

PRIVATE INTERNATIONAL LAW ASPECTS OF FREEZING INJUNCTIONS

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Abstract

The Commercial Court in London is frequently dealing with applications for a freezing injunction. The vast majority of academic literature and court decisions directly or indirectly adopt the view that freezing injunctions have stood the test of time and are so frequently granted in commercial litigation that there is no need for any serious concern about their scope, let alone the need to identify and question the legitimacy of the justifications for their existence. Contrary to the traditional view, this thesis has identified equipage equality as the primary function of freezing injunctions. This recognition that freezing injunctions seek to establish a level-playing field in litigation has led the author to conclude that the current scope of the relief is excessively claimant-friendly and involves illegitimate interference with the sovereignty of foreign states. Taking into account the tactical reasons for seeking a freezing injunction, the author challenges the current interpretation of the substantive preconditions for granting the relief. Their current interpretation does not strike a fair balance between the interests of the parties. The author argues that these concerns are exacerbated by the current international scope of freezing injunctions due to the insufficient regard for the principles of public international law. The encroachment on the jurisdiction of foreign states undermines equipage equality by enabling claimants to make multiple applications for interim relief in respect of the same assets. In the light of the above, the author has sought to make a range of proposals to restrict the scope of freezing injunctions with the aim of bringing the relief in line with equipage equality.

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Chapter 1: Introduction

1.1 The possible reasons for seeking a freezing injunction

The Commercial Court in London is frequently dealing with applications for a freezing injunction. The conduct of the defendant before the issue of proceedings may have given the claimant some negative indication about the defendant's future ability or willingness to meet any judgment in favour of the claimant. In such circumstances the claimant would be concerned to eliminate (or at least minimise) the risk of the defendant dealing with his assets in such a way as to create any difficulties (or even make it impossible) to enforce a potential judgment. The purpose of a freezing injunction is usually stated in broad terms as being to preserve any assets which might eventually be used to enforce a potential judgment against a defendant.¹ The actual reasons for an application for a freezing injunction may well go much further than ensuring the ability to enforce a future judgment. The claimant's underlying motive, at least in the context of commercial litigation, may well be strategic in nature with the aim of achieving settlement and avoiding litigation on the substantive claim. In other words, the claimant would not necessarily be looking far ahead to enforcement. A tactically astute claimant may wish to put pressure on the defendant with the aim of negotiating a favourable settlement. The pressure is partly financial in that the defendant's cash flow may be restricted and the defendant might have to incur significant legal costs to lift the injunction.² In *Cheltenham & Gloucester Building Society v Ricketts*,³ the Court of Appeal recognised that a freezing injunction may have the effect of ruining a thriving business and in that context it was described as one of the "nuclear weapons" in the courts' armoury. The pressure is also in the form of a risk of damage to the defendant's commercial reputation.⁴ Instead of settling a claim on an unfavourable basis, the defendant may choose to relieve some of the pressure by paying money into court to lift the injunction with the practical effect that the claimant gets security for his claim. In *Energy Venture Partners v Malabu*,⁵ the Court of Appeal highlighted the fact that "in many cases, of which the present is probably one, a Freezing Order has the practical if not theoretical effect of giving security to the Claimant for its claim".⁶ Indeed, apart from settlement, a claimant's top priority (and the underlying reason for seeking a freezing injunction) would be to get security at least up to the amount of the claim. Without any security, the claimant may be in a position where it simply does not make financial sense to invest in costly litigation, regardless of the strength of its own case. As explained by Lord Bingham, freezing orders "are not granted to give a claimant advance security for his claim, although they may have that effect".⁷ A further possible reason for seeking a freezing injunction may be to enable the claimant to obtain information about the location

¹ *Fourie v Le Roux* [2007] 1 WLR 320, [2]-[3].

² On the general implications of litigation risk, see Molot J., 'A Market in Litigation Risk' (2009) 76 *Uni. Chi. L. Rev.* 367; Fentiman R., *International Commercial Litigation* (OUP, 2nd edn, 2015).

³ [1993] 1 WLR 1545.

⁴ See, for example, the allegations in *Bloomsbury International v Holyoake* [2010] EWHC 1150.

⁵ *Energy Venture Partners Ltd v Malabu Oil and Gas Ltd* [2014] EWCA Civ 1295.

⁶ *Ibid*, [52] per Tomlinson LJ.

⁷ *Fourie v Le Roux* [2007] 1 WLR 320.

and value of the defendant's assets by means of an ancillary disclosure order.⁸ This is particularly common in cases involving assets in multiple jurisdictions.⁹

1.2 A short summary of the key requirements for obtaining a freezing injunction

By way of a brief introduction, the key requirements for obtaining a freezing injunction can be briefly summarised in broad terms.¹⁰ The first requirement relates to the strength of the claimant's case on the merits and the threshold is that of a good arguable case.¹¹ The second requirement relates to the conduct of the defendant and the threshold is a real risk of dissipation of the assets that would be amenable to execution.¹² In addition, the claimant is required to give a cross-undertaking in damages to the court so as to cater for certain losses that may arise as a result of the injunction. As a further safeguard, the claimant has a duty of full and frank disclosure to the court on an *ex parte* application for relief. If the preceding requirements are satisfied, the court may grant an injunction if, in the view of the court, it is "just and convenient" to do so.¹³ It can be seen from this brief summary that the requirements for obtaining a freezing injunction are materially different to the requirements applicable to other types of injunctive relief. The latter commonly involve balancing the prejudice that would be caused by the injunction in accordance with the approach prescribed by *American Cyanamid Co v Ethicon Ltd*.¹⁴

1.3 The key elements of the traditional view of freezing injunctions

The vast majority of academic literature and court decisions directly or indirectly adopt the view that freezing injunctions, whether domestic, worldwide, pre-judgment or post-judgment, have stood the test of time and are so frequently used in commercial litigation that there is no need for any serious concern about their scope let alone the need to identify and question the legitimacy of the justifications for their existence. The term scope is here being used to refer to what the author would see as two aspects of scope of freezing injunctions. First, the substantive circumstances in which a freezing injunction is available such as its availability in support of both proprietary and non-proprietary claims (the author will refer to this as the 'substantive scope' of freezing injunctions). Second, the availability of a freezing injunction in cases involving one or more foreign elements, such as the use of freezing injunctions to restrain a foreign defendant from dissipating any assets located abroad (hereinafter the 'international scope'). Furthermore, according to the widely held view, the freezing injunction is and has been in perfectly good working order and therefore no serious questions should be asked about issues such as their fairness to defendants. Indeed, it is not difficult to understand that there is no need to fix something that, at least on the face of it, does not appear to cause any injustice to defendants and is clearly a popular weapon with the claimants. The courts

⁸ See English Civil Procedure Rules Part 25 rule 25.1(1)(g). There is no free-standing right to obtain a pre-judgment disclosure order.

⁹ See, for example, *Republic of Haiti v Duvalier* [1990] 1 Q.B. 202.

¹⁰ The requirements outlined in this paragraph do not represent an exhaustive list and apply to this author's category of non-proprietary pre-judgment freezing injunctions. These will be analysed in detail in Part I of this thesis. It should be noted at this stage that the requirements are different in relation to other categories of freezing injunctions (e.g. in relation to what the author will refer to as 'proprietary freezing injunctions').

¹¹ *The Niedersachsen* [1983] 1 WLR 1412.

¹² *Ibid*.

¹³ Section 37(1) of the Senior Courts Act 1981.

¹⁴ [1975] A.C. 396. This is usually referred to as the "normal test for the grant of an interim injunction" – see *Yossifoff v Donnerstein* [2015] EWHC 3357, [42].

and the commentators have been keen to increase the options at the disposal of the claimant by expanding the substantive and international scope of injunctions – one of the examples being the development and gradual expansion of the so called *Chabra* injunctions including their use in cases involving foreign elements.¹⁵ In the author's view, one of the driving forces behind this desire to expand the scope of freezing injunctions is the excessive emphasis on a claimant-orientated view of the purpose of freezing injunctions. Part of this claimant-orientated view is the perception that a freezing injunction is simply a weapon against unscrupulous defendants and that the courts should assist claimants in removing any obstacles to the enforcement of judgments. Perhaps the only notable expressions of concern in the courts have related to the adequacy of protection for third parties from the effects of worldwide freezing injunctions.¹⁶ Particularly noticeable is the low frequency of judicial assessments of the compatibility of worldwide freezing injunctions with the principle of comity, especially when compared to the volume of debate and criticism of anti-suit injunctions on the same ground.¹⁷ The absence of concerns about comity is justified in simple terms: freezing injunctions are not regarded as extraterritorial because they operate *in personam* and therefore, under the traditional view, there is no doubt whatsoever that English courts can grant freezing injunctions in respect of assets located abroad,¹⁸ including in cases involving injunctions collateral to foreign substantive proceedings.¹⁹ The power to grant freezing injunctions in respect of assets located abroad is treated as 'black-letter law': its existence is accepted without questioning it at all. For the same reasons, worldwide freezing injunctions are not regarded as interfering with the sovereignty of foreign states.²⁰

1.4 Challenging the existing scope of freezing injunctions

This thesis will challenge the current substantive and international scope of freezing injunctions by demonstrating that the key elements of the traditional view are theoretically flawed. The author will seek to show that instead of focusing their energy on removing every possible obstacle to enforcement, the courts should take a different perspective by recognising that the principle of equipage equality is the underlying foundation of freezing injunctions.²¹ The principle of equipage equality is concerned with ensuring a level-playing field in litigation. The author's primary concern is that the existing scope of freezing injunctions is excessively claimant-friendly and inconsistent with the need for a level-playing field in litigation (whether domestic or international). Through the use of freezing injunctions, claimants can easily take advantage of financially vulnerable defendants by inflating the costs of litigation at an early stage of the proceedings. For this reason, it is crucial to impose restrictions on the existing scope of this relief to prevent potential unfairness to defendants. The author will argue that the current substantive preconditions are inconsistent with equipage equality for several reasons.²² For example, claimants can exploit the uncertainty in this field: the application of the preconditions to the facts of a given case is often difficult to predict and they are

¹⁵ For the analysis of the expansion of substantive scope in *Chabra* cases, see chapter 6 of this thesis.

¹⁶ See, inter alia, *Babanaft v Bassatne* [1990] Ch 13.

¹⁷ On anti-suit injunctions and comity see generally Raphael T., *The Anti-Suit Injunction* (OUP, 2010), chapter 1; Fentiman (2015), 16.111.

¹⁸ This is confirmed by the English Civil Procedure Rules ('CPR') rule 25.1(1)(f)(ii).

¹⁹ See, for example, *Credit Suisse v Cuoghi* [1998] Q.B. 818.

²⁰ The term 'worldwide freezing injunctions' will be used to refer to all freezing injunctions which extend to assets located abroad.

²¹ See chapter 7 of this thesis.

²² See chapter 8.

open to different interpretations. As for the international scope of freezing injunctions, the author will argue that the current jurisdictional preconditions for freezing injunctions are incompatible with the functions of the rules of jurisdiction in private international law.²³ The root of this problem is that the current jurisdictional preconditions are based on a narrow view that principles of public international law do not have any impact on the limits of jurisdiction in civil litigation. The courts need to reconsider the international scope of freezing injunctions by taking into account the international systemic perspective on the purpose of private international law rules. The latter perspective requires a multilateral and horizontal approach to the existence of jurisdiction as opposed to the unilateral and vertical approach under the current regime.²⁴ Restrictions on the international scope of freezing injunctions are urgently required in order to ensure a level-playing field in international litigation.²⁵ Under the current jurisdictional preconditions, financially strong claimants are able to make multiple applications for freezing injunctions in respect of the same assets. Moreover, another aspect of potential unfairness to defendants is that the current jurisdictional preconditions lead to the increased risk of wrongfully granted injunctions.²⁶

1.5 An overview of concerns about the substantive scope of the current regime

Due to the importance of the topic of this thesis for parties to international commercial transactions and their legal advisers, hypothetical examples will be used to highlight a number of elements of the current English legal framework for freezing injunctions which generate concerns. It should become apparent that this area of the law is worth exploring in more detail.

Example 1: An English company intended to commence substantive proceedings in the Commercial Court for breach of contract against another English company. The claimant made an *ex parte* application for a freezing injunction. The court first examined whether there was a good arguable case and a real risk of dissipation. The claimant gave a cross-undertaking in damages but the court refused to make an order for the claimant to fortify its cross-undertaking. Having satisfied both requirements, the injunction was granted by the English court. In the substantive proceedings the defendant was successful but ultimately unable to recover all of his losses due to the claimant's financial position.

Example 2: The claimant intends to bring two different types of claims against the defendant both of which arise out of their failed joint ventures. The first claim is for a breach of contract. The second is for a breach of fiduciary duty. In accordance with advice, the claimant made two interlocutory applications. The first was for a freezing injunction in support of the monetary claim. The second application was for a proprietary freezing injunction in support of a proprietary claim. Only the second application was successful.

²³ See chapters 14 and 15.

²⁴ See chapter 13 for analysis of the theoretical foundations of jurisdiction. This thesis will not analyse the consistency of jurisdictional theories with the current jurisdictional preconditions for freezing injunctions in support of foreign proceedings in a European Union Member State. This is primarily because, in the author's view, the rules of jurisdiction in Regulation (EU) 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ('Brussels I Recast Regulation') are not unilateral and vertical as the common law rules of jurisdiction. The focus will be on the residual common law rules of jurisdiction.

²⁵ For the author's proposals, see chapter 17. The counter-arguments to the author's proposals will be examined in chapter 18.

²⁶ See chapter 15, section 15.5.

Example 3: It is common ground that the claimant has a good arguable case on the merits. However, at the *inter partes* hearing the defendant disputes the allegation that there is a real risk of dissipation. The court rules in favour of the claimant placing emphasis on the ease with which the defendant may take advantage of its elaborate structure to place the assets out of the court's reach.

A concern common to all three of the above examples is that it is not immediately apparent why the claimant should be allowed to apply for and obtain any asset preservation relief at all without a prior judgment against the defendant? Before the issue of proceedings a claimant may have no more than mere allegations against a defendant. The strength of the allegations may not become apparent until a much later stage (e.g. after disclosure), or in some cases, until the actual trial. In the light of these challenges facing the court in assessing the strength of the claimant's case, it may be possible to argue that it is inappropriate for any court to grant a freezing injunction before judgment. These challenges are evident from example 1 where the defendant was successful at trial even though the claimant managed to show a good arguable case at the time of the application for a freezing injunction. In other areas of the law involving questions of private international law, the standard of a good arguable case has proved problematic and subject to academic criticism.²⁷ The uncertainty surrounding the application of the standard of a good arguable case is partly due to the constraints of the interlocutory process. As freezing order applications are most commonly dealt with at the interlocutory stage,²⁸ similar uncertainties with the good arguable case test are possible. As explained by the Court of Appeal in *Derby v Weldon*:

"on an application for an interim injunction, the court should not attempt to resolve critical disputed questions of fact or difficult points of law on which the claim of either party may ultimately depend, particularly where the point of law turns on fine questions of fact which are in dispute or are presently obscure"²⁹

With regards to example 2, should the legal basis of the substantive claim against the defendant matter for the purposes of a freezing injunction? It can be seen from example 2 above that the court had greater willingness to grant a freezing injunction in support of the proprietary claim. Where the substantive claim is for damages for breach of contract, one may feel that the claimant had made a bad bargain and that equity should not intervene by allowing the claimant to obtain a freezing injunction at all. One of the ways the claimant could have protected itself and avoided the need for an injunction would have been to negotiate a guarantee from a third party. It is very common to see references to guarantees in charterparty disputes before the Commercial Court.³⁰ It should be noted that both *The Mareva*³¹ and *Karageorgis*,³² the two cases credited with the creation of the modern day freezing injunction, involved disputes between the shipowners and the charterers about unpaid

²⁷ Rogerson P., 'Problems of the Applicable Law of the Contract in Common Law Jurisdiction: the Good Arguable Case' (2013) JPIL 387.

²⁸ The terms 'freezing injunction' and 'freezing order' will be used interchangeably in this thesis.

²⁹ *Derby v Weldon* [1990] Ch 48, 58F-G, 63G-H.

³⁰ See, inter alia, *Star Reefers Pool Inc v JFC Group Co Ltd* [2012] EWCA Civ 14; *Golden Ocean Group Limited v Salgaocar Mining Industries PVT Ltd and another* [2012] EWCA Civ 265; *Caresse Navigation Ltd v Office National de L'Electricite (The Channel Ranger)* [2014] 1 Lloyd's Rep 337 (the case went to the Court of Appeal on the issue of the anti-suit injunction. The Court of Appeal upheld the decision of Males J [2015] 1 Lloyd's Rep 256).

³¹ *Mareva Compania Naviera S.A. v. International Bulkcarriers Ltd. (The Mareva)* [1980] 1 All E.R. 213. This case came before the Court of Appeal one month after *Karageorgis*.

³² *Nippon Yusen Kaisha v Karageorgis* [1975] 1 W.L.R. 1093.

hire. Alternatively, one may take a modest view that the claimant should not be able to obtain a freezing injunction in support of a non-proprietary claim as easily as in support of a proprietary claim.

With regards to example 3, what is the justification for the seemingly uncontroversial actions of the defendant being stigmatised as evidence of a real risk of dissipation of the assets? What was unjust about the defendant's conduct? Does the requirement of a real risk of dissipation under English law strike the right balance between the interests of the parties? In the author's view, the term 'dissipation' has a negative connotation and it suggests that the defendant had an *intention* to make himself judgment proof by hiding or wasting the assets. Consequently, there is a concern that the courts are taking a claimant-friendly interpretation of the threshold relating to the conduct of the defendant.

All of these are concerns relate to the *substantive scope* of freezing injunctions. These will be addressed in detail in Part I of the thesis. In order to assess whether the current rules strike a just balance between the interests of claimants and defendants, it will be necessary to examine the theoretical foundations of the rules which requires an understanding of their historical foundations.

1.6 An overview of concerns about the international scope of freezing injunctions

The other set of concerns are related to the *international scope* of freezing injunctions. These will be examined in detail in Parts II and III of this thesis. Let us start with a hypothetical case. The context is an international sale of goods on CIF terms. A dispute has arisen between the Japanese seller and the Russian buyer. The buyer is refusing to pay for the goods on the basis that the bill of lading is allegedly inconsistent with the requirements stipulated in the sale contract. The buyer's main asset is a bank account at the New York branch of an English bank. The bank account is governed by New York law. The buyer has no assets in England. Both the sale contract and the bill of lading are governed by English law. The seller is contemplating launching substantive proceedings in the Commercial Court in London. In the New York District Court, the seller's application for pre-judgment attachment is unsuccessful because of the failure to demonstrate intention to defraud. Nevertheless, the seller subsequently obtains an *ex parte*, pre-judgment worldwide freezing injunction from the English court. The seller notifies the bank's head office in London and its New York branch.

Several related concerns emerge from the hypothetical case. While thinking about the private international law aspects of the hypothetical example, we need to keep in mind the dangers associated with any freezing order: the claimant's ability to obtain the *ex parte* order from the English court is a powerful tactical device which may force the defendant to give security or settle on an unfavourable basis. In *Mobil Cerro Negro v PDV*, there was insufficient connection with England but the claimant was able to obtain an *ex parte* freezing order.³³ While the order was later discharged, the article from Reuters about the freezing order,³⁴ which preceded the *inter parte* hearing, could have caused damage to the reputation of the defendant. It could also have

³³ See *Mobil Cerro Negro Ltd v Petroleos de Venezuela SA* [2008] EWHC 532 (Comm).

³⁴ 'Courts freeze \$12 billion Venezuela assets in Exxon row', 7th February 2008, Reuters: <http://www.reuters.com/article/us-exxon-venezuela-idUSN0741426720080207>

encouraged similar applications from third parties in a similar position to that of the claimant as a result of the expropriation of assets in Venezuela.

There is an issue as to whether the application of the English rules of jurisdiction in the context of injunctive relief is unfair to defendants in that there is no mechanism to stop the claimant *from the outset* from relitigating an issue which had already been considered by a foreign court. Such relitigation could be regarded as abusive forum shopping.³⁵ Should the claimant have the opportunity to make several applications for interim relief in relation to a single asset? It should be noted that there are different requirements for obtaining interim relief in England and New York. Should claimants be free to pick and choose whichever procedural rules offer them the most favourable substantive preconditions for obtaining a freezing injunction or equivalent form of protection? For these reasons it may be possible to argue that the claimant's ability to invoke the jurisdiction of the English court in relation to interim relief is in itself unfair to the defendant. While one may point out that there is an opportunity for the defendant to discharge the injunction at the *inter parte* hearing, the author is concerned whether this opportunity provides adequate protection for the defendant. The defendant would inevitably incur legal costs in order to discharge the injunction and, if successful, he might not be able to recover his costs on indemnity basis.

Apart from unfairness to the defendant, there is a concern in the hypothetical example about the interests of foreign states. Is the English court illegitimately interfering with New York's sovereignty? The question for the court in our hypothetical case is whether a Russian defendant should be restrained from exercising his contractual rights under a bank account governed by New York law. Is this a question which the English court should be adjudicating upon simply because the substantive dispute over the sale contract is governed by English law? The available ground of jurisdiction (or 'gateway') for service of the claim form out of the jurisdiction would be that English law is the governing law of the sale contract.³⁶ If so, the consequence is concurrent jurisdiction and a possible conflict of procedural laws: under New York law, the defendant is lawfully and freely allowed to deal with his asset whereas under English law any such dealing would amount to contempt of court. Thus, by granting a worldwide freezing injunction, the English court could be seen as encroaching upon what should be New York law's exclusive regulation of the defendant's rights acquired under New York law. This brings us to a further concern that the English court is indirectly regulating the conduct of a third party bank operating outside the court's territorial jurisdiction. For this reason, in a number of cases, the English courts have introduced provisos to the standard form freezing order to protect third parties. The concern, however, is whether the current provisos ensure sufficient protection.

As Rogerson has explained, "[i]t is only where the case is going ahead in a forum...which is not anticipated by the parties and to the substantial benefit of one of them that the choice of forum could be said to be unjust...a party seeking out an unconnected forum merely to gain an advantage can be considered an abusive forum shopper".³⁷ There is no doubt that the ability to obtain a worldwide freezing order from the English court is a substantial benefit to the claimant. As for

³⁵ See Merrett L., 'Abuse of Rights and Forum Shopping', Cambridge Private Law Centre Seminar Paper, 7th March 2013, who points out, at fn.5, that "[a]ttempting to relitigate an issue that has already been decided has also been described as forum shopping" and the examples provided therein.

³⁶ CPR Practice Direction 6B, para 3.1(6)(c).

³⁷ Rogerson P., *Collier's Conflict of Laws* (CUP, 2013), pp.140-141.

anticipation, putting aside our legal spectacles for a moment, it is perhaps difficult to see how a commercial party (in our example the Russian buyer) would be able to anticipate that an application before the English court could have serious implications on its dealings with its assets located abroad. This thesis will challenge the justifications for the availability of freezing injunctions in respect of assets located abroad. With regards to the issue of whether there is a real and substantial connection with the forum, it is this author's view that the above concerns arise from a failure of the courts to make a distinction between the following two questions. First, does the court have a real and substantial connection with the substantive claim? Second, does the court have a real and substantial connection with the application for injunctive relief?

1.7 The link between the substantive scope and the international scope

What is the link between the substantive scope of freezing injunctions (Part I of the thesis) and their international scope (Parts II and III of the thesis)? It would not be possible to exercise a fully informed judgment on the international scope of freezing injunctions without first having a close look at the historical and theoretical foundations, including their functions. In private international law it is not unusual to have a close relationship between the policies and functions which underpin the rules of substantive or procedural law and their territorial scope in disputes with a foreign element. This is not surprising given the 'private' element of private international law. It will be seen from the author's analysis of the historical foundations of freezing injunctions that there are a number of different types or categories of such injunctions. Given that the international scope of freezing injunctions may be influenced by their functions,³⁸ a complete understanding of the key characteristics of each category of these orders (Part I of the thesis) constitutes an essential foundation for determining their proper international boundaries (Parts II and III of the thesis). Furthermore, the need to explain and analyse the equitable characteristics of freezing injunctions arises from the fact that their equitable nature (in particular, what appears to be the *in personam* nature of such orders) has been used by the courts as a justification for extending their substantive and international scope because of the inherent flexibility of equity.

1.8 The objectives of the thesis and the author's proposals for reform

The primary objective of this thesis is to re-examine the current position and determine the appropriate international scope of freezing injunctions. The secondary objective is to lay down the foundations for assessing the legitimacy of the current international scope of freezing injunctions by gaining a deeper understanding of their theoretical foundations. The common denominator of assessing the scope of freezing injunctions (whether substantive or international) is to determine whether the current balance of rights (and the distribution of freedom) between the claimant and the defendant is satisfactory. As we will see, the author will take the view that the current balance does not achieve a level-playing field. Consequently, the author's objective will be to provide a range of possible solutions or proposals with the aim of strengthening the equality of the parties in this area of the law.³⁹ All of the proposals involve imposing restrictions on the current scope of freezing injunctions. The proposals are based on the author's argument that freezing injunctions are *quasi-*

³⁸ This is especially the case under the so called functional approach to jurisdiction (an approach which provides some counter-arguments to the author's proposals for reform of the law in this area) – see chapter 18 of this thesis for a detailed explanation of the functional approach.

³⁹ See Part III of this thesis.

proprietary and indirectly interfere with property rights. Under the author's 'bold' proposal, there would be an international instrument stipulating that the courts of the country where the assets are located have exclusive jurisdiction to grant a freezing injunction.⁴⁰ As an alternative to the bold proposal, the author will propose two 'modest' solutions.⁴¹ In a nutshell, the first modest proposal would involve recognising a mandatory requirement to establish jurisdiction over the assets (in addition to the current requirement for personal jurisdiction over the defendant). The second and alternative proposal would restrict the scope of freezing injunctions under the umbrella of the discretionary stage: the courts would have to consider the most appropriate forum and this would normally be the one where the assets are located. However, the English courts would have a limited discretion to grant an injunction in respect of assets located abroad in exceptional circumstances. The modest proposals rely on the courts broadly drawing upon several existing cases where concerns have been expressed about interference with the sovereignty of the foreign courts.⁴² The principles of comity and expediency would be redundant under all of the proposals.⁴³

⁴⁰ See chapter 16.

⁴¹ See chapter 17.

⁴² These include cases involving a wide variety of court orders (e.g. third party debt orders) but also some freezing injunction cases – see chapter 17.

⁴³ These principles will be heavily criticised by the author for creating unnecessary confusion and uncertainty – see especially chapters 13, 15 and 17.

PART I: The Substantive Scope of Freezing Injunctions

This part of the thesis will deal with the historical and theoretical foundations of freezing injunctions and assess the implications on their substantive scope.

Chapter 2: Historical Foundations of Injunctions

2.1 Introduction

What are the reasons for analysing the historical foundations of English freezing injunctions and their equitable characteristics? The creation of the freezing injunction in respect of non-proprietary claims in 1975 came as a surprise to many practitioners. Without exploring the historical foundations of injunctive relief and its equitable origins, it is impossible to fully comprehend the reasons for which the Court of Appeal's decisions in *The Karageorgis* and *The Mareva* generated the surprise effect. The analysis of the historical foundations of injunctive relief in this chapter will help us to identify any principles which were eroded or disregarded by the Court of Appeal in 1975 in order to create room for a new category of injunctions. The author submits that part of the reason for the lack of any serious challenges to the current scope of freezing injunctions is the insufficient coverage of their historical foundations in the existing academic literature. An important part of the historical foundations of freezing injunctions is the original exception to the general rule: the proprietary freezing injunction. Understanding the nature of the proprietary freezing injunction is necessary in order to assess the legitimacy of extending the scope of the exception to non-proprietary claims. The proprietary freezing injunction will be analysed in chapter 3.

2.2 Historical foundations: the equitable roots of injunctions and the fusion of law and equity⁴⁴

It is important for us to analyse the early developments of injunctive relief to see whether they are consistent with the decisions in 1975 credited with the creation of a pre-judgment freezing injunction in support of non-proprietary claims. The relevance of the case law from the 19th and early 20th century will become fully apparent when we consider the relevant cases from 1975 onwards. In some of the latter cases, the courts had to specifically address arguments challenging the doctrinal foundations.⁴⁵

Prior to the Supreme Court of Judicature Acts 1873 and 1875, it was only the Court of Chancery which had the power to grant injunctions. The only remedy available in the common law courts was damages. Section 79 of the Common Law Procedure Act 1854 had empowered the courts of common law to grant injunctions in particular cases, but this statutory jurisdiction was significantly more limited. It could only be employed where there was an existing power to award damages. The Court of Chancery could grant an injunction based on the fear that an equitable or legal right would be infringed. In order to invoke this so called *quia timet* jurisdiction evidence had to be shown of a wrongful act that would be committed in the future.⁴⁶ There had to be a threat of infringement.

⁴⁴ See generally McGhee J. (ed.), *Snell's Equity* (Sweet & Maxwell, 33rd edn, 2016), chapter 16; Gee S., *Commercial Injunctions* (Sweet & Maxwell, 6th edn, 2016), chapter 1.

⁴⁵ See below chapter 4 of this thesis.

⁴⁶ For a comparison with freezing injunctions, see *Mercedes-Benz v Leiduck* [1996] A.C. 284 and in chapter 5 of this thesis the section entitled "A step backwards? – *The Siskina*".

