the Wake of the Supreme Court’s Civil Double Jeopardy Excursion, 87 GEO. L.J. 849, n.78 (1999) (explaining “[t]raditionally, an in personam penalty was understood to punish the wrongdoer (the ‘person’). In an in rem forfeiture, by contrast, the government proceeds against the property (the ‘thing’); Steven F. Poe, Note and Comment, Civil Forfeiture and the Eighth Amendment: The Constitutional Mandate of Proportionality in Punishment in the Wake of United States v. United States, 70 CHI.-KENT. L. REV. 237, 255 (1994) (noting “under the common law, in rem actions are pursued against the property itself, not the owner of the property”); see also Sean M. Dunn, Note, United States v. Ursery: Drug Offenders Forfeit their Fifth Amendment Rights, 46 AM. U. L. REV. 1207, 1235 (1997) (highlighting “[t]he primary purpose behind creation of the in rem fiction was to expand judicial jurisdiction over property in situations where the courts lacked in personam jurisdiction over individuals.

\textsuperscript{291} See BLACK’S LAW DICTIONARY, 30 and 856 (7th ed. 1999) (defining “action in rem: an action determining the title to property and the rights of the parties . . . claiming an interest in that property” and “in rem jurisdiction: a court’s power to adjudicate the rights to a given piece of property, including the power to seize and hold it.”); see also Zohar Efroni, A Barcelona.com Analysis: Toward a Better Model for Adjudication of International Domain Name Disputes, 14 FORDHAM INT’L. PROP. MEDIA & ENT. L.J. 29, 39 (2003) (explaining “[t]he primary purpose behind creation of the in rem fiction was to expand judicial jurisdiction over property in situations where the courts lacked in personam jurisdiction over individuals.

\textsuperscript{292} See BLACK’S LAW DICTIONARY, 30 and 857 (7th ed. 1999) (defining “action in personam: an action determining the rights and interests of the parties themselves in the subject matter of the case” and “in personam jurisdiction: a court’s power to bring a person into its adjudicative process; jurisdiction over a defendant’s personal rights, rather than merely over property interests”); see also Efroni, supra note 291, at 35 (explaining “in personam jurisdiction determines when a defendant is subject to adjudicative process of the court’ai); Weisz, supra note 291, at 210 (clarifying “[i]f a court’s jurisdiction is based on its authority over the defendant, it is defined as in personam jurisdiction. When the
located is less important. While most business owners do not care to appreciate the subtlety of the distinction, it is a weighty one, as you might imagine, in the mind of a judge. After all, without it, a worldwide Mareva injunction over assets beyond the jurisdiction of England is a naked violation of international law, an affront to the sovereignty of every state in which it applies, as well as wholly inappropriate—a fact the English judges recognized when they extended the Mareva procedure to worldwide assets in Babanaft International Co. S.A. v. Bassatne.

The Court of Appeal made sure to state in no uncertain terms that the Mareva remedy would not operate abroad as an in rem injunction. Lord Justice Kerr stated,

[T]here can be no question of such orders operating directly upon the foreign assets by way of attachment, or upon third parties, such as banks, holding the assets. The effectiveness of such orders for these purposes can only derive from their recognition and enforcement by the local courts, as should be made clear in the terms of the orders to avoid any misunderstanding suggesting an unwarranted assumption of extraterritorial jurisdiction.

Lord Justice Nicholls seconded that by saying,

The enforcement of the judgment in other countries, by attachment or like process, in respect of assets which are situated there is not affected by the order. The order does not attach those assets. It does not create, or purport to create, a charge on those assets, nor does it give the plaintiff any proprietary interest in them. The English court is not court exercises in personam jurisdiction, it has the power to impose a personal obligation on the defendant.” (hereinafter Erosion of Tribal Sovereignty).


attempting in any way to interfere with or control the enforcement process in respect of those assets.\textsuperscript{296}

\textit{Mareva} orders – at least in theory – operate as \textit{in personam} remedies.\textsuperscript{297} As such, a much broader justification exists for their extension beyond the boundaries of English jurisdiction.\textsuperscript{298} In \textit{British Nylon Spinners, Ltd. v. Imperial Chemical Industries, Ltd. I},\textsuperscript{299} the Court of Appeal observed,

There is no doubt that it is competent for the court of a particular country, in a suit between persons who are either nationals or subjects of that country or are otherwise subject to its jurisdiction, to make orders \textit{in personam} against one such party – directing it, for example, to do something or to refrain from doing something in another country affecting the other party to the action.\textsuperscript{300}

In sum, so long as English courts continue to believe that the injunction operates only \textit{in personam} and not \textit{in rem}, international comity is not implicated, and they are free to continue the practice unabated. But do they actually believe that? It is certainly debatable, especially when one considers the words of Sir Nicolas Browne-Wilkinson who held the position of Senior Law Lord, Britain’s most senior permanent judicial

\textsuperscript{296} Id. at 65, para. 23 (2003) (citing Babanaft at 44).
\textsuperscript{297} See Johansson, supra note 43, at 1096 (explaining “[a]lthough the \textit{Mareva} injunction operates \textit{in personam}, it can affect defendants’ assets in ways that would ordinarily require courts to have \textit{in rem} jurisdiction”); Theuer, supra note 293, at 433 (noting nature of \textit{Mareva} injunctions is \textit{in personam} because they do not have any “legal” \textit{in rem} effect on assets themselves or defendant’s title to them); see also David L. Zicherman, Note, \textit{The Use of Pre-Judgment Attachments and Temporary Injunctions in International Commercial Arbitration Proceedings: A Comparative Analysis of the British and American Approaches}, 50 U. PITT. L. REV. 667, 674 (1989) (stating although \textit{Mareva} injunctions operate \textit{in rem}, they are \textit{in personam} orders).
\textsuperscript{298} See generally John Rothchild, \textit{Protecting the Digital Consumer: The Limits of Cyberspace Utopianism}, 74 IND. L.J. 893, n.114 (1999) (listing countries that grant \textit{Mareva} injunctions, including Australia, New Zealand, Antigua, the Bahamas, Canada, Malaysia, Hong Kong, and Singapore); Fabano, supra note 293, at 141 (commenting “[m]any countries use the \textit{Mareva} injunction, and the trend is toward giving it more recognition and use as a tool to protect plaintiffs from insolvent or untrustworthy defendants”); Zicherman, supra note 297, at 676–77 (noting \textit{Mareva} injunctions have been granted in the High Court of Australia, New South Wales, Queensland, Western Australia, Victoria, Australian Capital Territories, the Federal Court of Australia, New Zealand, the Canadian Federal Court, Provincial Courts of Ontario, British Columbia, New Brunswick, Nova Scotia, Manitoba, the Court of the North West Territories, Malaysia, Hong Kong, and Singapore).
\textsuperscript{299} [1953] Ch. 19, at *1.
\textsuperscript{300} Id. at *5.
position, until 2000. In an article in 1991, he stated that the worldwide Mareva injunction comes "very close to unwarranted interference with the jurisdiction of the courts of the place where the assets are situated." This was so, he continued, because the distinction between in rem and in personam in practical effect was a legal "fiction."

One of the reasons the Mareva procedure is so effective stems from its in personam classification. Orders that operate over the person of the defendant are enforced through the contempt authority of the court. A defendant who violates the terms of the Mareva order can be subject to fines, imprisonment, the


303 Id. at 152. With all due deference to Lord Browne-Wilkinson, this author feels that it does more than "come very close." The author suspects a measure of renowned British understatement probably best explains the statement.

304 See id. (also suggesting that line between in rem and in personam is further blurred where Mareva order is applied to defendants in civil law countries). See generally Catherine Kessedjian, Note on Provisional and Protective Measures in Private International Law and Comparative Law, Preliminary Document No. 10, HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW – ENFORCEMENT OF JUDGMENTS (Oct. 1998) available at http://www.hchc.net/doc/jdgmpdl0.doc (last visited June 20, 2004) (noting many European nations (with civil law systems) have at least one procedure – such as arrest and einstweilige Verfügung in Germany, which operate both in rem and in personam, depending on the nature of the claim, over 30 variations of protective remedies, including attachment, in France, protective attachment and kort geding in The Netherlands, and sequestration orders in Switzerland, – which operates similarly to Mareva procedure, only it does so, generally speaking, on theory of in rem jurisdiction).


306 See Fabano, supra note 293, at 141 (stating that trustee who violates Mareva injunction by transferring funds outside of named jurisdiction will face contempt of court charges and can be charged with fraudulent transfer); see also Michael Polonsky, Making Use of the English "Freezing Order," 648 PRACT. L. INST. 443, 462 (2001) (explaining that because freezing injunction operates in personam, any violation of such order is punishable by contempt); William Tetley, Arrest, Attachment, and Related Maritime Law Procedures, 73 TUL. L. REV. 1895, 1956 (1999) (asserting that Mareva injunction prohibits removal or dispersion of assets in question at risk of being charged with contempt).
drawing of unfavorable inferences based on existing evidence, discovery sanctions, and ultimately, default judgment (i.e., inability to argue the merits). A recent example of this power came in the case of *CIBC Mellon Trust Co. v. Mora Hotel Corp.* in which two secondary defendants – part of a two-tiered group of a dozen or so alleged conspirators – were subject to default judgment for the entire sum sought by plaintiffs over all defendants, an amount in excess of $300 million for violating the terms of a worldwide *Mareva* injunction. The asset subject to the order consisted of a $40 million hotel in New York.

The threat of contempt is more complex for banks who become involved in *Mareva*-related procedures. More often than not, the "assets" sought to be frozen by *Mareva* orders are bank accounts. Some countries have enacted bank secrecy laws which prevent them from revealing information about their

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307 The U.K. Practice Directions, Part 25, Appendix A provide a sample template *Mareva* order (or "freezing injunction" as it is now called) to be filled in by plaintiffs and presented *ex parte* to the court. On its face, it reads, "[If you] disobey this order you may be held in contempt of court and may be imprisoned, fined or have your assets seized." One sanction specifically discussed in *Mareva* cases is debarment of the defendant from defending the action entirely. Lord Donaldson, in *Derby & Co. Ltd v. Weldon (Nos. 3 & 4)*, [1990] 1 Ch. 65, 81–82 (Eng. C.A.), stated (or, perhaps, understated),

In the context of the grant of the *Mareva* injunction, I think that a sufficient sanction exists in the fact that, in the event of disobedience, the court could bar the defendant's right to defend. This is not a consequence which it could contemplate lightly as it would become a fugitive from a final judgment given against it without its explanations having been heard and which might well be enforced against it by other courts.


309 Id.

310 Id. (illustrating orders are not applied only to bank accounts).

311 See K. X. Li, *Maritime Jurisdiction and Arrest of Ships Under China's Maritime Procedure Law*, 32 J. MAR. L. & COM. 655, 671 (2001) (explaining that *Mareva* injunction applies to assets, i.e. things that are tangible or intangible, real or personal, including bank accounts); see also R. Doak Bishop, et al, *Strategic Options Available When Catastrophe Strikes the Major International Energy Project*, 36 TEx. INT'L L.J. 635, 647 (2001) (describing nature of assets affected by *Mareva* injunction). See generally United States v. First Nat'l City Bank, 379 U.S. 378 (1965) (holding that where in *personam* jurisdiction over New York bank was obtained, the District Court had authority to issue temporary injunction preserving assets in question).
A Mareva order over them places the bank in the unenviable position of either violating the English order – placing them in contempt – or violating the substantive secrecy law of the country in which they operate, which often carries criminal penalties. That parties and non-parties might be placed in such a position is further evidence of the improper extraterritorial reach of worldwide Mareva injunctions.

Were the Mareva procedure to be classified as in rem, plaintiffs would have to seek enforcement from local courts to enforce the Mareva order; that is, from courts in the jurisdictions where the


The need to exercise the court's jurisdiction with due regard to the sovereignty of others is particularly important in the case of banks. Banks are in a special position because their documents are concerned not only with their own business but with that of their customers. They will owe their customers a duty of confidence regulated by the law of the country where the account is kept. That duty is in some countries reinforced by criminal sanctions and sometimes by ‘blocking statutes’ which specifically forbid the bank to provide information for the purpose of foreign legal proceedings (compare s 2 of our Protection of Trading Interests Act 1980). If every country where a bank happened to carry on business asserted a right to require that bank to produce documents relating to accounts kept in any other such country, banks would be in the unhappy position of being forced to submit to whichever sovereign was able to apply the greatest pressure.

See Stephen J. Pearson, Using the English Courts to Assist with U.S. Proceedings, 688 Pract. L. Inst. 293, 326 (2003), stating that the Mareva injunction contains a penal notice warning the defendant of the penalty for violating the order, including imprisonment, imposing of fines, and the seizing of property. see also Fabano, supra note 293, at 140, indicating that a bank in possession of the assets targeted by a Mareva injunction may not “aid and abet a breach of its orders” – violation of such order will result in contempt of court charges for the third party bank.

assets are located.\textsuperscript{315} This would almost certainly take the teeth out of the procedure as it would require plaintiffs, in the United States at least, to notify the defendant of the case against him if not right away, at least soon after any \textit{ex parte} proceeding, precisely what the \textit{Mareva} order is designed to prevent.\textsuperscript{316} A defendant would then have recourse to argue in his local court – prior to an enforcement proceeding\textsuperscript{317} – whether or not the jurisdiction of the English court over him was proper in the first instance before all or a large part of his assets were frozen.\textsuperscript{318} This would tend to throw sunshine on the proceedings, taking it from the shadows where, as it stands now, English courts and nervous plaintiffs lurk about behind the defendant's back, strongarming his confidential fiduciaries into turning over the details of his private finances.\textsuperscript{319}

\begin{footnotesize}
\textsuperscript{315} See Jennifer M. Anglim, \textit{Crossroads in the Great Race: Moving Beyond the International Race to Judgment in Disputes Over Artwork and Other Chattels}, 45 HARV. INT'L L.J. 239, 244 (2004) (discussing fact that court with \textit{in rem} jurisdiction will have most control over ultimate disposition of property); see also Frederick J. Tansil, \textit{Asset Protection Trusts (Apts): Non-Tax Issues}, SJ027 ALI-ABA 291, 332 (2003) (stating that 14th Amendment of the U.S. Constitution typically requires forum court to either have \textit{in personam} jurisdiction over trustee of trust or \textit{in rem} jurisdiction over property). See generally Malis v. Zinman, 261 A.2d 875, 878 (1970) (holding that trial court had \textit{in rem} jurisdiction over property in question and therefore had authority to determine outcome of suit by creditors).


\textsuperscript{317} See PART IV.D. infra for further discussion.


\textsuperscript{319} Lord Acton once said, "Everything secret degenerates, even the administration of justice; nothing that does not show how it can bear discussion and publicity." Letter of Jan. 23, 1861. See Carlos G. Garcia, \textit{All the Other Dirty Little Secrets: Investment Treaties, Latin America, and the Necessary Evil of Investor-State Arbitration}, 16 FLA. J. INT'L 301, 354-355 (2004), arguing for transparency in international arbitration proceedings as they greatly affect public policy. See also Samuel A. Marcossen, \textit{A Price Too High: Enforcing the Ban on Gays and Lesbians in the Military and the Inevitability of Intrusiveness}, 64 UMKC L. REV. 59, 97 n.210 (1995), discussing the implication of the secrecy of proceedings.
\end{footnotesize}
As to the extraterritorial propriety of the *Mareva* procedure, the words of Lord Browne-Wilkinson (if not his later actions\textsuperscript{320}) speak volumes:

In seeking to combat international fraud, the international *Mareva* is better than nothing. However, in my view, it does not provide a very promising route forward. It smacks too much of the arrogance of a former imperial power sending a gun-boat when there is trouble abroad. That was never an effective remedy against land-locked countries such as Switzerland and Lichtenstein: in the modern world it is, in my view, quite inappropriate.\textsuperscript{321}

The bottom line is that while equity may draw a fine distinction between *in rem* and *in personam* jurisdiction, practical application does not.\textsuperscript{322} It makes little difference to a defendant whether his business has been “frozen” or “seized” by a foreign court. Either way, it is a slender reed on which to hang such a violation of international principles of sovereignty.

