

AMERICAN BAR ASSOCIATION
SECTION OF INTERNATIONAL LAW

REPORT TO THE SECTION COUNCIL

I. INTRODUCTION

Various common-law jurisdictions provide a remedy for a freezing order or its equivalent in civil lawsuits to recover monies, with the purpose of curtailing the defendant's ability to dispose of property that might render satisfaction of a money judgment, which freezing orders are commonly referred to as “Mareva” injunctions or orders (“Mareva Injunctions”). The United States Supreme Court considered and rejected application of Mareva Injunctions in Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund Inc., 527 U.S. 308 (1999) under the Federal Rules of Civil Procedure. Mareva Injunctions or orders are provisional remedies that are more appropriately the subject of state law, yet there is inconsistency among jurisdictions as to the interplay of pre-judgment attachment, freezing orders and equivalent remedies, as well as the reach of Grupo Mexicano.

Consequently, there is a need to codify the remedy of Mareva Injunctions, and inasmuch as Mareva Injunctions fall within the province of state law, it is appropriate that uniform legislation be proposed to address the issue.

As a practical matter, a money judgment on a legal claim is less than worthless if there are no assets to attach, after taking into account the cost of obtaining the judgment. There are various practical and legal issues involved in seeking to locate and possibly preserve assets prior to judgment in an arbitration or court proceeding, particularly in the context of fraudulent activity by defendant. However, it is important to note that the need for such a freezing order may arise in non-fraudulent contexts as well, where the debtor may be about to dispose of assets in the normal course of its business, or otherwise transparently; should an injunction issue simply to preserve a pool of assets to collect in the event of judgment? Remedies of pre-judgment attachment and fraudulent transfer or conveyance do not cover all such circumstances in which the relief may be appropriate, nor does a traditional preliminary injunction analysis necessarily provide appropriate standards. The issue arises domestically in terms of seeking an order or injunction to prevent dissipation of assets in a domestic suit, as well as in consideration of enforcement of a foreign-issued Mareva Injunction in aid of the foreign proceeding, whether from another state or another country. Mareva Injunctions are essentially injunctions against the transfer of assets to preserve a sufficient asset base for collection once judgment is obtained. An uniform model law would also address the enforcement of such an injunction issued in one state by the courts of a sister state.

For purposes of the discussion, the terms “freezing order” and “Mareva Injunction” are used interchangeably.

Three issues need to be resolved:

1. Is there presently a remedy as a matter of state law to accommodate the prevention of dissipation of assets in a suit based on legal, as opposed to equitable, claims, where no specific contract right exists?
2. Would a foreign (state or country) Mareva Injunction be recognized and enforced uniformly in a jurisdiction that did not explicitly recognize it?
3. What should a federal court do when confronted with an express state law permitting a Mareva Injunction in light of Grupo Mexicano, as discussed below?

It is the recommendation of the Section of International Law that the problem is best resolved at the state level, through a proposed uniform law, and that forms the basis of this Report and Recommendation. This does not rule out a concomitant federal statutory remedy to address Grupo Mexicano, but the focus here is on state law.

II. BACKGROUND

The Current State of United States Law

A. Federalism

Since in the United States the provision of pre-judgment equitable relief in civil and commercial cases is today primarily a function of state (rather than federal) law, it is appropriate to address this problem through the mechanism of a proposed model (or uniform) law for adoption by the states, commonwealths and territories, even though there seems to be little question that Congress could authorize the federal courts to issue such orders and expressly resolve the questions of Congressional intent that underlay the Grupo Mexicano decision.

B. Federal Procedure

The remedy of injunction should be distinguished from an attachment, although in some cases it may effectively accomplish the same purpose of preserving assets. Injunctions in federal court are governed by Fed. Rule Civ. Proc. 65. Rule 64 relates to seizure of property for purposes of satisfying a judgment. Rule 65 governs the use of temporary restraining orders, preliminary injunctions and injunctions, and provides the mechanism for ordering a party to do or refrain from doing something. Proceeding under Rule 64, however, does not preclude seeking injunctive relief as well. Sequa Capital Corp. v. Nave, 921 F. Supp. 1072 (S.D.N.Y. 1996).