The Judicature Act 1873 transferred all the jurisdiction of the Court of Chancery to the High Court of Justice. With regard to the jurisdiction to grant injunctions, section 25(8) provided that an injunction could be granted by an interlocutory order of the court in all cases in which it shall appear to the court to be “just or convenient” that such an order be made. Two types of injunctions were developed: interlocutory and perpetual (the latter now better known as final). Section 25(8) of the 1873 Act was replaced by section 45(1) of the Supreme Court of Judicature (Consolidation) Act 1925 but the wording remained the same. The current statutory basis for the power to grant injunctions is section 37(1) of the Senior Courts Act 1981. This provision is the successor of section 45(1) of the Supreme Court of Judicature (Consolidation) Act 1925. The only change in the wording was that the current provision refers to “just *and* convenient” as opposed to “just *or* convenient”.⁴⁷ There are no suggestions in the case law that this change is of any significance. The “just and convenient” requirement confirms that the court’s powers are discretionary, consistently with the equitable roots of injunctions. So how wide were the court’s powers to grant injunctions after 1873? What were the principles (whether restrictive or otherwise) that a court had to take into account when exercising its discretion? In order to answer these questions we need to look at the case law on section 25(8) of the Judicature Act 1873 and see the manner in which the courts exercised their discretion in certain circumstances. We will also examine whether the alleged requirement that the injunction should protect a “legal or equitable right” was a novel restriction on the substantive scope of freezing injunctions.

The scope of section 25(8) of the 1873 Act was considered in *Beddow v Beddow*,⁴⁸ a case where an injunction was sought to restrain an arbitrator from acting in a case in which allegedly he was unfit or incompetent to act. Jessel M.R. first explained that the jurisdiction given to the Common Law Courts by sections 79, 81 and 82 of the Common Law Procedure Act 1854 was extensive. The only limit was that it must be “reasonable and just” to grant the injunction. The Court of Chancery was not limited by any other terms. In the light of that background, Jessel M.R. did not consider that section 25(8) brought any major changes: the only addition was that “in ascertaining what is “just” you must have regard to what is convenient. All acts, therefore, which a Common Law Court or a Court of Equity only could formerly restrain by injunction, can now be restrained by the High Court”.⁴⁹

This wide interpretation of section 25(8) was consistent with the earlier decision in *Smith v Peters*.⁵⁰ The context was an interlocutory application for a mandatory order to compel the vendor to allow a valuation to proceed in accordance with the agreement for the sale of a house. Sir George Jessel M.R. granted the order and stated that “there is no limit to the practice of the court with regard to interlocutory applications so far as they are necessary and reasonable applications ancillary to the due performance of its functions, namely the administration of justice at the hearing of the cause. I know of no other limit. Whether they are or are not granted must of course depend upon the special circumstances of the case”.⁵¹ There is no reference to section 25(8) in the judgment but together

⁴⁷ Emphasis added.

⁴⁸ (1878) 9 Ch.D. 89.

⁴⁹ Ibid, 93.

⁵⁰ (1875) L.R. 20 Eq. 511.

⁵¹ Ibid, 513.

with *Beddow v Beddow* the case shows that “the demands of justice must always be the overriding consideration in considering the scope of [the power to grant injunctions]”.⁵²

*Morgan v Hart*⁵³ is an example of a case in which an order similar to an injunction was refused on the basis that the Court of Chancery could not have made such an order before the Judicature Act. The Court of Appeal held that the court had no jurisdiction to appoint a receiver by way of equitable execution in aid of a judgment at law with the exception of case where execution cannot be levied in the ordinary way. Buckley LJ confirmed that s.25(8) of the 1873 Act “does not give to the Courts either of Law or Equity any wider jurisdiction than existed before, but enables such orders as could be made before to be made in any proceedings, without commencing special proceedings in the Court of Chancery such as were necessary before the Act”.⁵⁴ Thus, while section 25(8) of the Judicature Acts 1873 appeared to give a wide discretion to the courts, it was clear that the statute did not alter the principles, as established by the case law, on which injunctions had been granted up until the fusion of law and equity.⁵⁵

2.3 What were the limits on the power of the courts to grant injunctions? The *Lister & Co v Stubbs*⁵⁶ line of cases

However, in a number of cases, the most prominent of which was *Lister v Stubbs*, it was established that the court cannot grant an injunction “to restrain a man who is alleged to be a debtor from parting with or dealing with his property as he pleases”.⁵⁷

In *Mills v. Northern Railway of Buenos Ayres Co.*,⁵⁸ the claimants were the unsecured creditors of a company and sought a *quia timet* injunction to restrain the company from carrying out proposed transactions including the creation of a floating charge and the distribution of dividends to shareholders. The Court of Appeal discharged the injunction granted by the Vice-Chancellor. Lord Hatherley L.C. asserted that “[t]he only remedy for a creditor in that case is to obtain his judgment and to take out execution”.⁵⁹ The creditor could not, by means of a *quia timet* injunction, obtain security for the payment which he expects to receive in the future.⁶⁰

The same approach was also taken in a number of matrimonial cases. In *Robinson v Pickering*,⁶¹ a creditor wanted to enforce the alleged debt against the separate estate of a married woman. The Court of Appeal held that until the creditor had obtained judgment and thereby established his right, he could not restrain the married woman from dealing with her separate estate. Counsel for the claimant creditor submitted that the injunction would preserve the property for the benefit of all her creditors. In rejecting this submission, the reasoning of Jessel M.R. was that to allow injunctions in

⁵² *Maclaine Watson & Co v International Tin Council (No. 2)* [1989] 1 Ch. 286, 302F.

⁵³ [1914] 2 K.B. 183.

⁵⁴ *Ibid*, 186.

⁵⁵ Paterson, J.M. (ed.), *Kerr on Injunctions* (London: Sweet & Maxwell, 6th edn, 1927), chapter 1, pp.6-7. See, however, *Masri v Consolidated Contractors International (UK) Ltd (No 2)* [2009] Q.B. 450 and *Tasarruf Mevduati Sigorta Fonu v Merrill Lynch Bank and Trust Co.* [2011] UKPC 17.

⁵⁶ (1890) 45 Ch.D. 1.

⁵⁷ Paterson, J.M. (ed.), *Kerr on Injunctions* (London: Sweet & Maxwell, 6th edn, 1927), p.613.

⁵⁸ (1869-70) L.R. 5 Ch.App. 621.

⁵⁹ *Ibid*, 628.

⁶⁰ *Ibid*, per Lord Hatherley L.C.

⁶¹ (1880-81) L.R. 16 Ch. D. 660.

such circumstances would mean that “every married woman who depended on her separate estate might be left to starve because someone alleged that she was indebted to him”.⁶²

Lister v Stubbs concerned a claim by a manufacturing company against its employee to recover the commission which he received from a third party supplier without the knowledge of the company. Part of the secret profit made by the defendant was invested in land. The company claimed to be entitled to follow the money into those investments. It sought an injunction to restrain the defendant from dealing with the investments or for an order directing him to bring the monies and the investments into court. The Court of Appeal held that the money received by the defendant could not be treated as being the money of the claimants. As the claimants were not entitled to follow the money into the investments, the injunction was refused. Cotton L.J. rejected the argument that the court should order “the Defendant to pay into court a sum of money in his possession because there is a *prima facie* case against him that at the hearing it will be established that he owes the money to the Plaintiffs”.⁶³ His Lordship was not aware of any case where “because it was highly probable that if the action were brought to a hearing the plaintiff could establish that a debt was due to him from the defendant, the defendant has been ordered to give security until that has been established by the judgment or decree”.⁶⁴

The question which arose in *North London Railway Co v Great Northern Railway Co*⁶⁵ was whether the court had a power to grant an injunction to restrain a party from proceeding with arbitration proceedings where the subject matter of the dispute was outside the scope of the arbitration agreement. The Court of Appeal held that there was no power to grant an injunction in such circumstances. It appears from the headnote of the case that the reason for this decision was that before the 1873 Act no court could grant such an injunction. In fact, the reasoning was more complex. The headnote does not explain the reason for the inability of the courts to grant an injunction in the circumstances such as those in *North London Railway*. Cotton LJ stated that “the sole intention of [section 25(8)] is this: that where there is a legal right which was, independently of the Act, capable of being enforced either at law or in equity, then, whatever may have been the previous practice, the High Court may interfere by injunction in protection of that right”.⁶⁶ When compared to references to “unlimited power” in *Beddow v Beddow*, the case could be seen to have laid down a new qualification on the power to grant injunctive relief: the existence of a legal or equitable right. The author submits, however, that the legal and equitable right requirement is now unnecessary and circular.⁶⁷

While there is a temptation at this stage to immediately embark on a comparison of the *Lister v Stubbs* line of cases with the creation of the non-proprietary freezing injunction in 1975, the reader can form a more independent and informed view of the scope of all freezing injunctions if we consider the non-proprietary freezing injunction’s older sister – what this author will be referring to as the ‘proprietary freezing injunction’. Ignoring the existence and role of injunctions in support of

⁶² Ibid, 662.

⁶³ (1890) 45 Ch.D. 1, 14.

⁶⁴ Ibid, 13.

⁶⁵ (1883) 11 Q.B.D. 30. On the misunderstanding of this case see: *Masri v Consolidated Contractors International (UK) Ltd (No 2)* [2009] Q.B. 450 (*Masri (No 2)*). See also the author’s discussion of *Masri (No 2)* in chapter 9 of this thesis.

⁶⁶ (1883) 11 Q.B.D. 30, 40.

⁶⁷ See chapter 9 of this thesis for the author’s further criticism of the requirement for a legal or equitable right.

proprietary claims is dangerous because it can lead to an incomplete understanding of the functions of freezing injunctions and thereby potentially distort our view of their international scope: how we see the ideal design of private international law rules in this specific field may be influenced by our understanding of their functions.

Chapter 3: The original exception to the general rule: 'proprietary freezing Injunctions'⁶⁸

3.1 Introduction

The *Lister v Stubbs* line of cases confirmed the significance of the general rule and the related requirement for all injunctions to protect a legal or equitable right. These cases, however, did not affect the availability of an injunction to preserve property in possession of the defendant in support of a proprietary claim. Indeed, in *Lister v Stubbs* itself, it would have been open to the plaintiff to obtain a proprietary freezing injunction if the plaintiff had successfully shown a *prima facie* case that it had a proprietary right in the monies in the hands of the defendant. It is simply not possible to obtain a full picture of the scope of freezing injunctions without an understanding of the proprietary freezing injunction. Given their status as the first category of freezing injunctions, comparisons will have to be made with the non-proprietary injunction to determine whether the latter category is a logical extension of the exception.

3.2 The purpose of proprietary freezing injunctions

CPR rule 25(1)(c)⁶⁹ provides that the court may grant an order for the preservation of relevant property.⁷⁰ There is case law dating back to the nineteenth century which demonstrates that the purpose of such orders is to protect the claimant by preserving the circumstances at the time of the application for the injunction "so that if at the hearing the plaintiffs obtain a judgment in their favour, the defendants will have been prevented from dealing in the meantime with the property in such a way as to make that judgment ineffectual".⁷¹ It follows that the idea of preventing the defendant from dissipating his assets before final judgment has been in existence long before the decision of the Court of Appeal in *Karageorgis*. Lord Denning MR must have been aware of the practice of granting such orders. In the majority of cases, the power of the court to preserve assets before judgment was employed where there were allegations that the claimant was the beneficial owner of the assets in the hands of the defendant. Such injunctions were limited to proprietary claims as evident from the 19th century decision in *Harman v Jones*⁷² where the Lord Chancellor asserted that:

"The proper office of the Court...is not to ascertain the existence of a legal right, but solely to protect the property, until that right can be determined by the jurisdiction to which it properly belongs. It is the duty of this Court to confine itself within the limits of its own jurisdiction; and therefore, it is a fundamental error in an order of this kind, to assume finally to dispose of legal rights and not to confine itself to

⁶⁸ See generally: Gee S., *Commercial Injunctions* (Sweet & Maxwell, 6th edn, 2016), chapter 7; Spry I.C.F., *Equitable Remedies* (Thomson Reuters Australia, 9th edn, 2013), chapter 4.

⁶⁹ The predecessor of this rule was R.S.C., Ord. 29, r.2.

⁷⁰ A proprietary freezing injunction is sometimes referred to as a 'preservation order' in the literature. Under C.P.R. r.25(1)(l), the court may also grant an order for a specified sum to be paid into court or otherwise secured, where there is a dispute over a party's right to the fund.

⁷¹ *Preston v Luck* (1884) L.R. 27 Ch. D. 497, 505, per Cotton L.J. See also *Harman v Jones* (1841) 41 E.R. 505 and *Harriman v Northern Securities Co.* (1904) 132 F. 464 (U.S.).

⁷² (1841) 41 E.R. 505. See also *Glamagard Pty. Ltd v Enderslea Productions Pty. Ltd* (1985) 80 F.L.R. 67.

protecting the property pending the adjudication of those rights by a Court of law.”⁷³

3.3 What requirements does the claimant need to satisfy to obtain a proprietary freezing injunction?

Analysis of the substantive preconditions of proprietary freezing injunctions and their comparison to those of non-proprietary freezing injunctions sheds some light on the underlying functions of both types of injunctions. The main substantive precondition for obtaining proprietary injunctions is for the claimant to cross a certain threshold relating to the strength of its case on the merits. In some cases, the threshold that was applied by the court was that of a good arguable case in respect of the proprietary claim.⁷⁴ However, there are cases which suggest that the threshold is lower. The confusion about the exact threshold is evident from the following passage from *Haque v Raja*:

“It is therefore unnecessary for the claimant to make out the usual requirements for a freezing order. It was necessary for him to show only that there was a serious question to be tried, and that the balance of risk of injustice favoured making the order sought. Again, I pause to note that no issue is taken by either side with this analysis, which in my view is plainly correct. I mention it only because, a little confusingly, the Injunction is described as a “freezing order”, and even in her skeleton argument for the hearing before me Ms Nye submitted that the court must be satisfied that there is “a good arguable claim”, that being the test for a freezing order properly so-called.”⁷⁵

Thus, there is no requirement to show a real risk of dissipation of the assets. As the risk of dissipation is unnecessary to trigger the injunction, this is a strong indication that a key function of proprietary freezing injunctions is protection of property rights. Where necessary to locate the assets, it is possible for the claimant to obtain an ancillary disclosure order, as on the facts of *Cherney v Neuman*.⁷⁶

3.4 The decision in *Polly Peck*: an early illustration of the differences with the non-proprietary freezing injunction

One of the most prominent cases involving a proprietary freezing injunction was *Polly Peck International plc v Nadir (No 2)*.⁷⁷ The judgment provides support for the author’s emphasis on the need to make a distinction between proprietary and non-proprietary freezing injunctions. In that case, there were two claims: the monetary compensation claim and the proprietary tracing claim. The court first considered whether a pre-judgment non-proprietary freezing order ought to be maintained against a bank in support of the claimant’s monetary compensation claim. The evidence showed that the bank’s foreign currency liquidity had been very seriously affected by the freezing injunction. The injunction had already seriously interfered with the bank’s normal manner of carrying on its banking business. At the time the injunction was granted, the claim against the bank

⁷³ Ibid, 506.

⁷⁴ *Cherney v Neuman* [2009] EWHC 1743 (Civ). For further discussion of this case, see section 3.5 in this chapter.

⁷⁵ [2016] EWHC 1950 (Ch), [22].

⁷⁶ [2009] EWHC 1743 (Civ).

⁷⁷ [1992] 4 All ER 769.

was “based on little more than speculation”.⁷⁸ The court concluded that the injunction should not be maintained. Scott LJ reasoned that “it is...wrong in principle to grant a *Mareva* injunction so as, before any liability has been established, to interfere with the normal course of business of the defendant.”⁷⁹ However, that was not the end of the matter. The claimant was successful in obtaining an injunction in support of its proprietary tracing claim. It was explained that this injunction was not “a *Mareva* injunction” but “an order for the interim preservation of property” until its true ownership could be determined at the trial.⁸⁰ The nature of the order was as follows:

“The Central Bank should be required, first, to earmark the £8.9m in a separate account and, second, should be restrained from dealing with the earmarked fund otherwise than in the normal course of business and unless and to the extent that there are no other funds in England available to be used. The Central Bank should be required to inform [the claimants’] solicitors in advance of any use proposed to be made of the £8.9m and, at the same time, to give details of all foreign currency reserves for the time being held in this country.”⁸¹

The Court of Appeal emphasised that there was a crucial factor which justified this type of relief and distinguished it from the non-proprietary freezing injunction: the property in the hands of the defendant belonged to the claimant. For this reason, a proprietary freezing order would not normally be subject to the ordinary course of business proviso.⁸² The court had to ensure that the money in the bank remained a traceable fund. The substantive preconditions for obtaining a non-proprietary freezing injunction did not apply.⁸³ Instead, the court’s decision to grant such an order was based on the application of the two-stage approach prescribed by *American Cyanamid Co v Ethicon Ltd.*⁸⁴ Under this approach, the court has to consider whether the claimant has any real prospect of succeeding on his claim for a permanent injunction at trial, and where the balance of convenience lies. It was emphasised that the court should not attempt to resolve conflicts of evidence at the interlocutory stage. In contrast to the application to maintain the injunction in aid of the monetary compensation claim, the inevitable interference with the bank’s normal course of business was not considered to be a sufficient obstacle to the grant of the order in support of the proprietary tracing claim.⁸⁵ The decision in *Polly Peck* provides a clear illustration of the courts’ greater readiness to grant an injunction for the purposes of protecting property rights.

⁷⁸ *Ibid*, 784.

⁷⁹ *Ibid*.

⁸⁰ [1992] 4 All E.R. 769, 787, per Lord Donaldson MR.

⁸¹ [1992] 4 All ER 769, 785.

⁸² *Ibid*, 784. On the ordinary course of business proviso, see chapter 9 of this thesis.

⁸³ For a detailed analysis of the substantive preconditions for non-proprietary freezing injunctions see chapter 8 of this thesis.

⁸⁴ [1975] A.C. 396.

⁸⁵ *Carl Zeiss Stiftung v. Herbert Smith (No 2)* [1969] 2 WLR 427 is an earlier case which concerned an allegation by the claimant company that the solicitors of a sister company had acted inconsistently with the terms of a trust and were accountable to the claimant for the money they had received. The court found that the solicitors had no notice of a trust. The injunction was therefore refused but the case is nevertheless useful in demonstrating the types of claims for which the injunction could be sought. In contrast to *Polly Peck*, it was stated that the injunction to preserve property would be refused where there was evidence that the interests of third parties would be prejudiced.

3.5 The recent cases involving both proprietary and non-proprietary freezing injunctions

The analysis of the more recent case law reveals a trend that is consistent with the decision in *Polly Peck*: a claimant, who is unsuccessful in obtaining a pre-judgment freezing order in respect of its non-proprietary claim, usually manages to persuade the court to grant a pre-judgment proprietary injunction under C.P.R. r.25(1)(c) to preserve the relevant property. The conditions for obtaining an order to preserve property may appear to be less stringent than those for the pre-judgment freezing injunction. Indeed, there is no need to show a real risk of dissipation of the relevant property even though protection of rights to that property seems to be one of the core functions of such injunctions.

The different treatment of cases involving proprietary claims was observed by Staughton LJ in *Republic of Haiti v Duvalier*:

“It may be that the powers of the court are wider, and certainly discretion is more readily exercised, if a plaintiff's claim is what is called a tracing claim. For my part, I think that the true distinction lies between a proprietary claim on the one hand, and a claim which seeks only a money judgment on the other. A proprietary claim is one by which the plaintiff seeks the return of chattels or land which are his property, or claims that a specified debt is owed by a third party to him and not to the defendant.

Thus far there is no difficulty. A plaintiff who seeks to enforce a claim of that kind will more readily be afforded interim remedies, in order to preserve the asset which he is seeking to recover, than one who merely seeks a judgment for debt or damages.”⁸⁶

This passage was approved in *Madoff Securities International Ltd v Raven*⁸⁷ where Flaux J dismissed the arguments of the defendant about the inconvenience of providing information about what happened to the assets because the defendant “should not have had the money in the first place”.⁸⁸ By implication, such arguments about inconvenience will have more weight in applications for non-proprietary claims as confirmed by the judgment of Rose J in *Ras Al Khaimah Investment Authority and others v Bestfort Development LLP and others*.⁸⁹ In that case, the draft freezing order sought by the claimants contained a paragraph requiring, *inter alia*, the defendants to identify the details of any natural person or entity to whom the defendants had given or otherwise transferred assets exceeding a certain value and whether there was any consideration for such transfers.⁹⁰ *Obiter*, Rose J considered that an order on such terms would have been inappropriate in the absence of a proprietary claim.⁹¹ In her view, the information sought was “clearly aimed not at identifying other assets beneficially owned by [the defendant LLPs] but in tracing any moneys that they once held into the ownership of another entity”.⁹²

⁸⁶ [1990] 1 Q.B. 202, 214.

⁸⁷ [2011] EWHC 3102 (Comm).

⁸⁸ *Ibid*, [140].

⁸⁹ [2015] EWHC 3383 (Ch).

⁹⁰ *Ibid*, [63].

⁹¹ *Ibid*, [65].

⁹² *Ibid*.

A clear example of a case in which the pre-judgment non-proprietary freezing injunction was refused but a proprietary injunction was granted is *Michael Cherney v Neuman*,⁹³ a decision of HH Judge Waksman QC sitting in the Chancery Division of the High Court.⁹⁴ The dispute was between two foreign businessmen in relation to their two main real estate joint ventures in Central London. With regards to the first joint venture, Mr Cherney claimed beneficial ownership of all the proceeds of sale which had been paid to Mr Neuman. As for the second joint venture, Mr Cherney similarly made a proprietary claim to some specific funds which had been received by Mr Neuman. The whereabouts of the claimed funds from both joint ventures were unknown to Mr Cherney. The judge found that Mr Cherney had a good arguable case in relation to both claims. Nevertheless, he refused to grant a worldwide freezing injunction because of the unjustifiable eight month delay in making an application for the order. He reasoned that, even without the delay, there was insufficient evidence to show a real risk of dissipation. With those circumstances in mind, one would be forgiven for thinking that the claimant could not obtain any pre-judgment injunctive relief. However, the judge granted a proprietary injunction restraining Mr Neuman from disposing or dealing with the same assets in respect of which a worldwide freezing injunction had been sought. His Honour explained that:

“The jurisdiction [to grant proprietary relief] is broad and does not depend on it being shown that there is a real risk of dissipation of assets to avoid a judgment since this is relevant only to *Mareva*-type general freezing relief. Obviously, if the location of the claimed asset were known and it was fully secured pending a trial, the Court would be unlikely to grant relief absent grounds for immediate delivery-up etc.”⁹⁵

There are cases where a proprietary freezing injunction has been refused because of the claimant’s inability to establish a good arguable case on the merits of the proprietary claim. Thus, in *Cadogan Petroleum Plc v Tolley*,⁹⁶ the “proprietary elements” of the freezing injunction were deleted because the claimant could not show a good arguable case in respect of the proprietary claims. Part of the reason for this failure was the controversial decision in *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd*⁹⁷ where the Court of Appeal chose not to follow the Privy Council’s decision in *Attorney-General of Hong Kong v Reid*⁹⁸ on the issue of the availability of proprietary remedies in respect of bribes and secret commissions.

⁹³ [2009] EWHC 1743 (Civ).

⁹⁴ See also *Luxe Holding Ltd. v Midland Resources Holding Ltd.* [2010] EWHC 1908 (“proprietary freezing injunction” granted; reference was made to the principles set out in *Films Rover International Ltd. v Cannon Film Sales Ltd.* [1987] 1 W.L.R. 670 (Hoffmann J.). Further relevant cases include: *A and another v C and others* [1981] 1 QB 956 (Robert Goff J.) where both proprietary and non-proprietary injunctions were granted; *Secretary of State for the Environment Transport and the Regions v Walton Group plc* (Unreported, 13/02/2001) where it was not deemed necessary to consider the application for a non-proprietary injunction because the court held there was a strong *prima facie* case for the existence of a proprietary right, and that therefore a proprietary freezing injunction should be granted. See also *National Commercial Bank Jamaica Ltd v Olint Corp Ltd* [2009] UKPC 16.

⁹⁵ *Cherney v Neuman* [2009] EWHC 1743, [101].

⁹⁶ [2011] EWHC 2286.

⁹⁷ [2011] EWCA Civ 347. This decision has been overruled by the Supreme Court in *FHR European Ventures LLP and others v Cedar Capital Partners LLC* [2014] UKSC 45.

⁹⁸ [1994] 1 AC 324.

3.6 The author's reflections on the case law involving proprietary freezing injunctions

The author submits that, in the light of the recent trend in case law and especially the ease with which the claimants seem to be able to obtain a proprietary freezing injunction, it may be necessary reconsider the limits of the courts' powers to grant such orders. The potential prejudice to defendants should not be underestimated as there is no evidence in the cases that the injunctions had been subject to all of the safeguards usually found in standard form non-proprietary freezing injunctions.⁹⁹ It appears that one of the justifications for the broad brush approach to the preconditions for relief (and the lack of all safeguards) is that proprietary freezing injunctions are limited to the specific assets which form the basis of the proprietary claim.¹⁰⁰ Sir Thomas Bingham MR (as he then was) made the following distinction in *Sundt Wrigley Co Ltd v Wrigley*:

"In the *Mareva* case, since the money is the defendant's subject to his demonstrating that he has no other assets with which to fund the litigation, the ordinary rule is that he should have resort to the frozen funds in order to finance his defence. In the proprietary case, however, the judgment is a more difficult one because in the plaintiff's contention the money on which the defendant wishes to rely to finance his litigation is not the defendant's money at all but represents money which is held on trust for the plaintiff. That, of course, gives rise to an obvious risk of injustice if the plaintiff, successful at the end of the day, finds that his own money has been used to finance an unsuccessful defence. As these authorities make plain, a careful and anxious judgment has to be made in a case where a proprietary claim is advanced by the plaintiff as to whether the injustice of permitting the use of the funds by the defendant is out-weighed by the possible injustice to the defendant if he is denied the opportunity of advancing what may of course turn out to be a successful defence."¹⁰¹

The courts are therefore concerned to fully protect property which *prima facie* belongs to the claimant. However, we should remember that these injunctions are often being granted before the issue of substantive proceedings. The *inter partes* hearing to set aside the injunction has all the usual limitations of hearings at such an early stage of litigation. In the circumstances of such limitations, there is a real danger of wrongfully granting an injunction. The above passage from Sir Thomas Bingham MR confirms this danger. Given the risks of wrongfully granting an injunction regardless of whether the claim is proprietary or non-proprietary, the author submits that the courts should not allow claimants to take advantage of the lack of certain safeguards for defendants. For the same reason, the courts should also refrain from the temptation to impose a less stringent condition regarding the strength of the substantive case when dealing with proprietary claims. Claimants should not be allowed to circumvent the need to meet the more stringent preconditions for a non-proprietary injunction by dressing up their allegations as proprietary.¹⁰²

⁹⁹ In *Cherney v Neuman* [2009] EWHC 1743 (Civ) the claimant was required to give a cross-undertaking in damages. The claimant was willing to fortify its cross-undertaking with a bank guarantee in the sum of £250,000.

¹⁰⁰ See for example, *Cherney v Neuman* [2009] EWHC 1743 (Civ), [102] – [106].

¹⁰¹ Unreported, 23rd June 1993.

¹⁰² A broad analogy could be made with the reasoning of the Court of Appeal in *Candy v Holyoake* [2017] EWCA Civ 92 in the context of the so called 'notification injunction' (described in the case as a "variant" of a freezing injunction which includes a requirement for the defendant to notify the claimant's solicitors in advance of any

Prior to 1975, freezing injunctions were confined to proprietary claims. In the author's view, while there is no express requirement for a claimant to show intention to evade judgment to obtain an injunction in respect of a proprietary claim, a possible explanation is that such an intention could be easily inferred from satisfying the relevant threshold in respect of the strength of a claimant's case for a proprietary claim. Indeed, there is some attraction in the argument that where a claimant has shown a *prima facie* case of fraud, an inference should be made that a defendant would take advantage of his position to make himself judgment proof – a defendant cannot be trusted that he would stay away from hiding or dissipating any wrongfully obtained assets.

dealings with the assets). See also: Farhan M., 'The Notification Injunction: a New Weapon in the Commercial Litigator's Armoury?' (2016) *Arbitration* 338.

Chapter 4: From pre-judgment proprietary injunctions to pre-judgment non-proprietary freezing injunctions

4.1 Introduction

What started off as a limited exception to the general rule because of equity's special treatment of property rights and its emphasis on maximising their protection has been expanded in so many ways, both at the substantive level and the international level, that it calls for a detailed examination of whether their current scope is consistent with the principles underlying its historical roots. This chapter will focus on the turning point in the expansion of the substantive scope of freezing injunctions: the Court of Appeal's landmark decisions in *Karageorgis* and *The Mareva*. These decisions expanded the types of claims in support of which a freezing injunction is available: an injunction that had been available only in support of proprietary claims suddenly also became available in support of non-proprietary claims. This chapter will analyse the manner in which this extension was achieved by the Court of Appeal and the extent to which it was consistent with the principles emanating from the *Lister v Stubbs* line of cases. We will see that, despite its insecure doctrinal foundations, the non-proprietary freezing injunction nevertheless managed to survive a number of attempts to challenge its legitimacy.

4.2 The decisions in *Karageorgis* and *The Mareva*

The pre-judgment non-proprietary freezing injunction was developed in these two Court of Appeal decisions in 1975 as an exceptional remedy to prevent a foreign defendant from defeating any ultimate judgment by removing his assets from the jurisdiction. It became known as the *Mareva* injunction after the name of the second of the two cases. In both cases, the Court of Appeal granted interlocutory injunctions to restrain the defendants from removing their assets out of the jurisdiction. In order to do so, the Court of Appeal adopted a wide interpretation of the wording of section 45 of the Supreme Court of Judicature (Consolidation) Act 1925. The injunctions were granted on the basis that it was both "just and convenient" to restrain the debtor from removing his funds from the jurisdiction.