\textbf{B. Extortionate Effect on Defendants to Force Settlements}

Another important implication of application of a *Mareva* order is the real, disproportionate effect it has on the relative

\textsuperscript{320} Lord Browne-Wilkinson maintains his own contradictory place in the history of the *Mareva* injunction. One of the only “hard-and-fast” rules (if there are such things when it comes to this device) was that a *Mareva* order could only be used as a procedure where a plaintiff had an underlying legal or equitable right to protect, i.e., the *Mareva* procedure was not a substantive cause of action itself. Lord Browne-Wilkinson called even that requirement into question with his decision in Channel Tunnel Group v. Balfour, [1993] 1 All ER 664. See generally Howard Johnson, *Mareva Injunctions: Practice Makes Perfect*, INT'L BANKING AND FIN. L., 13(7), 74–76 (1994); Raymond J. Werbicki, *Arbitral Interim Measures: Fact or Fiction?*, 57-JAN DISP. RESOL. J. 62 (2003), discussing the affect of arbitral interim measures.

\textsuperscript{321} See Browne-Wilkinson, supra note 38, at 153. Lord Browne-Wilkinson does not mention Switzerland and Lichtenstein simply for their geographic attributes. Switzerland has a host of bank secrecy laws which stand in the way of effective enforcement of worldwide *Mareva* orders. Id. And, Lichtenstein’s corporate laws forbid the disclosure of beneficial ownership of corporations organized under those laws, another frustrating obstacle to plaintiffs seeking to “trace” assets. Id. at 149–50.

bargaining position of the parties involved.323 This effect is made more acute when the order is applied to foreign defendants.324 English courts have recognized that plaintiffs might use the Mareva injunction to secure an oppressive settlement advantage, but there is little concern that were a judge to ascertain this intent from a plaintiff, that she would not issue an injunction in such a case.325 It would undermine the equitable underpinnings of the procedure itself.326 This “active” abuse of the system is not the precise concern of this section. Rather, the “passive” effects that result from merely complying with the order as issued are equally, if not more, devious.

The passive yet extortionate effects the Mareva order has on a defendant are manifold. By the time he receives notice of the order, the defendant’s privacy has been unquestionably invaded by the third party disclosures which have been made without his knowledge, usually by parties in whom he places the confidences of his personal finances.327 It is reasonable to assume that a bank


324 See Zicherman, supra note 297, at 673 (discussing importance of the Mareva injunction when foreign defendant is involved); see also Alexander, supra note 316, at 515 (noting that order is valuable pretrial tactic); cf. Bermann, supra note 287, at 563 (giving examples of many strains Mareva orders place of foreign defendants).

325 See Z Ltd. v. A-Z and AA-LL, [1982] Q.B. 558, 568 (1982) (Kerr, LJ) (warning “the great value of this jurisdiction must not be debased by allowing it to become something which is invoked simply to obtain security for a judgment in advance, and still less as a means of pressuring defendants into settlements.”); see also Bermann, supra note 287, at 569; cf. Alexander, supra note 316, at 498 (noting courts most often grant injunction but may provide remedy to injured defendant).

326 See Rhonda Wasserman, Equity Renewed: Preliminary Injunctions to Secure Potential Money Judgments, 67 WASH. L. REV. 257, 345 (1992) (commenting that purpose of the injunction is to prevent defendant from disposing of foreign assets); see also Grupo Mexican De Desarrollo v. Alliance Bond Fund, 527 U.S. 308, 329 (1961) (recognizing injunction as powerful tool for creditors); cf. Johansson, supra note 43, at 1095 (noting that plaintiff has burden of proving that defendant poses risk before injunction will be granted).

327 See Bermann, supra note 287, at 569 (labeling Mareva order “Draconian”); see also Wasserman, supra note 326, at 347 (noting that discovery order is issued to third party bankers with knowledge of defendant’s assets). See generally, Mark S.W. Hoyle, The Mareva Injunction and Related Orders, 39 VA. J. INT’L L. 503, 505–06 (1999) (explaining “[T]o maintain the element of surprise, speed and secrecy are required in applying for a Mareva Order.”)
who is made subject to a tracing order will rethink any future evaluation of a defendant's liquidity, creditworthiness, and reputation in light of the accusations of the plaintiff. If the English proceedings do not put him out of business, his ability to deal with his banks will be forever diminished. Even if the defendants eventually succeed in defending on the merits, it is not possible to "undo [this] invasion of his privacy."

When notice is finally made to him, he will almost immediately seek assistance of counsel locally. That counsel, upon researching this hitherto obscure English procedure, will then inform him that he must also secure English counsel. As mentioned above, securing both sets of counsel is made all the more difficult with frozen assets and the preliminary "judgment" against him represented by the Mareva order itself. If the order specifies an amount a defendant can spend on "reasonable legal expenses," any counsel of his will then ascertain whether that amount is sufficient to cover the likely expense of defending the order — and later the suit. Add to that the fees involved with defending a suit in England.

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328 See Tim Taylor, Worldwide Marevas in the Real Wide World, 86 LAW SOCIETY'S GAZETTE 22 (1989) (discussing reputational effects such orders have on defendants in business community); see also Hoyle, supra note 327, at 510–11 (stating that plaintiff may give notice of injunction to third parties in control of defendant's assets); Wasserman, supra note 327, at 347 (noting that third party bankers receive notice of injunction).

329 See Hoyle, supra note 327, at 506 (arguing that those with knowledge of defendants' assets are informed of injunction); see also Wasserman, supra note 326, at 347 (including bankers in list of those informed of injunction); cf. Fabano, supra note 293, at 191 (discussing some of plaintiff's potential liabilities).


331 See generally Hoyle, supra note 327, at 506 (discussing procedure); see also Alexander, supra note 316, at 494 (commenting on British court authority); cf. Johansson, supra note 43, at 1094 (noting history of order).

332 Compare Hoyle, supra note 327, at 509–10 (discussing procedure) with George A. Bermann, supra note 287, at 571 (commenting on importance of knowledge of British legal system); see also Zicherman, supra note 297, at 667 (noting that English courts must have jurisdiction over parties).

333 See Hoyle, supra note 327, at 512 (discussing legal costs); see also Bermann, supra note 287, at 571 (noting that if defendant disobeys injunction he may lose his right to defend); cf. Johansson, supra note 43, at 1094 (arguing that courts have wide latitude in enforcing injunctions).

334 See generally Michael Steiner, Adding Insult to Injury: Defendant's Use of Assets to Pay Legal Costs Following a Mareva, INSOLVENCY INTEL., 12(3), 17–20 (1999); see also Wasserman, supra note 326, at 345 (listing protections developed to mitigate potential harm to defendant); cf. Alexander, supra note 316, at 496 (discussing living expense deduction).

335 See Hoyle, supra note 327, at 512 (discussing legal costs); see also Alexander, supra note 316, at 498 (noting possible costs to defendants).
If he has managed to secure counsel, the defendant must then assess whether he can still conduct business and live on the allowances for expenses provided in the order, which was likely made in a hurry and with little knowledge of the defendant's weekly or monthly expenses. One practitioner has estimated that defendants subject to a *Mareva* order can usually expect to be able to keep their business open for only one to two weeks following its application. Payment of any outstanding debts that do not fall within the "ordinary business expense" category must be approved in advance by plaintiff's solicitors as does almost every other matter relating to the defendant's assets. In reality, the court does not police the *Mareva* order; that is done almost exclusively by the plaintiff's solicitors. This peculiar arrangement is wholly dependent upon the flexibility, responsiveness, and willingness to compromise of the plaintiff's counsel — the defendant's adversaries who are seeking to maximize their client's recovery. One would certainly expect those adversaries to view with almost utter disdain any attempt to free up assets for purposes other than paying their client. As one commentator pointed out, "The plaintiff's solicitor, continuously looking for sinister implications in the defendant's activities, can, whilst appearing not to be delaying matters, effectively paralyse [sic] the defendant's business by diligent policing of the *Mareva* order."

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336 See Bermann, *supra* note 287, at 564 (discussing prohibition against disposing of assets except to pay legal fees) (1999); see also Wasserman, *supra* note 326, at 344–45 (noting procedures to protect defendants because of possible financial consequences); cf. Hoyle, *supra* note 327, at 511 (discussing amount plaintiffs take into consideration during calculation).


339 See Taylor, *supra* note 2 (discussing requirement of consent from plaintiff's solicitor); Willoughby, *supra* note 24, at 480 (pointing out that every proposed transaction by defendant is noticed to and vetted by plaintiff's solicitors); see also Hoyle, *supra* note 327, at 509–10. See generally Alexander, *supra* note 316, at 497 (stating that plaintiff calculates costs).


Assuming he can manage his personal and business affairs on his “allowance,” there is still the matter of the duration of the defendant’s wait on this financial death row. Should a foreign defendant challenge the jurisdiction of the issuing court, the Mareva order remains in place through the entire challenge, including the appeals process. Should he lose that challenge, it then remains in place until the trial and indeed may be extended post-judgment.

Nothing in this process, save some less-than-cooperative behavior from plaintiff’s solicitors perhaps, has explicitly forced the defendant’s hand with regard to settling his claim. Yet every part of it forcibly suggests his only real option is to settle the case. The Mareva order, however, has tipped the scales in favor of the plaintiff in settlement negotiations as well. The plaintiff, after all, has been made aware through the defendant’s banks of exactly how much the defendant can afford to spend. It would be tantamount to legal malpractice for a plaintiff’s solicitor to come down from his initial damage claim absent an

342 See Taylor, supra note 2 (indicating that expenditures permitted by defendants for personal and legal expenses are commonly set at “completely unrealistic levels”); cf. Alon Seveg, Investments: When Countries go Bust: Proposals for Debtor and Creditor Resolution, 3 ASPER REV. INT’L BUS. & TRADE L. 25, (2003) (noting naively that order does not affect defendants right to conduct business); Alexander, supra note 316, at 497 (discussing seriousness of calculations).

343 See Grupo Torras SA v. Sheikh Fahad Mohammed Al-Sabah, Court of Appeal (Civil Div.), Hearing Transcript, Feb. 16, 1994 (discussing duration of Mareva order during appeals); Johansson, supra note 43, at 1104 (proposing courts consider due process prior to issuing order by determining whether it has in personam jurisdiction over defendant). But see Samuel K. Alexander, III, The Mareva Injunction and Related Orders, 39 VA. J. INT’L L. 503, 521–22 (1997) (explaining Mareva order must be recognized by foreign court before enforcement against foreign defendant; see Part IV).

344 See Zicherman, supra note 297, at 672 (explaining Mareva injunctions operate on assets located within jurisdiction of court); Alexander, supra note 343, at 513 (stating defendant within court’s jurisdiction may be subject to Mareva orders); Johansson, supra note 43, at 1096 (noting Mareva injunctions function in personam but affect defendant’s assets as if court had in rem jurisdiction).

345 See Alexander, supra note 316, at 488 (explaining Mareva injunctions often affect outcome of litigation); Alexander, supra note 343, at 506 (stating Mareva orders are tools used to convince defendants to settle); But see Peter S. O’Driscoll, Performance Bonds, Bankers’ Guarantees, and the Mareva Injunction, 7 N.W. J. INT’L L. & BUS. 380, 408 (1985) (arguing Mareva injunctions lead to arbitration or litigation).

346 See Alexander, supra note 316, at 488 (stating Mareva injunctions often influence outcome of litigation); Alexander, supra note 343, at 506 (arguing settlement is aim of Mareva orders); But see O’Driscoll, supra note 345, at 408 (hinting defendants can either settle or, assuming they can free up sufficient funds, litigate).

347 See O’Driscoll, supra note 345, at 398 (stating banks either indemnify or pay bond); Alexander, supra note 343, at 496–97 (stating order granting injunction typically mentions amount to be frozen).
exceedingly compelling circumstance.\textsuperscript{348} Any vestige of fair negotiation has long since disappeared once one side has all the information while the other side has no leverage with which to bargain.\textsuperscript{349} One commentator suggested that settling the case may not even be the end of a defendant's troubles.

Whether or not the worldwide \textit{Mareva} becomes as common as the defendants' arguments in \textit{Derby & Co} predicted ["common as confetti"], the availability of worldwide \textit{Mareva} relief can only increase the attractions of London as a forum for international litigation. Perhaps even greater than the attraction of being able to prevent the defendant from dealing with his assets on a worldwide basis is the facility to require the defendant to disclose his assets worldwide. This offers an incomparable advantage to plaintiffs who can this use proceedings in London as a platform for going into litigation abroad (subject to leave of the English court) armed with information which would frequently be unobtainable in the foreign proceedings.\textsuperscript{350}

It is impossible to know exactly what percentage of these cases end in settlement but it is not unrealistic to suggest that the number is dramatically higher than in cases not utilizing the \textit{Mareva} procedure. Lest we forget, in the English "loser pays" system, for all of his troubles, the defendant will also be required to pay the plaintiff's legal fees, a figure which may dwarf the actual damages in the case.\textsuperscript{351}

\textsuperscript{348} See Alexander, supra note 343, at 510 (stating full disclosure is necessary or judge may reject \textit{Mareva} order application); Alexander, supra note 316, at 495 (explaining all undertakings given by plaintiff to the court are plaintiff's personally); O'Driscoll, supra note 345, at 403 (stating plaintiff should specify maximum amount of funds to freeze to prevent defendant dealing with excess funds).

\textsuperscript{349} See Alexander, supra note 316, at 494 (suggesting plaintiff submit \textit{ex parte} application to prevent defendant from having notice because notice gives defendant incentive to remove or destroy evidence); Johansson, supra note 43, at 1105 (stating \textit{Mareva} orders should only be discharged when no real risk of asset removal exists); see also O'Driscoll, supra note 345, at 400 (hinting defendant may dispose of his assets when real risk of owing debt exists).

\textsuperscript{350} Taylor, supra note 2.

\textsuperscript{351} See Willoughby, supra note 24, at 480 (explaining defendant may be liable to pay plaintiff's legal costs); Alexander, supra note 343, at 511 (claiming maximum amount of frozen assets should include legal fees); cf. Zicherman, supra note 297, at 676 (stating courts limit frozen amount to ensure that it simply satisfies plaintiff's claim).
C. Lack of Ability to Raise Due Process Concerns

Readers familiar with American due process protections have undoubtedly been hearing alarm bells in their heads for some time while reading this Note. The lack of notice to the defendant for what could be months and the ex parte nature of the proceeding are obvious concerns, not wholly assuaged by the protections which are provided — and constantly whittled away — by the English courts. More distressing, though, is that an American defendant subject to a Mareva injunction may never gain the ear of a judge, foreign or domestic, to address those issues. The persuasiveness of those arguments, for or against, is really immaterial and secondary to the main problem: the lack of an ability to simply raise the argument in the first place.

What should be obvious by now is that an American defendant who wishes to argue the finer points of American due process in an English court will find his arguments fall on deaf ears. The English legal system is concerned with English due process, not that of the United States. So long as the English court has properly secured jurisdiction over the American defendant, the Mareva procedure is not incompatible with English notions of due process. Period. End of discussion. An English court, it will argue, has all of the authority the English laws allow and those laws are not tempered and that authority is not diminished or qualified because an American defendant might have recourse

352 See Alexander, supra note 343, at 506 (claiming ex parte orders necessary to prevent defendant from dissipating his assets); Johansson, supra note 43, at 1092 (arguing courts hesitate to grant Mareva order because it is ordered prior to determining whether defendants are in the wrong); see also O'Driscoll, supra note 345, at 398 (stating Mareva injunctions are ex parte in nature and are issued to prevent defendant from removing his assets from court's jurisdiction).

353 See Johansson, supra note 43, at 1107 (suggesting courts balance plaintiff's and defendant's interests prior to issuing Mareva order); Alexander, supra note 343, at 505 (arguing Mareva injunction persuades many opposing parties to settle claim for damages); But see O'Driscoll, supra note 345, at 405 (stating by definition, Mareva injunctions contemplate litigation within jurisdiction of court granting order).

354 See O'Driscoll, supra note 345, at 400 (stating Mareva injunctions are common tool of English civil procedure); Johansson, supra note 43, at 1096 (discussing Mareva injunction use within English courts); Alexander, supra note 316, at 493 (discussing source of power for English courts to issue Mareva orders).