However, in 1999, the Supreme Court spoke to the issue directly and rejected the use of such a freezing order in the form of an anti-dissipating injunction in the United States. In Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308, 333 (1999), the Court held that “[b]ecause such a remedy was historically unavailable from a court of equity, we hold that the District Court had no authority to

issue a preliminary injunction preventing petitioners from disposing of their assets pending adjudication of respondents' contract claim for money damages.”

With the federal practice so circumscribed, the issue turns on state law. That is now addressed.

C. State Pre-Judgment Attachment Generally

State pre-judgment attachment statutes generally set forth particular circumstances in which one might attempt such a remedy, either by statute or rule. There is a wide variety in the permitted factors and considerations set forth. The Mareva Task Force of the International Litigation Committee of the Section has compiled an extensive and detailed survey of the fifty states (see Appendix A) that identifies both each state’s pre-judgment attachment rules and case law response, if any, to the Mareva Injunction situation. What is lacking is not only uniformity of standards, but uniformity of approach and a consistent analytical framework. A uniform state law explicitly identifying the remedy of a freezing order, under defined circumstances, would remove ambiguity and not force courts to look to inapplicable criteria under presently enacted pre-judgment attachment statutes or a more amorphous analysis under general standards applicable to preliminary injunctions.

D. Enforcement of Foreign Injunctions

A court may issue a freezing order that precludes transfer of assets anywhere in the world, and to the extent that the court has personal jurisdiction over the enjoined party, it retains the power to enforce that order in its own jurisdiction. However, holding a party in contempt or otherwise penalizing it in the context of the domestic litigation may not always suffice to recover assets transferred in another jurisdiction. Enforcement in a foreign jurisdiction will require assistance of the local courts. To the extent that a freezing order is issued in a foreign (non-U.S.) jurisdiction, and enforcement or assistance sought in the United States, such is presently left to the courts. A uniform law relating to the remedy of freezing orders should also address enforcement in the United States of foreign-issued freezing orders.

A Mareva Injunction, freezing order or its equivalent is generally a provisional or interim measure, and not necessarily final. With regard to final monetary judgments, on the other hand, at least thirty one states and the District of Columbia have adopted the Foreign Country Money Judgments Recognition Act (“FCMJRA”) in various embodiments from its original postulation and its more recent modified form as put forward by the National Conference of Commissioners on Uniform State Laws (“NCCUSL”). The basic premise of the FCMJRA is to provide for enforcing money judgments consistent with the majority approach in the United States, with regard to certain money judgments rendered in foreign countries. Generally speaking, the “money judgment” is any judgment of such state granting or denying recovery of a sum of money, other than for taxes, a fine or other penalty, or other than a judgment for support in matrimonial or family matters. Since that statute does not apply to equitable orders or

judgments, and in the absence of a relevant treaty, American courts will look to general principles of comity. Courts will generally apply the law of the state where recognition is sought. See, e.g., de la Mata v. American Life Insurance Company, 771 F. Supp. 1375, 1381 (D. Del. 1991).

With regard to money judgments issued within American states, the Uniform Foreign Money-Judgments Recognition Act (“UFMJRA”) in its basic form also renders itself applicable to such foreign judgments that are “final and conclusive and enforceable,” leading to the same concerns about “finality” when considering enforcement and recognition in another jurisdiction of a Mareva Injunction issued by a sister state court. In the domestic context, this may be less of an issue than internationally.

The Supreme Court recently re-emphasized the “general rule” in the United States that “judgments of foreign courts awarding injunctive relief, even as to private parties, let alone sovereign states, ‘are not generally entitled to enforcement,’” and cited to “2 Restatement (Third) of Foreign Relations Law of the United States” § 481, Comment b at 595. Medellin v. Texas, --U.S.--, 128 S. Ct. 1346, 1366-67 (2008).