In *Karageorgis*, the court only heard argument from one side and was not referred to any authorities but Lord Denning MR was aware that "[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".¹⁰³ Nevertheless, his Lordship considered that it was time to revise the practice. There was a strong *prima facie* case that the shipowners were entitled to the hire and that the hire was unpaid. If the injunction had not been granted, the defendant's money in a London bank might have been moved out of the jurisdiction.

It was in *The Mareva* that the Court of Appeal had to consider the impact of the decisions in *Lister v Stubbs* and *North London Railway* on the court's jurisdiction to grant a pre-judgment freezing injunction. Lord Denning MR stated that the only qualification on the power of the courts to grant injunctions is the principle that the claimant must have "a legal or equitable right" which he seeks to protect, as established in *North London Railway*. His Lordship considered that this principle was satisfied on the facts of the case before him. His reasoning was that the principle "applies to a

¹⁰³ [1975] 1 W.L.R. 1093, 1094.

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".¹⁰⁴

4.3 The problems with the reasoning and the decision in *The Mareva*

The author submits that Lord Denning MR's application of *North London Railway* is difficult to accept. His Lordship seems to have interpreted the notion of a legal or equitable right according to his own view of its literal meaning. Lord Denning MR completely ignored the way in which the principle had been applied by the courts, including the context in which the principle was stated in *North London Railway* itself. The Court of Appeal failed to properly examine the previous case law partly because the court only heard argument from one side. Indeed, both Roskill and Omrod LJ reserved their position until the issue could be argued on both sides. The judgment of Roskill LJ was even shorter and more open to criticism. Despite acknowledging that previous applications for a similar injunction had been consistently refused, Roskill LJ nevertheless did not consider it necessary to distinguish *Lister v Stubbs*. Furthermore, without directly referring to *North London Railway*, Roskill LJ admitted that "[t]here is or may be a legal or perhaps equitable right which the shipowners may be entitled to have protected by the court. The full extent and nature of that right has long been a controversial matter which may have to be resolved hereafter and I therefore say no more about it".¹⁰⁵ It can be seen that Roskill L.J. effectively chose to ignore the need to deal with the case law which seemed to preclude the grant of the injunction.

Looking back at the facts and the decisions in the *Lister v Stubbs* line of cases, it is not entirely clear that this line of cases is irreconcilable with the two key decisions in 1975. None of the cases directly addressed the availability of an injunction in support of a non-proprietary claim. At least on a narrow reading of the case, *Lister v Stubbs* was actually concerned with whether the defendant could be compelled to pay money into court as security before judgment. In *Lister v Stubbs*, the cases cited by counsel for the claimants in support of granting an injunction to restrain the defendant from dealing with the relevant assets were actually cases on the principles applying to orders for payment of money into court as security. The leading case on payments of money into court was *London Syndicate v Lord*¹⁰⁶ in which the Court of Appeal (Jessel MR, Baggallay and Thesiger LJ) explained that:

"the Court may look at the result of the accounts, and, upon being satisfied that there is a probability amounting to a reasonable certainty that not less than a certain amount will be found due from the Defendants, may in its discretion direct the amount to be brought into Court".¹⁰⁷

Thesiger LJ went further and stated that:

¹⁰⁴ [1980] 1 All E.R. 213, 215.

¹⁰⁵ Ibid, 216.

¹⁰⁶ (1878) L.R. 8 Ch. D. 84.

¹⁰⁷ Ibid, 89, per Jessel M.R.

“I should like to see that jurisdiction [of the Court of Chancery to order payment into court] applied to the same extent in the Common Law Divisions instead of being limited, as it is at present limited in those Divisions.”¹⁰⁸

The latter statement could have been relied on by in *Lister v Stubbs* to grant the order for payment of money into court in respect of a non-proprietary claim. As for the Court of Appeal’s decision in *Mills* (a further potential obstacle to the decision in *The Mareva*), the application for a *quia timet* injunction was rejected because it would have been tantamount to giving the claimant security. Thus, there appears to be some room for the view that the questions which arose in *Lister v Stubbs* and *Mills* could be regarded as distinct from the legal issue which arose in *Karageorgis* and *The Mareva*. The issue in the latter two cases was not whether the claimants could get security for their claims. Indeed, the courts frequently underline the fact that restraining a defendant by means of a freezing injunction does not provide any security to the claimant. The author of this thesis does not agree with the narrow interpretation of the *Lister v Stubbs* line of cases. In his view, it is not possible to provide a convincing argument to reconcile the 1975 cases with the decision in *Lister v Stubbs*. The court in *Lister* was concerned that a decision in favour of the plaintiffs would allow interference with assets with a weak or no link to the claim and thereby encourage unmeritorious meddling with the defendant’s property rights. In other words, as a matter of policy, the court in *Lister v Stubbs* considered that, in the eyes of equity, only proprietary claims deserve protection by way of a pre-judgment injunction. For these reasons, granting an injunction in respect of a non-proprietary claim was therefore treated as incompatible with the requirement for the injunction to protect a claimant’s legal or equitable right. If we take such a broad interpretation of the decision in *Lister v Stubbs* then Lord Denning should have provided a more detailed justification for allowing the injunction in support of a non-proprietary claim.

Collins has argued that “[t]he creation of the *Mareva* jurisdiction was not so much a step forward as the rectification of an omission or error which had stemmed from a line of authority, of which perhaps the oddest was the decision in *Lister & Co. v. Stubbs*, to the effect that, except in proprietary claims in the strict sense, it was not possible to restrain the disposal of funds in the hands of a defendant prior to judgment.”¹⁰⁹ With respect, the author of this thesis submits that the prohibition on pre-judgment freezing injunctions had not been “an omission or error”. The approach taken in *Lister v Stubbs* was both logical and principled. It was explained by Sir Robert Megarry V-C in *Barclay-Johnson v Yuill*¹¹⁰ in the following terms:

“The plaintiff, like other creditors of the defendant, must obtain his judgment and then enforce it. He cannot prevent the defendant from disposing of his assets *pendente lite* merely because he fears that by the time he obtains judgment in his favour the defendant will have no assets against which the judgment can be enforced. Were the law otherwise, the way would lie open to any claimant to paralyse the activities of any person or firm against whom he makes his claim by obtaining an injunction freezing their assets.”¹¹¹

¹⁰⁸ Ibid, 95.

¹⁰⁹ Collins L., ‘The Territorial Reach of *Mareva* Injunctions’ (1989) L.Q.R. 262, 263.

¹¹⁰ [1980] 1 WLR 1259.

¹¹¹ Ibid, 1262-1263.

In 1765, long before the decision in *Lister v Stubbs*, Blackstone's Commentaries described the right to dispose of one's property as one saw fit, prior to a court judgment, as an "absolute" right in English law. This right was deemed to be of utmost importance because "the man, who is forbidden to acquire and enjoy it, is deprived of liberty in particulars of primary importance to his pursuit of happiness."¹¹² A further confirmation that the general rule was regarded as logical and significant is that it is also well established in early American case law.¹¹³ In *Shufeldt v Boehm*,¹¹⁴ it was stated that the general rule is "founded on the wisest policy" because, if the law were otherwise, debtors "would be constantly exposed to the greatest hardships and grossest frauds, for which the law would afford no adequate remedy".¹¹⁵ In the *Lister v Stubbs* line of cases, an injunction was refused in every single case and the reasoning, based on the general rule, was consistent. It is difficult to see how the *Lister v Stubbs* line of cases, which should have been regarded as a significant obstacle, was so easily overcome by the Court of Appeal in 1975. In addition, it is artificial to justify the two 1975 decisions by describing their effect as providing a "limited exception to the general rule that the court will not normally grant an injunction to restrain a defendant from parting with his assets so that they may be preserved in case the plaintiff's claim succeeds".¹¹⁶ Far from being "a limited exception", the ability of the court to grant a pre-judgment freezing order in support of a non-proprietary claim is difficult to reconcile with the general rule. Indeed in 1981 the Court of Appeal observed that "[t]he use of the remedy has greatly increased and far from being exceptional it has now become common place".¹¹⁷ A further apparent difficulty with the reasoning in *The Mareva* was that in the light of *Morgan v Hart*, taken together with *Lister v Stubbs*, section 45(1) of the 1925 Act should not have been interpreted as conferring on the court a new power to grant pre-judgment non-proprietary freezing injunctions.¹¹⁸ Given the lack of detailed reasoning in *The Mareva* and the significance of the decision, it is not surprising that a formal attempt to test its doctrinal foundations was soon to come.

4.4 Challenges to the doctrinal foundations of the pre-judgment non-proprietary freezing injunction

In *Rasu Maritima v Perusahaan Pertambangan*,¹¹⁹ the two-member Court of Appeal was faced with a formal attempt to challenge to the power to grant *Mareva* injunctions for the first time. The claimants sought a *Mareva* injunction in support of their claim for damages for breach and repudiation of the charterparty. Counsel for the defendants, Mustill QC (as he then was), submitted that the court was bound by the *Lister v Stubbs* line of cases to hold that it could not grant an injunction to detain the assets of a person alleged to be a debtor before judgment. With regard to *Karageorgis* and *The Mareva*, Mustill QC said that they were wrongly decided. The Court of Appeal rejected these submissions. In the leading judgment, Lord Denning MR distinguished the *Lister v Stubbs* line of authorities on the basis that they did not involve a defendant who was out of the jurisdiction but had money or goods within the jurisdiction.¹²⁰ In the author's view, this indicates that in 1975 the Court of Appeal's 'creation' of the freezing injunction for non-proprietary claims was

¹¹² Blackstone W., *Commentaries on the Laws of England* (1765-1769) (Oxford: Clarendon Press, 2001) 1, 138.

¹¹³ See *Adler v Fenton*, 65 U.S. 407, 411-13 (1861) and *Hutchinson v Schimmelfeder*, 40 Pa. 396, 398 (1861).

¹¹⁴ 96 III 560 (1880).

¹¹⁵ *Ibid*, 564.

¹¹⁶ Per Ackner L.J. in *A.J. Bekhor & Co Ltd v Bilton* [1981] Q.B. 923, 941.

¹¹⁷ *Ibid*, [18].

¹¹⁸ See, however, *Masri v Consolidated Contractors International Ltd (No 2)* [2009] Q.B. 450.

¹¹⁹ [1978] Q.B. 644.

¹²⁰ *Ibid*, 659.

fuelled by the difficulties of enforcing English judgments outside the jurisdiction. That was of course in the period of time before the Brussels Convention whose aim was to facilitate the free movement of judgments between the Contracting States. Lord Denning MR endorsed *Beddow v Beddow* and considered that the Court of Appeal in *North London Railway* should not have imposed a limit on the discretion conferred by section 25(8) of the Judicature Act 1873.¹²¹ His Lordship described the decisions in *Karageorgis* and *The Mareva* as “part of the evolutionary process” in that the considerations to be taken into account when the court exercises discretion under section 45 of the 1925 Act have changed. The only other judgment was given by Orr LJ who did not deal in detail with Mustill QC’s challenge to the *Mareva* regime. His Lordship simply took the view that it “would be wrong either to widen or narrow” the test laid down in *Beddow v Beddow*.¹²²

The author submits that the reasoning of Lord Denning MR and Orr LJ was not convincing and was inadequate to address the concerns about the foundations of the *Mareva* regime raised by Mustill QC. In *Mercedes-Benz A.G. v Leiduck*,¹²³ Lord Mustill, who delivered the majority opinion of the Privy Council, recognised the insecure foundations of the *Mareva* regime and in particular the problems with the Court of Appeal’s reasoning in *Rasu Maritima*. The majority therefore took the view that the *Mareva* injunction should be treated as a special exception to the general law;¹²⁴ in *Rasu Maritima*, significance should not have been placed on whether the defendant was out of the jurisdiction for the purposes of distinguishing the *Lister v Stubbs* line of cases. The fact that the defendant was based in England had never been regarded as a crucial factor in any of the cases on section 25(8) of the 1873 Act.

It was not long before the additional benefit available to claimants suing a foreign based defendant came under criticism. In *The Siskina*,¹²⁵ Lord Hailsham rejected the argument that claimants suing an English based defendant are not worse off because they can make use of the application for a summary judgment. Part 24 and Practice Direction 24 of the English Civil Procedure Rules set out the procedure for obtaining a summary judgment. It is immediately clear from the grounds for summary judgment that the procedure cannot be treated as an alternative to a freezing injunction: for the court to give summary judgment against a defendant, the latter must have no real prospect of successfully defending the claim or issue.¹²⁶ In addition, there must be no other compelling reason why the case or issue should be disposed of at a trial.¹²⁷ This is different to the strength of the claimant’s case for a freezing injunction: the claimant needs to show a good arguable case on the merits.¹²⁸ On an application for a summary judgment, the court may make a conditional order which requires the defendant to pay a sum of money into court.¹²⁹ However, such an order will only be made where it appears to the court that a defence may succeed but improbable that it will do so.¹³⁰

¹²¹ Ibid, 659-660.

¹²² Ibid, 664.

¹²³ [1996] A.C. 284.

¹²⁴ Ibid, 301.

¹²⁵ *Siskina (Owners of cargo lately laden on board) v. Distos Compania Naviera S.A.* [1979] A.C. 210.

¹²⁶ CPR rule 24.2(a)(ii).

¹²⁷ CPR rule 24.2(b).

¹²⁸ *Ninemia Maritime Corporation v Trave Schiffahrtsgesellschaft m.b.H. und Co K.G.* [1983] 1 W.L.R. 1412.

¹²⁹ CPR Practice Direction 24, para 5.2(1).

¹³⁰ CPR Practice Direction 24, para 4.

4.5 Foreign attachment: a purported attempt to retrospectively provide a foundation for the decision in *The Mareva*

In *Rasu Maritima*, Lord Denning MR stated that the freezing injunction was not “a new procedure”. As far back as the late fifteenth century, there was a process known as “foreign attachment”.¹³¹ His Lordship described it in the following terms:

“It was originally used so as to compel the defendant to appear and to give bail to attend: but it was extended to all cases when he was not within the jurisdiction. Under it, if the defendant was not to be found within the jurisdiction of the court, the plaintiff was enabled instantly, as soon as the plaint was issued, to attach any effects of the defendant, whether money or goods, to be found within the jurisdiction of the court”.¹³²

Lord Denning MR’s purpose here was to provide some form of historical foundation for the jurisdiction to grant *Mareva* injunctions. In this way, the decisions in *Karageorgis* and *The Mareva* could be presented as a revival of an old practice and consistent with the *Lister v Stubbs* line of cases. However, Lord Denning MR did not refer to any case law on foreign attachment. The procedure had been analysed by the House of Lords in *The Mayor and Aldermen of The City of London v Cox*¹³³ where the issue was whether the court had jurisdiction to grant a foreign attachment where none of the parties were resident in the City but the alleged third party debtor of the judgment debtor was temporarily within the jurisdiction. Both the judgment debt and the third party’s debt arose outside the jurisdiction. The opinion of the judges, delivered by Willes J., was that the scope of foreign attachment was not wide enough to cover such a case. Their Lordships adopted the opinion. Willes J. explained that “the custom of foreign attachment only extends the distringas to debts, of which it retains the payment until the Defendant surrenders or puts in bail; and after a return or returns on *nihil*, and a default to surrender or put in bail, it makes the garnishee [(un)less he shew cause to the contrary) pay the claimant instead of the Defendant, upon security to pay over to the Defendant if within a year and a day he “disproves” the debt”.¹³⁴ In the light of this description of how the custom operated, the author submits that, contrary to Lord Denning MR’s view, a *Mareva* injunction cannot be rationalised as a revival of foreign attachment. Foreign attachment could be applied in relation to the assets of the garnishee and was a process of execution. This latter feature makes it very different to a *Mareva* injunction which does not enforce rights but is merely an aid to execution. As Wasserman has explained:

“[t]he phrase foreign attachment was not literally accurate, as the procedure was never limited to foreign defendants, and the attachment authorized was really a garnishment, or attachment of the debtor’s property in the hands of a third party. Either the defendant or the garnishee could dissolve the attachment by posting bail for the defendant’s appearance. There is no evidence that this form of pretrial attachment was ever intended or used to

¹³¹ [1978] Q.B. 644, 658.

¹³² Ibid.

¹³³ (1867) LR 2 HL 239.

¹³⁴ Ibid, 265.

secure a plaintiff's judgment against a defendant who in fact appeared but threatened to waste his assets."¹³⁵

Foreign attachment was not concerned with the risk that the defendant will dissipate or move his assets out of the reach of the courts. These differences between the old process of foreign attachment under the Custom of London and modern freezing injunctions are reinforced by a later case, *The Mayor and Aldermen of the City of London v London Joint Stock Bank*.¹³⁶ In that case, the House of Lords held that a corporation could not be a garnishee for the purposes of foreign attachment because physical detention was the only means of obtaining payment from the third party.¹³⁷ Lord Selborne LC explained that in order to compel the defendant's submission to the jurisdiction, the custom "arrests or attaches [the defendant's] goods within the jurisdiction, or the debts owing to him within the jurisdiction...by way of security to enforce his appearance".¹³⁸ By contrast, a freezing injunction does not attach the assets of the defendant. This brings us to the characteristics of the injunction that was developed by the Court of Appeal in 1975.

4.6 Key characteristics of the newly created freezing injunction: the apparent *in personam* operation of the injunction

A freezing injunction does not have the effect of attaching the assets. It is an equitable remedy and, according to the traditional view, it operates *in personam*.¹³⁹ As we will see below, the implication of this for the substantive scope of English freezing injunctions is that the conduct of the defendant ought to be closely scrutinised to determine whether it warrants the relief sought. As for the implications of its *in personam* operation relevant to the international scope of freezing injunctions, in general the courts take the view that the person to whom an injunction is addressed must be within the reach of the court or amenable to its jurisdiction. However, in *Z Ltd v A- Z and AA-LL*¹⁴⁰ Lord Denning MR considered that "a *Mareva* injunction is a method of attaching the asset itself. It operates *in rem* just as the arrest of a ship does".¹⁴¹ Subsequent decisions have placed this statement in the dustbin of history: in *Babanaft SA v Bassatne*,¹⁴² Kerr LJ recognised that Lord Denning MR's statements had gone too far.¹⁴³ The *in personam* nature of the order is significant because it means that, unlike New York's pre-judgment attachment, the English freezing order does not provide security for a claim. Armed with an English freezing injunction, the claimant is not put in a better position than any other creditor of the defendant. This is illustrated by the decision of the Court of Appeal in *The Cretan Harmony*.¹⁴⁴ In that case the charterers created a floating charge on all moneys due or to become due to them. The debenture holder had a right to appoint a receiver. The floating charge had been created before the judge at first instance granted a *Mareva* injunction in

¹³⁵ R. Wasserman, 'Equity Renewed: Preliminary Injunctions to Secure Potential Money Judgments' (1992) 67 Wash. L. Rev. 257, 273-274. Internal quotation marks omitted.

¹³⁶ (1881) 6 App Cas 393.

¹³⁷ It was as a result of this decision that the process of foreign attachment had become obsolete: L. Collins, 'Provisional Measures, the Conflict of Laws, and the Brussels Convention' (1989) 1 Y.E.L. 249, 250.

¹³⁸ *Ibid*, 399.

¹³⁹ For the author's view that a freezing injunction should be seen as a quasi-proprietary form of relief, see chapter 14, section 14.3.

¹⁴⁰ [1982] Q.B. 558.

¹⁴¹ *Ibid*, 573.

¹⁴² [1990] Ch 13.

¹⁴³ *Ibid*, 25.

¹⁴⁴ *Cretanor Maritime Co Ltd v Irish Marine Management Ltd* [1978] 1 W.L.R. 966.

favour of the shipowners. However, the floating charge crystallised after the injunction was granted. The key issue in the Court of Appeal was the priority of rights to the charterers' assets between the shipowners and the debenture holder. Peter Millett QC, as he then was, who appeared for the shipowners, submitted that the rights of the shipowners to maintain the injunction had priority over rights arising on a subsequent appointment of a receiver.¹⁴⁵ Buckley LJ explained that "it is not the case that any rights in the nature of a lien arise when a *Mareva* injunction is made. Under such an injunction the plaintiff has no rights against the assets. He may later acquire such rights if he claims judgment and can thereafter successfully levy execution upon them, but until that event his only rights are against the defendant personally".¹⁴⁶ Thus, by obtaining the injunction, the shipowners acquired no proprietary rights against the assets of the charterers. By contrast, the floating charge created an immediate equitable charge upon the assets of the charterers. Consequently, when the floating charge crystallised, the debenture holder became entitled to a fixed charge upon the charterers' assets. It has been explained that:

"the reason why a freezing order does not create a security right over the assets from time to time subject to it is, in my judgment, that a freezing order - without more - does not impose an obligation on the part of the respondent to satisfy any judgment debt out of those assets. Rather, a freezing order provides...as 'a most efficient hold to prevent the misapplication [of those assets]'...that is not enough to create a security right"¹⁴⁷

4.7 Some comparisons with pre-judgment attachment in New York

This author will use the New York case law on pre-judgment attachment to support some of his proposed changes to the substantive preconditions for English freezing injunctions.¹⁴⁸ For this reason, a brief overview of pre-judgment attachment is provided in this section.

It is the *in personam* operation of English freezing injunctions which distinguishes them from pre-judgment attachment in the United States.¹⁴⁹ Although the latter is also a provisional remedy,¹⁵⁰ it always serves a security function and creates a lien on the attached assets and the 90 days running before trial in any state. It establishes priority in the assets from the date of the prejudgment attachment and preserves the property for eventual execution. A further possible use of pre-judgment attachment is jurisdictional: in certain limited circumstances (e.g. in the context of claims

¹⁴⁵ Ibid, 972.

¹⁴⁶ Ibid, 977.

¹⁴⁷ *Flightline v Edwards* [2003] 1 WLR 1200, [47]. The passage was cited with approval by Gloster J (as she then was) in *Munib Masri v Consolidated Contractors International Company SAL & Another* [2007] EWHC 3010 (Comm), [67].

¹⁴⁸ See chapters 8 and 9 of this thesis.

¹⁴⁹ Federal Rule 64 authorises federal district courts to use the state attachment rules. In this thesis, the author has chosen to refer to case law on the New York Civil Practice Law and Rules ('CPLR') §6201 (3) which provides a typical example of state law on attachment. The New York law has been chosen because of New York's historic desire to be a popular forum for resolving high value international commercial disputes.

¹⁵⁰ Provisional in the sense that it protects the claimant while the action is pending and does not have a permanent effect on the rights of the defendant. Under New York law, there are other provisional remedies for claimants including the so called *lis pendens* (notice of pendency) which provides notice to third parties that the claimant has a claim to a parcel of real property with the effect that any subsequent lender or purchaser would be subject to any rights of the claimant resulting from a future judgment.

against non-domiciliaries resident outside of the state),¹⁵¹ it may facilitate the establishment of *quasi in rem* jurisdiction. New York's pre-judgment attachment has gained importance this decade because some courts and commentators have indicated that it may be possible for attachment to be levied against out of state assets.¹⁵² Under New York law, there are four main requirements for obtaining pre-judgment attachment and we will be making some comparisons to these requirements in relation to the substantive scope of English freezing injunctions. The first requirement is for the claim to be for a money judgment. Second, the claimant needs to show a probability of success on the merits (more likely than not to succeed on the merits). Third, there needs to be intention to defraud creditors or frustrate the enforcement of judgment. Finally, the amount demanded by the claimant must be greater than the amount of all counterclaims known to the claimant. As for the disclosure of assets, CPLR 6219 imposes a requirement on the garnishee, through whom the attachment is levied, to provide to the sheriff a list of any assets of the defendant that the garnishee holds or any debts the garnishee owes the defendant.

4.8 The extension of the substantive scope of freezing injunctions to claims against English based defendants

Having survived an attempt to challenge its doctrinal foundations in *Rasu Maritima*, the process of extending the substantive scope of freezing injunctions made an early start. The first extension was made in *Chartered Bank v Daklouché*.¹⁵³ Lord Denning MR, contradicting his earlier statement in *Rasu Maritima*, said that it was possible to grant an injunction restraining a person who was served in England. The reason given was that "[w]ere it otherwise...the person who anticipates that he is going to be served with notice of a writ will come to this country and accept actual service and thus defeat a *Mareva* injunction".¹⁵⁴ The case was nevertheless regarded as a partial extension of the *Mareva* regime because, earlier in the same judgment, Lord Denning MR indicated that a *Mareva* injunction could not be granted where defendants were permanently settled in England. On the facts, the wife who was served was temporarily within the jurisdiction. It was in *Barclay-Johnson v Yuill* that Sir Robert Megarry V-C finally made it clear that the *Mareva* regime applied irrespective of the place of residence of the defendant. He found no reason to confine it to foreign based defendants and justified the extension on the basis that "the essence of the jurisdiction is the risk of the assets being removed from the jurisdiction".¹⁵⁵

4.9 Post-judgment freezing injunctions

These orders are not underpinned by the same principles as pre-judgment freezing orders. The justifications for and functions of these two devices are different. With post-judgment applications for a freezing injunction, there is a reduced risk of wrongfully granting the injunction because there is already a binding decision on the substance of the case.

¹⁵¹ For example, a defendant who moved assets to New York but remains beyond New York's personal jurisdiction.

¹⁵² For a more detailed analysis of this, see in this thesis the penultimate chapter on the counter-arguments to the author's proposals.

¹⁵³ [1980] 1 W.L.R. 107.

¹⁵⁴ *Ibid*, 114, per Lord Denning M.R.

¹⁵⁵ [1980] 1 W.L.R. 1259, 1264. The decision was subsequently approved by the Court of Appeal in *Prince Abdul v Abu Taha* [1980] 1 W.L.R. 1268.

There is no authority to the effect that the Court of Chancery had had no jurisdiction to grant an order equivalent to a post-judgment freezing injunction. The argument against pre-judgment freezing orders in the *Lister v Stubbs* line of cases can be turned around to justify the power of the courts to grant post-judgment freezing orders. Indeed, positive statements can be found in the *Lister v Stubbs* line of cases which support the availability of injunctive relief after the judgment. Thus, in *Jagger v Jagger*,¹⁵⁶ Hill J at first instance stated that “an injunction can be granted after the order for alimony or maintenance and cannot be granted before order made”.¹⁵⁷ In *Scott v Scott*,¹⁵⁸ the Court of Appeal considered a wife’s application for an injunction to restrain her husband from removing his assets out of the jurisdiction. The provision relied upon was s.45 of the Supreme Court of Judicature (Consolidation) Act 1925. The injunction was refused because, as Somervell LJ explained, the general principle was that “an injunction of this kind cannot be granted *quia timet* before some right to relief has been established”.¹⁵⁹ There is evidence that post-judgment freezing injunctions existed even prior to the Judicature Acts.¹⁶⁰ Surprisingly, however, it is often stated that the first reported case in which a post-judgment freezing order was granted was in 1984,¹⁶¹ almost ten years after the decision in *The Mareva*. In the *Orwell Steel* case, the only issue was whether the court had the power to grant a freezing injunction after final judgment. Farquharson J rejected the objection that there is a variety of methods for enforcing execution and that after the judgment in his favour the claimant should be confined to pursuing those remedies. In line with the arguments developed above and the author’s criticisms of the ‘thin’ reasoning relied upon in the two 1975 cases, Farquharson J stated that “indeed, in one sense it could be said that there is greater justification for restraining a defendant from disposing of his assets after judgment than before any claim has been established against him”.¹⁶² As emphasised by Farquharson J, in the post-judgment context, a freezing injunction is used in aid of execution. Similarly, in the Court of Appeal’s judgment in *DST v Shell International Petroleum*,¹⁶³ Sir John Donaldson MR explained that

“The case for imposing an injunction was much stronger than Bingham J thought that it was, because DST was an actual and not a potential judgment creditor. The purpose of the injunction was thus to maintain the status quo during the period covered by the stay of execution and not to preserve assets against the probability that DST might at some later date be able to establish its claim--the ordinary *Mareva* situation.”¹⁶⁴

¹⁵⁶ [1926] P. 93.

¹⁵⁷ *Ibid*, 96. The Court of Appeal (at 98) approved the judgment of Hill J.

¹⁵⁸ [1951] P. 193.

¹⁵⁹ *Ibid*, 195.

¹⁶⁰ *Bullus v Bullus* (1910) 102 L.T. 399. Statements in later cases confirm the long history of post-judgment freezing injunctions: *Mercantile Group (Europe) A.G. v Aiyela* [1994] Q.B. 366; *Goldtron Ltd. Most Investment Ltd.* [2002] JLR 424 (Royal Court of Jersey); *Deutsche Schachtbau- und Tiefbohrergesellschaft mbH v Shell Intl. Petroleum and another* [1987] 2 All ER 769, 780 per Sir John Donaldson MR; See also Gee S., *Commercial Injunctions*, (Sweet & Maxwell, 6th edn, 2016), chapter 3.

¹⁶¹ *Orwell Steel (Erection and Fabrication) Ltd. v Asphalt and Tarmac (U.K.) Ltd.* [1984] 1 W.L.R. 1097.

¹⁶² *Ibid*, 1100.

¹⁶³ *Deutsche Schachtbau-Und Tiefbohrergesellschaft m.b.H. v Shell International Petroleum and another* [1987] 2 All ER 769.

¹⁶⁴ *Ibid*, 783.