355 See Alexander, supra note 316, at 496 (claiming Mareva injunctions are only effective against defendant within court's jurisdiction); see also Johansson, supra note 43, at 1095 (discussing court's ability to reach worldwide assets when injunction based on in personam jurisdiction); O'Driscoll, supra note 345, at 402 (stating Mareva injunctions issued on defendant when his funds are within bank or possessed by third party within court's jurisdiction).
to a due process argument in a court in his country.\textsuperscript{356} In fact, an English judge might even point to the precedent of American law, were he so inclined to even entertain the rhetorical exercise, which allows for prejudgment attachment, \textit{ex parte} temporary restraining orders, and preliminary injunctions in aid of equitable claims.\textsuperscript{357} These could be seen, when taken together, as evidence of the due process argument having already been decided – and not in the defendant’s favor.\textsuperscript{358}

The next and last opportunity for a defendant to raise due process arguments would be in the context of an enforcement action in his own country.\textsuperscript{359} Once a plaintiff has reduced his claims to judgment in England, securing the assets in another country will require him to sue in that country to force their sale or transfer.\textsuperscript{360} Apart from the fact that raising the due process issue in an English court might entirely foreclose a defendant’s ability to later raise it in an American court on procedural grounds, discussed below in PART IV.D., American courts are notoriously deferential to recognition and enforcement of foreign judgments.\textsuperscript{361} Courts in those states which have adopted some

\textsuperscript{356} See Alexander, supra note 316, at 490–91 (discussing popularity of English law in resolving international commercial disputes); Johansson, supra note 43, at 1107 (arguing defendants may potentially be forced to litigate in foreign forum under \textit{Mareva} orders); O’Driscoll, supra note 345, at 408 (arguing \textit{Mareva} orders contemplate litigation within jurisdiction of court that issued order).

\textsuperscript{357} See Alexander, supra note 343, at 511–12 (comparing \textit{Mareva} injunction and United States law); Johansson, supra note 43, at 1098–1100 (discussing prejudgment attachment laws and preliminary injunctions); Zicherman, supra note 297, at 677 (stating American courts use temporary injunctions and pre-judgment attachment to prevent removal of assets from jurisdiction).

\textsuperscript{358} See supra, PART III (discussing availability, where certain requirements met, of preliminary injunctions in American federal courts). But see Connecticut v. Doehr, 501 U.S. 1, 2 (1991) (noting that state statute authorizing prejudgment attachment without notice or hearing – and without requiring a showing of exigent circumstances – violates due process); United States v. Noriega, 746 F.Supp. 1541, 1544 (S.D. Fla. 1990) (rejecting efforts by U.S. government to secure voluntary freezing of Manuel Noriega’s assets in foreign countries without affording him adversarial hearing to disprove link between assets and drug trafficking).

\textsuperscript{359} See Johansson, supra note 43, at 1096 (explaining plaintiffs can attach assets located in foreign jurisdictions and seek enforcement of judgment in those jurisdictions); Alexander, supra note 343, at 506 (stating plaintiffs can later attach judgment to assets protected by \textit{Mareva} injunction).

\textsuperscript{360} See Alexander, supra note 343, at 506 (noting \textit{Mareva} orders allow plaintiffs to preserve financial assets and property to which they can attach judgments at later time); Johansson, supra note 43, at 1096 (stating plaintiffs can seek enforcement of judgment on assets in foreign jurisdictions)

\textsuperscript{361} See Andreas F. Lowenfeld, INTERNATIONAL LITIGATION AND ARBITRATION, 387–89 West Group (2d Ed. 2002) (stating, “[T]he United States, with a long (and constitutionally mandated) tradition of enforcing sister-state judgments, appears to be the most receptive of any major country to recognition and enforcement of foreign judgments. . .”)
form of the Uniform Foreign Money-Judgment Recognition Act\textsuperscript{362} are restrained statutorily from even hearing such arguments when presented with a judgment from a nation whose system provides for due process protections, though those protections may differ from or even violate American ones.\textsuperscript{363}

D. Enforcement Actions & Procedural Ambiguity

Another troublesome area involves the peculiar intersection of the Mareva procedure and the enforcement action in American courts. Recall that the Mareva order operates as an interlocutory judgment, not merely as an injunction.\textsuperscript{364} Because they are faced with a judgment, much of the language used in these cases by American courts comes from recognition and enforcement actions, which have a more concrete framework when compared to the hairier dialect of provisional remedies, comity, and


\textsuperscript{363} See John Fellas, Lessons on Enforcing Foreign Judgments in the United States, N.Y.L.J., Vol. 228, No. 61 (Sept. 27, 2002), suggesting that to enforce an action based on a Mareva injunction in New York, a plaintiff must – or at least should – demonstrate to the English court that the procedure would satisfy American notions of due process. This proposition, based on the enforcement action decision by the New York Court of Appeals in CIBC v. Mora Hotel, is probably erroneous. An English court is not in any way constrained by American due process rights of American defendants. In an exceedingly generous forum such as New York (a UFMJRA state) with regard to enforcement actions, and even in the CIBC decision itself, there was no such explicit requirement that a plaintiff have made a showing that the judgment comports with American notions of due process. In fact, the court explicitly rejected any suggestion that an English judgment could even be considered to have been rendered without adequate due process protections. While the decision of the Court of Appeals in CIBC is problematic to this author, a fair reading of CIBC cannot support the commentator’s proposition that a plaintiff might have to demonstrate to an English court in order to enforce an action based in a Mareva injunction that the procedure would satisfy American notions of due process. Though, in fact, this author wishes it did support such a requirement.

\textsuperscript{364} See supra, note 8 for discussion re: interlocutory judgments. Note, too, that in cases like CIBC where the defendants default, the “interlocutory” adjective is dropped and replaced with “final,” fitting even better into existing case law and statutory frameworks.
reciprocity. As has been noted, simply securing a judgment in England only gets the plaintiff half-way home. To get their hands physically on defendant’s assets, they must initiate a recognition and enforcement action in the country where those assets are located. A recent enforcement action in the New York Court of Appeals, CIBC Mellon Trust Co. v. Mora Hotel Corp., illustrated how increased use of the Mareva injunction, if simply treated as another foreign court procedure, should worry and induce nightmares for American defendants who have any – even tenuous or associative – contact with potential plaintiffs in English courts.

See generally Guinness v. PLC Ward, 955 F.2d 875 (4th Cir. 1992); CIBC, 100 N.Y.2d at 221 (concerning enforcement of Mareva order); Kingsland Holdings Inc. v. Fulvio Bracco, Civ. Act. No. 14817 (Court of Chancery of Del., New Castle March 6, 1997) (concerning Mareva order).

See Fabano, supra note 293, at 141 (writing that Mareva order “does not give plaintiff a security interest in the defendant’s assets prior to a final judgment”); Alon Seveg, When Countries Go Bust: Proposals for Debetor and Creditor Resolution, 3 ASPER REV. INT’L BUS. & TRADE L. 25, 59 (2003) (declaring that “[t]he purpose of the [Mareva] injunction is to prevent the defendant from committing a fraud on the court... the injunction does not remove any of defendant’s rights in the assets”); Ronald J. Silverman, Mareva Orders: Fact or Fiction in the United States?, 21-9 AM. BANKR. INST. J. 24, 24 (2002) (stating that Mareva injunction does not deny party of his property “but merely curtails defendant’s ability to arbitrarily dispose” of it).

In the arena of international litigation, these are two separate concepts which must be considered, though in actuality, they are often either confused or dealt with together. “Recognition” involves one country agreeing to hold as conclusive the legal judgment and procedures of another country’s courts. It is a prerequisite for “enforcement,” which, in legal effect, turns the foreign country’s “recognized” judgment into a judgment of the enforcing forum. For example, a plaintiff who has secured an English judgment may sue a defendant in the state of New York to force the sale of assets maintained by the defendant in Syracuse. In the enforcement action, often disposed of by summary judgment, the New York courts “transform” the English judgment into an identical New York judgment, thereafter affording the plaintiff the relief they seek.

Mary J. Davis, Summary Adjudication Methods in United States Civil Procedure, 46 AM. J. COMP. L. 229, 244 (1998) (stating that jurisdiction over either person or the property is necessary for freezing or obtaining assets); H. Patrick Glenn, The Morris Lecture: Conflicting Laws in a Common Experiment? The NAFTA Experiment, 76 CHI.-KENT L. REV. 1789, 1804 (stating that Mareva injunction may only enjoin movement of assets outside issuing jurisdiction); Michael Polonsky, Making Use of the English “Freezing Order,” 1 INT’L BUS. Lit.& ARB. 443, 474 (2001) (stating that Mareva injunction does not affect persons outside issuing country until enforced in relevant jurisdiction, though this proposition is debatable, to say the least).

For those readers not familiar with the confusingly titled court system of the Empire State, the New York Court of Appeals is the highest court in the New York state court system, akin to most states’ Supreme Court. More frustrating, maybe, is that the trial-level court in New York is the New York Supreme Court.

George A. Bermann, Provisional Relief in Transnational Litigation, 35 COLUM. J. TRANSNAT’L L. 553, 576 (1997) (positing that Mareva orders have potentially severe consequences especially since they are issued without finding of liability); Bruce Kercher, Remedy Discussion Forum: Legal History and the Study of Remedies, 39 BRANDEIS L.J. 619, 628 (2001) (stating that Mareva orders are dangerous for alleged debtors); Ronald J.
1. The “Generous Forum”

The second part of Judge Read’s opinion in CIBC begins, “New York has traditionally been a generous forum in which to enforce judgments for money damages rendered by foreign courts.” He went on to explain that New York has adopted the Uniform Foreign Money-Judgment Recognition Act (“UFMJRA”) as part of New York’s civil practice rules. The rationale behind adopting the UFMJRA was to “codify and clarify existing case law” and, alternatively, to promote the efficient enforcement of New York judgments abroad “by assuring foreign jurisdictions that their judgments would receive streamlined enforcement here.” In fact, Judge Read explained, a plaintiff who has secured a final, conclusive foreign money judgment proceeds to the New York courts and “merely asks the court to perform its ministerial function of recognizing the foreign country money judgment and [convert] it into a New York judgment.”

Judge Read's opinion in CIBC is squarely in line with the general thinking around the country with regard to enforcement of foreign judgments. It also points out the two assumption-
riddled pillars upon which enforcement and recognition actions—and indeed the UFMJRA—rest.\textsuperscript{379} First, American courts provide generous forums so that, by appearing to be respectful international citizens, foreign courts will in turn enforce American judgments abroad.\textsuperscript{380} This concept is known as reciprocity.\textsuperscript{381} And, in theory, it’s logic is undeniable. The presumed benefits of ease and convenience, avoidance of duplicative actions, maximization of limited court resources, and mutual respect between legal professionals all suggest that, in the international arena especially, a little cooperation will go a long way.\textsuperscript{382} Unfortunately, lots of things which work in theory falter in practice. Reciprocity is one of them. By all objective standards, American courts enforce almost every foreign


\textsuperscript{380} See Hilton v. Guyot, 159 U.S. 113, 202–03 (1895) (finding comity to be reciprocal principle); \textit{In re Akiebolaget Kreuger & Toll}, 20 F. Supp 964, 969 (S.D.N.Y. 2003) ("The principle of comity is extended by the courts of this country to the judgments of the courts of a foreign country to the same extent that courts in the foreign country extend the principle to judgments of the courts of this country."); Jennifer M. Anglim, \textit{Crossroads in the great Race: Moving Beyond the International Race to Judgment in Disputes over Artwork and other Chattels}, 45 HARV. INT’L L.J. 239, 249–50 (2004) (stating that in deciding whether to enforce a foreign judgment, U.S courts often consider reciprocity).


judgment that passes in front of their benches. Abroad, foreign courts enforce almost none of the American judgments that come before theirs.

In over two hundred years of jurisprudence, the Supreme Court of the United States has rendered exactly two decisions on the issue of enforcement of foreign judgments, both on the same day, over a century ago, only one of which is ever cited, and neither of which is followed by the vast majority of state courts. The main decision, Hilton v. Guyot, stresses the importance of true reciprocity in enforcement actions, and, as it has not been overruled, technically remains binding precedent. While American courts should afford great deference to the judgments of foreign courts, the court held, true reciprocity demands that American courts not be too generous in enforcing

383 See Edward C.Y. Lau, Update on the Hague Convention on the Recognition and Enforcement of Foreign Judgments, 6 ANN. SURV. INT'L & COMP. L. 13, 14 (2000) (stating "While the U.S. has been generous about recognition of foreign judgments, the U.S. has not enjoyed reciprocity with most countries on U.S. judgments."); Andreas F. Lowenfeld, INTERNATIONAL LITIGATION AND ARBITRATION, 387–89 West Group (2d Ed. 2002) (stating, "[T]he United States, with a long (and constitutionally mandated) tradition of enforcing sister-state judgments, appears to be the most receptive of any major country to recognition and enforcement of foreign judgments."); Traynor, supra note 381, at 393 (stating "[R]ecognition and enforcement of foreign country judgments has been governed by a relatively stable principle of finality accompanied by comity, particularly as applied to money judgments.").

384 See The Committee on Foreign and Comparative Law of the Association of the Bar of the City of New York, Survey on Foreign Recognition of U.S. Money Judgments, THE RECORD, Vol. 56, No. 3, pp. 380–411 (2001), reviewing enforcement of American judgments abroad. See also Georges R. Delaume, Economic Development and Sovereign Immunity, 79 A.J.I.L. 319, 342 (1985), noting foreign judgments are more likely of being recognized by the United States judicial system than United States judgments are in foreign judicial systems. There are any number of theories and explanations for why — and significant commentary on the subject — but, at the base, foreign courts don't like how things are done in the United States. They dislike American discovery (too broad), American theories of jurisdiction (especially general or "doing business" jurisdiction), and for some civilian countries, the common law system itself (places too much discretion in judges). But, mostly, they think American judges and American juries simply give away way too much money in damages, especially punitive damages. When a foreign court refuses to enforce an American money judgment, it often does so on "public policy" grounds, i.e., that punitive damages are against that nation's public policy.


386 159 U.S. 113 (1895).

387 See Hilton, 159 U.S. at 227-28 (concluding United States' foreign policy, as elucidated by Supreme Court, for judgment recognition requires reciprocity from foreign judgment-issuing jurisdiction).
judgments from countries that do not enforce American judgments. Led by New York, the *Hilton* decision was soon discarded and thoroughly distinguished in state courts and the existing rule became the norm, relying on the dicta of *Hilton* rather than the decision.

The second pillar involves what is known as comity. A New York judge recently stated, "In international law, the principle of comity is best exemplified by the recognition of the courts of one nation to a judgment rendered by the courts of another country. Such comity promotes international cooperation and ensures that the reasonable, if not the necessary, conclusion appears to us to be that judgments rendered in France, or in any other foreign country, by the laws of which our own judgments are reviewable upon the merits, are not entitled to full credit and conclusive effect when sued upon in this country, but are prima facie evidence only of the justice of the plaintiffs' claim.

In holding such a judgment, for want of reciprocity, not to be conclusive evidence of the merits of the claim, we do not proceed upon any theory of retaliation upon one person by reason of injustice done to another; but upon the broad ground that international law is founded upon mutuality and reciprocity, and that by the principles of international law recognized in most civilized nations, and by the comity of our own country, which it is our judicial duty to know and to declare, the judgment is not entitled to be considered conclusive.


See Tahan v. Hodgson, 662 F.2d 862, 868 n.21 (D.C. Cir. 1981) (discussing current United States case law and procedure limiting applicability of Supreme Court reciprocity mandates); Royal Bank of Canada v. Trentham Corp., 491 F. Supp. 404, 414 (S.D. Tex. 1980) ("[T]he courts and commentators have almost universally rejected or ignored the doctrine that reciprocity should be required as a precondition to the recognition and enforcement of a foreign country's judgment."); vacated by 665 F.2d 515 (5th Cir. 1981) (vacated due to change in state law); Johnston v. Compagnie Generale Transatlantique, 242 N.Y. 381, 387 (1926) (Pound, J.) ("[A] right acquired under a foreign judgment may be established in this State without reference to the rules of evidence laid down by the courts of the United States. Comity is not a rule of law, but it is a rule of "practice, convenience and expediency.". Like the eminent reputation of Lord Denning and the subsequent emboldening effect his *Mareva* decision had on later English judges, one could certainly argue that the *Johnston* decision may maintain lasting effect primarily because of the weight of the reputation of the members of the New York Court of Appeals at the time, names including Pound, Cardozo, McLaughlin, Crane, Andrews, and Lehman.

disputes are tried only once.” Comity is not *per se* a rule of law and is not technically dependent upon reciprocity. Like reciprocity, comity is wonderful in theory and thorny in practice. It too rests on an assumption that, without it, the whole of international law will come toppling down like a house of cards. But, such is not the case. Comity, like all other considerations in the international arena, demands assent. A court cannot legally assent to enforcing another’s laws in violation of its own, nor can another court ask that it do so.