Section 481 of the Restatement (3rd) of the Foreign Relations Law of the United States (“FRL”) applies to recognition and enforcement of foreign judgments. As noted above, in the case of certain monetary judgments, American jurisdictions that have adopted the FCMJRA will follow that. That act, however, does not preclude enforcement or recognition of judgments not falling within the act’s definitions, so courts would be left to such authority as the FRL. As the Medellin majority noted, Comment b does say that “judgments granting injunctions, declaring rights or determining status, and judgments arising from attachments of property, are not generally entitled to enforcement,” but what the Supreme Court majority failed to add is the second part of the sentence, namely, “but may be entitled to recognition under this and the following sections.”

Consequently, a foreign injunction contained in a judgment may be entitled to recognition (which could include enforcement or applicability in the context of issue preclusion) as set forth in the FRL. Comment c of Section 481 of the FRL provides for recognition in the same general manner as recognition of a sister state judgment, and points to Restatement (Second), Judgments §§18-20 as well as Restatement (Second) Conflict of Laws (“CL”) § 98. Section 98 is relevant here and provides an alternative basis for recognition of foreign injunctions; it states that “a valid judgment rendered in a foreign nation after a fair trial in a contested proceeding will be recognized in the United States so far as the immediate parties and the underlying claim are concerned.

FRL § 482 sets forth the grounds for non-recognition of foreign judgments, providing mandatory non-recognition where the judgment was rendered in a partial judicial system or where the court lacked personal jurisdiction. Discretionary non-recognition is permitted where the court lacked subject matter jurisdiction, the defendant lacked notice, the judgment was obtained by fraud, the claim or judgment was contrary to

American or the particular state's public policy, or the parties had agreed to submit the controversy to another forum.

It is also relevant to consider the issue in the purely domestic context. Section 102 of CL also has an applicable section titled "Enforcement of Judgment Ordering or Enjoining Act," and provides that "[a] valid judgment that orders the doing of an act other than the payment of money, or that enjoins the doing of an act, may be enforced, or be the subject of remedies, in other states." It should be noted that CL also refers to "states" as states of the United States, the District of Columbia, Puerto Rico, Guam and the Virgin Island. CL § 3. (The rules expressed in the CL can apply in international contexts. See CL § 10 ("The rules in the Restatement of this Subject apply to cases with elements in one or more States of the United States and are generally applicable to cases with elements in one or more foreign nations. There may, however, be factors in a particular international case which call for a result different from that which would be reached in an interstate case.")). The provisions of Section 102, though, are limited to a particular kind of injunction: "Common examples of judgments that fall within the scope of the present rule are judgments that order the defendant specifically to perform a contract or to convey land or a chattel . . . The rule does not apply to equity decrees that are not by their nature enforceable by action. Belonging to this category are decrees that create, affect or destroy a status, such as decrees of divorce, annulment and adoption." CL § 102, Comment a.

There is a line of cases which takes a broad view of enforcement and recognition of non-final injunctive orders. See Pilkington Brothers P.L.C. v. AFG Industries Inc., 581 F. Supp. 1039 (D. Del. 1984); Cardenas v. de Solis, 570 So. 2d 996, 998 (Fl. 3rd Dist. 1990). However, not all courts agree. See, e.g., Global Royalties, Ltd. v. Xcentric Ventures, LLC, 2007 U.S. Dist. Lexis 77551 (D. Ariz. 2007) ("Arizona courts have relied on two different Restatements that address the enforcement of international judgments," referencing FRL and CL [additional citations omitted]). As an example of an area in which an American court might refuse to enforce a foreign injunction on the grounds of public policy, see Yahoo! Inc. v. La Ligue Centre Le Racisme et L'Antisemitisme, 433 F.3d 1199 (9th Cir. 2006).

Consequently, a lack of uniformity can lead to inconsistent results regarding recognition and enforcement of both domestic and foreign injunctions. Courts are presently grappling with this situation in a variety of contexts, without necessarily a single and coherent analytical framework. The establishment of a uniform state law would resolve the issue in the context of the Mareva Injunction or freezing order. It may be that a broader uniform law is undertaken to create uniformity in analogous fashion to the FCMJRA but such is not the focus of this report.