4.10 Reflections on the development of the non-proprietary freezing injunction

Was the creation of the non-proprietary freezing injunction a radical departure from proprietary freezing injunctions? What seems to emerge from the historical analysis of pre-judgment proprietary injunctions to preserve property is that Lord Denning MR's 'creation' of the non-proprietary freezing injunction in 1975 could be viewed as an extension of the *existing* powers of the court to grant interlocutory injunctions to preserve property pending judgment on the substance.¹⁶⁵ The analysis of the case law on the equitable principles underlying all types of injunctions demonstrates that the scope of the powers of the Court of Chancery to grant injunctions was extremely wide.¹⁶⁶ As Lord Nicholls explained in *Mercedes Benz v Leiduck*:¹⁶⁷

"the jurisdiction to grant an injunction, unfettered by statute, should not be rigidly confined to exclusive categories by judicial decision. The court may grant an injunction against a party properly before it where this is required to avoid injustice, just as the statute provides and just as the Court of Chancery did before 1875. The court habitually grants injunctions in respect of certain types of conduct. But that does not mean that the situations in which injunctions may be granted are now set in stone for all time. The grant of *Mareva* injunctions itself gives the lie to this. As circumstances in the world change, so must the situations in which the courts may properly exercise their jurisdiction to grant injunctions. The exercise of the jurisdiction must be principled, but the criterion is injustice. Injustice is to be viewed and decided in the light of today's conditions and standards, not those of yester-year."¹⁶⁸

From this perspective, an extension of the existing powers of the court to preserve assets before judgment was not unreasonable, provided that it was consistent with the principles developed by the Court of Chancery. From this perspective, the decisions in *Karageorgis* and *Mareva* may be seen as a justifiable departure from the *Lister v Stubbs* line of authorities and the decision in *North London Railway*. Lord Hoffmann, writing in the early 1990s based on his personal experience as a practising barrister in the relevant period and reflecting on the developments in civil litigation, draws attention to the link between the development of the non-proprietary freezing injunction and other forms of relief including *Anton Piller* orders.¹⁶⁹ In the same period there were other significant and indirectly related developments including the decisions in *Norwich Pharmacal*¹⁷⁰ (discovery) and *Bankers Trust v Shapira*.¹⁷¹ The author submits that the common denominator of all these procedural devices (including the non-proprietary injunction) was the increasing need to respond to new, modern

¹⁶⁵ Under what were then the Rules of the Supreme Court, Order 29, rule 2.

¹⁶⁶ See generally, Spry I.C.F., *Equitable Remedies* (Thomson Reuters Australia, 9th edn, 2013), chapter 4. *Day v Brownrigg* (1878-79) L.R. 10 Ch. D. 294; *Holmes v Millage* [1893] 1 Q.B. 551; *Kitts v Moore* [1895] 1 Q.B. 253; *Duchess of Argyll v Duke of Argyll* [1967] Ch. 302; *Gouriet v Union of Post Office Workers* [1978] A.C. 435; *Bremer Vulkan Schiffbau v South India Shipping Corp Ltd* [1981] AC 909; *South Carolina Insurance Co. v Assurantie Maatschappij "De Zeven Provinciën" N.V.* [1987] A.C. 24; *Masri v Consolidated Contractors International Ltd (No 2)* [2009] Q.B. 450.

¹⁶⁷ [1996] AC 284.

¹⁶⁸ *Ibid*, 308.

¹⁶⁹ *Anton Piller K.G. v. Manufacturing Processes Ltd.* [1976] Ch. 55.

¹⁷⁰ *Norwich Pharmacal Co v Customs and Excise Commissioners* [1974] A.C. 133.

¹⁷¹ [1980] 1 W.L.R. 1274.

methods of committing fraud,¹⁷² largely as a result of technological progress.¹⁷³ In such circumstances, the extension of the existing powers to preserve assets before judgment, from proprietary to personal claims, could have been seen as a 'necessary evil'. Part of the reason for new forms of relief was also the inadequacy of procedural devices such as summary judgment, as pointed out by Lord Hoffmann.¹⁷⁴ With regards to the practical trigger for *The Mareva* and the timing of the changes, a major downturn in the shipping (freight) market in the 1970s led to charterers defaulting on payments of hire to shipowners.¹⁷⁵ Sometimes the only remaining asset within the jurisdiction would be the proceeds of the insurance policy in England. The ship (i.e. the main asset of a one-ship company) would be moved out of the jurisdiction.¹⁷⁶

A major advantage of any equitable relief is its flexibility and the element of discretion with the resulting ability to tailor the relief in a fact-sensitive manner. We can see from the historical analysis so far that features of the freezing injunction have been used by the courts to adapt its substantive scope in order to deal with new challenges. For example, the courts removed the restriction of the freezing injunction to foreign defendants as they recognised that the risk of dissipation and the difficulty of enforcing a judgment could equally apply to the new generation of English defendants.

¹⁷² The decisions in *Mareva* and *Karageorgis* did not make references to international fraud and the justifications given by Lord Denning MR (such as the *Mareva* as a revival of the old process of foreign attachment) were convincingly shown to be based on wrong assumptions by Lord Mustill in *Mercedes Benz v Leiduck* – see above, section 4.4 of this chapter.

¹⁷³ See also Kerr M., 'Modern Trends in Commercial Law and Practice' (1978) 41 M.L.R. 1, esp. pp.11-15; Schlosser P. F., 'Coordinated Transnational Interaction in Civil Litigation and Arbitration' (1990-1991) 12 Mich. J.I.L. 150.

¹⁷⁴ See also McLachlan C., 'International Litigation and the Reworking of the Conflict of Laws' (2004) LQR 580, esp. part V. McLachlan has emphasised how the innovations in practice have been shaping the rules of private international law. He observes that the actions of litigants have been influencing the changes, including in the realm of pre-judgment freezing injunctions. In his view, the worldwide freezing injunction stemmed from developments in domestic civil procedure in England.

¹⁷⁵ See Gee S., *Commercial Injunctions* (Sweet & Maxwell, 6th edn, 2016), chapter 1 and the preface.

¹⁷⁶ Note however the availability of other remedies such as maritime liens (i.e. actions *in rem* to enforce certain maritime claims).

Chapter 5: The imposition of restrictions on the scope of freezing injunctions

5.1 Introduction

In the last chapter we analysed the unsuccessful attempts to challenge the legitimacy of the non-proprietary freezing injunction. The extension of the scope of the already controversial injunction to foreign defendants and its growing popularity among claimants prompted further concerns about its scope. In this context, it was not surprising that it had not taken long before an attempt to restrict the scope of the non-proprietary freezing injunction reached the House of Lords. That was in *The Siskina* where the House of Lords imposed restrictions on the substantive scope and the international scope of freezing injunctions. As we will see in this chapter, the restrictions in *The Siskina* proved unpopular and resulted in a series of subsequent decisions which carved out exceptions. The final part of this chapter will consider the partial reversal of *The Siskina* through statutory intervention.

5.2 A step backwards? - *The Siskina*

In this case, there was a dispute between cargo-owners and shipowners. The case had no connection with England except that the shipowners were entitled to insurance moneys which were payable in England. The cargo-owners sought an injunction to restrain the shipowners from dealing with the insurance moneys. However, the shipowners were a one-ship Panamanian company and there was no ground on which the court could serve the claim form out of the jurisdiction. There was no substantive claim within the jurisdiction of the court to which the *Mareva* injunction sought could be ancillary. The cargo-owners argued that the claim form could be served out of the jurisdiction on the basis of the Rules of the Supreme Court Order 11, r. 1(1)(i).¹⁷⁷ In a nutshell, the central issue in *The Siskina* was a narrow legal issue: whether there was an available ground of jurisdiction for service out of the jurisdiction. This was a question relating to the international scope of the freezing injunctions and involved the application of the rules of private international law.

The House of Lords held that the Rules of the Supreme Court Order 11, r. 1(1)(i) did not allow the assumption of jurisdiction to grant a freezing injunction in relation to the local assets of a person resident outside the jurisdiction in a case which has no other relevant connection with England. In the leading judgment, Lord Diplock took the view that R.S.C. Order 11, r. 1(1)(i) pre-supposed the existence of a cause of action.¹⁷⁸ A claim for an interlocutory injunction was not a cause of action, but was dependent on there being a pre-existing cause of action arising out of an invasion, actual or threatened, of a legal or equitable right of the plaintiff enforceable in England.¹⁷⁹ Lord Diplock relied on *North London Railway*, stating that it was first established in that case that “the High Court has no power to grant an interlocutory injunction except in protection or assertion of some legal or equitable right which it has jurisdiction to enforce by final judgment”.¹⁸⁰ Applying this to the facts of *The Siskina*, the cargo-owners had no legal or equitable right or interest in the insurance moneys payable to the shipowners, which was enforceable in England. They only had a claim to monetary

¹⁷⁷ This provided that service out of the jurisdiction is permissible “if in the action begun by the writ an injunction is sought ordering the defendant to do or refrain from doing anything within the jurisdiction (whether or not damages are also claimed in respect of a failure to do or the doing of that thing);...”.

¹⁷⁸ [1979] A.C. 210, 254.

¹⁷⁹ Ibid.

¹⁸⁰ Ibid, 256.

compensation arising from a cause of action against the shipowners which was not justiciable in England.

As Collins has explained, “[t]he reference in *The Siskina* to a pre-existing cause of action was not necessary to the decision. The only issue in the case was whether the court had jurisdiction to grant a *Mareva* injunction where it did not have jurisdiction over the substance of the dispute between the parties”.¹⁸¹ As for Lord Diplock’s reliance on *North London Railway*, Collins has argued that that decision was “simply one of several which held that the statutory power could not be exercised where the plaintiff had no legal or equitable right whatever. It was not a decision which was directed to the issues which arose in *The Siskina*”.¹⁸²

It should be noted that the House of Lords was probably aware that a proper examination of the case law on section 25(8) would lead to the conclusion that *Karageorgis* and *The Mareva* were wrongly decided.¹⁸³ As the practice of granting *Mareva* injunctions had proved “extremely popular” in the Commercial Court,¹⁸⁴ and counsel for the defendant did not challenge the foundations of the jurisdiction, their Lordships were unwilling to address this issue.

5.3 The development of exceptions to the decision in *The Siskina*

The decision in *The Siskina* was subsequently criticised in a number of significant cases, some of which eroded or modified its scope by creating artificial exceptions to its application. These cases collectively demonstrated that the law of freezing injunctions took a step backwards in *The Siskina*. It seems that the courts quickly realised that the limits on the power to grant injunctions would hamper the effective enforcement of judgments and thereby undermine the needs and expectations of the parties to international commercial litigation. Rigid categorisation of the court’s powers to grant freezing injunctions is inconsistent with the fact that the touchstone has always been the demands of justice, providing an opportunity for the courts to cater for new techniques designed to frustrate the enforcement of judgments.¹⁸⁵

The need for a pre-existing cause of action proved to be an obstacle which the claimants could not overcome in *The Veracruz*.¹⁸⁶ The context was a contract for the sale of a ship. The sellers were a one-ship Liberian company. The purchase price was payable upon delivery of the vessel. In arbitration proceedings in London, the buyers claimed damages from the sellers for two alleged breaches of the contract of sale. The first was a breach of the duty to deliver the vessel on the contractual date. The second was an anticipatory breach of the term of the agreement that on delivery the vessel would be in the same condition as it was when inspected (fair wear and tear expected). The buyers sought a freezing injunction to restrain the sellers from dealing with a substantial part of the purchase price once it has been paid over. This was on the basis that, fearing an adverse arbitration award, the sellers would remove what would constitute their only asset within the jurisdiction. The Court of Appeal maintained the freezing injunction in respect of the claim

¹⁸¹ Collins L., ‘The Legacy of *The Siskina*’ (1992) L.Q.R. 175, 180.

¹⁸² Ibid.

¹⁸³ See, inter alia, Lord Hailsham’s observation in *The Siskina* at p.261 that “at least some of the arguments by which [the practice of granting *Marevas*] is supported are, I would have thought, a little specious”.

¹⁸⁴ Ibid, 261, per Lord Hailsham.

¹⁸⁵ See *Smith v Peters* and related cases referred to above in chapter 2.

¹⁸⁶ *Veracruz Transportation v VC Shipping Co Inc (The Veracruz)* [1992] 1 Lloyd’s Rep 353.

for damages for late delivery. However, the injunction was refused in respect of the claim for damages for defects in the vessel. At the time of the application for the injunction, the claimants had no accrued cause of action for damages for defects; the cause of action would arise upon delivery. Consequently, the requirement for a pre-existing cause of action, established in *The Siskina*, was not satisfied. At first instance, Hobhouse J had granted an anticipatory freezing injunction on the basis that the claimants had shown an arguable claim for damages for defects which they expected would be present on delivery. The anticipatory injunction had been in a conditional form in that it was to come in force only after delivery and payment of the purchase price.¹⁸⁷ The Court of Appeal rejected this approach as inconsistent with *The Siskina*. Nourse LJ and Sir John Megaw expressed disappointment with the conclusion which they were bound to reach. As Nourse LJ observed, an anticipatory freezing injunction would have been expedient because the risk of dissipation was formidable and the accrual of the cause of action was both imminent and inevitable.¹⁸⁸ Collins has argued that *The Siskina* should not have been treated as a bar to the grant of the freezing injunction.¹⁸⁹ The facts of *The Veracruz* could be distinguished from those in *The Siskina* on the basis that the court had jurisdiction over the defendants.¹⁹⁰

*Zucker v Tyndall Holdings Plc.*¹⁹¹ is a case which illustrated how the application of *The Siskina* could lead to divergent arguments on whether the requirement of a cause of action has been satisfied. As Neill LJ pointed out, “[o]ne of the difficulties which arises...is the fact that the phrase or expression “cause of action” can be used in different contexts and in different senses”.¹⁹² On the facts, the claimant shareholders sought a declaration from a Swiss court that they had validly exercised a put option under the shareholders’ agreement governed by Swiss law and an order for the payment of a sum of money in lieu of new shares. If there was a valid exercise, the defendants were obliged to issue new shares to the claimants within three months. The Court of Appeal held that there was no “jurisdiction” to grant a *Mareva* injunction. Neill LJ’s reasoning was that while the claimants had the right to be paid, there had been “no invasion of that right”.¹⁹³ Dillon LJ, on the other hand, did not mention the need to show that a legal or equitable right had been invaded or interfered with. His Lordship saw the case “on a narrower basis than that on which it was decided” below.¹⁹⁴ Some confusion about the precise limits on the scope of freezing injunctions imposed by *The Siskina* was evident from Neill LJ’s own addition that it was sufficient to demonstrate that an invasion or interference had been “threatened”.¹⁹⁵ Furthermore, Neill LJ even approved counsel for the claimants’ submission that “interlocutory relief can be obtained in certain circumstances to protect an equitable interest even before the time for performance under a contract has arisen”.¹⁹⁶ In the light of such contradictory statements and the Court of Appeal’s use of the term “jurisdiction” to describe the substantive scope of the injunction, the author submits that a differently constituted Court of Appeal could easily have come to a different conclusion.

¹⁸⁷ The practice of granting such injunctions had been developed by Saville J in *A. v B.* [1989] 2 Lloyd’s Rep 423.

¹⁸⁸ [1992] 1 Lloyd’s Rep 353, 360.

¹⁸⁹ Collins (1992), p.180.

¹⁹⁰ *Ibid*, p.177.

¹⁹¹ [1992] 1 W.L.R. 1127.

¹⁹² *Ibid*, 1134F.

¹⁹³ *Ibid*, 1135B.

¹⁹⁴ *Ibid*, 1136G.

¹⁹⁵ *Ibid*, 1135C.

¹⁹⁶ *Ibid*.

The House of Lords in *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd*¹⁹⁷ was keen to seize the opportunity to distinguish *The Siskina*. In that case, the English court proceedings had to be stayed because the construction contract contained an arbitration agreement which provided for arbitration in Brussels. The key issue was whether the English court had jurisdiction under section 37(1) of what was then the Supreme Court Act 1981 to grant an injunction in support of a cause of action which the parties had agreed to submit to arbitration abroad. It was held that the court had jurisdiction to grant an injunction in such circumstances. Lord Browne-Wilkinson's interpretation of *The Siskina* was that it only laid down two limitations on the power conferred by section 37(1) of the 1981 Act.¹⁹⁸ First, the court must have personal jurisdiction over the defendant. Second, the claimants must have a cause of action available in the English courts. His Lordship rejected the defendants' submission that *The Siskina* imposed a third requirement that the court had to be satisfied that the final order for substantive relief, if any, would be made by an English court. Lord Browne-Wilkinson concluded that "the court has power to grant interlocutory relief based on a cause of action recognised by English law against a defendant duly served where such relief is ancillary to a final order whether to be granted by the English court or by some other court or arbitral body".¹⁹⁹ Lord Mustill's interpretation of the restrictions imposed by *The Siskina* was even more liberal than that of Lord Browne-Wilkinson. This is evident from his Lordship's statement that "the doctrine of *The Siskina*, put at its highest, is that the right to an interlocutory injunction cannot exist in isolation, but is always incidental to and dependant on the enforcement of a substantive right, which usually although not invariably takes the shape of a cause of action. If the underlying right itself is not subject to the jurisdiction of the English court, then that court should never exercise its power under section 37(1) by way of interim relief".²⁰⁰

An opportunity arose in *Mercedes-Benz A.G. v. Leiduck* for a strong Privy Council to lessen the impact of *The Siskina*.²⁰¹ In *Leiduck*, there were substantive proceedings in Monaco against the defendant, a German citizen, for allegedly misappropriating some funds. A *Mareva* injunction was sought by the claimant in Hong Kong to restrain the defendant from transferring his shares in a Hong Kong company which he controlled. The majority concluded that in a case where the only connection with the forum was the presence of assets within the jurisdiction, the Rules of the Supreme Court did not permit the court to serve the defendant out of the jurisdiction. The majority thereby approved the decision in *The Siskina*. Lord Nicholls, who gave a dissenting judgment, made reference to *quia timet* injunctions to show that, contrary to Lord Diplock's view in *The Siskina*, there was no need for a pre-existing cause of action. His Lordship described *quia timet* injunctions as a classic instance of injunctions granted by the Court of Chancery to prevent anticipated wrongs from being committed. By contrast, the majority rejected the analogy with *quia timet* injunctions. Lord Mustill distinguished *Mareva* injunctions from *quia timet* injunctions on the following basis:

"The threatened infringement of the plaintiff's rights which a *quia timet* injunction forestalls is a wrongful act, although not one which constitutes an immediate cause of action for

¹⁹⁷ [1993] A.C. 334. See Collins L., 'The End of *The Siskina*' (1993) L.Q.R. 342.

¹⁹⁸ [1993] A.C. 334, 342A.

¹⁹⁹ Ibid, 343C.

²⁰⁰ Ibid, 362B-C.

²⁰¹ For comments on this case see Andrews N.H., 'Mareva Relief Cannot Stand Alone: Further Judicial Reflections upon *The Siskina* Doctrine' (1996) 55(1) C.L.J. 12.

substantive relief. By contrast, the threatened dispersal of assets is not a wrongful act even against the background of a pending suit in England”.²⁰²

Lord Nicholls distinguished between the *existence* of jurisdiction to grant *Mareva* relief and the *exercise* of the jurisdiction. With regard to the former, he said that the claimant’s underlying cause of action is irrelevant. This is because, in his view, the purpose of *Mareva* relief was to facilitate the enforcement of a prospective money judgment. It was “not granted in aid of the cause of action asserted in the proceedings”.²⁰³ In general, the cause of action is irrelevant to the question of whether a foreign judgment should be enforced. The only consideration which is relevant to the existence of jurisdiction to grant *Mareva* relief is the prospective money judgement and its enforceability in the jurisdiction where the relief is sought.²⁰⁴ The fact that the requirement for a cause of action is artificial and circular is reinforced by Lord Nicholls’ analogy with seeking an anti-suit injunction on the ground that foreign proceedings are unconscionable: the cause of action is “a right not to be sued abroad when that would be unconscionable”.²⁰⁵ The analysis adopted by Lord Nicholls broadly supports the author’s view that it is important to separate the question of jurisdiction to grant the injunction from the claimant’s ability to satisfy the substantive preconditions for obtaining relief.²⁰⁶ As for the *exercise* of jurisdiction, Lord Nicholls observed that the cause of action was relevant because the court had to assess the strength of the claimant’s case on the merits and the likely amount of the judgment.²⁰⁷ For these reasons, Lord Nicholls disagreed with Lord Diplock’s view in *The Siskina* that a *Mareva* injunction was “ancillary to a substantive pecuniary claim for debt or damages”.²⁰⁸ The latter’s view may help to explain what this author sees as an artificial link between jurisdiction to grant the injunction and jurisdiction over the substantive claim.²⁰⁹

5.4 The reversal of *The Siskina*

The reversal of *The Siskina* was eventually achieved through legislation. Section 25 of the Civil Jurisdiction and Judgments Act 1982 enabled the court to grant relief in cases where the substantive proceedings were taking place in a different jurisdiction. Initially, this was only where the other jurisdiction was a Brussels Convention²¹⁰ or a Lugano Convention²¹¹ state. This provision was enacted to ensure that the rule in *The Siskina* did not prevent the courts from giving effect to Article 24 of the Brussels Convention. In 1997 the scope of section 25 was extended to non-Convention countries and proceedings outside the scope of the Conventions.²¹² Consequently, there is no longer a requirement that the cause of action in respect of which the claimant seeks an injunction must be enforceable in England.

²⁰² [1996] A.C. 284, 303D-G.

²⁰³ Ibid, 306E.

²⁰⁴ Ibid, 307C-D.

²⁰⁵ Ibid, 310G.

²⁰⁶ We will return to this issue in relation to the international scope of freezing injunctions.

²⁰⁷ Ibid, 307F.

²⁰⁸ Ibid, 307H-308A.

²⁰⁹ We will return to this issue in relation to the international scope of freezing injunctions.

²¹⁰ The Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, set out in Schedule 1 to the Civil Jurisdiction and Judgments Act 1982 (‘the Brussels Convention’).

²¹¹ The Lugano Convention of 16 September 1988 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (‘the Lugano Convention’).

²¹² Civil Jurisdiction and Judgments Act 1982 (Interim Relief) Order 1997 (S.I. 1997 No.302).

Chapter 6: The extension of freezing injunctions to third parties: *Chabra*-type injunctions

6.1 Introduction

In the early 1990s the courts had to respond to defendants who were creative in avoiding the effects of a freezing injunction by increasingly using third parties to hide their assets. The courts were forced to make a further extension of the substantive scope of the freezing injunction in order to reach the assets in the hands of third parties. In the next section, we will consider the case in which such an extension was developed and how its own scope is still gradually expanding to keep up with the latest methods of judgment evasion. The inevitable question is whether the existing boundaries of *Chabra* injunctions are consistent with the principles which underpin the power to grant freezing orders.

6.2 The landmark decision in *Chabra*

In *TSB Bank International v Chabra*,²¹³ a new precedent was set by granting an injunction in respect of the assets in possession of a third party which were held for and on behalf of the defendant to the substantive claim. The freezing order was regarded as incidental and ancillary to a cause of action against a co-defendant. The factual context was an action against Mr Chabra, the guarantor and the first defendant, pursuant to the contract of guarantee. A freezing injunction was granted against Mr Chabra but this was inadequate to protect the claimant. The court of its own motion ordered that a company, in which Mr Chabra was a director and majority shareholder, be joined to the action as the second defendant under the R.S.C. Ord.15 r.6(2)(b)(ii), and granted a similar freezing injunction against it. The second defendant was a third party in that there was no cause of action against it. The court relied on the following passage from the claimant's solicitors' affidavit:

"In substance, the assets of the company are the assets of Mr. Chabra and that with 100 per cent control in him or his wife, he can procure the transfer of assets, in particular the proceeds of the hotel site where he wishes by disposition of proceeds themselves thus diminishing the value of his shareholding in the company."

Even at this early stage of the development of the *Chabra* injunction, it is not clear how an injunction against a third party is consistent with the historical origins of the exception to the general rule. The property in the hands of the third party (a separate legal entity) was treated as the defendant's property. As there was no proprietary claim in *Chabra*, it cannot be argued that the court was protecting the claimant's property rights. The claim was contractual and therefore the only available rationale from earlier cases was the prevention of judgment evasion. Arguably, that rationale should have been applicable only if the claimant had managed to overcome the obstacle of lifting the corporate veil. More recently, freezing injunctions against third parties have been described as "ancillary to the main freezing injunction" in that they ensure the effectiveness of the main injunction.²¹⁴

²¹³ [1992] 1 WLR 231.

²¹⁴ *JSC MP Bank v Pugachev et al* [2015] EWCA Civ 906.

6.3 The erosion of the beneficial interest requirement and the expansion of the scope of the *Chabra* injunction

Later cases have eroded the requirement of beneficial ownership of assets which had been established in *Chabra*. In *Yukos v Rosneft*,²¹⁵ there was a complex scheme whereby Rosneft's several sister companies had entered into back-to-back oil sale and purchase transactions. The claimant's allegation was that the reason behind such a transactional structure was to permit oil trading with Western purchasers without exposing Rosneft's assets to its Russian creditors. The claimant had obtained arbitration awards against Rosneft in Russia and sought a freezing order against Rosneft's sister companies (third parties against whom there was no cause of action). The complicating factor was that, on the evidence, there was a legitimate reason for the adopted structure of oil sale and purchase transactions. It was for the protection of banks because it ensured that the proceeds of sale made by Rosneft's sister companies only came to under Rosneft's control, and ceased to be controllable by banks, when the companies transferred them to Rosneft's Russian bank accounts. The only circumstances in which such transfers were permitted were in the event of default in the overall credit facilities. The Commercial Court held that it was sufficient if the claimant could show that there existed some legal mechanism to compel the third party to make the assets available for enforcement purposes.²¹⁶

The author submits that this extension of the original *Chabra* injunction should not have been made because of the absence of wrongful conduct on the defendant's part in respect of the structure of its assets. The lack of an unjust element means that the decision is inconsistent with a key equitable principle which underpinned the historical development of freezing injunctions. The claimant could not demonstrate that the transactional arrangements were made in order to ensure Rosneft was judgment-proof. In the author's view, the court took a claimant-friendly approach and crossed the boundary between protecting the claimant from deliberate evasion of judgment on the one hand, and protecting the claimant's ability to enforce a judgment in the circumstances where the claimant made a bad bargain and failed to protect itself from the inherent risk of non-enforcement on the other.²¹⁷ The latter type of risk of non-enforcement arises through defendant's legitimate use of certain legal devices. It is up to the claimant company (or more accurately its experienced team of commercial lawyers), rather than the Commercial Court acting retrospectively, to foresee the risk and protect itself from financially damaging business practices.

The author submits that the English courts should generally refrain from granting freezing injunctions or extending their substantive scope merely on the basis of the difficulties that the claimant would have in enforcing a future judgment. If such difficulties exist because of the defendant's legitimate actions, the claimant has only himself to blame. One of the factors that the courts take into account in assessing the risk of dissipation is whether the defendant is domiciled

²¹⁵ [2011] EWHC 1461 (Comm). For comments on this case see McGrath P., 'The Freezing Order: a Constantly Evolving Jurisdiction' (2012) CJC 12.

²¹⁶ This represented adoption of the liberal approach of the High Court of Australia in *Paul Cardille v LED Building Proprietary Ltd* [1999] HCA 18. For a detailed review of all requirements for obtaining a *Chabra*-style injunction see the judgment of Sir John Chadwick in the Court of Appeal of the Cayman Islands in *Algozaibi v Saad Investments Company Limited* [2011] 1 CILR 178, cited with approval inter alia by Flaux J in *Linsen International Limited v Humpuss Sea Transport Pte Limited* [2011] EWHC 2339 (Comm).

²¹⁷ This is consistent with the author's proposals relating to the real risk of dissipation requirement – see chapter 8 below.

abroad but such a factor should not serve to tilt the balance in favour of the claimant. If the claimant knowingly entered into a transaction with a company domiciled overseas, it should have been cautious from the outset about the possible risks. The decision not to continue the freezing injunction in *IOT Engineering Projects Ltd v Dangote Fertilizer Ltd et al*²¹⁸ is a positive example where the Court of Appeal correctly disregarded the claimant's arguments about the alleged difficulties of enforcing the arbitration award in Nigeria. During the course of the proceedings, the claimant accepted a guarantee from a Nigerian parent company with a large turnover. Nevertheless the claimant sought to preserve a fund in London against which it would seek to (easily) enforce any judgment in the future. The claimant argued that the guarantee was not the same as a guarantee from a first class London bank and that it would have to seek enforcement of the guarantee in Nigeria. Tomlinson LJ acknowledged that in *The Nicholas M*²¹⁹ Flaux J referred to the possibility of satisfying the requirement of a real risk of dissipation where, in the absence of an injunction, the assets were to be dealt with in a way that make the enforcement of a judgment more difficult. However, Tomlinson LJ added a gloss by stating that:

“What Flaux J there meant by “mak[ing] enforcement of an award or judgment more difficult” was, I have no doubt, more difficult than usual. Enforcement of an award or judgment is rarely straightforward unless there happens to be a secure and otherwise unencumbered fund against which enforcement can be sought. It is well known that enforcement in some jurisdictions is more difficult than in others. Some legal systems move at a greater pace than others. I do not consider that a party who contracts with a Nigerian company can legitimately pray in aid as justifying freezing order relief the difficulties routinely encountered by those who seek to enforce judgments or awards in that jurisdiction.”²²⁰

Tomlinson LJ's comments should be contrasted with the reasoning in an earlier case, *Stronghold Insurance Co Ltd v Overseas Union Insurance Ltd*,²²¹ where the claimants relied on the alleged possibility of “increased difficulty, delay and cost” in enforcing a possible arbitration award in Singapore which might have had the effect of pushing them to accept a compromise or discount in order to avoid further unrecoverable costs. Potter J agreed that there was a risk of dissipation and specifically took into account the “substantial risk” that the claimants would have to chase the assets for the purposes of enforcement.²²² Potter J explicitly accepted that “[s]o far as enforcement in Singapore is concerned, I accept there is no evidence that, if the plaintiff were obliged to go there (and incur extra costs and delays), it would do other than belatedly recover the amount of its award.” In the author's view, this claimant-friendly interpretation of the requirement to show a real risk of dissipation allows claimants to obtain assistance from the court whenever they find it more difficult than usual to enforce a judgment or award.²²³ A freezing injunction in respect of a non-proprietary claim should be restricted to assisting a claimant in fighting deliberate evasion. In the absence of wrongful conduct on a defendant's part, equity should not assist a claimant. However, in

²¹⁸ [2014] EWCA Civ 1348.