393 See Somportex, Ltd. v. Philadelphia Chewing Gum Corp., 453 F.2d 435, 440 (3rd Cir. 1971) (stating “[Comity] is not a rule of law, but one of practice, convenience, and expediency.... Comity should be withheld only when its acceptance would be contrary or prejudicial to the interest of the nation called upon to give it effect.”); Harold G. Maier, Symposium, “Could a Treaty Trump Supreme Court Jurisdictional Doctrine?”: A Hague Conference Judgments Convention and United States Courts: A Problem and a Possibility, 61 ALB. L. REV. 1207, 1223–24 (1998) (explaining international concerns specific jurisdiction must contemplate before determining whether to extend comity); Harold G. Maier, Article, *Extraterritorial Jurisdiction at a Crossroads: An Intersection Between Public and Private International Law*, 76 A.J.I.L. 280, 282–83 (1982) (noting “[T]he laws of one country can have no direct force in another country, yet nothing could be more inconvenient to the commerce and general intercourse of nations than... transactions valid by the law of one place... rendered of no effect elsewhere owing to a difference in law.”).

394 See Societe Nationale Industrielle Aerospatiale v. United States Dist. Court for the S. Dist. of Iowa, 482 U.S. 522, 554–55 (1987) (Blackmun, J., dissenting) (arguing for generalized across-the-board assent to international comity by United States rather than assent on case-by-case basis); Maier, *supra* note 393, at 1223–24 (positing “[E]nforcement of a foreign country judgment results from the forum’s unilateral choice of... either to give effect to the local law of the foreign sovereign... or to dismiss the case. There is no... legal requirement that a forum give effect to the judgment of a foreign... [court].”); Ronald J. Silverman & Mark W. Deveno, *Distressed Sovereign Debt: A Creditor’s Perspective*, 11 AM. BANKR. INST. L. REV. 179, 189 (2003) (providing example of country’s ability to set its own standards under principle of comity for rejection of foreign judgments as contrary to public policy).

395 See Finanz AG Zurich v. Banco Economico S.A., 192 F.3d 240, 246–50 (2nd Cir. 1999) (stating United States policy not to recognize foreign judgments that violate “the laws or public policy of the United States” or lack “fundamental standards of procedural fairness” and observing a foreign bankruptcy proceeding violates those principles); Cunard S.S. Co. v. Salen Reefer Services AB, 775 F.2d 452, 457 (2nd Cir. 1985) (stressing comity will not be granted if foreign issuing court lacked proper jurisdiction or violated principles of due process); Lauretta Drake, *Stop the Madness! Procedural and Practical Defenses to Avoid Inconsistent Cross-Border Judgments Between Texas and Mexico*, 9 J.
But, where there is no direct conflict, only a difference of approach or opinion, comity will still have persuasive and powerful effect in the enforcement of foreign judgments. As it stands now, international litigation is quickly being reduced to a multinational "game of chicken." Where one court enters a judgment in direct opposition to or despite that of a foreign court, comity suggests that one will back down; the who, when, and why are matters of speculation at best. Add to that mix an ill-conceived theory of reciprocity and you have one complicated litigation environment.

Add to that environment the Mareva injunction and you have a potentially combustible situation. Bowing to the twin gods of reciprocity and comity, American courts run the risk of placing...
their own citizens (and their assets) at risk, endorsing the extraterritorial, exorbitant exercise of jurisdiction the Mareva order represents.\textsuperscript{399} What’s worse is that they place their citizens at risk in exchange for an enforcement of American judgments abroad which is simply not happening and a measure of judicial deference for the judgments of the American legal system which foreign courts regularly refuse.\textsuperscript{400} Rather than reduce these pipe dreams to statutory reality in frameworks like the UFMJRA, especially where the Mareva procedure is involved, American courts should dramatically reassess their approaches to reciprocity and comity (and re-read Hilton).

2. The Uniform Foreign Money-Judgment Recognition Act Framework

The \textit{CIBC} decision explained the general UFMJRA approach in place in at least 29 states.\textsuperscript{401} Where a foreign judgment is “final, conclusive, and enforceable where rendered”\textsuperscript{402} an American court will consider it “conclusive between the parties to the extent that it grants or denies recovery of a sum of money.”\textsuperscript{403} There are two mandatory exceptions.\textsuperscript{404} First, where “the...

\textsuperscript{399} See Mary A. Nation, Comment, \textit{Granting a Preliminary Injunction Freezing Assets Not Part of the Pending Litigation: Abuse of Discretion Or an Important Advance in Creditors’ Rights?}, 7 TUL. J. INT’L & COMP. L. 367, 401-04 (1999) (discussing three major cases where Mareva order was applied and extent to which order froze money around world); Theuer, supra note 293, at 426-38 (recognizing extraterritorial reach of Mareva order and minimal showing required for its issuance). See generally Bermann, supra note 287, at 588-89 (analyzing jurisdictional questions stemming from United Kingdom case that imposed Mareva order on highly tenuous jurisdictional grounds).


\textsuperscript{401} See CIBC Mellon Trust Co. v. Mora Hotel Corp. 100 N.Y.2d 215, 221 n. 2 (2003) (noting that District of Columbia has also adopted variation of the UFMJRA); Balan, supra note 400, at 238 (citing table of jurisdictions where Act has been adopted); see also Brian Richard Paige, Comment, \textit{Foreign Judgments in American and English Courts: A Comparative Analysis}, 26 SEATTLE UNIV. L. R. 591, 598 (2003) (explaining that UFMJRA is majority approach to foreign judgment enforcement in US).

\textsuperscript{402} \textit{CIBC}, 100 N.Y.2d at 221.

\textsuperscript{403} Id.

\textsuperscript{404} See Balan, supra note 400, at 239 (noting that section four of UFMJRA states basis for non-recognition); Paige, supra note 401, at 602-03 (comparing grounds for non-recognition under UFMJRA and Restatement [Third] of Foreign Relations Law); see also Ronald A. Brand, \textit{Enforcement of Foreign Money-Judgments in the United States: In Search of Uniformity and International Acceptance}, 67 NOTRE DAME L. REV. 253, 266
judgment was rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law." 405 Second, where the "foreign court did not have personal jurisdiction over the defendant." 406 There are also seven discretionary exceptions 407 which the court did not discuss in its opinion in CIBC but a few of which were raised by defendants 408 and are discussed further below.

For all practical purposes, the UFMJRA approach ties the court's hands when it comes to enforcing a judgment that involves a Mareva injunction. 409 CIBC is an excellent example. The courts of New York, a state with significant international presence, has addressed cases involving Mareva injunctions several times. Indeed, the Supreme Court's Grupo Mexicano decision overruled a decision of the United States Court of Appeals for the Second Circuit, 410 in which New York sits. New York's Court of Appeals endorsed the Grupo Mexicano decision in

(1991) (explaining that if judgment is not recognized, matter litigated elsewhere will need to be re-litigated in United States action).

405 CIBC, 100 N.Y.2d at 221–22 (emphasis added).
406 Id. at 222.
407 See, e.g., N.Y. C.P.L.R., §5304(b) (2004). New York, when adopting the UFMJRA, moved that basis for non-enforcement into its list of "discretionary" bases. New York's discretionary bases, then, are as follows: 1) the foreign court did not have jurisdiction over the subject matter; 2) the defendant in the proceedings in the foreign court did not receive notice of the proceedings in sufficient time to enable him to defend; 3) the judgment was obtained by fraud; 4) the cause of action on which the judgment is based is repugnant to the policy of New York; 5) the judgment conflicts with another final and conclusive judgment; 6) the judgment in the foreign country was contrary to an agreement between the parties under which the dispute in question was to be settled otherwise than by proceedings in that court; and 7) in the case of jurisdiction based only on personal service, the foreign court was a seriously inconvenient forum for the trial of the action. See generally Chao & Neuhoff, supra note 362, at 151–52. Some of the "uniformity" of the UFMJRA is lost with successive adoption by the various states, but remains fairly consistent around the country).

408 See CIBC Mellon Trust Co. v. Mora Hotel Corp., N.V., 2002 WL 32173789, at *1, *6–7 (Brief for Defendants–Appellants) (2002) (arguing that recognizing foreign award is repugnant to public policy since facts are extreme and Appellants' punishment is disproportionate to conduct in question).
409 See Jennifer M. Anglim, Crossroads in the Great Race: Moving Beyond the International Race to Judgment in Disputes over Artwork and Other Chattels, 45 HARV. INT'L L.J. 239, 254–5 (2004) (noting that mandatory exceptions to UFMJRA are rarely invoked successfully); Chao & Neuhoff, supra note 362, at 150–51 (stating that under UFMJRA, foreign judgments are presumptively enforceable unless reason for non-enforcement is found); see also CIBC, 100 N.Y.2d at 222 (stating that defendant sued on English judgment will rarely be in position to defeat it).
Credit Agricole Indosuez v. Rossiyskiy Kredit Bank,411 foreclosing the ability of New York state courts from issuing preliminary injunctions in aid of money claims.412 In doing so, they had a few harsh words for the Mareva procedure:

The widespread use of [the worldwide Mareva injunction] would drastically unbalance existing creditors' and debtors' rights under the present Federal and State statutory and decisional schemes, and substantially interfere with the sovereignty and debtor/creditor/ bankruptcy laws of, and the rights of interested domiciliaries in, foreign countries. At the very least, the availability of such a powerful, discretionary provisional remedy, even when that discretion is exercised by courts with caution and restraint, would introduce uncertainty in results which the present [common law] bright-line rule — more readily permitting investors accurately to assess likely risks, and to adjust interest rates accordingly — avoids.413

In CIBC, the Court of Appeals, despite their concern over Mareva orders, nonetheless enforced an English judgment granted as a contempt sanction against two defendants who refused to comply with the requirements of a Mareva order.414 By converting the $330 million contempt judgment into a New York judgment, the Court of Appeals created the largest ever award for contempt of court in the history of American law — over $300 million more than the next highest one.415

412 See Credit Agricole, 94 N.Y.2d at 548–51 (noting that court will refuse injunctions if convinced that money judgment is true object of action); Paul H. Aloe, Survey of New York Law: Civil Practice, 51 SYRACUSE L. REV. 247, 265 (2001) (stating that “it has long been the law that a preliminary injunction is not available where the claimant seeks only money damages”); see also Traffix, Inc. v. Talk.com Holding Corp., No. 00 Civ. 9802 (AKH), 2001 U.S. Dist. LEXIS 1200, at *6 (S.D.N.Y Feb. 13, 2001) (asserting that court cannot grant preliminary injunction where underlying proceeding is simply action for money damages pursuant to contract).
413 Credit Agricole, 94 N.Y.2d at 551.
414 See CIBC, 100 N.Y.2d at 222–26 (noting that use of such an order, standing alone, does not render entire English system incompatible with due process).
Given their hesitation with the *Mareva* procedure, what explains this shocking result? The UFMJRA. Neither mandatory exception allowed the New York court to refuse enforcement or countenanced the peculiar situation presented by the *CIBC* defendants and the *Mareva* injunction. The first exception— the *system* compatible with due process exception— cannot even be seriously argued without rebuke by a reviewing court. England, after all, does have a system which provides for due process, a system on which the American one is based. Note, too, that due process must simply be available, not necessarily available as it exists in the United States. One Court of Appeals judge described it as follows: "Any suggestion that [England's] system of courts 'does not provide impartial tribunals or procedures compatible with the requirements of due process of law' borders on the risible." Judge Read, in *CIBC*, added, "the relevant inquiry under [the UFMJRA] is the overall fairness of England's legal 'system,' which is beyond dispute."
More importantly, the use of a questionable procedure – like the *Mareva* injunction – “does not render the English system as a whole incompatible with our notions of due process.” In dismissing the applicability of this exception, he concluded that a defendant would rarely be in a position to defeat an English judgment under this exception.

The second possible exception – lack of personal jurisdiction – is also implicated by the procedural history of *CIBC*, the facts of which are not unusual, but provide a worthwhile cautionary tale. In *CIBC*, two defendants with assets in the United States were made subject to a *Mareva* order in a conspiracy to defraud case. They were notified by the plaintiffs of the order over *nine months* after the initial *ex parte* grant of the *Mareva* order. In England, the defendants challenged the personal jurisdiction of the English court over them – and its power to issue such an injunction. They were denied, and eventually exhausted their appeals through the House of Lords without success. While they pursued their appeals through the English system, they elected to refuse compliance with the *Mareva* order, apparently on the advice of English counsel. After a few stern warnings and subsequent “unless” orders, the English High Court found the defendants in contempt of court and issued judgment for plaintiffs as a sanction in the amount requested for the entire

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422 *Id.* at 222 (noting validity of English law despite “potential commercial disruption” of *Mareva* orders).

423 UNIF. FOREIGN MONEY-JUDGMENT RECOGNITION ACT § 4 comment, 13 U.L.A. 59 (1986) (“A mere difference in the procedural system is not a sufficient basis for non-recognition. A case of serious injustice must be involved.”); see also Guinness, 955 F.2d at 900 (noting that foreign tribunal’s procedures need not be identical to those used in United States); *CIBC*, 100 N.Y.2d at 222 (noting that statute is satisfied so long as England’s procedures were congruent with U.S. notion of due process).

424 See *CIBC*, 100 N.Y.2d at 218–19 (suggesting that plaintiffs were “duped” into making fraudulent investments.)

425 See *id.* at 218-19 (noting that legal proceedings were commenced in May 1996 and defendants were notified of *Mareva* order in March 1997).

426 *Id.* at 219 (arguing that necessary defendant was not domiciled in England at critical time).

427 *Id.* at 219 (noting that three separate courts rejected defendants’ arguments).

428 *See id.* at 219-20 (specifying that *Mareva* order related to tracing claim).

429 See *id.* at 220 (noting that defendants ignored several warnings). The New York court called them “unless” orders. They might better be described as ultimatums. In essence, the English court issued these to the defendant warning them that failure to comply would result in their being debarred from defending the suit on the merits in England. Such a sanction is obviously a harsh one and it is at least refreshing to see that the English court took the step of issuing the “unless” orders before finding the defendants in contempt, a step it is not required to take.
case, not merely the two defendants at issue.\textsuperscript{430} Plaintiffs then commenced an enforcement action in New York's Supreme Court\textsuperscript{431} which granted plaintiffs summary judgment and appointed a receiver to sell the defendants' assets,\textsuperscript{432} a decision the defendants appealed unsuccessfully to New York's Appellate Division.\textsuperscript{433} Next they appealed to the New York Court of Appeals, the decision discussed here.\textsuperscript{434} Defendants further countered by moving to set aside the judgment of the High Court in England,\textsuperscript{435} at which point plaintiffs moved to have the defendants' appeal dismissed in New York pursuant to the UFMJRA. Specifically, they relied on the inapplicability of the second exception.\textsuperscript{436}

Plaintiffs contended, and the Court of Appeals agreed, that defendants' attempts to set aside the English High Court's decision constituted an "appearance" in the English court, which went beyond merely challenging personal jurisdiction.\textsuperscript{437} The wording of the personal jurisdiction exception is particularly important. It states that foreign country judgment will be refused for lack of personal jurisdiction if "the defendant voluntarily appeared in the proceedings, other than for the purpose of protecting property seized or threatened with seizure in the proceedings or of contesting the jurisdiction of the court over him."\textsuperscript{438} Recall that a \textit{Mareva} order acts \textit{in personam}\textsuperscript{439} and so technically does not qualify as a procedure that "seizes" any assets.

\textsuperscript{430} See id. at 220 (stating that Feb. 1999 default judgment of $600,000 was increased to $330 million after Dec. 1999 default judgment).
\textsuperscript{431} See supra, note 369 (regarding New York's peculiarly named courts).
\textsuperscript{432} See CIBC, 100 N.Y.2d at 220 (noting that Gorham Hotel was attached and sold in satisfaction of judgment).
\textsuperscript{433} Id. at 220 (noting judgment on May 28th, 2002).
\textsuperscript{434} Id. at 220 (reiterating issues on appeal regarding defendants' due process rights).
\textsuperscript{435} Id. at 221 (noting Court's dismissal of defendants' application).
\textsuperscript{436} See id. at 221 (explaining plaintiffs' argument that defendants' applications to High Court "mooted" their constitutional claim).
\textsuperscript{437} See id. at 223–25 (concluding that defendants 'voluntarily appeared' in English proceeding by doing more than necessary to contest jurisdiction).
\textsuperscript{438} N.Y. C.P.L.R. § 5305(a)(2) (1997) (necessitating finding that defendant who appears and contests merits has submitted to jurisdiction of court).
\textsuperscript{439} See supra, PART IV.A (noting absurdities of application of \textit{in personam} jurisdiction in these cases); see also Ackermann v. Levine, 788 F.2d 830, 838 (2d Cir. 1986) (noting proper standard to apply when evaluating whether country had obtained \textit{in personam} jurisdiction); CIBC, 100 N.Y.2d at 223 (noting that \textit{Mareva} order acts \textit{in personam}).
The underlying theory is that a defendant who seeks to make arguments in a foreign jurisdiction beyond those relating solely to contesting personal jurisdiction is, in fact, submitting to that jurisdiction's authority and will waive any right thereafter to claim the foreign court lacked jurisdiction in an enforcement action. Judge Read summarized the law as follows: "If the judgment debtor did any more than she had to do, however, to preserve her jurisdictional objection in the foreign court, she would thereby have submitted voluntarily to its jurisdiction and forfeited the right to claim an exception under [the UFMJRA]."