The Mareva Injunction

A. Background

The type of remedy in the form of freezing order under discussion has its genesis in England. In 1975 an English court granted an injunction against the transfer or dissipation of assets beyond the jurisdiction of the court of a defendant, prior to judgment, in what has come to be referred to as a “Mareva injunction.” See Mareva Compania Naviera S.A. v. Int’l Bulkcarriers S.A., 2 Lloyd’s Rep. 509 (1975). The first employment of this injunction was actually in Nippon Yusen Kaisha v Karageorgis, [1975] WLR 1093 (CCA). It is primarily recognized in certain common law jurisdictions, such as Australia, Canada, Hong Kong, Ireland, Jersey and New Zealand. Malet-Deraedt, Fleur. “The Siskina Is Listing. Fire The Last Salvo” Research On Whether Other Countries Should Adopt The Mareva Injunction In Aid Of Foreign Proceedings, The New Zealand Postgraduate Law E-Journal Issue 2 / 2005 ([http://nzpostgraduatelawejournal.auckland.ac.nz/PDF%20Articles/Issue%202%20\(2005\)/7%20Fleur%27s%20Final.pdf](http://nzpostgraduatelawejournal.auckland.ac.nz/PDF%20Articles/Issue%202%20(2005)/7%20Fleur%27s%20Final.pdf))[accessed July 15, 2008].

The injunction has been codified in the United Kingdom and states:

37. — (1) The High Court may by order (whether interlocutory or final) grant an injunction or appoint a receiver in all cases in which it appears to the court to be just and convenient to do so.

* * *

(3) The power of the High Court under subsection (1) to grant an interlocutory injunction restraining a party to any proceedings from removing from the jurisdiction of the High Court, or otherwise dealing with, assets located within that jurisdiction shall be exercisable in cases where that party is, as well as in cases where he is not, domiciled, resident or present within that jurisdiction. Supreme Court Act 1981 (c. 54).

This has been extended to give the English court authority in certain non-UK jurisdictions. Civil Jurisdiction and Judgments Act 1982, section 25(1).

B. Policy Considerations

In an article appearing in 2004 in the University of Western Sidney Law Review titled “Mareva after Thirty Years,” author C.M. Hetherington noted the following (footnotes omitted):

Thirty years later the doctrinal debate is far from exhausted. It remains uncertain on what, if any, proper doctrinal basis the Mareva rests. It is unclear whether the Mareva represents a development of equitable jurisdiction, an exercise of the superior courts’ inherent jurisdiction to prevent abuse of process, a statutory remedy, a special exception to the general law, or a doctrinal heresy that is here to stay. Notwithstanding all these uncertainties, in practical terms, the Mareva has gone from strength to strength. It has become a commonplace remedy and indeed an unashamedly

expansive part of the courts' 'accepted armoury'. In addition, on the world stage the Mareva provides a useful form of interim urgent transnational relief, valued outside as well as inside the common law world, for its superior flexibility and aptitude to meet emerging needs before global treaties and conventions have had time to develop, and with apparent potential to fulfil a greater future role supporting the administration of justice internationally.

A significant amount of the discussion has been on the legal authority for Mareva Injunctions. Nonetheless, they have become an established part of common law jurisprudence. The policy behind them has its roots in equity, if nothing more complex than every wrong should have a remedy. The proposal for a uniform law recognizes the reality (and the confusion) in the current United States legal landscape and purports a solution.

CONCLUSION

A uniform law expressly recognizing freezing orders, and the ability to enforce foreign-issued freezing orders both in a domestic context and in the context of recognizing foreign state and foreign country non-final freezing orders, provides a necessary remedy, removes uncertainty and establishes consistency of approach. This facilitates cross-border enforcement, both domestically and of foreign judgments, while at the same time ensuring due process. As such freezing orders can accommodate the issuance of a bond or other security, the defendant's rights remain protected.

Respectfully submitted,

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