²¹⁹ *Congentra AG v Sixteen Thirteen Marine SA (The Nicholas M)* [2008] 2 CLC 51.

²²⁰ [2014] EWCA Civ 1348, [14].

²²¹ [1995] CLC 1268.

²²² *Ibid*, 1274.

²²³ See the author's arguments on the need for a level-playing field in litigation (chapter 7) and his further analysis of the real risk of dissipation requirement (chapter 8).

contrast to the author's view, some practitioners have applauded the extension of the *Chabra* injunction in *Yukos v Rosneft*. McGrath QC has suggested that the decision:

“represents a sensible and pragmatic extension of the *Chabra*-jurisdiction, recognising the fact that the monies sitting in the London bank accounts, although in the name of a [respondent] company, and not formally in Rosneft's beneficial ownership, were monies that were subject to irrevocable instructions to pay over to Rosneft and therefore were subject to being preserved under the freezing order jurisdiction. The fact that the whole arrangement appears to have been set up and devised by the banks for their own protection and not by Rosneft as an artificial means of disguising its ownership of these assets simply deprived Yukos of making any submissions based upon sham arrangements. It did not prevent Yukos contending that, taking the scheme at its face value, there was a sufficient connection between Rosneft and the sale proceeds in the English bank account to justify granting the freezing order.”²²⁴

6.4 The uncertainty of the requirements for a *Chabra* injunction and the potential for unfairness to defendants

A useful case illustrating the difficulties that defendants may face in discharging a *Chabra* injunction is *PJSC Vseukrainskyi Aktsionernyi Bank v Maksimov et al.*²²⁵ In arbitration proceedings the claimant Ukrainian bank sought damages for breach of contractual obligations to repay some loans against the defendant, its former president. The defendant was the subject of criminal proceedings in Ukraine. The bank sought a freezing order which would cover the assets of a number of English companies which were allegedly the defendant's nominees and over which the defendant allegedly exercised substantial control. The only substantial asset of the English companies was their shareholding in OPH, a Ukrainian company whose beneficial ownership was in dispute. The crucial factual issue was whether a Cypriot company called Carlsbad, the majority shareholder in OPH, was a nominee of Mr Maksimov. To use the words of the judge, was Mr Maksimov the ultimate beneficial owner of Carlsbad, using the director of Carlsbad as his nominee and acting through him in exercising control?²²⁶ Despite the need to resolve such complex and disputed factual issues, the *ex parte* application for a *Chabra* freezing order was successful. Popplewell J rejected the defendants' application to set aside the order and he used the opportunity to summarise the key principles governing the power to grant *Chabra* orders. The most important one is the principle relating to the condition for granting the order:

“The *Chabra* jurisdiction may be exercised where there is good reason to suppose that assets held in the name of a defendant against whom the claimant asserts no cause of action (the NCAD) would be amenable to some process, ultimately enforceable by the courts, by which the assets would be available to satisfy a

²²⁴ McGrath P., ‘The Freezing Order: a Constantly Evolving Jurisdiction’ (2012) CJQ 12, 19.

²²⁵ [2013] EWHC 422 (Comm).

²²⁶ *Ibid*, [10] per Popplewell J.

judgment against a defendant whom the claimant asserts to be liable upon his substantive claim (the CAD).”²²⁷

Another important clarification by Popplewell J is his principle relating to the relevance of substantial control by the CAD over the assets in the name of the NCAD:

“Substantial control by the CAD over the assets in the name of the NCAD is often a relevant consideration, but substantial control is not the test for the existence and exercise of the *Chabra* jurisdiction. Establishing such substantial control will not necessarily justify the freezing of the assets in the hands of the NCAD. Substantial control may be relevant in two ways. First, evidence that the CAD exercises substantial control over the assets may be evidence from which the Court will infer that the assets are held as nominee or trustee for the NCAD as the ultimate beneficial owner. Secondly, such evidence may establish that there is a real risk of dissipation of the assets in the absence of a freezing order, which the claimant will have to establish in order for it to be just and convenient to make the order. But the establishment of substantial control over the assets by the CAD will not necessarily be sufficient: a parent company may exercise substantial control over a wholly owned subsidiary, but the principles of separate corporate personality require the assets to be treated as those of the subsidiary not the parent. The ultimate test is always whether there is good reason to suppose that the assets would be amenable to execution of a judgment obtained against the CAD.”²²⁸

In the light of this principle, it is interesting that later in his judgment Popplewell J decided that the circumstances of the case were such that it was “legitimate to conflate the legally distinct tests of beneficial ownership and substantial control” and concluded that “If Carlsbad, a Cypriot company with admittedly nominee shareholders, is under the substantial control of Mr Maksimov, there is good reason to suppose that he is its ultimate beneficial owner”.²²⁹ The specific circumstances the judge had in mind was that Mr Maksimov had conducted his affairs through a number of offshore companies which he had used as nominees without treating their separate corporate personality as a matter of any reality or significance.²³⁰ The author of this thesis believes that the conflation of the concepts of beneficial ownership and substantial control, although limited by the judge to the particular circumstances of the case, stretched the *Chabra* jurisdiction into dangerous territory. This is because it increases its existing potential as a powerful tool for oppression of innocent third parties and its use for unmeritorious purposes such as putting pressure to extract a settlement on terms unfavourable to the defendant. Carlsbad’s own application to discharge the worldwide freezing order came before Blair J.²³¹ Carlsbad’s main argument was that its assets were not owned by Mr Maksimov. Blair J accepted the claimant’s argument that Carlsbad was barred under privity of interest and/or the abuse of process principles running the same point again at this interim stage: Carlsbad was not a party to the proceedings before Popplewell J but it provided funding for the legal costs of the English companies (the NCADs). Blair J proceeded to consider the evidence anyway and

²²⁷ Ibid, [7] per Popplewell J, emphasis in the original.

²²⁸ Ibid. [7].

²²⁹ Ibid, [12].

²³⁰ Ibid.

²³¹ [2013] EWHC 3203 (Comm).

concluded that he would not have discharged the order on the strength of the new evidence if the point had been open to Carlsbad to argue. Blair J's judgment provides a short but useful insight into the difficulties that the defendant encountered in its attempt to argue that the claimant bank did not meet the requirement that there was a "good reason to suppose" that its assets were "amenable to enforcement".²³² Carlsbad argued that even if the claimant could prove that the company was owned and controlled by Mr Maksimov, enforcement would not be available in Cyprus. Expert evidence from a Cypriot lawyer was that in the absence of a floating charge, the receiver could not be appointed over the shares. However, for Blair J, this was not sufficient to undermine the claimants' case because the expert witness did not deal with the possibility of the appointment of a trustee in bankruptcy. Given the constraints of the interlocutory stage, the court was not prepared to express a view on whether the appointment of a trustee in bankruptcy would apply to a corporation rather than an individual. In the author's view, what emerges from this analysis of the enforcement issue (which it should be emphasised is the indispensable element in establishing the existence of the power to grant a *Chabra* order) is that the limits of the interlocutory process favour claimants. For claimants, it seems that mere allegations about the 'possible routes' of enforcement backed up by expert evidence, but without substantial research, are sufficient to overcome the hurdle of showing amenability to enforcement. At the same time, it appears that defendants may well have a mountain to climb in order to rebut the evidence of the claimant's experts.

6.5 Reflections on the development of the *Chabra* injunction

The creation by the courts of freezing orders against third parties can broadly be justified on the basis of the equitable nature of freezing orders which gives them the following key characteristic: the flexibility of the substantive scope of freezing orders and the ability of the courts to set its boundaries according to the needs of justice. Indeed, in a recent case, the Court of Appeal treated their flexibility as a matter of principle:

"The second principle is that the jurisdiction to make a freezing order should be exercised in a flexible and adaptable manner so as to be able to deal with new situations and new ways used by sophisticated and wily operators to make themselves immune to the courts' orders or deliberately to thwart the effective enforcement of those orders"²³³

However, the need for caution when exercising the power to grant a *Chabra* injunction was underlined by Males J in *Cruz City 1*:

"[The *Chabra* injunction] is, nevertheless, an unusual jurisdiction, involving as it does the exercise of the court's compulsive powers, backed by the sanction of contempt proceedings, against a party against whom no cause of action is asserted. In a case where the exercise of the jurisdiction is not based on beneficial ownership but on the possibility of the judgment creditor being able to exercise rights of the judgment debtor, its effect is to restrain a

²³² Ibid, [84] – [87].

²³³ [2013] EWCA Civ 928, [36] per Beatson LJ. In articulating this principle, the author of this thesis would interpret the Court of Appeal's use of the term 'jurisdiction' as a reference to the substantive scope of freezing injunctions; the court was not referring to the private international law aspects of freezing injunctions.

Chabra defendant from dealing with assets over which it has both legal and beneficial ownership.”²³⁴

The equitable roots of injunctions have provided a license to the courts to develop a completely separate category of principles here from the rules relating to piercing the corporate veil. Indeed, it has been possible to overcome the obstacle of granting relief against third parties where the claimant would otherwise not be able to pierce the corporate veil. This is particularly important because the Supreme Court decision in *Prest v Petrodel*²³⁵ severely limited the doctrine of piercing the corporate veil.²³⁶

*Linsen v Humpuss*²³⁷ is an excellent example where there was clear evidence of wrongful conduct within a group of shipping companies with the aim of evading judgment. There were allegations of illegitimate transfers of assets for the sole purpose of avoiding liability. Flaux J described the effect of the suspicious transactions in the following terms:

“the Singaporean company has been ‘cleaned out’ of assets worth some US\$60 million which have been transferred to an Indonesian company which was balance sheet insolvent and which would appear not to have paid any part of the consideration for the ostensible transfers.”

But for the absence of jurisdiction as a matter of private international law, the *Chabra* injunction would have been granted against the Indonesian company.²³⁸ The substantive preconditions were met because the corporate veil could be pierced: there was a good arguable case that the purported sales of vessels and transfers of assets to the Indonesian company were shams designed to make enforcement more difficult and that the corporate structure was misused.²³⁹ Given that the transfers could be unravelled, the claimant could successfully show that the Indonesian company (the NCAD) had or held assets which were arguably the Singaporean company’s (the CAD) assets or in which the latter had a beneficial interest.

On the face of the matter, it seems that it is necessary to restrain dealings with the assets in the hands of third parties in order to avoid an easy avenue for defendants to become judgment proof. The author submits that the key task of the court is to identify, with precision, the unjust element in the defendant’s conduct. The historical roots of the freezing injunction confirm that the presence of an unjust element is an essential prerequisite or trigger for granting a freezing injunction.²⁴⁰ It is difficult to accept the argument that the unjust element in *Chabra*-type cases is the very manner in which the defendant’s assets are held and the resulting inability of the claimant to enforce his future judgment against the defendant. In the author’s view, the pre-condition for *Chabra* order ought to be some type of wrongful conduct on the defendant’s part. Evidence of wrongful conduct would be

²³⁴ [2014] EWHC 3704 (Comm), [10]. On the need for caution see also *ETI Euro Telecom International NV v Bolivia* [2008] EWCA Civ 880, [126].

²³⁵ [2013] UKSC 34.

²³⁶ See Hare C., “Family Division, 0; Chancery Division, 1: piercing the corporate veil in the Supreme Court (again)” [2013] C.L.J. 72(3) 511.

²³⁷ *Linsen International Limited v Humpuss Sea Transport Pte Limited* [2011] EWHC 2339 (Comm).

²³⁸ We will consider the issue of jurisdiction in the context of *Chabra* injunctions (and their international scope) in Parts II and III of the thesis.

²³⁹ [2011] EWHC 2339 (Comm), [83].

²⁴⁰ See chapter 2 of this thesis.

the existence of an 'illegitimate' transaction in respect of the assets sought to be frozen (such as a transfer, exchange or restructuring of assets). 'Illegitimate' could be defined as a transaction which is not in the ordinary course of business and whose purpose is to knowingly put the assets beyond the claimant's reach.²⁴¹ This means that *Chabra*-type injunctions would be restricted to deliberate acts of evasion as opposed to assistance with any difficulties with enforcement. A related point is that *Chabra*-type injunctions may be sought in the circumstances where the party against whom the claimant has a cause of action has become insolvent. The author submits that the courts should not use freezing injunctions to assist the claimants to overcome the difficulties caused by the insolvency of the defendant. The risk that a claimant would not be able to recover the judgment debt because the defendant will take deliberate steps to dissipate his assets is materially different to the risk of being unable to recover because the defendant company may become insolvent.²⁴² The former type of risk is based on the possibility of intentional and wrongful actions of the defendant: the assets can be dissipated for the purpose of obstructing enforcement of the judgment. The latter type of risk does not necessarily depend on the wrongful actions of the defendant. Consequently, the claimant cannot obtain a freezing injunction against a third party to deal with the general risk of insolvency where there is nothing unjust about the actions of the defendant.

²⁴¹ For further analysis of the ordinary course of business proviso, see chapter 9, section 9.3.

²⁴² For the author's discussion of the pejorative meaning of 'dissipation' and its association with intention to avoid enforcement, see chapter 7.

Chapter 7: Theoretical Foundations of Freezing Injunctions

7.1 Introduction

This chapter will take into account our analysis of the historical foundations of freezing injunctions in order to assess their theoretical foundations. Why do we need to think about the theoretical foundations of freezing injunctions? In all cases in which freezing injunctions have been granted, the courts have sought to explain that the injunction was necessary to do justice. While it is clear that the power to grant a freezing injunction stems from the general equitable power to avoid injustice, the key task is to identify the unjust element against which the injunction is directed at. The Court of Appeal's decision in *Lister v Stubbs* was based on the general rule that a creditor cannot restrain his debtor from dealing with his property before judgment. The creditor should obtain his judgment first and then enforce it. We know that a freezing injunction is an *exception* to this general rule. However, what is less clear is why a defendant's activities should be curtailed by a freezing injunction? The author submits that there are unassailable justifications for the existence of the exception. The analysis of the theoretical foundations of the freezing injunction, informed by our review of its historical foundations, will clarify the reasons for the development of the exception to the general rule and help us to determine the proper scope of the exception.

7.2 Equipage equality as the theoretical foundation for freezing injunctions

In *Fourie v La Roux*, the House of Lords made a general observation that freezing injunctions are "granted to protect the efficacy of court proceedings". How does a freezing injunction protect the efficacy of court proceedings? In the author's view, where the claimant has shown that the defendant *intends* to make himself judgment proof,²⁴³ the claimant and the defendant are in different positions. Without an ability to restrain the defendant from dissipating his assets, the claimant would be entirely powerless to stop the defendant from rendering the proceedings futile. The defendant would have the ability and time to take steps to either eliminate or at least reduce the risk of losing his assets. Thus, the parties would not be in an equal position for the purposes of the process of litigation. The claimant would be disadvantaged by the risk of being unable to enforce a judgment in his favour. Surely, the defendant should not have the advantage to effectively pre-empt the court's decision. If the court had no means of restraining the defendant from making himself judgment proof, the defendant would be able to hold the claimant to ransom. The injustice lies in the fact that the defendant would be able to dictate whether the claimant could recover in the event of a successful claim on the merits. What a freezing injunction does is to ensure a level-playing field in litigation. The author of this thesis submits that the procedural function of any pre-judgment freezing injunction could therefore be best explained by reference to the principle of "equipage equality" which has been identified in the United States as one of the central organising principles of any common law civil procedural system.²⁴⁴ Equipage equality is one of the three different forms of procedural equality and it is the principle that the parties should be equally equipped to engage in adversarial adjudicatory procedures.²⁴⁵ The benefit of identifying and distinguishing various forms of

²⁴³ On the author's proposal for a requirement of intention, see chapter 8, section 8.2.3.

²⁴⁴ Rubenstein W., 'The Concept of Equality in Civil Procedure' (2002) 23 Cardozo Law Review 1865, 1867-1868.

²⁴⁵ Rubenstein explains that there is not one "procedural equality" but rather a host of "procedural equalities". The three different forms of equality he identifies are equipage equality, rule equality (the principle that like

procedural equality is to enable us to enhance our procedural system by reducing the potential for procedural injustice. As evident from the different forms of procedural equality, the procedural system contains “an intricate web of architectural decisions that promote these various forms of equality”.²⁴⁶ Thus, for example, broad and liberal factual ‘discovery’ (i.e. disclosure) in the United States could be seen as equalising the information available to each side in litigation.²⁴⁷ In broad terms, this equalises the capacities of the parties to produce their proofs and arguments.²⁴⁸ Each procedural rule or decision which seeks to address the equality of the parties must carefully balance their rights. For this reason, there are usually safeguards to address potential inequality resulting from the unrestrained operation of the specific procedural rule in question. For example, in the United States, while broad disclosure can be an expensive process, one of the safeguards is that the party producing the discovery bears the costs of doing so.²⁴⁹ The safeguards which balance the parties’ rights and purport to address the inequality resulting from the unrestrained operation of freezing injunctions will be discussed in chapter 9. Such safeguards include a cross-undertaking in damages from the claimant.

The author of this thesis submits that in the above mentioned web of architectural decisions, pre-judgment freezing injunctions are an essential part of the web to ensure equality of the parties. The principle of equipage equality should not be seen as unique to the United States. One of the “overriding objectives” of the English Civil Procedure Rules is stated as “ensuring that the parties are on an equal footing”.²⁵⁰ Without the availability of freezing injunctions, there would be an easy escape route for unscrupulous defendants and a claimant would not be equipped to close this route; equipage equality would be undermined to such an extent that litigation would be futile. One American author asserted that “insofar as adjudicatory procedure is perceived to be adversarial and dispute resolving, the degree to which procedures facilitate equal opportunities for the adversaries to influence the decision may be the most important criterion by which fairness is evaluated”.²⁵¹ Without the possibility for a claimant to obtain a freezing injunction, the parties would have unequal opportunities: defendants would know that they have the opportunity to make any potentially unfavourable decision practicably unenforceable. There are many examples in English case law, including high-value cases in the Commercial Court, where substantive proceedings would not have been possible but for the availability of a freezing injunction.²⁵² In a judgment from 1981 Robert Goff J (as he then was) stated that:

cases should be processed according to like procedural rules across case types), and outcome equality (the principle that like cases should reach consistent results).

²⁴⁶ Rubenstein (2002), 1868.

²⁴⁷ Ibid, 1880.

²⁴⁸ A further example of the potential role of the principle of equipage equality is in relation to the availability of legal aid. Thus, one commentator described the case of *Steel & Morris v United Kingdom* (68416/01) [2005] E.M.L.R. 15 (ECHR) as providing an example of “equipage inequality”: Shipman S., ‘*Steel & Morris v United Kingdom*: Legal Aid in the European Court of Human Rights’ (2006) C.J.Q. 5, footnote 36. This demonstrates that the principle of equipage equality could be linked to human rights law.

²⁴⁹ Rubenstein (2002), 1880.

²⁵⁰ CPR Part 1, r.1.1(2)(a).

²⁵¹ Mashaw J., ‘The Supreme Court Due Process Calculus for Administrative Adjudication in *Matthews v Eldridge*: Three Factors in Search of a Theory of Value’, 44 U. Chi. L. Rev. 28 (1976), at 52. See also: Mashaw J., ‘Administrative Due Process: The Quest for a Dignitary Theory’, 61 B.U. L. Rev. 885 (1981).

²⁵² See, for example, the freezing injunction granted in *Energy Venture Partners v Malabu Oil & Gas* [2012] EWHC 853 (Comm) (a dispute about commission allegedly due from the sale of Nigerian oil assets where USD

“It is, I believe, now generally recognised that the *Mareva* jurisdiction has filled a gap in the court's powers which badly needed to be filled. In the Commercial Court, certainly, a very large number of these injunctions is granted each year.”²⁵³

As one commentator put it, “[w]ithout equipage equality, ‘the stronger case might not necessarily be the better case.’ When the resources and abilities of opposing parties are lopsided, the adversarial system will fail to produce accurate results. The wealthier, sophisticated, repeat-player litigants will usually win; the poorer, outgunned, one-shot litigants will lose, regardless of the merit of their cases.”²⁵⁴ If we take into account these concerns when thinking about the availability of freezing injunctions in the international context, we should aim to reduce the possibility for wealthier litigants to make several applications for asset preservation relief in respect of the same assets. From the perspective of equipage equality, we cannot simply focus all our attention on dealing with unscrupulous defendants. The reality is that there are also unscrupulous claimants who can ‘outgun’ poorer litigants (defendants) through multiple applications for interim relief in different jurisdictions. In the author’s view, the unscrupulous claimant should not be allowed to ‘cherry-pick’ the most favourable substantive preconditions for interim relief in relation to the same asset. The substantive preconditions for freezing injunctions or similar types of interim relief can vary from one legal system to another depending on policy choices in relation to the balance of rights between the claimant and the defendant.²⁵⁵ These differences can therefore have a significant impact on the claimant’s choice of forum for interim relief and eventually on the outcome of litigation in relation to the substantive claim.²⁵⁶

The potential for unfairness to defendants is not confined to international litigation.²⁵⁷ In order to ensure a level-playing in litigation, it is essential to protect defendants from unnecessary interference with their assets. Consequently, the courts need to avoid the temptation to promote a narrow, one-dimensional view that freezing injunctions are only the claimant’s weapon against unscrupulous defendants. Indeed, one of the implications of placing emphasis on equipage equality is greater care to avoid a claimant-friendly attitude towards the substantive preconditions for a freezing injunction.²⁵⁸ In the author’s view, the term ‘dissipation of assets’ has a pejorative connotation: it is easily associated with hiding or dealing with the assets with an *intention* to avoid enforcement.²⁵⁹ The author will argue that the English courts should be focusing on that particular risk.²⁶⁰ The courts should protect the claimant from wrongful conduct rather than tip the balance in

215 million held by JP Morgan Chase Bank NA was frozen). In the substantive proceedings, the Commercial Court held in favour of the claimant for the sum of USD 110.5 million: *Energy Venture Partners v Malabu Oil & Gas* [2013] EWHC 2118 (Comm), [325]).

²⁵³ *Searose Ltd. v Seatrain UK Ltd.* [1981] 1 WLR 894, 897.

²⁵⁴ Frost A., ‘Limits of Advocacy’ (2009-2010) 59 Duke Law Journal 447, 500.

²⁵⁵ See, for example, in chapter 4 of this thesis, the author’s comparisons between English freezing injunctions and New York’s pre-judgment attachment. See also, in this chapter, the author’s discussion of the theoretical foundations of preliminary injunctions in the US.

²⁵⁶ The relationship between equipage equality and the international scope of freezing injunctions will be explored in more detail in Parts II and III of this thesis.

²⁵⁷ An alternative term for international litigation is ‘cross-border litigation’.

²⁵⁸ The implications of the principle of equipage equality on the substantive preconditions for freezing injunctions will be discussed in the next chapter (chapter 8).

²⁵⁹ Gloster LJ stated that freezing injunctions “carry a reputational stigma” in the recent judgment in *Candy v Holyoake* [2017] EWCA Civ 92, [36].

²⁶⁰ See below chapter 8 of this thesis.

favour of the claimant by eliminating any type of obstacle to enforcement. When balancing the rights of the parties and considering the potential for unfairness to defendants we should not forget the seriousness of potential consequences of non-compliance with an English freezing injunction and/or an ancillary disclosure order. A breach of the order may result in imprisonment for multiple counts of contempt of court. For example, in the *Ablyazov* litigation saga, the defendant was given a 22 months prison sentence following *inter alia* persistent contempts and non-disclosure.²⁶¹ Moreover, a freezing order may include an order for the defendant to surrender his passport and an order restraining the defendant from leaving the jurisdiction, including a Tipstaff to police any such orders.²⁶² The Tipstaff order may contain powers of arrest, entry, and seizure.²⁶³

Although the regulation of the parties' balance of rights using freezing injunctions is essential, it is not sufficient to ensure complete equipage equality. For example, in order to have the ability to effectively restrain a defendant using a freezing injunction, it is necessary to have procedural devices such as disclosure orders which enable the claimant to obtain information on the location and value of the defendant's assets.²⁶⁴ The complexity of compliance with equipage equality increases and gains a new dimension in cases involving assets located abroad and/or foreign substantive proceedings.²⁶⁵

7.3 Equipage equality and the type of assets or activities that could be caught

A high-profile example of a relatively recent legal issue which can be linked to the principle of equipage equality concerned the types of assets or activities which could be caught by a freezing injunction. Thus, in a long-running litigation saga, *JSC BTA Bank v Mukhtar Ablyazov*,²⁶⁶ the legal issue which caused difficulties and eventually reached the UK Supreme Court was whether a freezing order could be granted in respect of contractual rights to draw down under an unsecured loan facility. Could such choses in action be covered by the wording of the standard form freezing order? This partly involved the construction of the terms "asset", "disposing of", and "dealing with" in the standard form order. The claimant submitted that:

"logic and consistency – not to mention certainty – dictated that all choses in action should be treated in the same way for the purposes of freezing orders; dealings with them should not occur except pursuant to one of the exceptions".²⁶⁷

In the Court of Appeal, after detailed consideration of the authorities, Beatson LJ stated that there was no reason in principle why choses in action such as rights to draw down under a loan agreement could not qualify as "assets" for the purposes of a freezing order. His Lordship acknowledged that "it is important for a third party who deals with the enjoined defendant to know whether or not a

²⁶¹ *JSC BTA Bank v Ablyazov* [2012] EWCA Civ 1411 (confirming the first instance decision).

²⁶² *Kuwait Airways Corporation v Iraq Airways Co and Another* [2010] EWCA Civ 741 (this was an exceptional case in that the order was made in a commercial context against a non-resident, non-party who was temporarily in the jurisdiction).

²⁶³ *Ibid.*

²⁶⁴ For the author's further discussion of the relationship between equipage equality and disclosure orders, see chapter 8, section 8.2.5.

²⁶⁵ See below in this chapter the section entitled "Equipage equality at the international level".

²⁶⁶ [2013] EWCA Civ 928.

²⁶⁷ *Ibid.*, [26].

transaction is in breach of the freezing order”.²⁶⁸ However, the Court of Appeal held that the terminology in the standard form order could not be stretched to encompass such choses in action. Mr Ablyazov’s right to draw down under a loan facility did not constitute an “asset”. Thus, he was not in breach of the freezing order against him by instructing the relevant lender to pay the sum drawn down to a third party. This was not a relevant “disposal” or “dealing”. Four payments totalling £40 million were paid by the lender to Mr Ablyazov’s lawyers. Mr Ablyazov maintained that these were personal loans and not ordinary commercial transactions.

The practical effect of the decision of the Court of Appeal had been that defendants could have avoided liability for breach of freezing orders by effectively entering into (sham) loan agreements and hiding behind apparently independent third party lenders. The Court of Appeal considered itself incapable of using the ‘flexibility principle’ to stretch the scope of the wording and thereby avoid the gap in protection. This unsatisfactory state of affairs (viewed from the perspective of claimants) was rectified by the Supreme Court which reversed the decision of the Court of Appeal.²⁶⁹ The key fact for the Supreme Court was the provision in both loan agreements giving the defendant power to direct the lender to transfer the money to any third party. The court considered that the effect of this provision was that the defendant had unfettered discretion to deal with each lender’s money as if it were his own.²⁷⁰ Consequently, the defendant’s contractual rights to draw down under the loans were “assets” within the extended definition of an asset found in paragraph 5 of the standard form freezing order. The Supreme Court’s interpretation of the extended definition of assets was broader than the interpretation preferred by the Court of Appeal. Its purpose was to catch assets which would not otherwise be caught by the basic part of the definition and in particular assets not beneficially owned by the defendant but which the latter had power, directly or indirectly, to deal with as if they were his own. By contrast the Court of Appeal narrowly construed the wording as covering only assets owned by the defendant. In the author’s view, the decision of the Supreme Court should be applauded for closing the gap in protection of claimants by ensuring that the freezing injunction is equipped to cover the ever-more sophisticated methods of siphoning money by unscrupulous defendants. The decision is consistent with the need for a level-playing field and the context was “one in which a court might be tempted to stretch legal analysis to capture what are seen as the merits or lack of merits of the case before it”.²⁷¹

7.4 Equipage equality at the international level

A problematic aspect of freezing injunctions is that in cases involving a defendant’s assets located abroad as well as assets located in England, a freezing injunction only in respect of the latter may be inadequate to ensure equipage equality. For example, unless some form of mechanism exists to prevent the defendant from dissipating his assets located abroad, the claimant may remain in a weaker position and at the mercy of the defendant in the event that the assets located in England are insufficient to meet the judgment debt. However, in the example just given, it is noted that the relevant mechanism to prevent the defendant from dissipating his assets located abroad may be available from a foreign court. Thus, a related question is whether the English courts should leave it to the foreign courts to fill out any gaps in equipage equality arising from the existence of assets

²⁶⁸ Ibid, [84].