When the CIBC defendants made the motion to set aside the default judgment, they raised a "question as to the merits" and, in doing so, did more than they "had to do" — a tricky standard at best.

Given the existing English precedent, the CIBC defendants' decision to refuse to comply with the Mareva order — while entirely consistent with their lack of personal jurisdiction argument — was not wise. Given the statutory requirements of

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440 See CIBC, 100 N.Y.2d at 225 (noting voluminous materials defendants brought before judge while contesting merits and attempting to set aside judgment of English court); see also S.C. Chimexim S.A. v. Velco Enters. Ltd., 36 F. Supp. 2d 206, 215 (S.D.N.Y. 1999) (finding that since defendants appeared to contest merits, even though they raised jurisdictional issues as well, jurisdictional issues were waived because defendants voluntarily appeared); Nippon Emo-Trans Co., Ltd. v. Emo-Trans, Inc., 744 F. Supp. 1215, 1222-26 (E.D.N.Y. 1990) (finding that defendant's appearance to contest on merits after losing jurisdictional challenge was voluntary appearance, and thus jurisdictional issues were waived).

441 See CIBC, 100 N.Y.2d at 223 (quoting Siegel, David D., Practice Commentaries, N.Y. C.P.L.R. §C5305:1 (1997)) (noting that voluntary appearance constitutes anything above and beyond an appearance solely to contest jurisdiction).

442 See id. at 224-26 (quoting Nippon, 744 F. Supp. at 1222-26) (noting that in applying to contest on merits and set aside judgment defendants did more than raise mere jurisdictional challenge).

443 See Grupo Torras SA v. Sheikh Fahad Mohammed Al-Sabah, Court of Appeal (Civil Div.), Hearing Transcript, Feb. 16, 1994 (noting defendant, while under Mareva order, must disclose his assets while jurisdictional arguments were pending as opposed to after); see also Society of Lords v. Ashenden, 233 F.3d 473 (7th Cir. 2000) (according almost absolute deference to English decisions such that court practically declares any argument about due process concerns in English justice system to be absurd); CIBC, 100 N.Y.2d at 222 (noting strong deference that United States courts accord to English judgments).

444 See N.Y. C.P.L.R. §5304 (1997) (noting that basis for non-recognition of foreign money judgment is lack of personal jurisdiction); CIBC, 100 N.Y.2d at 219-20 (noting that defendant refused to comply with Mareva order while it was contesting court's jurisdiction); see also Credit Corp. v. Uzan, [2003] EWCA Civ. 752 (2003) (providing example of similarly situated defendants that similarly refused to comply with Mareva order in light of their position that court had failed to establish personal jurisdiction over them).
UFMJRA in the United States, that miscalculation was compounded greatly.445

But consider a hypothetical American defendant who is issued a *Mareva* order, freezing his assets. While contesting personal jurisdiction, the defendant attempts to apply for a discharge or variation of the *Mareva* order to allow him to avoid some of the oppressive nature of the device. Would this be considered doing "more than he had to do" for the purposes of a later enforcement action under UFMJRA? Aren't discharge applications, after all, highly fact-sensitive, and don't they include the distinct possibility of reaching something approaching the merits of the case? Does not the defendant's argument rest primarily on defeating the *ex parte* evidence of the plaintiff which, in turn, usually requires him to produce evidence of his business practices, reputation, and credit-worthiness to attack the "risk of default" ground for issuing the *Mareva* injunction? Or, say, he places at the court's disposal security sufficient to indemnify plaintiff's claim and discharge the *Mareva* order. Would this act itself frustrate any future personal jurisdiction argument in a subsequent action? Under the existing UFMJRA framework, the answer to all of these questions is probably "yes."

As mentioned above, there are seven bases on which an argument for non-enforcement might be raised, i.e., grounds on which a reviewing court "need not" enforce the foreign judgment.446 Given the pervasiveness of New York's "generous forum" philosophy, the likelihood of success with resort to these discretionary exceptions is slim.447 More problematic is that, in a standard *Mareva* situation, five of the seven are largely

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446 See N.Y. C.P.L.R. §5304 (1997) (listing non-exclusive grounds on which foreign judgments might not be enforced); see also *CIBC*, 100 N.Y.2d at 221–22 (noting that despite these bases New York has traditionally been generous in enforcing foreign judgments); Greschler v. Greschler, 51 N.Y.2d 368, 376 (1980) (explaining doctrine of comity and New York's general willingness to enforce foreign judgments).

447 See *CIBC*, 100 N.Y.2d at 221 (noting that New York has historically been generous in recognizing foreign money judgments); see also *Greschler*, 51 N.Y.2d at 376 (1980) (explaining doctrine of comity and New York's general willingness to enforce foreign judgments); Lazier v. Westcott, 26 N.Y. 146, 148 (1862) (providing early example of New York's willingness to accept foreign country judgments as conclusive evidence).
inapplicable and the remaining two are tenuous at best. The CIBC defendants attempted to raise the "repugnant to the public policy of this state" exception in their brief to the Court of Appeals in New York. Without comment, the Court of Appeals refused to entertain that argument in its decision. Like the personal jurisdiction exception, the public policy exception's specific wording makes it particularly slippery. It states that it must be the "cause of action" on which the foreign judgment is based that violates state public policy. The underlying causes of action in CIBC were for fraud and conspiracy to defraud, certainly commonplace in the courts of New York. Most

448 The first one, subject matter jurisdiction, is probably not satisfied by the mere exercise of jurisdiction by the English court which will have made an affirmative determination as to this basis as a matter of course. The second one, adequate notice - while intriguing in the Mareva context - discusses notice which allows for a defendant to defend the proceeding. While that notice may be delayed following application of a Mareva order, the defendant does have the right to both challenge the Mareva order itself and the case on the merits. The fraud exception will be based on the facts of particular cases. The two others, similarly - conflict with another final judgment and forum selection - are fact-sensitive and meant to effectuate the will of the parties and to avoid duplicative litigation, concepts not directly implicated in the standard Mareva context. See also N.Y. C.P.L.R. §5304 (1997).

449 See Piper Aircraft v. Reno, 454 U.S. 235, 257–61 (1981) (noting that for court to find a foreign country inconvenient forum, several factors must be balanced; there is no clear bright line test); Ackermann, 788 F.3d at 841 (positing that defendants that seek a finding that judgment is unenforceable because it is repugnant to state public policy must meet high standard); N.Y. C.P.L.R. §5304 (1997).

450 See CIBC Mellon Trust Co. v. Mora Hotel Corp., N.V., 2002 WL 32173789, at *1, *56 (Brief for Defendants-Appellants) (2002) (noting N.Y. C.P.L.R. §5304(b)(4) gives New York courts discretion to refuse recognition of foreign judgment where underlying cause of action is repugnant to significant public policy in New York); see also Hilton, 159 U.S. at 193 (reinforcing notion that doctrine of comity forbids recognition of judgments which are violative of public policy of state). But see Ackermann, 788 F.2d at 841 (finding that standard to hold judgment unenforceable as repugnant to New York's public policy is high standard that will not be frequently met).

451 See CIBC, 100 N.Y.2d at 223 (mentioning public policy exception argument only in summary of appellants' and respondents' arguments, but not commenting on it); CIBC Mellon Trust Co. v. Mora Hotel Corp., N.V., 2002 WL 32173789, at *1, *57 (Brief for Defendants-Appellants) (2002) (stating that Appellate Division effectively held in opinion below that public policy argument was not properly preserved for appeal because it was not raised at trial). See generally Ackermann, 788 F.3d at 841 (positing that judgment of English court is practically beyond reproach from argument based on public policy).

452 See N.Y. C.P.L.R. §5304(b) (outlining bases to refuse recognition of foreign judgment).


454 See Grupo Mexicano de Sarrollo S.A. v. Alliance, 527 U.S. 308, 310–42 (1999) (explaining applicability of Mareva orders); CIBC, 100 N.Y.2d at 218–19 (noting
Mareva orders are utilized in a commercial setting, in causes of action which are familiar to New York courts and courts around the world. That the Mareva order itself may implicate the public policy of New York is immaterial under this exception.

The only other discretionary exception which might apply is the "inconvenient forum" exception. Under the UFMJRA (and New York's C.P.L.R., §5304), a court need not enforce a foreign judgment where "in the case of jurisdiction based only on personal service, the foreign court was a seriously inconvenient forum for the trial of the action." Such a forum non conveniens argument may have some effect where the defendants are relatively unsophisticated parties with little or no contact in England. Forum non conveniens analysis, however, is far from uniform, is subject to significant balancing of interests (including those of the plaintiff in England) and, as such, represents a

underlying cause of action and facts; Credit Agricole Indosuez Rossiyskiy Kredit Bank, 94 N.Y.2d 541 (2000) (noting that Mareva orders are most utilized in cases involving crimes in commercial settings).

See Grupo Mexicano, 527 U.S. at 331–32 (explicating arguments against use of Mareva injunctions because of effect it would have on debtor – creditor law); CIBC, 100 N.Y.2d at 222 (noting court's concern for potential of Mareva orders to disrupt commercial activity due to order's power); Credit Agricole Indosuez v. Rossiyskiy Kredit Bank, 94 N.Y.2d 541, 544 (2000) (noting that widespread use of Mareva injunctions would have subsequent profound effect on international commerce).

See N.Y. C.P.L.R. §5304 (b)(7) (providing for forum non conveniens argument); see also CIBC, 100 N.Y.2d at 221 (noting that defendant seeking to set aside English judgment bears high burden). See generally, Piper Aircraft v. Reno, 454 U.S. 235, 257–61 (enunciating ever-changing balancing test necessary to decide whether forum is inconvenient).


See id. (also encompassing due process and personal jurisdiction concerns).

See XR Co. v. Block & Balestri, P.C., 44 F.Supp.2d 1296, 1300 (S.D. Fla. 1999) (illustrating sophistication of person requesting change in forum is just one consideration in forum non conveniens decision, noting that moving defendant was not so unsophisticated as to not understand contractual forum clause); see also Citibank v. Collins, 1991 U.S. Dist. LEXIS 4919, *4 (S.D.N.Y. 1991). See generally Friedrich K. Juenger, The Internalization of Law and Legal Practice: Forum Shopping, Domestic and International, 63 Tul. L. Rev. 553, 565 (1989) (alluding to plaintiffs who find Mareva injunctions particularly appealing because they are useful in disputes between people of different nations. Thus, they have been used as method of preying on an opponent's lack of sophistication).

See Jeffrey M. Eilender, Forum Non Conveniens and Comprehensive Hazardous Waste Coverage Suits, 90 Colum. L. Rev. 1066, 1080 (1990) (stating that some courts will consider, "as a public factor, a concern for the convenience of other courts across the country in not expending resources on a case that one court could have heard comprehensively"); Mary-Rose Papandrea, Standing to Alleg Violations of the Doctrine of Specialty: An Examination of the Relationship between the Individual and the Sovereign, 62 U. Chi. L. Rev. 1187, 1211 (1995) (noting that deciding inconvenience involves examining characteristics of foreign governments). See generally Piper Aircraft, 454 U.S. at 257–61 (analyzing public and private interest factors when considering grant of forum
somewhat risky approach. First, the exception is a discretionary one. Even were the judge to determine the English forum to be seriously inconvenient, it is within her discretion to nevertheless enforce the judgment.\(^{461}\)

Second, the comity “game of chicken” problem comes into play. The English court has exercised jurisdiction under what it considered to be proper grounds. England recognizes the principle of *forum non conveniens* and its decision to assume jurisdiction over the defendant implies that it has made a decision that the forum is an appropriate one, or at least not an unreasonably inconvenient one.\(^{462}\) A reviewing court that refuses to enforce the English judgment on *forum non conveniens* grounds stands as a direct obstacle to what the English court considers its pursuit of justice between the parties.\(^{463}\) At that point, international comity and respect for the judicial proceedings of other nations is implicated.\(^{464}\)

non conveniens dismissal, noting foreign plaintiffs have “local interest in having localized controversies decided at home”).


\(^{464}\) In this author’s view, that is rightly so. Comity should not be used as a sword to push through judgments based on exorbitant jurisdiction. That a foreign court might rely on the “generous” nature of enforcing American courts, even where it exercises authority beyond its jurisdiction, has already implicated the principle of comity. When a reviewing court uses comity as a shield, it is within its purview to do so, to fend off such outrageous exercises of jurisdiction. This thinking was used in Somportex, Ltd. v. Philadelphia Chewing Gum Corp., 453 F.2d 435, 440 (3rd Cir. 1971), which held that “[a]lthough more than mere courtesy and accommodation, comity does not achieve the force of an imperative or obligation.” Comity can have dangerous consequences, such as denying
Finally, and where the CIBC defendants likely lost all chance with this exception, any resort to the English courts indicates that the English forum may not be “seriously inconvenient” at all.\(^{465}\) Whether a discharge application to unshackle the defendant from the Mareva order will nullify this exception is an issue that has not been addressed in the courts.\(^{466}\) Likely, the securing of English counsel and the production of evidence to negate the plaintiff’s showing in a discharge proceeding may demonstrate enough contact to make this exception functionally impossible to rely on.\(^{467}\)

In this light, then, the defendant is faced with a Hobson’s Choice:\(^{468}\) defend on the merits in England or challenge the litigants’ interests in favor of national ones. See Mladen Don Kresic, Note, The Inconvenient Forum and International Comity in Private Antitrust Actions, 52 FORDHAM L. REV. 399, 418 (1983). Thus, some courts decide the comity question only after they have decided the subject matter jurisdiction question. E.g., Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1291–92 (3rd Cir. 1979).

\(^{465}\) The CIBC defendants had secured assistance of English counsel (who proved to be of questionable “assistance”) and instituted a number of appeals in the English courts prior to raising the “inconvenient forum” argument in New York. In all likelihood, the New York court was not impressed with the CIBC defendants’ ability to litigate in England everything but the merits of their case. The New York Court of Appeals quoted Society of Lloyd’s v. Ashenden, 233 F.3d 473, 476 (7th Cir. 2000) when it stated that to charge that English courts do not “provide impartial tribunals or procedures compatible with the requirements of due process of law borders on the risible.” CIBC Mellon Trust v. Mora Hotel Corp. N.V., 100 N.Y.2d, 215, 222 (2003). The court also cited Guinness PLC v. Ward, 955 F.2d 875, 900 (4th Cir. 1992) when it noted that the enforcement of a Mareva injunction does not deny the defendant his due process rights. CIBC, 100 N.Y.2d, at 222.

\(^{466}\) See John F. Carella, Of Foreign Plaintiffs and Proper Fora: Forum Non Conveniens and ATCA Class Actions, U. CHI. LEGAL F. 717, 730 (2003) (pointing out courts have said that doctrine of forum non conveniens is not implicated when foreign matter at hand is not United States interest, specifically under Alien Tort Statute.); cf. Mardirosian, supra note 461, at 1683 (noting forum non conveniens argument can still be used if defendant “fully satisfies her burden by showing that both an adequate alternative forum is available and the convenience factors strongly favor dismissal.”). But see Aric K. Short, Is the Alien Tort Statute Sacrosanct? Retaining Forum Non Conveniens in Human Rights Litigation, 33 N.Y.U. J. INT’L L. & POL. 1001, 1046 (2001) (pointing to only few cases brought under Alien Tort Statute that have been dismissed on forum non conveniens grounds).

\(^{467}\) See N.Y. C.P.L.R §5305(a)(2) (2004) (stating foreign judgments will most likely not be nullified if defendants voluntary appear in foreign courts); CIBC, 100 N.Y.2d at 222 (noting that personal jurisdiction objections are foreclosed when defendants do anything beyond appearing to contest personal jurisdiction); see also S.C. Chimexim S.A. v. Velco Enters. Ltd., 36 F.Supp.2d 206, 215 (S.D.N.Y. 1999) (holding that defendant appeared voluntarily when he argued merits after judgment had been handed down).