²⁶⁹ *JSC BTA Bank v Ablyazov* [2015] UKSC 64.

²⁷⁰ Ibid, [40] – [41].

²⁷¹ Ibid, [17].

located abroad. A possible argument is that, if in a position to do so, the English court should at least use any powers it may have to deter the defendant from dissipating his assets located abroad.²⁷²

Due to the potential for factual scenarios involving foreign substantive proceedings where there is no link to England except for the presence of assets in England, it is this author's view that it is essential as a matter of equipage equality at the international level for any legal system's procedural law to enable claimants to prevent dissipation of assets located within the court's territorial jurisdiction. Thus, the availability of freezing injunctions in respect of assets located in *England* in support of *foreign* proceedings is crucial for equipage equality. In the absence of such rules, equipage equality for claimants would partially depend on the availability of extraterritorial measures which encroach upon another legal system's regulatory authority in the field of asset preservation relief.²⁷³ Such a state of affairs would be unsatisfactory. It would undermine both the interests of private parties (not only litigants but any commercial stakeholders) and the interests of states.²⁷⁴ It is in the interests of creditors, especially those involved in international commercial transactions, to ensure that debtors have as few places to hide their assets as possible. From the perspective of creditors (claimants), national procedural rules should aim to close any gaps in the availability of freezing order relief whatever the factual circumstances such as the territorial connections of the dispute between the parties. It can safely be assumed that the creditors would ideally want to avoid the need to apply for relief in all the countries where the assets are located. As for the interests of debtors with non-fraudulent intentions, it would not have been unreasonable for them before or after entering into an international commercial transaction to keep or spread their assets across different countries. Moreover, there is arguably nothing unreasonable for commercial parties to choose the location of their assets on the basis of legal and financial advice about the nature and stringency of the rules on pre-judgment asset preservation relief. For example, it is reasonable for a shipowner to choose to avoid keeping any significant assets in countries whose procedural rules allow relief equivalent to Rule B pre-trial attachment in the United States.²⁷⁵ As for the interests of states and national courts, it is in their interests to avoid and prevent from the outset any potential conflict with other sovereign states and their judicial institutions. We should not forget that it is arguably also in the interests of states to protect the interests of local creditors by providing them with the legal weapons suitable for the international terrain.

Taking a step back, what are the reasons for considering the interests of private parties and the interests of states? By way of introduction at this stage, one of the functions of private international law rules could be seen as marrying together, as far as possible, the interests of private parties and the interests of states.²⁷⁶ From this perspective, the functions of private international law rules ought to be seen as both private and international. It follows from their importance in the protection of private rights that the legislators and the courts may need to take into account the functions of

²⁷² This question will be explored in Parts II and III of this thesis, but on the deterrence argument see especially chapter 18.

²⁷³ The protection is partial because of the higher risk that such invasive measures cannot be effectively enforced.

²⁷⁴ On the need to take into account the interests of foreign states, see chapter 13.

²⁷⁵ On Rule B pre-trial attachment for maritime claims, see Mandaraka-Sheppard A., *Modern Maritime Law Volume 1: Jurisdiction and Risks* (Informa Law, 3rd edn, 2013), chapter 3.

²⁷⁶ For a detailed discussion of the theoretical perspectives on the purpose of private international law rules, see chapter 13 of this thesis.

specific substantive or procedural legal rules (in our case, the freezing injunction) when designing private international law rules. In order to ensure that English freezing injunctions effectively perform their functions (e.g. maximising equipage equality), there may be a need for tailor-made private international rules which take into account the specific characteristics of each category of freezing injunctions. Consequently, for example, some of the differences identified in this part of the thesis between proprietary,²⁷⁷ non-proprietary, post-judgment,²⁷⁸ and *Chabra*-type freezing injunctions give rise to the possibility that different private international rules may be required.²⁷⁹

7.5 The American views on the theoretical foundations of preliminary injunctions: substantive functions vs procedural functions

The analysis of the theoretical foundations of freezing injunctions would not be complete without taking into account the American literature focusing on the functions of preliminary injunctions. In the author's view, that literature is useful because it illuminates and broadens our thinking about the functions of English freezing injunctions. It reminds us to consider what the author of this thesis would describe as the *substantive* functions of freezing injunctions – those relating to the substantive rights of the parties – as opposed to a narrow analysis of their *procedural* functions. The latter relate to the fairness of the 'rules of the game' where, as it has been argued, equipage equality plays a central role. It follows from our earlier analysis that non-proprietary freezing injunctions are mainly concerned with performing a procedural function. We have also seen that proprietary freezing injunctions perform an important substantive function: protection of property rights.²⁸⁰ Such categorisations might be useful in the latter part of this thesis when we examine what the author would describe as the 'functionalist' perspectives on the international scope of freezing injunctions.²⁸¹

Under the Leubsdorf-Posner formulation,²⁸² the goal of preliminary injunctions is to minimise irreparable injury to legal rights in situations in which the court cannot know, at the outset of the litigation, who will ultimately be determined to have rights. The court should seek that goal by comparing the irreparable injury that each party faces, as discounted by the likelihood that party will turn out to be legally in the wrong. From the perspective of Brooks and Schwartz,²⁸³ preliminary injunctions seek to allocate assets productively while litigation is pending. They explain that the uncertainties of litigation might encourage some defendants (but for the availability of preliminary relief) to pursue wasteful courses of action more than they would in a world of instant judicial decisions. The author of this thesis believes that both the Leubsdorf-Posner formulation and the views of Brooks and Schwarz are useful to take into account when designing or redesigning any element of the English rules on freezing injunctions. If we think about "irreparable injury", it is easier

²⁷⁷ See chapter 3 of this thesis.

²⁷⁸ See chapter 4, section 4.9.

²⁷⁹ These arguments will be explored in Part III of the thesis, see esp. chapter 18.

²⁸⁰ See chapter 3 of this thesis.

²⁸¹ See chapter 18 of this thesis.

²⁸² Leubsdorf J., 'The Standard for Preliminary Injunctions', (1978) 91 Harv. L. Rev. 525; Leubsdorf J., 'Preliminary Injunctions: In Defense of the Merits', (2007) 76 Fordham L. Rev. 33. The formulation was adopted in *American Hospital Supply Corp. v Hospital Products Ltd.*, 780 F.2d 589 (7th Cir. 1986), per Judge Richard Posner.

²⁸³ Brooks R.R.W. and Schwartz W.F., 'Legal Uncertainty, Economic Efficiency, and the Preliminary Injunction Doctrine', (2005) 58 Stan. L. Rev. 381.

to visualise its application in the context of property rights rather than non-proprietary claims. This is because in non-proprietary claims, monetary compensation should be sufficient to place the injured party in the position where they would have been in if the obligation had been performed. It is perhaps not surprising, therefore, that preliminary injunctions in the United States are generally restricted to equitable claims. An alternative possible reason for this restriction could be a historical anomaly arising from the separation of law and equity. The explanation provided by the courts is that a debt claim leads only to a money judgment and does not in its own right constitute an interest in specific property. Accordingly, a debt claim does not, before reduction to judgment, authorise prejudgment “execution” against the debtor’s assets.²⁸⁴ In *Grupo Mexicano de Desarrollo, S.A. v Alliance Bond Fund Inc.*,²⁸⁵ the majority of the US Supreme Court observed that “[t]he law of fraudulent conveyances and bankruptcy was developed to prevent [debt avoidance or preference]; an equitable power to restrict a debtor’s use of his unencumbered property before judgment was not”.²⁸⁶ Apart from the general restriction of preliminary injunctions to equitable claims, there is a further sub-restriction on the availability of such orders. Namely, in order to establish a court’s authority to grant a preliminary injunction based on a plaintiff’s equitable claim to the property of a defendant, the plaintiff must assert an equitable claim to the specific property of the defendant.²⁸⁷ The plaintiff’s equitable claim must have a “sufficient nexus to the assets sought to be enjoined, before a court may issue a prejudgment injunction freezing or limiting a defendant’s use of his assets”.²⁸⁸ The reasons for the restriction of preliminary injunctions to equitable claims give further weight to the argument that the Court of Appeal in *The Mareva* should have provided more justifications for departing from the *Lister v Stubbs* line of cases.

²⁸⁴ See *U.S. ex rel Rahman v. Oncology Assc.*, 198 F.3d 489 (4th Cir.1999).

²⁸⁵ 527 U.S. 308, 119 S.Ct. 1961, 144 L.Ed.2d 319 (1999).

²⁸⁶ 119 S.Ct. 1961, at 1970.

²⁸⁷ *Newby v. Enron Corp.*, 188 F.Supp.2d 684 (S.D.Tx.2002), at 696 n. 6. See also, *U.S. ex rel Rahman v. Oncology Assc.*, 198 F.3d 489 (4th Cir.1999).

²⁸⁸ *Ibid.*

Chapter 8: Equipage equality and the substantive preconditions for obtaining a freezing injunction

8.1 Introduction

Having identified equipage equality as the key theoretical pillar on which any freezing injunction stands, it is now important to examine the implications of this new theoretical perspective on each of the key substantive preconditions for a freezing injunction. In particular, should the author's new theoretical perspective make any difference to the threshold that a claimant needs to satisfy in relation to the conduct of the defendant? In order to find the answer, there are essentially two stages of analysis. The first stage is to try and identify the current threshold from the plethora of reported cases. The second stage is to analyse the consistency of the current threshold with the principle of equipage equality. In the event of any inconsistency, the author should make proposals to bring the substantive preconditions in line with the principle of equipage equality. This chapter will carry out the two stage analysis in respect of each of the two key substantive preconditions. In addition, the author will argue that there is a need for free-standing disclosure orders in order to reduce any risk of inadequate protection from the evidential thresholds.

8.2 The first substantive precondition: the conduct of the defendant

8.2.1 The current position

In *The Niedersachsen*,²⁸⁹ the key questions for the Court of Appeal were what type of prejudice the claimant must demonstrate, in the shape of a risk of dissipation of assets, and with what degree of conviction must it be shown.²⁹⁰ The Court of Appeal's view was that "the test is whether, on the assumption that the plaintiffs have shown at least "a good arguable case", the court concludes, on the whole of the evidence then before it, that the refusal of a *Mareva* injunction would involve a real risk that a judgment or award in favour of the plaintiffs would remain unsatisfied."²⁹¹ At first instance, Mustill J explained that the claimant had to provide "solid evidence" of such a risk.²⁹² This remains part of the current requirement as to the type of conduct which justifies a freezing order. The other part of the test appears to be that the claimant can alternatively show that "unless the defendant is restrained by injunction, assets are likely to be dealt with in such a way as to make enforcement of any award or judgment more difficult, unless those dealings can be justified for normal and proper business purposes".²⁹³ Given the wording of the test, it is not surprising that the Court of Appeal has recently emphasised the so called "enforcement principle":

"The first and primary principle is that the purpose of a freezing order is to stop the enjoined defendant dissipating or disposing of property which could be the subject of enforcement if the claimant goes to win the case it has brought, and not to give the claimant security for his claim"²⁹⁴

²⁸⁹ [1983] 1 WLR 1412.

²⁹⁰ *Ibid*, 1415.

²⁹¹ *Ibid*, 1422H.

²⁹² *Ibid*, 1425.

²⁹³ *Congentra AG v Sixteen Thirteen Marine SA* [2008] 2 CLC 51 ("*The Nicholas M*"), [49] per Flaux J. This alternative part of the test was cited with approval by Teare J in *U&M Mining Zambia Ltd v Konkola Copper Mines plc* [2014] EWHC 3250 (Comm), [16].

²⁹⁴ *JSC BTA Bank v Mukhtar Ablyazov* [2013] EWCA Civ 928, [34] per Beatson LJ. It should be noted that later in the same judgment, at [50], Beatson LJ observed that the courts' recognition that it was legitimate in some

More recently, however, there is increasing evidence that High Court judges are demanding a higher degree of prejudice than that envisaged by the Court of Appeal in *The Niedersachsen*. For example, in *Mobil Cerro Negro*,²⁹⁵ Walker J emphasised that the claimant must demonstrate unjustifiable conduct on the defendant's part.²⁹⁶ He found support for this principle in a Court of Appeal's statement that 'there must be a risk that [the asset] will be used otherwise than for normal and proper commercial purposes'.²⁹⁷ In *The Western Moscow*,²⁹⁸ Christopher Clarke J (as he then was) reaffirmed his remarks from an earlier case that *The Niedersachsen* test is not a complete statement of the law and that "[s]omething more than a real risk that the judgment will go unsatisfied is required".²⁹⁹ According to him, what is required is "unjustifiable disposals of assets otherwise than in the ordinary course of business with the intention, or having the effect, that any judgment against either of them goes unsatisfied or is very difficult to enforce".³⁰⁰ Reluctance has also been shown to grant freezing orders in circumstances where the claimant has provided no evidence apart from mere oral assertions that the defendant is likely to dissipate or hide some unspecified assets.³⁰¹

8.2.2 The relevant factors for assessing the risk of dissipation

The relevant factors for assessing the risk of dissipation include, *inter alia*, the reputation of the defendant, the structure of the defendant company, the nature of the assets and how easy it is to hide them. In a recent long-running litigation involving allegations of misappropriation of assets from a Russian bank against its former chief executive Mr Pugachev, Mann J observed that:

"merely pointing to offshore holdings in some generalised way would not be enough. However, in some cases the quality and nature of the arrangements may be a pointer towards a risk of dissipation. The sort of elaborate structures which Mr Pugachev seems to have set up would, in my view, be evidence of a desire to shield assets from view."³⁰²

The court will also look at any patterns of evasiveness or refusals to participate in negotiations with the claimant. The conduct of the defendant at the pre-action stage may be sufficient to lead the court to make an inference that there is a real risk of dissipation of the assets as demonstrated by the successful *ex parte* application for a freezing order in *Nadera Ahadi and others v Abdullah Ahadi*.³⁰³ The intended claim by Mrs Ahadi and her four sons against the defendant (the deceased's son from the first marriage) was for an alleged share of the assets from the deceased's estate. With regards to the defendant's conduct, Snowden J stated that:

circumstances to include within a freezing order property which appeared to be held by a defendant as a nominee or trustee showed that the enforcement principle is not absolute.

²⁹⁵ *Mobil Cerro Negro Ltd v Petroleos de Venezuela SA* [2008] EWHC 532 (Comm).

²⁹⁶ *Ibid*, [80]. This requirement was recently approved in *Candy v Holyoake* [2017] EWCA Civ 92.

²⁹⁷ *Mediterranean Feeders v Berndt Meyering Schiffarts* (unreported, June 1997).

²⁹⁸ *Western Bulk Shipowning III A/S v Carbofer Maritime Trading ApS & Ors (The Western Moscow)* [2012] EWHC 1224 (Comm).

²⁹⁹ *TTMI Ltd v ASM Shipping Ltd* [2006] 1 Lloyd's Rep 401, [25] per Christopher Clarke J.

³⁰⁰ *The Western Moscow* [2012] EWHC 1224 (Comm), [101].

³⁰¹ *Gravy Solutions Ltd v Xyzmo Software* [2013] EWHC 2770 (QB).

³⁰² *JSC Mezhdunarodniy Promyshlenniy Bank v Pugachev* [2014] EWHC 4336 (Ch).

³⁰³ [2015] EWHC 3912 (Ch).

“In this case there is no direct evidence to suggest that Abdullah Ahadi is in the habit of frustrating litigation against him, but I believe that it is right to infer from the reaction in the correspondence to this claim that there is a risk that if the proposed defendant learns that a claim has been issued against him (or to be issued against him) he may take steps to put assets beyond the reach of the claimants. I draw that inference because of the response which Porter & Co asserted to the claim made on behalf of Nadera Ahadi which seems on the face of it to be entirely misguided and to make serious allegations of forgery against Mrs. Ahadi and to dispute a marriage which at least on the material which I have seen seems to be a legitimate marriage. In reaching that conclusion I do not lose sight of the fact that Mrs. Ahadi has a conviction for benefit fraud.”

The author of this thesis believes that there was insufficient evidence for Snowden J to conclude that there was a real risk of dissipation of the assets. Alternatively, if Snowden J was right to make such a conclusion, the threshold is too easy to satisfy and needs to be reconsidered. His Lordship made an inference from the nature and apparent weakness of the defendant’s argument on only one of a number of issues which would be relevant for the purposes of establishing the claimants’ allegations. As a matter of principle, Snowden J was wrong to blur the distinction between the need for a good arguable case on the merits and the requirement of a real risk of dissipation. As we will see in this chapter, these two requirements perform separate functions.³⁰⁴ It is also noted that the claimants failed to put forward a convincing argument that they had a share in another (more substantial) asset.

The conduct of the parties in other proceedings in another jurisdiction may be taken into account. For example, in the context of a claim by charterers against the owners of a vessel, the Commercial Court found a real risk of dissipation because the charterers had a “good arguable case of wrongful attachment by the owners in New York in support of an unsustainable case, involving either bad faith, malice or at the very least gross negligence on the part of the owners. The charterers have also shown a good arguable case that the owners have engaged in what at its lowest is discreditable conduct in relation to the maintenance of the attachment, involving perjury on the part of Captain Bourdis”.³⁰⁵

The availability of security in another jurisdiction may be useful in showing the absence of real risk of dissipation. This was the case in *Refco v Eastern Trading*³⁰⁶ because the fruits of an arbitration award were attached in New York. However, it is interesting that in one shipping case the arrest of a vessel in another jurisdiction did not lead to the discharge of a worldwide freezing injunction.³⁰⁷ The arrest did not amount to a breach of an undertaking by the claimant not to enforce the injunction in another jurisdiction without the court’s permission.³⁰⁸

Allegations of dishonesty need to be carefully scrutinised to see whether they justify an inference that the assets will be dissipated unless the defendant is restrained by way of injunction.³⁰⁹ A finding

³⁰⁴ See below section 8.3 of this chapter.

³⁰⁵ *The Nicholas M* [2008] 2 CLC 51, [53].

³⁰⁶ [1999] Lloyd’s Rep 159.

³⁰⁷ *Re LMAA Arbitration* [2013] EWHC 895 (Comm).

³⁰⁸ For the author’s further analysis of the English court’s approach when deciding whether to give permission to enforce an English freezing injunction in another jurisdiction see chapter 14 of this thesis.

³⁰⁹ *Thane Investments v Tomlinson* [2003] EWCA Civ 1272, [28] per Peter Gibson LJ.

of dishonesty is not necessarily insufficient to found the necessary inference of a real risk of dissipation of the assets.³¹⁰ This was confirmed in *Madoff Securities* in the part of the judgment in relation to the freezing order where there was

“a sufficiently arguable case of deliberate wrongdoing, the issuing of sham invoices and the disguising of the true nature of the payments of millions of dollars made to the Kohn defendants over many years. This demonstrates in itself a serious risk of dissipation.”³¹¹

It is interesting to note that in a subsequent judgment on the substance of the dispute the claimants actually failed to prove dishonesty and wrongdoing on the defendant’s part.³¹² This shows the risks involved when judges make inferences at the interlocutory stage about the risk of dissipation from mere allegations of dishonesty. The following passage from the judgment is particularly powerful:

“To this was added the burden of this unfounded claim, making serious allegations of dishonesty, which threatened financial ruin and personal humiliation...Mrs Kohn has suffered poisonous press releases by the SIPA Trustee (for example referring to her as Bernard Madoff’s “criminal soul mate whose greed and dishonest inventiveness equalled his own”) and been subject to a worldwide freezing order and extensive disclosure of her family’s assets and affairs.”³¹³

It is the author’s view that the courts can do more to reduce potential unfairness to defendants,³¹⁴ especially in cases involving serious allegations of dishonesty. One option is to make it mandatory for claimants to fortify their cross-undertaking in damages.³¹⁵ As the English courts would be reluctant to give up their discretion, a compromise option could be a default rule in favour of fortifying the cross-undertaking.

A real risk of dissipation may be easier to establish in an application for a post-judgment freezing injunction. This is especially true of cases where the claimant was able to show some dishonesty on behalf of the defendant.³¹⁶ The claimant may wish to rely on the defendant’s conduct during the course of litigation such as non-compliance with any orders of the court and a failure to make any voluntary disclosure of assets.

8.2.3 Equipage equality and the need to raise the current threshold

If there is no judgment against the defendant, why should the defendant not be free to deal with his assets as he pleases? What is wrong with the defendant moving his assets abroad before judgment? What exactly is unjust about his actions and what conduct should be sufficient to justify restraining the defendant before judgment?

³¹⁰ Per Patten J in *Jarvis Field Press Ltd v Chelton* [2003] EWHC 2674 (Ch), [10].

³¹¹ Per Flaux J in *Madoff Securities International Ltd v Raven* [2011] EWHC 3102 (Comm), [169].

³¹² *Madoff Securities International Ltd v Raven* [2013] EWHC 3147 (Comm).

³¹³ *Ibid*, [470] per Popplewell J.

³¹⁴ On the need to control the potential unfairness to defendants see the central argument on the role of equipage equality in chapter 7 of this thesis.

³¹⁵ For a more detailed analysis, see in chapter 9 of this thesis the section entitled “Cross-undertaking in damages”. For a broadly similar debate in relation to temporary restraining orders and preliminary injunctions in the American context see: Dobbs D.B., ‘Should Security be Required as a Pre-Condition to Provisional Injunctive Relief’ (1974) 52 N. Carolina L. Rev. 1091.

³¹⁶ *SPL Private Finance (PF1) IC Ltd v Arch Financial Products LLP* [2015] EWHC 1124 (Comm).

In the light of the review of the current position, the real risk of dissipation threshold is excessively claimant-friendly. In dealings between commercial parties operating at arm's length, the author submits that it is the parties' own responsibility to take preventive measures to protect themselves from the risk of non-enforcement of any judgments due to the conduct of the non-performing party and its financial structure. Equity's helping hand in the form of a freezing injunction to strengthen equipage equality should not be extended to commercial actors who were not sufficiently cautious, consciously took risks, or simply made a bad bargain. If they had failed to take reasonable steps to protect themselves in the event of non-performance by the defendant, especially if such non-performance was foreseeable in any way, the court should resist the temptation to assist the claimant. Indeed, equity is well-versed in developing a nuanced and flexible rather than a broad and mechanical approach to intervention. All of the circumstances of the case, including the steps that the claimant could have taken to protect itself, should be examined by the courts.

From the author's perspective the term 'dissipation' has a pejorative connotation.³¹⁷ The author submits that in order to obtain a freezing injunction, the claimant should provide objective evidence of the defendant's intention to make himself judgment proof. Where there is such evidence, it would be unjust not to grant the freezing injunction and leave the claimant at the mercy of the defendant. The court must balance the interests of the claimant and the defendant. Where the defendant has the means of concealing his assets coupled with an intention to do so, the balance of justice is in favour of granting the injunction. Accordingly, the purpose of a freezing order is not simply to stop any kind of dealings with the assets by the defendant which can prejudice the claimant's interests; it is to stop only *wrongful* forms (dissipation in the pejorative sense). In order to accept the author's submissions the courts need to recognise that a freezing injunction is not simply a weapon against unscrupulous defendants. The application of the principle of equipage demands a level-playing field in litigation and this includes tailoring the substantive preconditions in such a way as to ensure adequate protection for defendants from unnecessary interference with their assets.

It is noted that, prior to the Court of Appeal's clarification in *The Niedersachsen*, there had been further confusion in relation to the level of defendant's conduct required to allow the court to grant a freezing order. This was because in *Z Ltd. v. A-Z and AA-LL*³¹⁸ Kerr LJ stated *obiter* that a defendant may "take steps *designed* to ensure that these [assets] are no longer available or traceable when judgment is given."³¹⁹ The statement was subsequently interpreted to mean that "nefarious intent" on a defendant's part had to be shown.³²⁰

The effect of a freezing injunction is that the defendant cannot enjoy the full spectrum of rights which can be exercised by an owner in respect of his property. It takes away some of his rights even though the assets remain in his possession. This can be justified on the ground that he should not have the freedom to use his rights for a *wrongful* purpose. This reinforces the author's submission that the defendant should only be deprived of his rights where he *intends* to use those rights to make himself judgment proof. The fact that a defendant has the means to conceal his assets, for example by being a one-ship company with off-shore bank accounts, should not amount to sufficient

³¹⁷ See section 7.2 of the previous chapter in this thesis.

³¹⁸ [1982] Q.B. 558, 585F.

³¹⁹ *Ibid*, (emphasis added).

³²⁰ See the judgment of Parker J in *Home Insurance Co. v. Administra tia Asigurarilor de Stat*, (unreported) July 29, 1983 (referred to in *The Niedersachsen* [1983] 1 WLR 1412, 1422).

conduct to justify a freezing injunction.³²¹ Something more should be required. In stark contrast to the author's proposal is the following passage from Court of Appeal's decision in *Third Chandris Shipping*:

"But there are some foreign companies whose structure invites comment. We often see in this court a corporation which is registered in a country where the company law is so loose that nothing is known about it—where it does no work and has no officers and no assets. Nothing can be found out about the membership, or its control, or its assets, or the charges on them. Judgment cannot be enforced against it. There is no reciprocal enforcement of judgments. It is nothing more than a name grasped from the air, as elusive as the Cheshire Cat. In such cases the very fact of incorporation there gives some ground for believing there is a risk that, if judgment or an award is obtained, it may go unsatisfied."³²²

This statement is at odds with the long established principle that there is nothing wrongful about a defendant using a corporate structure to limit his liability.³²³ What *is* wrongful is for the owner to move his assets for the purpose of avoiding the consequences of a future judgment against him. There is further support for the author's proposal in Zuckerman's following observation:

"The justification for interfering with the defendant's proprietary freedom before judgment has, from the start, rested on one principle: the need to prevent unlawful evasion....It follows that *Mareva* injunctions may be issued only to protect plaintiffs from evasion and not to provide them with security against simple deterioration. However, the jurisdiction has not remained confined to evasion...[the test laid down in *The Niedersachsen*] has undermined the fairness of the *Mareva* jurisdiction, because what may be reasonable as a measure against defendants bent on evading judgment may be oppressive, when employed against defendants who harbour no such intention."³²⁴

8.2.4 The requirement of intention to dissipate: potential practical problems and solutions

What are the potential problems if we adopt this author's proposal for the requirement of intention to dissipate? The main concern is the practical difficulties that the claimants may have in satisfying the evidential threshold of intention. How could any claimant show that the defendant intends to dissipate his assets in order to prevent the claimant from satisfying a future judgment? The New York courts have successfully overcome a similar practical problem in one category of cases on pre-judgment attachment.³²⁵ Under New York law, one of the alternative requirements for pre-judgment attachment is the defendant's intention to defraud creditors or frustrate the enforcement of

³²¹ The courts will more readily grant a freezing injunction where the defendant is foreign than against an English defendant. The reason for this is that it is easier for the foreign defendant to move his assets outside of the jurisdiction.

³²² *Third Chandris Shipping*, at 669A-C, per Lord Denning M.R.

³²³ *Adams v Cape Industries* [1990] Ch. 433.

³²⁴ Zuckerman A.A.S., 'Interlocutory Remedies in Quest of Procedural Fairness', (1993) 56 MLR 325, 332-333. See also: Zuckerman A.A.S., 'Mareva Injunctions and Security for Judgment in a Framework of Interlocutory Remedies' (1993) LQR 432.

³²⁵ For an overview of the nature of pre-judgment attachment and some general comparisons with English freezing injunctions see above chapter 4 of this thesis.

judgment.³²⁶ The district courts in the second circuit recognised that intention to defraud is rarely susceptible to direct proof. Consequently, the approach of the district courts established in a number of cases is to examine whether allegedly suspicious transactions exhibit “badges of fraud” that give rise to a sufficient inference of intent.³²⁷ The badges of fraud identified by the courts include the following: (1) gross inadequacy of consideration, (2) a close relationship between the transferor and the transferee, (3) the transferor’s insolvency as a result of the conveyance, (4) a questionable transfer not in the ordinary course of business, (5) secrecy in the transfer, (6) retention of control of the property by the transferor after the conveyance. There is a need to impose the limits as to how far the courts would be prepared to go to make an inference of intent. In the New York courts, allegations raising a mere suspicion of fraudulent intent have been held insufficient, as well as “conclusory allegations” without any supporting evidence.³²⁸ Past misconduct will generally be inadequate for an inference of intent to defraud. In *Signal Capital Corp v Frank*,³²⁹ the claimant tried to point to the defendant’s past misconduct involving fraudulent transfers and argued that such misconduct gives rise to a presumption of the danger of dissipation of assets that would frustrate a judgment in the claimant’s favour but the court held that it was not sufficient.

In *City of New York v Citisource Inc.*,³³⁰ the plaintiff sought attachment of funds in several bank accounts and a freezing order. The claim was for treble damages under the Racketeer Influenced and Corrupt Organizations Act (RICO).³³¹ The plaintiff made allegations of bribery of the deputy director with the intention of influencing the award of a multi-million dollar municipal contract to the defendant. It was stated that:

“[A]ttachment is a harsh remedy for which the supporting evidence must be strictly construed against the plaintiff. A plaintiff seeking an attachment under §6201 (3) must show that *defendant has or is about to dispose of property with the intent to defraud creditors or frustrate the enforcement of a judgment*. It is well established that when a P seeks an attachment on the ground that the D has acted with intent to defraud, fraud will not be lightly inferred. Evidence which establishes defendant’s intent to dispose of property, standing alone, does not justify an attachment. The same principles should apply when P seeks an attachment on the ground that D is disposing of property with the intent to frustrate the enforcement of a judgment. P cannot show such an intent merely by adducing evidence that Ds have sought to withdraw money from their bank accounts. P must show that defendants somehow have attempted to conceal their property or to place it beyond the reach of the Court’s judgment”³³²

³²⁶ CPLR 6201, paragraph 3. See generally Siegel D., *New York Practice*, (West, 5th edn, 2011), chapter 12.