\(^{468}\) A Hobson’s Choice is “an apparently free choice where there is no real alternative.” Merriam Webster Online Dictionary, at http://www.merriamwebster.com/cgi-bin/dictionary?va=Hobson’s. “Tobias Hobson was a carrier and innkeeper at Cambridge... He kept a stable of forty good cattle, always ready and fit for traveling; but when a man came for a horse he was led into the stable, where there was great choice, but was obliged to take the horse which stood nearest to the stable-door; so that every customer was alike well served, according to his chance, and every horse ridden with the same justice.” See Historical and Genealogical Notes, at http://ftp.rootsweb.com/pub/
judgment nowhere. That a potential defendant may not have the means to defend in England exacerbates the problem. Likewise, when taken together, the UFMJRA, CIBC, and Credit Agricole stand for the precarious proposition that New York can prevent its own courts from issuing Mareva-type remedies against New York defendants but is powerless to stop English courts from doing the same with Mareva orders. This is a dangerous position to occupy given the expanding use of the procedure, the risk that plaintiffs could use this procedure strategically to stifle American competition, and the likely

469 See Jennifer M. Anglim, Crossroads in the Great Race: Moving Beyond the International Race to Judgment in Disputes over Artwork and Other Chattels, 45 HARV. INT'L L.J. 239, 270-71 (2004) (stating that main purpose of forum non conveniens doctrine is that forum be convenient, which includes ready availability of witnesses and documentation); see also Piper Aircraft Co. v. Reyno, 454 U.S. 235, 255-56 (1981) (arguing that when foreign persons are involved, their forum choices are less reasonable); Friedrich K. Juenger, The Internationalization of Law and Legal Practice: Forum Shopping, Domestic and International, 63 TUL. L. REV. 553, 565 (1989) (arguing that foreign plaintiffs should not receive great deference in regards to forum non conveniens arguments).

470 See Credit Agricole Indosuez v. Rossiyskiy Kredit Bank, 729 N.E.2d 683, 688 (N.Y. 2000) (implying that Mareva-type relief should be left to legislatures), CIBC, 100 N.Y.2d at 161 (holding that standards used to determine whether jurisdiction is preserved can adjust in Mareva situations, but Mareva orders are still not permitted in New York). But see Paul H. Aloe, 2002-2003 Survey of New York Law: Civil Practice, 54 SYR L. REV. 825, 850 (2004) (noting that Mareva orders, though not recognized by New York, are not "repugnant to New York public policy").

471 One underhanded tactic is for plaintiffs to secure Mareva orders, not for the assistance in seeking a claim, but for the shackling effects they have on defendants' ability to conduct business. This is done by pursuing the claim slowly or not at all without informing the court of their intention to later abandon the suit. See Maurice Sheridan, Procedure: Abuse of Process of the Mareva Injunction, J. OF INT'L BANKING L., 1989, at N237.

An egregious case of such use of the Mareva injunction occurred in the case of Daisystar, Ltd. v. Town and Country Bldg. Soc., TIMES, Oct. 16, 1989 (CA). In Daisystar, a defendant was able to convince the Court of Appeal to discharge a Mareva order and, in the process, declare the granting judge's choice to maintain the order over the vigorous protests of the defendant as "plainly wrong." Judge Dillon, in Daisystar, was particularly concerned with the possibility that a party could secure a Mareva order, then sit back and rest on the protections it afforded without diligently prosecuting the case. In effect, the party was using the Mareva as an "end," rather than merely a "means." Calling any Mareva order "essentially oppressive," he stated, "where a party has obtained a Mareva injunction, that party is bound to get on with the trial of the action - not to rest content with the injunction. The injunction is merely ancillary to the trial of the action to hold the position until the action comes on for trial." Id. at 3. This sentiment was echoed by Judge Farquarson in his opinion. Id. at 7. Judge Dillon, (quoting Lloyds Bowmaker Ltd. v. Britannia Arrow Holdings, [1988] 3 All E.R. 178 (CA (Civ. Div.))), stated,

In other words, a plaintiff who succeeds in obtaining a Mareva injunction is in my view under an obligation to press on with his action as rapidly as he can so that if he should fail to establish liability in the defendant the disadvantage which the injunction imposes upon the defendant will be lessened so far as possible.
further expansion of the *Mareva* procedure into areas of public law, such as antitrust, patent, and securities regulation. Part V suggests some possible solutions.

V. SOLVING THE *MAREVA* PROBLEM IN THE UNITED STATES

A. Attempting Diplomacy

One logical approach, it seems, would be to mobilize the diplomatic corps of Great Britain and the United States to hammer out some sort of agreement with regard to the *Mareva* procedure. The nations are close allies and share a “special relationship” which one would assume could be brought to bear in this type of situation. Two potential stumbling blocks to effecting such a bilateral convention, however, make this solution unlikely. One involves the lack of precedent; the other a lack of incentive.

*Id.* at 3. In *Lloyd’s Bowmaker*, Judge Dillon states that there should be full disclosure “to the court on the part of the applicant.” *Lloyd’s Bowmaker*, [1988] 3 All E.R. at 186.

472 In Pantell (No.1) *Mareva Injunctions: Isolated Incursions into the Field of Public Law or Part of a Strategic Plan*, J. OF BUS. L., Jan. 1994, at 18–27, Dennis Crighton outlines the implications of Lord Browne-Wilkinson’s decision in Securities and Investments Bd. v. Pantell (No. 1), [1989] 2 All E.R. 673 (Ch.D), which allowed for the use of the *Mareva* injunction in aid of a cause of action created by a securities statute—a statute which, incidentally also carries criminal provisions and penalties. In Pantell (No. 1), Lord Browne-Wilkinson stated,

Parliament, by giving the Secretary of State (that is to say the SIB) a statutory cause of action, has invested the Secretary of State and the SIB with the necessary *locus standi* to apply for relief. In my judgment the court has the incidental powers, including the power to grant *Mareva* relief, necessary to prevent such statutory right of action being rendered abortive by the dissipation of assets.


473 Attempting to find solutions to the problems of the *Mareva* procedure is, by no means, limited to the foreign jurisdictions subject to it. See generally Taylor, *supra* note 2 (discussing potential reforms of procedure in England to alleviate some of harshness of *Mareva* “relief”).


475 For example, a uniform system of temporary relief in arbitration situations is especially difficult because precedent even within the United States is fairly varied and inconsistent. See William Wang, *Note, International Arbitration: The Need For Uniform*
First, the United States and Great Britain have never managed to come to any general agreement as to the enforcement of judgments, either as part of a bilateral or multilateral treaty. Any such effort would be breaking new ground rather than treading on well-worn terrain. In fact, the United States as a general matter is party to very few mutual cooperation agreements with other countries, and where it is, the agreement is usually limited and subject-specific. The U.S. legal system itself—especially its liberal discovery and more liberal damages—presents difficulties of assent, to say the least, in other countries. Such a treaty only about Mareva injunctions is

Interim Measures of Relief, 28 BROOKLYN J. INT’L L. 1059, 1081 (2003). In addition, the Supreme Court has issued rulings that add difficulty to jurisdictional issues, such as accepting jurisdiction in foreign nations for lawsuits only if other continuous business has been performed in that nation. See Russell J. Weintraub, How Substantial is Our Need for a Judgments Recognition Convention and What Should We Bargain Away to Get It?, 24 BROOKLYN J. INT’L L. 167, 187 (1998). However, certain instances do demonstrate that the United States can accept foreign judgments even if foreign procedures are inconsistent from our own, such as differing notice requirements. See Tahan v. Hodgson, 662 F.2d 862, 867–68 (D.C. Cir 1981); Alan Reed, A New Model of Jurisdictional Property for Anglo-American Foreign Judgment Recognition and Enforcement: Something Old, Something Borrowed, Something New?, 25 LOY. L.A. INT’L & COMP. L. REV. 243, 284 (2003).


477 See Paige, supra note 476, at 591 (calling attention to fact that United States is not party to any treaty that agrees to recognize foreign judgments); Survey on Foreign Recognition of U.S. Money Judgments, supra note 384 at 383 (noting absence of U.S. in treaties recognizing foreign judgments); see also Campbell & Dharmendra, supra note 476, at 520 (explaining that diverse procedural and substantive rules in United States have thwarted any attempt at forming treaty to recognize foreign judgments).

478 See Bermann, supra note 276, at 566-67, 609 (discussing agreements to which United States is party); see, e.g., Agreement Concerning the Investigation of Drug Trafficking Offences and the Seizure and Forfeiture of Proceeds and Instrumentalities of Drug Trafficking, Feb. 9, 1988, U.S.-U.K., art. 10, T.I.A.S. No. 11,649 (requiring state parties to enact enabling legislation to identify, trace, and freeze property derived from or related to drug trafficking); Treaty on Mutual Assistance in Criminal Matters between the United States and Switzerland, May 25, 1973, 27 U.S.T. 2019 (1976) (permitting United States Securities and Exchange Commission to obtain freezes on assets in Switzerland involved in securities violations).

479 See Campbell & Dharmendra, supra note 476, at 520 (discussing aspects of U.S. law that have prevented formation of treaties with foreign countries); Susan L. Stevens, Commanding International Judicial Respect: Reciprocity and the Recognition and Enforcement of Foreign Judgments. 26 HASTINGS, INT’L & COMP. L. REV. 115 (2002) (arguing that liberal damages awards to United States citizens has deterred foreign countries from enforcing American judgments); see also Survey on Foreign Recognition of
almost surely to devolve into debate about other procedures which, as has always happened, will likely culminate in fundamental failure of agreement, or at best, agreement to disagree.

Second, England has no incentive to limit the Mareva procedure’s reach. As it has been structured, the English courts do not consider it an exorbitant use of jurisdiction because it is classified as an in personam remedy. Besides, American courts are enforcing judgments based on its utilization without any treaty. The United States, in reality, has nothing to bargain with and Great Britain has nothing further to gain, only something to lose. So long as American courts adhere to the UFMJRA framework, the Mareva injunction’s devastating effect on American defendants will continue relatively or completely unmolested in the absence of a bilateral treaty.

U.S. Money Judgments, supra note 384, at 383 (discussing issue of treaties between civil law and common law countries).

480 See Bermann, supra note 287, at 561 (contrasting United Kingdom’s inclination for world-wide Mareva injunctions with United States Supreme Court’s due process concern in Shaffer v. Heitner, 433 U.S. 186, 210 (1977) that “at most . . . a State in which property is located should have jurisdiction to attach that property . . . as security for a judgment being sought in a forum where the litigation can be maintained”); see also Campbell & Dharmendra, supra note 476, at 520 (stating United States procedural rules make it difficult to reach agreements recognizing judgments); Stevens, supra note 479, at 115 (recognizing foreign court’s hesitation to enforce U.S. judgments because of its differing procedural rules).

481 See Bermann, supra note 287, at 564 (explaining that Mareva injunctions are aimed people not property, obviating concern for territorial reach); see also Johansson, supra note 43, at 1095 (describing ability of court to reach defendant’s assets wherever they are when Mareva order operates in personam as opposed to in rem). Cf. Shaffer, 433 at 210 (explicating due process limits on property attachment).

482 See Johansson, supra note 43, at 1098 (noting that Mareva injunctions are not available to plaintiffs in U.S., where courts are hesitant to grant pre-judgment relief); Samuel K. Alexander, III, Book Review of The Mareva Injunction and Related Orders, by Dr. Mark S. W. Hoyle. 39 VA. INT’L L. 503, 526–27 (1999) (stating that there is no United States counterpart to Mareva injunction because it might violate defendant’s right to due process); see also Theuer, supra note 293, at 479 (describing how although some United States courts have welcomed an approach similar to that of England, there are still due process concerns).

B. Re-Thinking the Common Law

While the diplomats engage in what could be decades of hand-wringing, American courts can certainly address the *Mareva* problem under their own authority.484 One conceivable approach would be to recognize the *Mareva* injunction as an affront to the sovereignty of the state or country and create a bright-line rule refusing enforcement of any foreign judgment utilizing the procedure. Within the UFMJRA framework, under the CIBC facts, a court could consider such a contempt judgment as not final, not conclusive – and therefore outside of the UFMJRA entirely.485 This approach, given the sway concerns of comity have in the minds of American judges486 (and perhaps leery of retribution in the form of refusal of enforcement of what few judgments do get enforced abroad), is not likely.

A second, more tenable approach, however, could effect serious change on the application and deleterious ramifications on American defendants of the *Mareva* procedure. That approach would simply follow the Supreme Court’s reasoning in *Hilton* when it said,

[The foreign] judgment is prima facie evidence, at least, of the truth of the matter adjudged; and it should be held conclusive upon the merits tried in the foreign court, unless some special ground is shown for impeaching the judgment, as by showing that it was affected by fraud or prejudice, or that, by the principles of international law, and by the

484 See Theuer, supra note 293, at 450 (stating that some United States courts have adopted “Mareva-type” injunctions); see, e.g., Guinness PLC v. Ward, 955 F.2d 875 (4th Cir.1991) (finding no violation of due process in upholding district court’s decision to enforce *Mareva* injunction); United States v. All Funds on Deposit in any Accounts Maintained in the Names of Meza or Castro, 856 F. Supp. 759 (E.D.N.Y. 1994) (supporting *Mareva* order against drug trafficking organization).


486 See Hilton, 159 U.S. at 228 (defining comity as procedural, reciprocity and public policy restrictions on American enforcement of foreign judgments); see also Enson, supra note 485, at 166–70 (describing comity as one of doctrines limiting enforcement of foreign judgments); Jennifer M. Anglim, Crossroads in the Great Race: Moving Beyond the International Race to Judgment in Disputes over Artwork and Other Chattels. 45 HARV. INT’L L.J. 239, 250 (2004) (noting example of American judge giving due consideration to comity in lawsuit to continue without final foreign judgment).
comity of our own country, it should not be given full credit and effect.487

Both the current Supreme Court488 and the New York Court of Appeals489 have expressed serious reservations on the extraterritorial application of the Mareva procedure by English courts. Those concerns might readily rise to the level of a "special ground" for impeaching a foreign judgment.490

The question remains as to who should bear the burden of demonstrating either the existence of the "special ground" or the absence of such an impeaching factor. Under the current UFMJRA framework and the ex parte nature of the procedure itself, logic suggests that the plaintiff should bear this burden.491

According to the Second Circuit, in an enforcement action, currently the "plaintiff has the 'prima facie' burden of establishing (1) a final judgment, (2) subject matter jurisdiction, (3) jurisdiction over the parties or res, and (4) regular proceedings conducted under an impartial system of justice."492
To require the plaintiff to establish a fifth element, the absence of a special ground for impeaching the English judgment by use of an *ex parte Mareva* order, would not overly (or at least unreasonably) burdensome – and consistent with *Hilton*. In effect, this approach would create a rebuttable presumption of invalidity where a foreign judgment makes use of a *Mareva*-type procedure.

This approach would offer at least three beneficial checks to the procedure that currently do not exist. First, it would afford a natural forum for defendants to make a due process argument, unshackled from the UFMJRA's restrictive mandatory exceptions, re-injecting some adversarial balance into the proceedings. Second, it might tend to chill the plaintiff in advance from seeking the *Mareva* injunction in the first place, or at least limit those requests to meritorious scenarios where an increased evidentiary burden could easily be satisfied, i.e., where there is demonstrable risk of dissipation of assets. Third, it would give a moment of pause to English judges who might restrict their *Mareva* orders to non-American assets or require assistance from an American court in administering them.


Similar procedures have been available in civil law countries prior to the *Mareva* case, referred to variously as "ring-fencing", "arrest", and "interim anticipatory protection." In Italy, for example, a similar device called "protective attachment" is utilized. See supra, note 278. For an article discussing the expansion of the *Mareva* procedure in Canada for use in aid of foreign proceedings, see Paul Michell, *The Mareva Injunction in Aid of Foreign Proceedings*, 34 OSGOODE HALL L.J., 741 (1996). See generally supra, note 476, at 601–07, which addresses grounds for non-recognition.

See Chao, supra note 362, at 151 (necessitating tribunals to exercise due process and proper jurisdictional requirements over defendants); see also *CIBC Mellon Trust Co. v. Mora Hotel Corp. N.V.*, 100 N.Y.2d 215, 225 (2003) (ensuring if there is voluntary appearance, other jurisdictional requirements are waived so that case can be heard). See generally supra, PARTS IV.C & D.

See *CIBC*, 100 N.Y.2d at 221 (explaining that New York courts are always generous in enforcing money judgments from foreign courts); Wasserman, supra note 326, at 332 (commenting on how American courts routinely use injunctions to freeze assets); see also Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308, 328 (1999) (commenting that *Mareva* remedies have been confirmed in federal statute).