³²⁷ *BFP v Resduction Trust Corp* 511 U.S. 531 (1994); *Encore Credit Corp* (2006) WL 148909; *Bank of China v NBM* 192 F. Supp. 2d 183 (SDNY 2002); *Strategic Growth International v Remote MDX Inc* (2008).

³²⁸ See *DLJ Mortgage Capital Inc v Kontogiannis et al* (2009) US District Court, E.D. of New York (on the facts, only a suspicion of defendant’s intent to defraud and the court held this was insufficient to obtain attachment). See also *National Audubon Society v Sonopia Corp* (2009) WL 636952.

³²⁹ 895 F. Supp. 62 (SDNY 1995).

³³⁰ 679 F. Supp. 393 (S.D.N.Y. 1988). This case was distinguished in the context of attachment proceedings in *Buy This Inc. v. MCI Worldcom Communications* 178 F.Supp.2d 380 (S.D.N.Y. 2001).

³³¹ See in particular 18 U.S. Code §1962(c) and (d) (1982).

³³² 679 F. Supp. 393 (S.D.N.Y. 1988), 396.

“While an attempt to dispose of assets, standing alone, will not justify an attachment, the timing of defendants’ actions raises an inference that defendants intended to frustrate enforcement of a judgment.”³³³

The approach of the New York courts in relation to the fraudulent intention requirement would be workable in practice. In cases where the claimant is concerned that the defendant may have already taken steps to conceal his assets but the claimant cannot produce the evidence to satisfy the evidential threshold of intention to dissipate, there is a possibility of a gap in the protection for claimants from unanticipated wrongful conduct by unscrupulous defendants despite the lack of any warning signs. In the next section, the author will consider modest changes to the current rules on disclosure orders as a possible solution to this gap in order to ensure a level-playing field.

8.2.5 Equipage equality and the need for free-standing disclosure orders

In order to reduce the risk of inadequate protection of claimants resulting from the proposed evidential threshold, one possible option advocated by the author is to enable claimants to obtain free-standing disclosure orders. Armed with information about the value and location of the defendant’s assets, the claimants would be in a stronger position to prevent concealment. Moreover, the author submits that the proposed solution would not represent a big jump from the present position adopted by the courts. Namely, the courts have already been flexible in their interpretation of CPR para 25.1(1)(g) which enables a court to make

“an order directing a party to provide information about the location of relevant property or assets or to provide information about relevant property or assets which are *or may be* the subject of an application for a freezing injunction.” (Emphasis added)

Although it is well established that there is no free-standing right to a pre-judgment disclosure order, the emphasised words have been relied upon to grant a disclosure order in circumstances where the claimant had not yet made an application for a freezing order.³³⁴ It is sufficient that there might be an application for a freezing order in the future and the claimant needs to show “some credible material” that would justify such an application.³³⁵ The latter threshold is lower in comparison to that required for the purposes of an application for a freezing order. This leads us to make the following observation about claimants’ freedom to use CPR 25.1(1)(g): as evident from the Court of Appeal’s analysis in *Pugachev*, the courts are flexible in allowing claimants (in certain cases) to use this provision to obtain information that would help them to decide whether or not to make an application for a freezing order.³³⁶

³³³ Ibid, 397.

³³⁴ For a recent example, see *Gerald Metals SA v Vasile Frank Timis* [2016] EWHC 2136 (Ch). In *JSC Mezhdunarodniy Promyshlennyi Bank & Anr v Pugachev* [2015] EWCA Civ 139, at this stage of the litigation there was no freezing order in respect of the assets subject to discretionary trusts but the Court of Appeal nevertheless confirmed the disclosure order.

³³⁵ *Parker v CS Structured Credit Fund Ltd* [2003] EWHC 391 (Ch), [23].

³³⁶ [2015] EWCA Civ 139.

Apart from privacy, one of the concerns with liberalising the ability to obtain a disclosure order is the potential for claimants to embark on ‘fishing expeditions’ with a view to testing the strength of their allegations or, to use the words of Patten LJ, to “investigate the truth of the claim”.³³⁷ Given their full awareness of the problem, the author submits that the English courts are capable of dealing with the risk of speculative applications for a disclosure order. This was confirmed by the Court of Appeal’s judgment in *Pugachev* where the court was satisfied that the case before them did not fall into the fishing expedition category because there was more than a “remote possibility” on the facts. The Court of Appeal’s judgment will serve as a helpful clarification of the boundaries for the lower courts. The author further submits that the most effective mechanism to deter claimants from making unmeritorious applications for free-standing disclosure orders would be a rigorous approach when dealing with the costs of any application. A related point is that the courts should demand a cross-undertaking in damages from the claimant and, at least as a default rule, the claimant should provide security.³³⁸ The author’s proposed mechanisms for dealing with unmeritorious applications do not involve the creation of new remedies and they are consistent with the need for a level-playing field in litigation.³³⁹

8.2.6 Freezing injunctions and performance bonds: the need for wrongful conduct

Further support for this thesis’ proposal to change the current threshold, and introduce the requirement of intention, is arguably found in the treatment of freezing injunctions related to performance bonds.³⁴⁰ It has been the law since early 1980s that a freezing injunction will not be granted to restrain payment under a demand bond unless the party applying for the injunction can show that the demand on the bond is fraudulent or that the bank knew it to be fraudulent;³⁴¹ a mere suspicion of fraud is not sufficient.³⁴² The fact that it would be difficult for an applicant to show fraud or bank’s knowledge of fraud has not dissuaded the judges from maintaining such a high threshold.

8.3 The second substantive precondition: the strength of the claimant’s case on the merits

The use of the good arguable case test in relation to the required strength of a claimant’s case on the merits in non-proprietary freezing injunction cases was first confirmed by the Court of Appeal in *Rasu Maritima*.³⁴³ The test was explained by Mustill J at first instance in *The Niedersachsen* as

“a case which is more than barely capable of serious argument, and yet not necessarily one which the judge believes to have a better than a 50% chance of success ...”³⁴⁴

³³⁷ *JSC BTA Bank v Solodchenko* [2010] EWCA Civ 1436, [39] per Patten LJ.

³³⁸ For the author’s arguments on the need for fortification of the cross-undertaking in respect of applications for freezing injunctions, see the next chapter of this thesis.

³³⁹ In *Gerald Metals SA v Vasile Frank Timis* [2016] EWHC 2136 (Ch), Rose J expressly recognised the need for a cross-undertaking in damages due to “a general principle of the need for the courts to be even-handed between parties when intrusive relief is granted at an early stage in proceedings without the court having had the opportunity to consider the merits”. The reasoning of Rose J is consistent with the author’s emphasis on the principle of equipage.

³⁴⁰ O’Driscoll P.S., ‘Performance Bonds, Bankers’ Guarantees, and the *Mareva* Injunction’ (1985-1986) 7 Nw. J. Int’l L. & Bus. 380.

³⁴¹ The same is true for payment due under an irrevocable letter of credit or a bank guarantee.

³⁴² *United Trading Corp. S.A. v Allied Arab Bank Ltd.* (1984).

³⁴³ [1978] QB 644, 661G, per Lord Denning MR.

The standard of a good arguable case was not newly invented for freezing injunction cases. Prior to *Rasu Maritima*, it had been used in the context of applications for permission to serve a claim form out of the jurisdiction.³⁴⁵ However, while the test is still being used in relation to service out of the jurisdiction, the Court of Appeal in *Canada Trust Co v Stolzenberg (No 2)*³⁴⁶ added what has been described as a “gloss” on the good arguable case test, stating that in the interlocutory context, the test “reflects...that one side has a much better argument on the material available”.³⁴⁷ This gloss on the test was subsequently approved by the Privy Council in *Bols Distilleries BV (trading as Bols Royal Distilleries) v Superior Yacht Services Ltd.*³⁴⁸ Whether one side has a much better argument on the material available may be difficult to decide at the interlocutory stage especially in cases involving numerous factual disputes where the credibility of witnesses is a crucial factor.³⁴⁹ Hence it is not surprising that judges have been uncomfortable with the *Canada Trust* gloss and even showed reluctance to apply it in the context of freezing injunctions as evident from the *obiter* observations of the Court of Appeal in *Kazakhstan Kagazy plc v Zhunus*.³⁵⁰

“‘Much the better of the argument’ has recently emerged as a test on applications for service out of the jurisdiction. But I see no reason why that test should apply to freezing injunctions”³⁵¹

This view has been recently approved by the Commercial Court in *PJSC Tatneft v Bogolyubov and others*³⁵² where Picken J accepted the logical possibility that in some cases both sides may have a good arguable case on the material available.³⁵³ In the author’s view, this current trend (disregarding the *Canada Trust* gloss in the case law on freezing injunctions) is justified by the potential complexity of the exercise at the interlocutory stage and the need to deal with the matter in a cost efficient, proportionate and timely manner.³⁵⁴ Disregarding the *Canada Trust* gloss would make it easier for legal advisers to give clear advice on the merits of the application for a freezing injunction. However, for the avoidance of doubt, this author is not advocating that the courts should adopt a lower threshold than that of the good arguable case for a claimant to satisfy whenever faced with factually or legally complex cases. The author is concerned that in some cases, such as *Finurba Corporate Finance Ltd v Sipp SA*,³⁵⁵ the courts seem to be in favour of relaxing the requirement to show a good arguable case on the merits when faced with difficult points of substantive law and evidence. In *Finurba*, Lord Neuberger MR (as he then was) observed that:

³⁴⁴ [1983] Com LR 234, 235. The statement was approved by the Court of Appeal in the same case: *The Niedersachsen* [1983] 1 W.L.R. 1412

³⁴⁵ *Vitkovice Horni a Hutni Tezirstvo v Korner* [1951] AC 869.

³⁴⁶ [1998] 1 WLR 547

³⁴⁷ *Ibid*, 555.

³⁴⁸ [2007] 1 WLR 12, [28].

³⁴⁹ This was acknowledged by Nugee J in *Holyoake v Candy* [2016] EWHC 970 (Ch), [13]. The judgment of Nugee J was reversed by the Court of Appeal but this point was not challenged.

³⁵⁰ [2014] 1 CLC 451. See also *Petroleum Investment Co Ltd v Kantupan Holdings Co Ltd* [2002] 1 All ER (Comm) 124, [38] (where Toulson J (as he then was) noted the limitations of the interlocutory process and the resulting difficulties with the *Canada Trust* gloss).

³⁵¹ [2014] 1 CLC 451, [25] per Longmore LJ.

³⁵² [2016] EWHC 2816 (Comm).

³⁵³ *Ibid*, [110].

³⁵⁴ See the overriding objective of the Civil Procedure Rules, rule 1.1.

³⁵⁵ [2011] EWCA Civ 465.

“In the light of the increasing sophistication of fraudsters, and their extensive use of companies and other entities to mask their activities and assets, the court should adopt a robust and realistic approach to technical points of substantive law or evidence raised against the grant of a freezing order, in cases where there is good reason to believe that the fraud has occurred.”³⁵⁶

While there is no doubt that the courts should be alert and take into account the sophisticated methods employed by modern fraudsters, that represents an issue which is already catered for by the courts’ wide interpretation of the provisions of freezing orders.³⁵⁷ The author submits that taking a more relaxed approach to the preconditions for obtaining a freezing injunction when faced with allegations of fraud creates the risk of pre-judging the merits of the claimant’s application for relief. A failure to properly give weight to the technical points of substantive law or evidence raised by a defendant may increase the risk of wrongfully granted injunctions. This undermines the aim of achieving a level-playing field in litigation.

The uncertainty surrounding the application of the good arguable case test in the context of applications for freezing injunctions was illustrated by the Court of Appeal’s reversal of the first instance decision to discharge the two injunctions in *Sukhoruchkin v Van Bekestein*.³⁵⁸ The Court of Appeal held that Morgan J was not entitled at the interlocutory stage to come to firm conclusions about certain disputed issues of law and fact such as in relation to the circumstances in which shadow directors owe fiduciary duties – the legal principles in this area were not settled, the legal issue was highly fact-sensitive and the parties relied on conflicting evidence.³⁵⁹ The Court of Appeal’s reversal of Morgan J’s application of the good arguable case demonstrates that it may be difficult to predict how a court would apply the test. This reinforces the author’s argument that disregarding the *Canada Trust* gloss would help to reduce the uncertainty and that, consistently with the principle of equipage equality, both parties would be in a better position to know where they stand.

What is the likely attitude of a court to the link between the two main substantive preconditions for freezing injunctions? In a recent case,³⁶⁰ the claimants unsuccessfully argued that the defendants’ concession that the claimants have a good arguable case on the merits had the effect of establishing a propensity to dissipate the assets.³⁶¹ This argument could potentially have been successful if an inference had been drawn from the pleaded case that the defendants’ breach of duty was dishonest. That was not the case on the facts. Consistently with the author’s views on the requirement for real risk of dissipation, a finding of propensity to dissipate should not be sufficient for the court to conclude that there is a real risk of dissipation. In order to adequately protect defendants, a higher threshold is required.³⁶² The author further submits that the existence of an intention to dissipate the assets with the aim of rendering any judgment nugatory should be seen as central to establishing the unjust element. By contrast, if the claimant establishes a good arguable case on the merits this should not be treated as sufficient in itself to show that the demands of justice are such

³⁵⁶ Ibid, [31].

³⁵⁷ For example, see the author’s analysis of the Supreme Court’s decision in *JSC BTA Bank v Ablyazov* [2015] UKSC 64 in the previous chapter (chapter 7) of this thesis.

³⁵⁸ [2013] EWHC 1993 (Ch); [2014] EWCA Civ 399.

³⁵⁹ [2014] EWCA 399, [41].

³⁶⁰ *Dinglis Properties Limited and others v Dinglis Management Limited and others* [2016] EWHC 818.

³⁶¹ Ibid, [22].

³⁶² See above section 8.2.3 of this chapter.

that the order should be granted.³⁶³ In other words, the requirement of a good arguable case on the merits should not be inextricably linked to the question of whether the defendant's conduct justifies the need for a freezing injunction. The primary purpose of the former appears to be to reduce the risk of a later finding that it was wrongful to grant the order because the claimant had not been successful on the merits. Reducing the risk of wrongfully granting injunctions is important to ensure a level-playing field in litigation. Any conflation of the two substantive preconditions undermines the protection of defendants as it allows claimants to circumvent an important substantive precondition.

Given the differences in the functions of the substantive preconditions for granting a freezing injunction, it is somewhat surprising that there is no need to show a risk of dissipation in order to obtain a proprietary freezing injunction. Why are the courts prepared to grant a proprietary freezing injunction where the claimant has only established a good arguable case on the merits in a proprietary claim? One possible explanation is that a good arguable case for a proprietary claim automatically establishes the risk of dissipation, or at least an inference that the defendant may dissipate his assets, which in turn makes it unjust to refuse the order. Where there is evidence that the defendant has defrauded the claimant, an inference could arguably be made that the defendant would try to make himself judgment proof. The courts should, however, be cautious about allegations of fraud and protect the defendant against the risk of concocted claims. For this reason, the courts have developed a specific test for pleading fraud.³⁶⁴ In the context of freezing injunctions, the test can be a useful weapon because the defendant may apply to strike out the claimant's plea of fraud (and apply for a summary judgment) if it does not meet the requirements of the test.³⁶⁵ In non-proprietary freezing injunction cases, even if a claimant has shown a good arguable case on the merits, it cannot be automatically inferred that the defendant has the intention to evade judgment. Consequently, in non-proprietary cases, the claimant should always *positively* demonstrate that the defendant intends to dissipate his assets in order to bring the case within the exception to the general rule.

8.4 Summary of the relationship between equipage equality and the substantive preconditions for freezing injunctions

The common denominator of the problems with the substantive preconditions is that they are currently geared towards maximising assistance to the claimants. The underlying reason for the excessively claimant-friendly approach is the courts' narrow perception of the function of freezing injunctions as a weapon against unscrupulous defendants. In some cases the courts are keen to remove any obstacles to the enforcement of a future judgment even in the absence of any wrongdoing in relation to the assets. This author is advocating a change in the courts' view of the function of freezing injunctions. Namely, if the courts were to recognise the role of equipage equality in freezing injunctions, there would be a greater emphasis on protecting defendants from unnecessary interference with their assets in order to achieve a level-playing field in litigation. One

³⁶³ There is evidence from the case law that the courts are tempted to conflate the two substantive preconditions (a good arguable case on the merits and a real risk of dissipation): see, *inter alia*, the Court of Appeal's observations in *VTB Capital v Nutritek* [2012] EWCA Civ 808, [178] per Lloyd LJ.

³⁶⁴ See *Three Rivers District Council v Bank of England* [2001] UKHL 16.

³⁶⁵ See, for example, *JSC Bank of Moscow v Vladimir Abramovich Kekhman et al* [2015] EWHC 3073 (Comm) (on the facts of this case, the defendant's applications – to strike out and for summary judgment – were dismissed).

of the highlighted problems with the current thresholds for the substantive preconditions is that they are open to different interpretations and unpredictable. This is potentially unfair to defendants as it favours financially strong claimants who are prepared to make a tactical application for a freezing injunction to put pressure on defendants. One of the author's proposals for reducing the uncertainty is for the courts to disregard the *Canada Trust* gloss on the good arguable case test. The author's proposal to raise the current threshold relating to the conduct of the defendant by introducing the requirement of intention to dissipate would help to reduce potential unfairness to defendants. This proposal would be consistent with the negative connotation of the term dissipation. To reduce potential unfairness to claimants from the proposed evidential threshold for dissipation, the courts should allow applications for free-standing disclosure orders.

Chapter 9: Equipage equality and the safeguards for defendants

9.1 Introduction

Like other procedural devices whose very existence seeks to have the effect of equalising the parties' capacities to litigate, the use of the freezing injunction must be subject to certain safeguards. These safeguards, some of which are known as the provisos, seek to ensure that the operation of freezing injunctions does not itself generate a new form of inequality between the parties. The provisos ensure that the freezing injunction is *only* used to fulfil its purpose and nothing more. They are central to equipage equality as they ensure that the injunction does not tip the balance of power in favour of the claimant in a manner that gives him an unfair advantage over the defendant. We will consider selected examples of provisos to the freezing injunction on an individual basis. We will see that, from the perspective of equipage equality as the underlying function of freezing injunctions, the current operation of the provisos is insufficient to ensure a level-playing field in litigation. This is because they do not sufficiently protect the interests of the defendants. In this chapter we will also consider other forms of protection for defendants such as any additional requirements for making an application without notice to the defendant.

9.2 The purpose of the provisos and the link with equipage equality

One of the purposes of the provisos is to ensure that the freezing injunction does not result in injustice to the defendant. What the provisos do is to delicately balance the interests of the parties so as to avoid a freezing injunction giving unfair advantages to the claimant and becoming the claimant's tool of oppression. Where the defendant has the intention to dissipate his assets, his freedom to deal with his assets should not be curtailed to such an extent that the claimant is put in a position to dictate the effectiveness of the judgment. As the purpose of the freezing injunction is to ensure a level playing field in litigation, it would be impossible to achieve this purpose without the provisos. But for the provisos, the freezing injunction would be too powerful and therefore fail to ensure that the parties are on an equal footing. The distribution of freedom between the claimant and the defendant would be unjust. The defendant should only be deprived of his freedom to the extent to which it is necessary to stop him from making himself judgment proof. The claimant should only be given more freedom to the extent that it is necessary to ensure that if he is successful on the merits he would not be prevented from enforcing his judgment by the intentional and wrongful actions of the defendant. The defendant must be protected from the consequences of a wrongfully granted injunction.

9.3 The ordinary and proper course of business proviso

The ordinary course of business proviso is a safeguard which is designed to prevent, *inter alia*, the claimant from using the threat of a freezing injunction to force the defendant to provide security. Without this proviso the defendant could be faced with a choice between defaulting on its payments on the one hand and providing security on the other. Indeed, the solvency of the defendant and/or his ability to meet the judgment debt may depend on transactions in the ordinary course of business. The claimant should not be able to use the freezing injunction to hold the defendant to ransom. Transactions in the ordinary course of business carry the usual business risk of loss but they do not amount to wrongful conduct. They are not intended to prejudice the claimant and make the process of litigation futile.

While the author is not concerned about the theoretical justification for this proviso, it is still necessary to investigate whether there is any evidence of unfairness to defendants. In particular, are there any potential obstacles for defendants in continuing their business? Although freezing orders do not normally prohibit transactions in the ordinary course of business, there is evidence that defendants can experience difficulties in implementing such transactions because of the reactions of third parties to a freezing order.³⁶⁶ It is also important not to make an assumption that every freezing order contains an ordinary course of business proviso. In the high-profile *Fiona Trust* litigation,³⁶⁷ one of the freezing orders specifically prohibited the conclusion of newbuilding (shipbuilding) contracts even though that would have been in the ordinary course of business of the defendant. In that case, security was provided by the defendants but it was agreed that the secured funds could not be used in the ordinary course of business without a prior successful application for permission to the court. The court effectively acknowledged that the need for an application to court was of little or no value to the defendants and effectively made it impossible to use the secured funds in the ordinary course of business.³⁶⁸

There is a further and related concern about the practical value of the safeguards contained in a standard form freezing injunction. Although in theory defendants against whom a non-proprietary freezing order has been granted would normally be free to spend a reasonable amount of funds on legal representation,³⁶⁹ it has been recognised that in practice it is “not an uncommon occurrence” that a bank holding the defendant’s assets is unwilling to release any part of the assets.³⁷⁰ The unfairness to defendants in such a scenario was demonstrated in *Appleyard* where the defendant was forced to incur further costs in making an application to the court “for an explicit order authorising or even requiring release of funds by a bank”.³⁷¹ Another potential burden on a defendant’s use of funds towards legal representation (or in the ordinary course of business) may be a requirement of prior notice to the claimant’s legal representatives.³⁷²

Despite some of the above criticisms, the Court of Appeal should also be applauded for strengthening equipage equality by ensuring that the lower courts do not interpret the ordinary and proper course of business proviso too narrowly. This was demonstrated in *Emmott v Michael Wilson and Partners*³⁷³ where the Court of Appeal overturned the first instance decision that two payments had been made in breach of a freezing injunction. The court emphasised the fact that the payments were made in good faith and related to pre-existing liabilities. A useful clarification was made that an ad-hoc transaction is not necessarily inconsistent with the ordinary course of business proviso. The court also underlined the fact-sensitive nature of the exercise of determining whether a transaction

³⁶⁶ See, for example, *Kevin Taylor v Van Dutch Marine Holding Limited et al* [2016] EWHC 2201 (Ch), [37]. In the introduction to this thesis, we saw that the Court of Appeal in *Candy v Holyoake* recently acknowledged that a freezing injunction carries a reputational stigma.

³⁶⁷ [2016] EWHC 2163 (Comm). See further discussion of this case in the next section of this chapter. The decision of Males J was upheld by the Court of Appeal in *SCF Tankers Limited (formerly known as Fiona Trust & Holding Corporation) and Others v Yuri Privalov and Others* [2017] EWCA Civ 1877.

³⁶⁸ *Ibid.*, [83]-[85].

³⁶⁹ See, for example, paragraph 11(1) of the standard form freezing injunction (adapted for use in the Commercial Court) in Appendix 5 of the Admiralty and Commercial Court Guide.

³⁷⁰ *Appleyard (Trustee) v Reflex Recordings Ltd* [2013] EWHC 4514 (Ch), [1] per HHJ David Cooke.

³⁷¹ *Ibid.*

³⁷² The option to insert the relevant wording is found in para 11(1) of the Commercial Court version of the standard form freezing order.

³⁷³ [2015] EWCA Civ 1028.

is in the ordinary course of business. Overall, the Court of Appeal's decision provides evidence that the English courts have made progress in protecting the defendants' right to continue with any genuine commercial dealings.

9.4 Cross-undertaking in damages by the claimant

In order to obtain a pre-judgment freezing injunction, the claimant must give an undertaking to the court to comply with any future order of the court to compensate the defendant for any loss caused by the freezing injunction. The usual wording of the undertaking is on the following terms:

"If the court later finds that this order has caused loss to the respondent, and decides that the respondent should be compensated for that loss, the applicants will comply with any order the court may make".³⁷⁴

The claimant may be required to provide a bank guarantee in respect of any such order.³⁷⁵ A failure by the claimant to comply with the undertaking would amount to contempt of court. However, in the event of a wrongfully granted injunction, the defendant cannot enforce the undertaking as of right: the court has discretion whether to enforce it at all.³⁷⁶ The court will take into account, *inter alia*, the defendant's conduct. It is only after the discretion is exercised to enforce the undertaking that the court needs to assess whether the defendant has suffered any loss as a result of the injunction. The principles of causation, remoteness and mitigation are all relevant when measuring the amount recoverable by the defendant. The requirement to give a cross-undertaking in damages is an invaluable safeguard for the defendant. Its primary purpose is to protect the defendant against the injustice of any loss caused by a wrongfully granted freezing injunction.³⁷⁷ In *Energy Venture Partners v Malabu Oil & Gas*, the Court of Appeal observed that:

"since the Claimant has obtained a Freezing Order preserving assets over which it may be able to enforce on the basis of having shown the court that it has a good arguable case, it is only appropriate that if the Defendant can show that it too has a good arguable case that it will suffer loss in consequence of the making of the Order, it should equally be protected. It may be said that what the Defendant in such circumstances obtains is security whereas the Claimant obtains something less, but in many cases, of which the present is probably one, a Freezing Order has the practical if not theoretical effect of giving security to the Claimant for its claim."³⁷⁸

A secondary purpose of a cross-undertaking is its potential deterrent effect in that, at least in theory, it reduces the possibility of opportunistic applications by claimants.³⁷⁹ In the author's view, however, a more effective deterrent would be a default requirement for the claimant to pay money into court or provide a third party guarantee (e.g. a bank guarantee), unless the claimant can show some exceptional circumstances. The same solution has been adopted for pre-judgment applications for

³⁷⁴ See para (1) of Schedule B of the standard form freezing injunction.

³⁷⁵ *Ibid*, para (2) of Schedule B.

³⁷⁶ *F Hoffmann-La Roche & Co AG v Secretary of State for Trade and Industry* [1975] AC 295.

³⁷⁷ *Graham v Campbell* (1878) 7 Ch D 490.

³⁷⁸ [2014] EWCA 1295, [52].

³⁷⁹ *Cheltenham & Gloucester Building Society (formerly Portsmouth Building Society) v Ricketts* [1993] 1 WLR 1545, 1554.

the so called European Account Preservation Order ('EAPO').³⁸⁰ As a matter of principle, such a default rule would ensure a fairer distribution of rights between the parties in comparison to the current default position. It would reflect the seriousness of the risks of injustice to defendants associated with a *pre-judgment* freezing injunction. It would be a fair price to pay for interfering with the defendant's assets before judgment. The flexibility of principles such as remoteness, and a lack of a more rigid causation rule on recoverable losses, can lead to complex and costly litigation on the defendant's entitlement to compensation, as illustrated by the judgment of the court in *Abbey Forwarding (in liquidation) and another v Hone and others*.³⁸¹ There are even examples from case law, such as *Yossifoff v Donnerstein*,³⁸² where the claimant openly admitted that any cross-undertaking in damages would be "of limited value in practice" due to his financial circumstances.³⁸³

The risk of unfairness to defendants from placing reliance on the claimant's allegations at the interlocutory stage and the potential for significant losses from wrongfully granted injunctions in high value commercial cases is illustrated by the *Fiona Trust* litigation.³⁸⁴ At the outset of this long-running litigation brought by the Russian state-owned shipping companies, a worldwide freezing order was made in respect of assets up to the value of 225 million USD and a similar amount was paid into court by the defendants to discharge the injunction. That was in August 2005. Five years later, in December 2010, the claimants obtained a judgment for roughly 16 million USD – a substantial difference compared to the sum frozen. The defendants were successful in enforcing the cross-undertaking and obtained substantial damages for the loss suffered as a result of the 2005 freezing order. It is notable that the claims in *Fiona Trust* involved wide ranging allegations of bribery, corruption and diversion of assets. With the benefit of hindsight, it is the author's view that something needs to be done to reduce the risk of wrongfully granting freezing injunctions in high value commercial cases based on such serious allegations. It is also notable that in *Mobil Cerro Negro* the claimant was initially successful (at the *ex parte* stage) in obtaining a freezing order which covered 12 billion USD worth of assets. In this high-profile case the claimant was later successful only in relation to roughly 2.6 billion USD.³⁸⁵ This underlines the author's argument that the English courts need to introduce a deterrent against exaggerated claims in applications for freezing orders. An effective deterrent would be a default requirement for claimants to fortify their cross-

³⁸⁰ Regulation 655/2014 of the European Parliament and of the Council of 15 May 2014 establishing a European Account Preservation Order procedure to facilitate cross-border debt recovery in civil and commercial matters ("the EAPO Regulation"). See esp. Recital 18 of the EAPO Regulation which provides that: "Such circumstances could be, for instance, that the creditor has a particularly strong case but does not have sufficient means to provide security, that the claim relates to maintenance or to the payment of wages or that the size of the claim is such that the Order is unlikely to cause any damage to the debtor, for instance a small business debt." The author agrees with this approach. For further comments on the EAPO Regulation see chapter 16 of this thesis.

³⁸¹ [2012] EWHC 3525 (Ch).

³⁸² [2015] EWHC 3357 (Ch).

³⁸³ *Ibid*, [49].