See *CIBC*, 100 N.Y.2d at 221 (encouraging England and other foreign nations to be as open as New York in approving foreign judgments); see also Grupo Mexicano 527 U.S. at 329 (stating that *Mareva* order is powerful tool in England).
Importantly, American courts could continue to provide “generous forums” for enforcement of foreign judgments. Those judgments sought to be enforced that do not utilize the *Mareva* procedure would be unaffected by this higher evidentiary showing.498 If English courts take such considerations into account and issue fewer of these orders extraterritorially, all the better. As the procedure becomes more commonplace in the United States (which it is likely to do given the broad exceptions already in place to side-step *Grupo Mexicano*), such an approach could also assuage some federalism and sovereignty concerns between the states themselves.499

C. Addressing the Statutory Loophole

Another potential solution lies in the modification of the UFMJRA itself. It is the solution with the greatest ease of implementation, though not without its difficulties. A change in the statute would force enforcement courts to address the *Mareva* procedure square on, rather than confining their concerns with the procedure to persuasive, but non-precedential dicta.500

One method of modification would be to address the language of the mandatory “lack of personal jurisdiction” exception. Resort to an English court to attempt to discharge a *Mareva* injunction should be explicitly disclaimed as a basis which would constitute a voluntary submission to English jurisdiction. A defendant who seeks to stave off “seizure” of assets is, as the statute stands currently, still within his rights to raise the personal jurisdiction exception. A defendant who seeks to do the same to avoid “freezing” of his assets is not similarly protected. As there is no practical difference to a defendant, the statutory language should encompass both.

498 See CIBC, 100 N.Y.2d at 221 (explaining generous nature of American courts in enforcing foreign judgments).

499 See Credit Agricole, 94 N.Y.2d at 551 (noting difficulties *Mareva*-type procedures present to state decisional and statutory schemes); see also CIBC, 100 N.Y.2d at 221-22 (concluding ease of New York court’s function in converting foreign money judgment). See generally *Grupo Mexicano*, 527 U.S. at 308.

500 See *Grupo Mexicano* 527 U.S. at 331 (relying on English case law and precedent to reach holding); Bermann, *supra* note 287, at 560 (finding authority for *Mareva* injunction in English case law and English statute); Wasserman, *supra* note 326, at 332-33 (discussing English precedent of *Mareva* injunction).
Another modification might involve adding another mandatory or discretionary basis for non-enforcement. This author would argue for mandatory non-enforcement where the *Mareva* order is granted *ex parte* without timely notice to the defendant. Requiring plaintiffs to have demonstrated compliance with American notions of due process when suing American defendants with little or no connection to England does not seem too strenuous a requirement.\(^{501}\) A discretionary ground is more in line with the “equitable” nature of the device and might grant the reviewing court a measure of flexibility in recognition and enforcement actions, though it might be frustrated by the ubiquitous “generous forum” philosophy.\(^{502}\)

These changes, however, would have to be made on a state-by-state basis.\(^{503}\) The UFMJRA is not a federal statute, but rather a codification of legal principles and suggested statutory framework which states are at liberty to accept *en toto* or modify as they deem appropriate.\(^{504}\) Change in a few key states with international presence, however, would go a long way to negating the *Mareva* order’s impermissible reach.

### D. “International Judicial Warfare”\(^{506}\)

One of the dirty little secrets of international law is that much, if not most, of it depends on one nation simply capitulating to the legal processes of another.\(^{507}\) This “comity” is, really, entirely

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\(^{501}\) See Goldring, *supra* note 254, at 54 (discussing United States’ due process simply as requiring minimal contacts with jurisdiction); see also Wasserman, *supra* note 254, at 319–20 (explaining importance of due process concerns in American law). *But see CIBC*, 100 N.Y.2d at 223 (arguing that New York law allows foreign judgment even with lack of personal jurisdiction if there was voluntary appearance).

\(^{502}\) See Wasserman, *supra* note 254, at 261 (noting relief of such action is equitable); *see also Grupo Mexicano* 527 U.S. at 318–19 (explaining that this issue must be one of equity to be decided by courts); *CIBC*, 100 N.Y.2d at 221 (discussing New York State’s generous forum philosophy).

\(^{503}\) See Goldring, *supra* note 254, at 54 (explaining that each state has varying forum and jurisdictional statutes); *see also CIBC*, 100 N.Y.2d at 223 (ruling based on New York’s legal position on this matter); Wasserman, *supra* note 254, at 276–77 (discussing varying state statutes regarding judgments, writs of attachments, and remedies).

\(^{504}\) See *Grupo Mexicano* 527 U.S. at 328 (explaining that *Mareva* relief has been confirmed by certain federal statutes), *See Generally* Wasserman, *supra* note 254, at 332–33 (summarizing various legal principles regarding use of injunctions to secure money judgments).

\(^{506}\) Bermann, *supra* note 287, at 615.

\(^{507}\) See Quaak v. KPMG Bedrijfsrevisoren, 361 F.3d 11, 16 (1st Cir. 2004) (discussing difficulty in international law of balancing different nation’s laws while maintaining sovereignty); Goldring, *supra* note 254, at 8 (clarifying that nature of international law
voluntary in the absence of treaties and conventions.\textsuperscript{508} The European Union has taken the lead in establishing such conventions for its member states, but beyond the borders of Europe, enforcing foreign judgments – let alone preliminary provisional remedies like the \textit{Mareva} order – is more akin to the Wild West.\textsuperscript{509} What happens when a suit in Country X threatens the banking system of Country Y or a prominent industry in Country Z? Are the courts of Country Y or Country Z required or even obliged to enforce those judgments? Absolutely not. Some states do not even wait for the final judgment shoe to drop before acting to frustrate Country X's legal processes, becoming proactive rather than reactive.\textsuperscript{510}

The anti-suit injunction is the most powerful tool for these "frustrating" courts. This type of injunction, which also operates \textit{in personam}, can be issued by a court over parties subject to its jurisdiction to prevent them from proceeding with litigation in other forums, including other nations' courts.\textsuperscript{511} Though it technically operates over the parties, there is no doubt that it can frustrate another nation's legal processes and be considered violative of the notion of international comity.\textsuperscript{512} While anti-suit injunctions are effective, other methods such as declarations of

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\textsuperscript{508} See Goldring, \textit{supra} note 254, at 8 (explaining that international agreement must be approved by nation's government). See \textit{generally} Bermann, \textit{supra} note 287 (discussing implications of international law on such agreements).

\textsuperscript{509} See Goldring, \textit{supra} note 254, at 34–35 (describing European Union and powers afforded to member countries regarding agreements); see \textit{also Grupo Mexicano 527 U.S. at 331}(denying \textit{Mareva} relief).

\textsuperscript{510} See Bermann, \textit{supra} note 287, at 579 (categorizing United States and other nations as taking proactive stance towards such remedies, though this remains to be proven as far as the U.S. is concerned). See \textit{generally} Goldring, \textit{supra} note 254 (delineating different nation-states' remedies).

\textsuperscript{511} See Bermann, \textit{supra} note 287, at 555 (suggesting anti-suit injunction as alternate remedy to prevent litigant from bringing suit in another country); George A. Bermann, \textit{The Use of Anti-Suit Injunctions in International Litigation, 28 Colum. J. Transnat'l L. 589, 589} (1990) (defining anti-suit and its effects on international litigation) [hereinafter Bermann Anti-Suit].

\textsuperscript{512} See Quaak v. KPMG Bedrijfsrevisoren, 361 F.3d 11, 16–19 (1st Cir. 2004) (discussing ramifications and decisional calculus involved in issuing international anti-suit injunctions); Bermann, \textit{supra} note 511, at 607 (mentioning that considerations of international comity in regards to anti-suits should be evaluated). See \textit{generally} Goldring, \textit{supra} note 254 (exploring difficulties of different countries interacting with various laws and agreements).
non-liability and even simple non-enforcement will do. The overriding point is that by throwing up obstacles into the path of another country's attempt to enforce its legal system beyond its own borders a state can force the issuing court to re-think its tack or back down entirely.

This legal “game of chicken,” however, is not limited to the enforcement of final judgments. With the rise of prejudgment provisional remedies like the Mareva orders and Anton Piller orders comes an increasing use of these frustrating devices. At the tip of the spear of frustration is England itself, accompanied by its commonwealth nations. In an ironic twist that would make Socrates blush, England would flatly refuse to enforce any Mareva-type order were it to be asked to do so. A few examples

513 See Bermann, supra note 287, at 555 (stating that amidst controversy, anti-suit is still effective form of intervention); see also Bermann, supra note 511, at 602 (comparing anti-suits to declarations of non-liability).

514 See Derby & Co., Ltd. v. Weldon (No. 2), [1989] E.C.C. 322, 339 (Eng. C.A. 1988) (stating that court “should not appoint Receivers over non-residents in relation to assets which are not within the jurisdiction of this Court, unless satisfied that the local Court either of residence or of the situation of the assets will act in aid of the English Court in enforcing it”); Bermann, supra note 287, at 566 (stating that “litigants have urged that courts refrain from issuing orders restraining the use of property located abroad in the absence of available sanctions in the event such orders are disregarded”); Bermann, supra note 287, at n.54 (quoting Rosseel N.V. v. Oriental Commercial Shipping (U.K.) Ltd., [1990] 1 W.L.R. 1387, 1388-89 (Eng. C.A.)) (stating that except for exceptional case, English courts should refrain from asserting extraterritorial jurisdiction).

515 See Alexander, supra note 316, at 501 (stating that “once the plaintiff obtains the English Mareva, it must then apply to the foreign court to have the Mareva recognized and enforced against the foreign defendant”); Bermann, supra note 287, at 557 (stating as example, that courts of country X may see fit to issue protective orders affecting persons or property in country Y, they may not be able to ensure that those orders are obeyed or that the relief sought to be achieved will otherwise be effective); see also Fabano, supra note 293, at 144 (stating that in application for a world wide Mareva order, plaintiff may be required to make further application in foreign jurisdiction where he believes defendant's assets are located).

516 See Alexander, supra note 515, at 490 (stating that effectiveness of Mareva and Anton Piller have led to their increasing use); Samuel K. Alexander, III, The Mareva Injunction and Related Orders, by Dr. Mark S.W. Hoyle, 39 VA. J. INT'L L. 503, 506 (1989) (book review) (stating that effectiveness of Mareva injunctions has led to their increased use and popularity); Theuer, supra note 293, at 421 (stating that English courts have aggressively expanded applicability of prejudgment interlocutory relief, such as Mareva orders and Anton Piller injunctions).

517 See Securities and Exchange Commission v. Wang, 699 F. Supp. 44 (S.D.N.Y. 1988); Silverman & Kirshner, supra note 254, at 24 (noting that Mareva-type orders are becoming the norm in common law jurisdictions); Zicherman, supra note 297, at 676 (noting that most common law jurisdictions in which English case law is followed now grant Mareva injunctions). But see Mark S.W. Hoyle, The Mareva Injunction and Overseas Assets, J. INT'L BANKING L. 4(1), 15 (1989) (noting that there seems no reason why the English courts will not enforce a similar Mareva-type order from any of the other Brussels Convention countries).
will help illustrate the rising tide of this "international judicial warfare."518

Example 1: The British Government Weighs In.519 The U.S. Securities and Exchange Commission secured a court order to freeze the bank accounts of two foreign defendants allegedly involved in insider trading activities.520 The defendants promptly instructed the New York branch of their bank to move the accounts to the Hong Kong branch and thereafter failed to appear at the proceedings.521 A default judgment was entered.522 The defendant then sued the bank in Hong Kong to release the funds which the bank had been holding pursuant to the American court order.523 The U.S. court then issued an anti-suit injunction, staying the Hong Kong proceedings, demanding the accounts be transferred to the American court.524 The Hong Kong court, in response, issued an order denying effect to the U.S. orders, including the anti-suit injunction (an "anti-anti-suit injunction"), claiming the freezing of the assets was an extraterritorial exercise of U.S. sovereignty.525 The British government came to the aid of the Hong Kong court via diplomatic channels, complaining that the U.S. court had acted extraterritorially, in violation of international law, by "seeking to regulate... relations between a banking company, not of United States nationality... , and a customer of that Bank in respect of a sum of money held in accounts in a branch of that Bank in Hong Kong."526 Before the respective high courts of the countries involved could engage in an extended "pot calling the kettle black" debate, the parties settled.527

518 See Bermann, supra note 287, at 615 (stating that transnational provisional relief and anti-suit injunctions are similar in that both can precipitate "international judicial warfare").
520 See Wang, 699 F. Supp at 45.
521 Id.
522 Id..
523 Id..
524 Id..
525 Id..
526 See Bermann, supra note 287, at 614.
527 See id., at 615.
Example 2: Reigning in the Worldwide *Mareva?* Plaintiffs secured a worldwide *Mareva* order from an English court, freezing defendant’s assets wherever situated. The plaintiffs contacted a third party Swiss bank (with a branch in England) to trace defendants’ assets. The Swiss bank protested to the English court that compliance with its order would force it to violate Switzerland’s bank secrecy laws. The English court agreed to vary the terms of the *Mareva* order, and the plaintiffs appealed. The English Court of Appeal dismissed the appeal and issued instructions for future grants of worldwide *Mareva* orders. These instructions included a proviso that third parties subject to a *Mareva* order cannot be forced to comply where it would subject them to inconsistent obligations in the country where the assets are located. The Court of Appeal considered it “inexpedient” for an English court to issue an order it could not enforce. Of course, only a few nations have such strict bank secrecy laws and so the effect of this case is yet to be seen. It should be noted, too, that where the plaintiff names

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529 Bank of China, 1 Lloyd’s Rep. at 506.

530 Id.

531 Id.

532 Id.

533 Bank of China v. NBM, LLC (2002) 1 ALL E.R. 717 (CA) at [22] (holding that “Baltic proviso” should be in standard freezing [*Mareva*] order for third parties unless court considers it inappropriate).

534 See Baltic Shipping co. v. Translink Shipping Ltd, (1995) LLOYD’S REP. 673 (commonly allowing third party to “comply with what it reasonably believes to be its obligations under the law of the State in which those assets are situated.”); *Bank of China*, 1 ALL E.R. 717 (CA) at [11] (stating that Baltic was first case in which English court permitted addition of this proviso); see also Great Future International Ltd. v. Sealand Housing Corp. (2004) EWHC 124 (CH) at [36] (noting, although court adopted Baltic proviso as standard, it did not address consequences of third party breaching *Mareva* order once it was made).

535 Bank of China v. NBM, LLC (2002) 1 ALL E.R. 717 (CA) at [19] (defining inconsistent obligations as those that are contractual as well as those that are penal in nature).

536 Id. at 18 (stating that it is “exceptional” for an order of English court to require “third party to do or refrain from doing something abroad” because of inherent territorial limits of court’s jurisdiction).

537 See Jennifer A. Mencken, Note, *Supervising Secrecy: Preventing Abuses Within Bank Secrecy and Financial Privacy Systems*, 21 B.C. INT’L AND COMP. L. REV. 461, 469 n.68 (1998) (stating there are relatively small number of nations with strict banking secrecy laws, most of which are small nations or nations from Pacific Rim); see also Michael Evans, *Why Switzerland Will Not Give Up Bank Secrecy*, INT’L FIN. L. REV. (2002)
the bank as a party to the case, the proviso does not need to be issued and the banks remain subject to the worldwide Mareva order. Whether the enforcement in these cases is any more "expedient" or even possible is a matter of conjecture.

Example 3: Defeat of a Worldwide Mareva Order. Plaintiffs instituted an action for fraud in the United States and sought a Mareva-type remedy to enjoin defendants from absconding with their assets. The U.S. court could not grant them the relief they sought. Plaintiffs thereafter filed suit in England and secured a worldwide Mareva order over all of defendants' assets while the American proceedings were pending. Defendants, citizens of Turkey and with no connection to England, objected to the granting of the Mareva order on "expediency" grounds, i.e., the English court could not enforce the order against them. After refusing to comply with the Mareva order, the defendants were held in contempt of court and given lengthy prison sentences in absentia.

While the defendants appealed the ruling to the English Court of Appeal, they secured an anti-suit injunction in Turkey, staying

(pointing out even though Swiss banking laws are still legendarily strong, they no longer apply to criminal matters); Private Banking: A new Swiss role, The Economist, Feb. 20, 1999, at 68 (noting in addition, over time, banking laws in Switzerland itself have gradually eroded).

See Societe Eram Shipping Co. Ltd. v. Compagnie Internationale de Navigation, [2003] 2 All E.R. (Comm.) 65, para. 23 (2003) (stating that English Court of Appeals have accepted that there is nothing that precludes English court from granting Mareva orders against a defendant); see also Great Future International Ltd. v. Sealand Housing Corp. (2004) EWHC 124 (Ch) at [36] (noting that Court was considering rights of third parties to litigation rather than rights of parties to litigation when approving Baltic proviso), Baltic Shipping Co. v. Translink shipping Ltd. and Translink Pacific Shipping Ltd., (1995) 1 Lloyd's Rep 673 (stating that need for proviso arises from need to protect third parties to litigation in regard to overseas actions, and describing importance of drawing distinction between rights of third parties and rights of litigants).


Motorola Credit Corp. v. Uzan, 388 F.3d 39, 44 (2d Cir, 2004) (stating that plaintiffs, Motorola and Nokia, urged court impose constructive trust over some of assets of defendants, as well as attachment of certain properties and shares in corporate defendants as collateral).


See id. at 17 (noting that on May 30, British court granted freezing orders for all four defendants with maximum of 200 million dollars (American)).

Id. at 18–23 (stating that second and third defendants appealed Mareva order on ground that English court had no jurisdiction over them because they had no association with England, and owned no assets in England)

Id. at 31, 33 (noting that lower court held four defendants in contempt for failure to comply with court ordered cross-examinations, and sentenced them to fifteen months in prison in absentia, with exception of fourth defendant who was sentenced to six months).
the proceedings in both the United States and England.\textsuperscript{545} The plaintiff then obtained an order from the American court requiring the defendants to withdraw from the proceedings in Turkey.\textsuperscript{546} Rather than do so, the defendants obtained a second injunction from the Turkish court, again staying the English and American proceedings.\textsuperscript{547} The English Court of Appeal, despite the contempt shown by the defendants for the English proceedings, determined it would be "inexpedient" to attempt to enforce a \textit{Mareva} order over the Turkish defendants and dissolved the \textit{Mareva} order.\textsuperscript{548} The defendants lost the case in the United States and are currently appealing the $4.26 billion judgment against them.\textsuperscript{549} They have been informed that if they ever enter the United States, they will face immediate arrest for contempt.\textsuperscript{550}

These examples demonstrate the extraterritorial problem areas presented by \textit{Mareva} orders, especially when the diplomatic and judicial arms of separate countries become entangled.\textsuperscript{551} They also point out the underlying fragility of the

\textsuperscript{545} Id. at 29 (stating that defendants successfully filed an injunction in Turkey on November 27, 2002, which stayed United States action and all other related proceedings).

\textsuperscript{546} Id. at 37 (stating that plaintiff filed in U.S. District Court to compel defendants to withdraw from Turkish court, and filed in Turkish court to have judge who gave previous order removed for bias. The District Court granted order, and Turkish judge voluntarily withdrew from proceedings, pending resolution of plaintiff's claim).

\textsuperscript{547} Id. at 39 (stating that employees of corporate defendant obtained second injunction in Turkey, preventing proceedings in all of jurisdictions in which plaintiff filed suit (England, United States, Germany, France, Bermuda, The Channel Islands)).

\textsuperscript{548} Id. at 125-26 (holding that freezing orders as they applied to second and third defendant must be dismissed because Turkish injunction in connection with lack of assets in English jurisdiction and defendants' lack of cooperation indicated that defendants would disobey freezing order. If that did happen, an English court had no ability to sanction defendants. However, court sustained freezing order against first and fourth defendants).

\textsuperscript{549} The Court of Appeals ordered a reconsideration of punitive damages awards granted by the lower court in the amount of 2.1 million dollars on the grounds that it was inconsistent with the due process requirements of the U.S. Constitution, and Illinois law. Motorola Credit Corp. v. Uzan, 388 F.3d 39, 65-66 (2d Cir., 2004).

\textsuperscript{550} Id. at 47 (stating that district court ordered defendants arrested if they entered United States because of their contempt of prior court orders); see also Motorola Credit Corp. v. Uzan, 274 F. Supp. 2d 481, 582 (S.D.N.Y. 2004) (holding that unless defendants purge their contempt of prior orders, they will be confined until they comply with directives of court). But see Motorola Credit Corp v. Uzan, 2004 U.S. APP. LEXIS 22057 at *1-3 (2d Cir. 2004) (denying plaintiff's motion to dismiss defendants' appeals on ground that defendants were not "fugitives" who abandoned jurisdiction after an adverse judgment).

procedure when faced with any obstacle to its enforcement.\textsuperscript{552} One potential consequence of failing to erect such obstacles to enforcement of \textit{Mareva} orders is that “non-frustrating” states may see a run on the assets of their country.\textsuperscript{553} Between freezing the assets in a country, like the United States, who does not impede the enforcement of a \textit{Mareva} order and the assets in another country, like Turkey or Switzerland, which does, the choice is easy. Failure to act, in this arena, is consequently not a preferable option.\textsuperscript{554}

at 29 (noting that G7 Summit of Financial Action Task Force on Money Laundering suggested that percentage or share of funds be given to foreign jurisdiction in return for cooperation in freezing order process, which would then reduce any potential inconsistent judgments by different countries); see also Bank of China v. NBM LLC (2002) 1 ALL E.R. 717 at [18] (noting that English \textit{Mareva} order doesn’t require third party to violate law of other jurisdiction, or disobey court orders from that jurisdiction).

See Johansson, \textit{supra} note 43, at 1096 (finding “courts are less willing to grant the \textit{Mareva} injunction if the consequences of the orders suggest that in-rex jurisdiction would be required”); John Rothchild, \textit{Protecting the Digital Consumer: The Limits of Cyberspace Utopianism}, 74 IND. L.J. 893, 923 (Summer, 1999) (listing difficulties of enforcing \textit{Mareva} orders such as “hiring foreign counsel to bring the \textit{Mareva} action may be very expensive; the jurisdiction where the \textit{Mareva} injunction is instituted may have bank secrecy laws that make it all but impossible to ascertain the extent of frozen funds; in cases where the \textit{Mareva} action is unsuccessful, the plaintiff may be liable for substantial damages; and even where successful, this type of action does not prevent the defendant from resuming her violative behavior after arriving at a monetary settlement”); see also Alon Seveg, \textit{Investment: When Countries Go Bust: Proposals For Debtor and Creditor Resolution}, 3 ASPER REV. INTL BUS. & TRADE L. 25, 60 (2003) (arguing “a creditor’s best strategy to attach sovereign assets would be to pursue a post-judgment order of constraint (as opposed to a pre-judgment order.”)).

See Catherine Kessedjian, \textit{First Impressions of the Transnational Rules of Civil Procedure From Paris and the Hague}, 33 TEX. INT’L L.J. 477, 483 (1998) (noting “Mareva injunctions may be useful in international litigation, it is not evident that judges in countries where such injunctions do not exist will readily make the adjustment and adopt such a procedural remedy”); Johansson, \textit{supra} note 43, at 1107 (illustrating criticism that “while the \textit{Mareva} injunction’s disclosure order adds to the injunction’s effectiveness, it might subject defendants to oppressive multiple lawsuits worldwide”); see also Fabano, \textit{supra} note 293, at 146 (discussing multiple reasons for United States to not adapt \textit{Mareva} injunction such as not wanting to “go against a strong precedent, or because the principles of due process would be offended by its adoption”).

See Alexander, \textit{supra} note 316, at 515 (positing that “the international scope of such orders will become more pronounced in the future as more and more international transactions involve debtors seeking to transfer their property and assets to different jurisdictions to avoid creditor claims”); Vaughan Black, \textit{Commodifying Justice for Global Free Trade: The Proposed Hague Judgments Convention}, 38 OSGOODE HALL L.J. 237, 265 (2000) (noting that country’s decision to recognize foreign money judgments is similar to accepting foreign goods within its borders and “this problem is not in any respect a principled one, but rather a bargaining process wherein states are rational self-maximizers”); cf. Silverman & Kirshner, \textit{supra} note 242, at *24 (arguing that “U.S. courts and lawmakers should more frequently adopt what has become the norm in other common-law jurisdictions”).
VI. CONCLUSION

The final chapter of the story of the Mareva injunction is not yet written. For defendants, English or American, all indications are that it will not end well. Two overriding factors suggest that the Mareva procedure has only begun to defile and oppress defendants.555

First, the very efficient lethality of the procedure itself suggests that English judges are unlikely to abandon this powerful weapon in their attempts to effectuate international frontier justice.556 The Mareva injunction is an effective tool, to be sure. Draconian measures usually are effective tools of those who wield them.557 But, at what price are we allowing the discretion of a few to override the protections of the many? While some judges may caution restraint, few deny the Mareva injunction's effectiveness or counsel for its abandonment.558

Second, there is no demonstrable pattern of judicial restraint so necessary for this procedure to avoid becoming an abuse of the highest order.559 Nearly every self-imposed limitation placed

555 See Doak R. Bishop et. al., Strategic Options Available When Catastrophe Strikes the Major International Energy Project, 36 TEX. INT'L L.J. 635, 647 (Summer, 2001) (finding "ex parte nature, and the fact that defendants are rarely able to "discharge a Mareva order," the orders can be powerful tools in prompting defendants to settle"); Sally Lloyd-Bostock, Alternative Dispute Resolution and Civil Justice Reform: Is ADR Being Used to Paper Over Cracks? Reactions to Judge Jack Weinstein's Article, 11 OHIO ST. J. ON DISP. RESOL. 397, 402 (1996) (explaining Mareva orders "can have very harsh consequences for the defendant"); Theuer, supra note 293, at 438 (arguing "the only restraint on the courts' ability to indulge a plaintiff is the requirement that it have personal jurisdiction over the defendant").

556 The developer of another "nuclear weapon," Edward Teller, once said, "The more decisive a weapon is, the more surely it will be used ..." While he was speaking of atomic arsenals, the point is well-taken and appropriate in this context, too.

557 See Alexander, supra note 316, at 468 (commenting Mareva injunctions are extraordinary remedy and "often have a decisive effect on a case"); Bermann, supra note 287, at 568 (proposing "an order restraining a defendant from dealing with any of his assets overseas, and requiring him to disclose details of all his assets wherever located, is a draconian order"); Theuer, supra note 293, at 484 (arguing "the expansive use of equitable relief to secure future damages remedies through judicial imperialism is an infringement of a defendant's substantive rights and an affront to American principles of equity and fair-play").

558 Ironically, the only true restraint on the procedure may be the English court system itself and its ability to handle the swarm of requests that come before it. "The attraction of London could, however, soon fade if the infrastructure of our courts is not properly equipped to handle the phenomenon which they have created." Taylor, supra note 3.

559 Commentators who counsel for the acceptance of the Mareva procedure in the United States generally do so on condition that the self-imposed limitations of the English courts remain as they existed when the commentary was written. George Bermann's 1997
upon the courts' discretion has been abandoned or ignored. It has been applied to English citizens, to defendants with no assets in England, to third parties, to assets outside of England, and in aid of foreign proceedings - all once thought impermissible. Even judges, such as Lord Browne-Wilkinson, who have publicly expressed hesitation with the procedure have used and, in some cases, greatly extended the device. Indeed, the Mareva article, supra note 287, at 572-73, is an excellent example of an endorsement of the procedure, recognizing this inherent problem:

Given its close consideration of the proper international scope of Mareva injunctions, U.K. case law may be a useful source of guidance for American courts as they venture into the realm of provisional restraints on foreign assets. Although, like most exercises of discretion, the determination of how far to reach in quest of assets to secure satisfaction of a future judgment depends on the totality of the circumstances, at least some guidelines seem to have emerged from U.K. practice.

For one thing, the British courts claim to regard provisional restraints on overseas assets more favorably when the applicant asserts an actual property interest in those assets than when it merely treats them as a convenient way of securing satisfaction of a judgment. In the same vein, they seem to find the extraterritorial Mareva injunction less unattractive when the purpose of the U.K. action is to adjudicate the merits of a claim, rather than merely to enforce a judgment rendered by a foreign court or international arbitral tribunal.

However sensible these (and other) guidelines may be, it is nevertheless unlikely that they will ever serve as more than rules of thumb for the exercise of judicial discretion. Bermann, supra note 287, at 572-73.

Subsequent cases, as shown above, have demonstrated that Professor Bermann's suspicions in the last sentence were not unfounded. Professor Wasserman's 1992 article, supra note 254, suffers still more from overly optimistic assumptions about judicial self-restraint.

See Fabano, supra note 293, at 139 (arguing "it is safe to say that as long as the basis for granting the injunction is reasonable, it will be granted and applied to all types of property regardless of the cause of action or debt owed to the plaintiff"); William, Q.C. Tetley, Arrest, Attachment, and Related Maritime Law Procedures, 73 TUL. L. REV. 1895, 1956 (1999) (noting "an action in rem plaintiff petitioner has been held entitled to an arrest warrant as of right, whereas the Mareva injunction petitioner must depend on judicial discretion"); Theuer, supra note 293, at 432 (recalling "the Mareva injunction had been initially confined to cases in which the defendant was not resident in the jurisdiction but had property in the jurisdiction, and the injunction only restrained removal of property from the jurisdiction, these limitations had been systematically relaxed by subsequent cases").

See Johansson, supra note 43, at 1095 (noting "initially, the Mareva injunction reached assets only within the courts' jurisdiction and applied only to foreign defendants engaged in transnational business. However, the Mareva injunction has evolved and now reaches assets located worldwide"); Theuer, supra note 293, at 437 (concluding "despite the admonitions of the courts that a Mareva injunction is an extraordinary remedy, practice belies the rarity of such relief"); Zicherman, supra note 297, at 675 (noting "the Mareva injunction does not merely regulate the actions of the defendant-owner; it also controls the behavior of third parties and prevents them from dissipating the defendant's enjoined assets").

See Bundock, supra note 25, at 496 (predicting that "given the safeguards now incorporated in the order it could well be argued that it is consonant with this approach to the exercise of the court's discretion that such orders should more readily be granted in future"); Peter Hutchesson, Derby & Co Ltd. and Others vs. Weldon and Others, 138 NEW L.J. 6385, 339 (December, 1988) (quoting Lord Browne-Wilkinson as finding it proper to grant "Mareva injunction pending trial over assets worldwide even where the relief
injunction's entire development demonstrates an astonishing failure to heed the warning of Montesquieu who said in 1742, "There is no crueler tyranny than that which is perpetrated under the shield of law and in the name of justice." 563

Erecting obstacles to frustrate the oppressive effects of the *Mareva* injunction in the United States may bruise a few national egos and may require a comprehensive re-thinking of America's approach toward international law and the judgments of foreign nations. 564 Failing to do so, however, is not an acceptable alternative solution, and any extended delay in the face of the ever-quickening pace of *Mareva*-type remedies places American assets and businesses at severe risk. 565 It would be the height of immodesty to compare this Note with Paul Revere's ride in the Massachusetts countryside to warn the colonists. But, warnings need only one voice; revolutions require many.

sought is against a non-resident company which has no assets within the jurisdiction of the English court); Lenon, supra note 137, at 1234 (positing expansion of court's power to grant *Mareva* injunctions in foreign proceedings, among other examples, are "latest in the series of incremental extensions which have characterized the history of the *Mareva* injunction since its emergence in 1975").

563 CHARLES-LOUIS DE SECONDAT, BARON OF MONTESQUIEU, THE SPIRIT OF THE LAWS (1748). One American take on this theory is that of President John Adams, who said, "The moment the idea is admitted into society that property is not as sacred as the law of God, and that there is not a force of law and public justice to protect it, anarchy and tyranny commence."

564 See Alexander, supra note 482 (finding "Hoyle's discussion of the Worldwide *Mareva* is particularly important for international law practitioners who must consider the merits and the costs of such applications in foreign jurisdictions"); Fabano, supra note 293, at 147 (arguing "a plaintiff dealing with a defendant in the international business arena needs to feel that there is a sure and effective remedy for him in the event that he has to initiate a lawsuit. As we have seen from the analysis of the American legal system, the plaintiff will face more uncertainty than peace of mind"); Theuer, supra note 293, at 421 (noting "American legal commentators have generally approved this development and urged the adoption of similar measures by American courts. Furthermore, at least one U.S. circuit court has expressed admiration for the English courts' success in this field").

565 See Alexander, supra note 554, at 493 (noting "the use of the *Mareva* injunction and other *ex parte* orders had become quite common, as hundreds of orders were being made each year with few applications being rejected"); Johansson, supra note 43, at 1096 (suggesting "without expanding the courts' jurisdiction *per se*, the injunction effectively extends the courts' geographic reach. In short, court orders apply to defendants wherever they are"); Theuer, supra note 293, at 484 (predicting "hydraulic pressure of those claiming a source of funds against those seeking to retain that source will doubtless seek release elsewhere, either through Congress or a new "nuclear weapon of law".