³⁸⁴ *Fiona Trust & Holding Corporation v Yuri Privalov & Others* [2016] EWHC 2163 (Comm). See also the author's discussion of this case (in relation to the ordinary course of business proviso) in the previous section of this chapter. The decision of Males J was upheld by the Court of Appeal in *SCF Tankers Limited (formerly known as Fiona Trust & Holding Corporation) and Others v Yuri Privalov and Others* [2017] EWCA Civ 1877.

³⁸⁵ See 'Exxon owed \$1.6bn by Venezuela for 2007 nationalisation', 10th October 2014, BBC News: <http://www.bbc.co.uk/news/business-29561345>

undertaking in damages, unless exceptional circumstances can be shown.³⁸⁶ Apart from the potential losses that the defendant may suffer, the level of security should take into account, *inter alia*, the value of the claim and any losses that may be suffered by third parties.

Notwithstanding the requirement for a cross-undertaking in damages by claimants, defendants who suffer financial loss as a result of a wrongfully granted injunction may have practical difficulties in recovering their loss. For example, in the multifaceted and long-running *Pugachev* litigation, concerns were raised not only about the potential loss that Mr Pugachev could suffer in the event of a failure by the DIA (acting as the liquidator of the bank) to succeed on its substantive claims but also about his ability to recover any loss.³⁸⁷ The DIA did not have any assets in England and the bank was in insolvent liquidation. Moreover there was no formal mechanism for enforcing orders of the English court in Russia. Mr Pugachev therefore obtained, at first instance, a fortification of the cross-undertaking in damages; in practical terms the DIA was ordered to pay 25 million USD into court. The DIA appealed against the fortification on the ground that Mr Pugachev failed to produce evidence about the potential loss that would result from the freezing order. The Court of Appeal observed that there was evidence of “the collapse of a joint venture investing in real estate in Russia which, according to the evidence, would have given Mr Pugachev a profit of USD \$25 million or more”.³⁸⁸ Such evidence shows the degree of damage which a worldwide freezing order may have especially if its coverage extends to all of the defendant’s assets and the defendant is engaged in large scale business ventures as in the *Pugachev* litigation. However, the Court of Appeal overturned the fortification order because Mr Pugachev failed to show an established and continuing pattern of business enterprise in the period after his exile from Russia.³⁸⁹ The evidence about the collapsed joint venture was not sufficient to show a continuing pattern. The rule in paragraph 5.1 of CPR PD 25A is that the cross-undertaking in damages should be unlimited unless the court orders otherwise. Only in exceptional circumstances will the court, on a discretionary basis, place a cap on the cross-undertaking in damages.³⁹⁰ A cross-undertaking in damages will be required to obtain an injunction *ex parte* despite the fact that there is no evidence that defendant may suffer loss. While there is no doubt that a cross-undertaking in damages is necessary to ensure equipage equality, it is the author’s view that equipage equality will not be achieved unless the courts impose a mandatory requirement to fortify the cross-undertaking. The courts should no longer adopt the view enunciated in *Sir Lindsay Parkinson & Co Ltd v Triplan Ltd*³⁹¹ that “justice, convenience and fairness might well justify an injunction even where the cross-undertaking is frail”.³⁹² The author submits that the difficulties faced by the defendant in *Pugachev* to prove an established and continuing pattern of business enterprise and the fact that the issue of fortification had to be resolved by the Court of Appeal is inconsistent with the principle of proportionality in civil procedure and the need to streamline interlocutory proceedings.

³⁸⁶ Further support for this argument is found in the minority judgment of the US Supreme Court in *Grupo Mexicano de Desarrollo S.A. v Alliance Bond Fund Inc.* 119 S.Ct. 1961 (1999), 1978 where it was suggested that in order to protect defendants, “[a]s an *essential condition* for a preliminary freeze order, a district court could demand sufficient security to ensure a remedy for wrongly enjoined defendants” (emphasis added).

³⁸⁷ *JSC MP Bank v Pugachev* [2015] EWCA Civ 139, [88].

³⁸⁸ *Ibid*, [92].

³⁸⁹ *Ibid*, [99].

³⁹⁰ See the following examples of cases where a limit was imposed: *Re DPR Futures Ltd* [1989] 1 WLR 778 and *RBG Resources Ltd v Rastogi* [2002] BPIR 1028.

³⁹¹ [1973] QB 609.

³⁹² *Ibid*, 626.

9.5 Full and frank disclosure

Given that a freezing order may cause substantial prejudice to a defendant, one of the existing safeguards to reduce unfairness to defendants is that a claimant has a duty of full and frank disclosure to the court of all matters material to the court's discretion on an *ex parte* application. These include matters which may be adverse to an application for a freezing order. A defendant may apply to the court to discharge the injunction on the basis of a failure to comply with this duty. The court has a discretion whether or not to discharge the injunction on this basis and would usually do so where there had been deliberate non-disclosure or misrepresentation. The purpose of this rule on full and frank disclosure has been described as "to deprive a wrongdoer of an advantage improperly obtained and to serve as a deterrent to others to ensure that they comply with their duty to make full and frank disclosure on *ex parte* applications".³⁹³ In the author's view, the duty of full and frank disclosure is sufficiently onerous to achieve its purpose.³⁹⁴ There is no evidence to suggest that any amendments should be made to the manner in which the courts have been dealing with applications to discharge freezing injunctions on the basis of a failure to comply with this duty. In order to properly deal with any technical and unmeritorious applications to discharge the injunction for the alleged non-compliance with the duty of full and frank disclosure, the author submits that the availability of discretion plays a useful role.

9.6 Any special requirements for seeking a freezing injunction without notice to the defendant?

As we will see, the need to distinguish between *ex parte* applications and *inter partes* applications is important to minimise the risk of unmeritorious applications from the outset.

Once again, it is useful to look at the American procedural law relating to pre-trial relief. A temporary restraining order (TRO) is designed to preserve the status quo before a preliminary injunction hearing and remains in effect only until the preliminary hearing is held.³⁹⁵ When a TRO is issued *ex parte*, the applicant must show special reasons why notice should be excused and "that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or his attorney can be heard in opposition". This means that in the United States, claimants have to meet a higher burden to obtain an *ex parte* TRO in comparison to the threshold for obtaining a TRO with notice or a preliminary injunction.³⁹⁶ The author of this thesis sees no reason why *ex parte* applications for the English freezing injunction should not be subject to a similar requirement to show to that immediate loss or damage will result to the applicant before the *inter partes* hearing. At the very least, such a formal requirement would warn the applicants that their allegations will be rigorously scrutinised by the court. Deterrence against unmeritorious applications does not represent the only reason in favour of introducing a higher burden. The seriousness of the *ex parte* pre-judgment freezing injunctions and their potential for damage to commercial reputation need to be accounted for in the preconditions that the applicant must satisfy.

³⁹³ *The Nicholas M* [2008] 2 CLC 51, [62] per Flaux J, relying on the Court of Appeal's statement about this in *Brink's Mat Ltd v Elcombe* [1988] 1 WLR 1350. See also *Memory Corporation v Sidhu* [2000] 1 WLR 1443.

³⁹⁴ It should be added that the duty of full and frank disclosure is a continuing duty in the sense that it continues to apply until the freezing injunction has been implemented.

³⁹⁵ *Sierra On-Line Inc v Phoenix Software Inc*, 739 F.2d 1415, 1422 (9th Cir. 1984).

³⁹⁶ It has been recognised that notice may not be required if it would give the opposing party time and/or motivation to destroy property or evidence or otherwise make it impossible to obtain the relief sought: *In the Matter of Vuitton et Fils S.A.*, 606 F.2d 1, 5 (2d Cir. 1979).

9.7 Freezing injunctions and the requirement of protection of a legal or an equitable right

The author submits that this requirement should be seen as unnecessary and the English courts should simply clarify that a pre-judgment freezing injunction cannot be obtained unless there is at least an undertaking from the claimant to commence substantive proceedings against the defendant.³⁹⁷ This is consistent with the principle of equipage equality as there is no need for a freezing injunction if there is no promise to commence substantive proceedings. Let us briefly consider the unnecessary confusion surrounding the requirement and the author's proposed clarification.

The requirement is not unique to freezing injunctions but applies to all interlocutory injunctions and receivership orders. However, the recent trend in case law on interlocutory injunctions and receivership orders has been to dispense with the need to satisfy such a requirement.³⁹⁸ Moreover, the protection of a legal or equitable right is no longer regarded as necessary to obtain an anti-suit injunction. The same position should be adopted in relation to freezing injunctions. In the context of anti-suit injunctions, Fentiman has argued that the terminology of "legal or equitable rights" is unhelpful.³⁹⁹ As he explains, an equitable right in this context is a right protected by the equitable remedy of granting an injunction and does not mean (or need not be) a right in property or created by contract. The author agrees with Fentiman's comments.

9.8 Reflections on the safeguards for defendants

There is currently insufficient protection for defendants, probably due to the over-emphasis on providing assistance to claimants. In other words, the root of the problem with the current availability and operation of the safeguards is that there is insufficient regard to the underlying need to ensure a level-playing field in litigation. A shift of emphasis is required, away from the claimant-friendly approach of viewing the provisos as obstacles for claimants.

Chapter 10: Summary of Part I of the thesis

The author's theory is that the principle of equipage equality is the primary function of freezing injunctions. This is in contrast to the prevailing, traditional view that freezing injunctions are simply a weapon against unscrupulous defendants and concerned with the enforcement of judgments. The courts need to recognise that the rules on freezing injunctions, by balancing the rights of the parties, also protect defendants from unnecessary interference with their assets. The author's theory has important implications on the scope of freezing injunctions and the preceding chapters dealt with the implications on their *substantive* scope. Namely, we have seen that some aspects of the current substantive preconditions of freezing injunctions are inconsistent with equipage equality and that the overall balance created by the substantive preconditions is excessively favourable to the claimant. The uncertainty surrounding the application of the good arguable test can benefit claimants as it increases the risk of wrongfully granted injunctions. As for the threshold relating to the conduct of the defendant, the circumstances which can be sufficient for a judge to make a finding of a real risk of dissipation are currently too wide and inconsistent with the negative

³⁹⁷ See *Ras Al Khaimah Investment Authority et al v Bestfort Development LLP et al* [2015] EWHC 1955 (Ch).

³⁹⁸ For a recent example see *Tasarruf Mevduati Sigorta Fonu v Merrill Lynch Bank and Trust Co.* [2011] UKPC 17.

³⁹⁹ Fentiman (2015), 16.11.

connotation of term 'dissipation'. Furthermore, it has been demonstrated that equipage equality requires more powerful safeguards for defendants. On other hand, we have seen that the duty of full and frank disclosure is sufficiently onerous to deter claimants from misleading the court at the without notice hearing. In the context of this duty, judicial discretion plays an important role in ensuring that the courts can adequately deal with any tactical and unmeritorious applications from *defendants* to discharge the freezing injunction for the alleged non-compliance with the duty. We have also seen that some limited discretion is necessary in the context of the author's call for a default position that security should be provided by the claimant for his cross-undertaking for damages. Such discretion would serve to protect vulnerable claimants and thereby prevent any inequality between the parties.

The analysis of the historical foundations has shown that, in the light of the *Lister v Stubbs* line of authority and the early case law on proprietary freezing injunctions, the landmark decision in *Karageorgis* ought to be regarded as an extension of the scope of the exception which had been confined to proprietary claims up until 1975. However, concerns arose because the development of the non-proprietary freezing injunction in 1975 was characterised by Lord Denning as a novel invention albeit with roots in the old custom of foreign attachment. The failure to recognise the non-proprietary freezing injunction as an extension of an existing exception has resulted in a lack of consistency with the requirements for a proprietary freezing injunction. Thus, the claimant seeking a freezing injunction does not need to show intention to dissipate even though such a requirement (or at the very least some form of wrongful conduct by the defendant) is arguably implicit in and fundamental to the proprietary freezing injunction. It has been argued by the author that the key trigger for the exception to the general rule that a defendant cannot be restrained from dealing with his property before judgment should be the defendant's express or implied intention to make himself judgment proof. This intention could be implied, *inter alia*, from the defendant's use (or intended use) of his own assets for unjustifiable purposes, or from his dishonest conduct vis-à-vis the claimant (such as misappropriation of the claimant's assets).

PART II: The International Scope of Freezing Injunctions

Chapter 11: Introduction to the international scope of freezing injunctions

In part I of the thesis we have seen that equipage equality should be regarded as the primary function of freezing injunctions. Furthermore, we have seen the extensive implications of this new theory on the substantive preconditions for freezing injunctions. We can now turn to the jurisdictional preconditions and examine their consistency with theories of jurisdiction and the principle of equipage equality. The jurisdictional preconditions are only relevant in applications for a freezing injunction involving a foreign element (e.g. an application to restrain a foreign defendant from dealing with his assets in England). Such preconditions arise out of the application of the rules of private international law. By contrast, the substantive preconditions do not involve the application of private international law. In any case involving a foreign element, in order to obtain a freezing injunction from the English court, it would not be sufficient for the claimant to satisfy the substantive preconditions we analysed in part I of the thesis. The claimant would also need to satisfy the jurisdictional preconditions. These preconditions determine the international scope of freezing injunctions. This means that the jurisdictional preconditions ultimately control the extent to which the English court can apply the English rules on freezing injunctions (including the substantive preconditions) to cases involving one or more connections with other countries.⁴⁰⁰

We have already seen from the introduction to this thesis that there are a number of *prima facie* concerns with the international scope of freezing injunctions. These concerns seem to suggest that the jurisdictional preconditions are excessively claimant-friendly and inconsistent with the underlying purpose of creating a level-playing field in litigation. Moreover, there are related concerns that the courts are tailoring the jurisdictional preconditions in a claimant-friendly manner by ignoring, to some extent, the interests of foreign states. In practice, this means that it may be possible for a claimant to obtain a worldwide freezing injunction from the English court even in the circumstances where a foreign court should have exclusive jurisdiction to regulate the claim for interim relief. As we will see in this part of the thesis, this author takes the view that the international scope of English freezing injunctions is too wide and needs to be reconsidered. We will start with a brief summary of the current jurisdictional preconditions for English freezing injunctions. After the brief summary it will be necessary to consider some theoretical aspects of the rules of jurisdiction in order to understand the roots and complexity of the flaws with the current jurisdictional preconditions. Indeed, it is sometimes the absence of sufficient reference to the theoretical foundations of the rules of jurisdiction which may contribute to the inability to recognise or successfully prevent illegitimate interference with the sovereignty of other states in the context of injunctive relief.

⁴⁰⁰ The author refers to jurisdictional preconditions in plural because there are several elements which need to be established. For an explanation of the different elements, see the next section of this thesis.

Chapter 12: A brief summary of the jurisdictional preconditions

12.1 Introduction

In this chapter, we will seek to summarise the jurisdictional preconditions which a claimant would need to satisfy in order to obtain a freezing injunction from the English court in a case involving a foreign element. A detailed scrutiny of the legitimacy of these preconditions will only be possible after considering some of the conflicting theories which may underpin the rules of jurisdiction. Broadly speaking, there are three different sets of jurisdictional preconditions depending on the location, or intended location, of the proceedings on the substance of the case. The jurisdictional preconditions may also vary according to the type or category of freezing injunction being sought by a claimant. In order to explain the jurisdictional preconditions, it will be necessary to distinguish between factors relevant to the existence of jurisdiction and any factors relevant to a court's decision whether to exercise its jurisdiction.⁴⁰¹ The latter question is entirely a matter of discretion and could be described as the 'discretionary stage'. The summary below is subject to the caveats that it represents this author's interpretation of the case law and that, in his view, the jurisdictional preconditions are not entirely clear. This lack of clarity is particularly true of the discretionary stage.

12.2 Substantive proceedings in England⁴⁰²

In this category of cases, it is usually straightforward for a claimant to satisfy the jurisdictional preconditions. When does jurisdiction exist to grant the injunction? As a freezing injunction operates *in personam*, it is necessary to establish personal jurisdiction over the defendant. Jurisdiction in relation to the substantive claim also provides personal jurisdiction over the defendant to grant the injunction.⁴⁰³ If the English court has jurisdiction over the defendant in relation to the substantive claim (whether under the Brussels I Recast Regulation⁴⁰⁴ or the residual common law rules of jurisdiction), there is no need for a claimant to identify a separate ground of jurisdiction for the purposes of the application for a freezing injunction. What about jurisdiction over the assets? CPR rule 25.1(1)(f)(ii) makes it clear that English courts have jurisdiction to grant a worldwide freezing injunction in support of English proceedings.⁴⁰⁵

In what circumstances would the English court exercise its jurisdiction to grant the injunction? One of the most important factors at this discretionary stage seems to be the ability of the court to enforce the order.⁴⁰⁶ Where the English court has no means to enforce the order, it is highly likely that the injunction would be refused. When considering whether to grant an injunction extending to

⁴⁰¹ For an explanation of this distinction see chapter 13, section 13.4.2.

⁴⁰² See chapter 14 of this thesis for a detailed analysis of the jurisdictional preconditions for this category of freezing injunctions.

⁴⁰³ *Masri v Consolidated Contractors International (No 2)* [2009] Q.B. 450 ('*Masri No 2*'). Section 37(3) of the Senior Courts Act 1981 provides that the power to grant freezing injunctions under section 37(1) of the 1981 Act "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".

⁴⁰⁴ Regulation (EU) 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ('Brussels I Recast Regulation').

⁴⁰⁵ This is effectively a statutory confirmation of the decision in *Babanaft v Bassatne* [1990] Ch 13.

⁴⁰⁶ See, inter alia, *Derby v Weldon (No 3 and 4)* [1990] Ch. 65. This case will be analysed in more detail in chapter 14.

the defendant's assets located abroad, the court will also take into account whether there are sufficient assets in England to satisfy the claim.⁴⁰⁷ There is usually no mention of the principle of comity in cases involving English substantive proceedings.⁴⁰⁸ This may be due to the courts' implicit view that the fact that the substantive proceedings are in England provides the English court with "sufficient interest or connection" with the claim for interim relief and consequently there is no possibility of infringement of comity.⁴⁰⁹ Such an inference depends on one particular interpretation or theory of comity.⁴¹⁰ For the avoidance of doubt, it should also be noted that at the discretionary stage there is no need to consider whether it would be 'inexpedient' to grant a freezing injunction.⁴¹¹ Furthermore, even if assets located abroad are involved, there appears to be no requirement for the court to apply the principle of *forum non conveniens* in the sense that there is no need to consider whether a foreign court would be a more appropriate forum to determine the merits of an application for a freezing injunction or equivalent relief.⁴¹²

In *Chabra*-style freezing injunctions cases, the English courts seem to impose a more rigorous set of jurisdictional preconditions, even if the substantive proceedings are in England. The courts would be particularly cautious about granting a *Chabra*-style freezing injunction which restrains a defendant from dealing with his assets located abroad.⁴¹³ In addition to the usual jurisdictional preconditions in cases involving English substantive proceedings, a claimant may need to establish that the English court has 'subject matter jurisdiction'.⁴¹⁴ There are several decisions of the English courts where the concept of subject matter jurisdiction has been confusingly and incorrectly used in order to formulate a justification for the court's refusal to exercise its jurisdiction.⁴¹⁵ As a result of these decisions, the current position appears to be that subject matter jurisdiction is incorrectly equated with the question of whether there is a sufficient connection between the defendant and the English court.⁴¹⁶ However, there is insufficiently clear guidance from the English case law about the circumstances in which the court would find that there is a sufficient connection.⁴¹⁷ This in turn means that, based on the current interpretation of the concept in *The Mahakam*, it is not possible to provide a straightforward answer to the question whether the requirement of subject matter

⁴⁰⁷ Ibid.

⁴⁰⁸ See, however, *Masri (No 2)* [2009] Q.B. 450, 465 per Lawrence Collins LJ.

⁴⁰⁹ The language of "sufficient interest or connection" and its link to the principle of comity was initially developed by Lord Goff in the context of anti-suit injunctions in *Airbus v Patel* [1999] 1 A.C. 119.

⁴¹⁰ See the author's explanation of the different perspectives and theories of comity in the next chapter.

⁴¹¹ In other words, section 25 of the Civil Jurisdiction and Judgments Act 1982 is not applicable to freezing injunctions in support of English proceedings.

⁴¹² See, however, in the context of a *Chabra*-style injunction in aid of enforcement of an arbitration award the *obiter* observations of Males J in *Cruz City 1 Mauritius Holdings v Unitech* [2014] EWHC 3704 (Comm) on the need to identify a more appropriate forum. This case, and the potential requirement to consider the more appropriate forum for interim relief, will be discussed in more detail in chapter 17 of this thesis.

⁴¹³ *Parbulk II AS v PT Humpuss (The Mahakam)* [2011] EWHC 3143 (Comm). For another recent example of a cautious approach see *Cruz City 1 Mauritius Holdings v Unitech* [2014] EWHC 3704 (Comm). Both cases will be discussed in more detail in chapter 17 of this thesis.

⁴¹⁴ Ibid, per Gloster J (as she then was).

⁴¹⁵ The key examples include: *Mackinnon v Donaldson, Lufkin & Jenrette* [1986] Ch. 482, *Societe Eram Shipping Co Ltd v Cie Internationale de Navigation et al* [2004] 1 AC 260, and *Parbulk II AS v PT Humpuss (The Mahakam)* [2011] EWHC 3143 (Comm).

⁴¹⁶ In *Masri (No 2)* [2009] Q.B. 450, the concept of subject matter jurisdiction was also equated with sufficient connection but the ultimate conclusion of the Court of Appeal was that there was sufficient connection with the forum to appoint a receiver over assets located abroad.

⁴¹⁷ This is especially true in cases involving the defendant's conduct relating to his assets located abroad.

jurisdiction is satisfied in a given case.⁴¹⁸ In the author's view, this uncertainty needs to be resolved as a matter of urgency.⁴¹⁹ The English courts need to clarify that the concept of subject matter jurisdiction has nothing to do with the discretionary question of whether it is appropriate to exercise jurisdiction in a particular case based on the degree of connection with the forum. In order to clarify this point, the courts should make reference to the correct use of the concept of subject matter jurisdiction by the Supreme Court in *Lucasfilm v Ainsworth*.⁴²⁰ In a nutshell, the concept of subject matter jurisdiction is actually concerned with whether the facts and matters forming the basis of the claim or defence (i.e. the subject matter of the case) may be the object of adjudication by the court.⁴²¹ It follows that the concept of subject matter jurisdiction should be regarded as irrelevant in the context of applications before the English courts for a freezing injunction.

As the law currently stands, the courts may be prepared to refer to the principle of comity as a form of restraint on the territorial scope of injunctive relief.⁴²² There is insufficient clarity about the circumstances in which the principle of comity would lead to a refusal to grant a *Chabra*-style injunction. The court may also make vague references to "principles of international law" when weighing up the factors at the discretionary stage.⁴²³

The above discussion of jurisdictional preconditions is equally applicable in cases involving post-judgment freezing injunctions where a judgment has been obtained from an English court.⁴²⁴ An application for a post-judgment freezing injunction may be made against a foreign third party against whom the claimant has no cause of action.⁴²⁵ Once again, the English courts would take a more cautious approach to the jurisdictional preconditions when dealing with a *Chabra*-style post-judgment injunction.⁴²⁶

12.3 Substantive proceedings abroad (in a non-EU state) – 'collateral freezing injunctions'⁴²⁷

When does jurisdiction exist to grant a freezing injunction in support of foreign substantive proceedings in a non-EU state? Personal jurisdiction over the defendant would be automatically established by invoking section 25(1) of the Civil Jurisdiction and Judgments Act 1982. In cases involving service out of the jurisdiction, CPR PD6B 3.1(5) provides a straightforward ground of jurisdiction. What about jurisdiction over the assets? Section 25 of the 1982 Act is silent about the territorial scope of a freezing injunction in support of foreign proceedings. However, the Court of

⁴¹⁸ On the concept of subject matter jurisdiction and its relevance in the context of freezing injunctions, see the next chapter of this thesis. See also in chapter 17 the discussion of subject matter jurisdiction in relation to the author's proposals for changes to the current international scope of freezing injunctions.

⁴¹⁹ For the author's full spectrum of proposals see part III of this thesis.

⁴²⁰ [2012] 1 A.C. 208.

⁴²¹ Thus, it can be said, by way of an example, that the so called *Moçambique* rule was based on the lack of subject matter jurisdiction: *British South Africa Co v Cia de Moçambique* [1893] AC 602. This interpretation of the concept of subject matter jurisdiction is consistent with that adopted by Briggs: see Briggs A., *Private International Law in English Courts* (OUP: Oxford, 2014), pp.169-171.

⁴²² See, for example, *The Mahakam* [2011] EWHC 3143 (Comm).

⁴²³ Ibid.

⁴²⁴ See, for example, *Babanaft v Bassatne* [1990] Ch 13. On post-judgment freezing injunctions see chapter 4, section 4.9 of this thesis.

⁴²⁵ See, for example, *The Mahakam* [2011] EWHC 3143 (Comm).

⁴²⁶ Ibid.

⁴²⁷ For a detailed analysis of the jurisdictional preconditions for freezing injunctions in support of foreign proceedings (and the relevant case law) see chapter 15 of this thesis.

Appeal has made it clear that it is possible for a claimant to obtain a worldwide freezing injunction from an English court in support of foreign substantive proceedings.⁴²⁸ In what circumstances would the court exercise its discretion to grant a freezing injunction collateral to foreign substantive proceedings? The short answer is that, applying section 25(2) of the 1982 Act, the court needs to be satisfied that it is not “inexpedient” to grant a freezing injunction. There are several important decisions of the Court of Appeal on the application of the test of expediency.⁴²⁹ It appears that an English court would exercise its discretion to grant a collateral freezing injunction even where there is minimal or no connection to the forum.⁴³⁰ In cases where there is minimal or no connection to the forum, the claimant needs to show some “exceptional circumstances”, fraud probably being the best example.⁴³¹ Ordinarily, there is no discussion of the principle of *forum non conveniens* – in the sense that the court does not expressly consider whether England is the most appropriate forum for the claim or application for a freezing injunction.⁴³² There are several sets of non-exhaustive ‘guidance’ on the factors that the courts may take into account when making a decision whether to exercise their jurisdiction to grant a collateral freezing injunction. The Court of Appeal in *Motorola v Uzan (No 2)* identified five considerations which may be relevant to the test of expediency at the discretionary stage:

“First, whether the making of the order will interfere with the management of the case in the primary court e.g. where the order is inconsistent with an order in the primary court or overlaps with it...Second, whether it is the policy in the primary jurisdiction not itself to make worldwide freezing/disclosure orders. Third, whether there is a danger that the orders made will give rise to disharmony or confusion and/or risk of conflicting inconsistent or overlapping orders in other jurisdictions, in particular the courts of the state where the person enjoined resides or where the assets affected are located....Fourth, whether at the time the order is sought there is likely to be a potential conflict as to jurisdiction rendering it inappropriate and inexpedient to make a worldwide order. Fifth, whether, in a case where jurisdiction is resisted and disobedience to be expected, the court will be making an order which it cannot enforce”.⁴³³

It is not clear how the courts should balance the above factors identified in *Motorola (No2)* and whether this is consistent with the other case law on collateral freezing injunctions, including the more recent “summary” of the circumstances in which a court may (or may not) grant a collateral freezing injunction by Popplewell J in *ICICI Bank UK v Diminco NV*.⁴³⁴

⁴²⁸ See, for example, *Motorola v Uzan (No 2)* [2003] EWCA Civ 752 and related case law in chapter 15.

⁴²⁹ See especially *Credit Suisse v Cuoghi* [1998] Q.B. 818, *Refco v Eastern Trading* [1999] Lloyd’s Rep 159, and *Motorola v Uzan (No 2)*. These decisions will be analysed in chapter 15.

⁴³⁰ See, inter alia, in chapter 15 the discussion of *Royal Bank of Scotland Plc v FAL Oil Company Ltd et al* [2012] EWHC 3628 (Comm) and the comparisons with the reasoning in *ICICI Bank UK v Diminco NV* [2014] EWHC 3124 (Comm).

⁴³¹ See, inter alia, *Mobil Cerro Negro Ltd v Petroleos de Venezuela SA* [2008] EWHC 532 (Comm); *Belletti v Morici* [2009] EWHC 2316 (Comm); *ICICI Bank UK v Diminco NV* [2014] EWHC 3124 (Comm). For the author’s criticisms relating to the requirement for exceptional circumstances, see especially chapter 15, section 15.6.

⁴³² For further discussion of the possible role of this principle, see especially chapter 17, section 17.3.1.

⁴³³ *Motorola (No 2)* [2003] EWCA Civ 752, [115].

⁴³⁴ For the author’s comparisons and criticisms of these cases, see chapter 17 of this thesis.

As for *Chabra*-style freezing injunctions in support of foreign proceedings, it is highly likely that the English courts would be more cautious about the territorial scope of injunctive relief when dealing with no cause of action defendants.⁴³⁵

12.4 Substantive proceedings in an EU Member State ('EU MS')

Subject to additional requirements, the author's summary of the jurisdictional preconditions applicable in cases involving foreign substantive proceedings in a non-EU MS is equally applicable in cases where the proceedings are in an EU MS. In order to invoke section 25 of the 1982 Act, a claimant would have to rely on Article 35 of the Brussels I Recast Regulation which operates as a 'gateway' to the application of English national law rules. The application of the real connecting link criterion to any applications under Article 35 operates as a restriction on the international scope of freezing injunctions in support of proceedings in an EU MS.⁴³⁶ This is contrast to the jurisdictional preconditions in cases involving proceedings in a non-EU MS where it appears that the criterion does not apply.⁴³⁷ The requirement for a real connecting link originates from the Court of Justice of the European Union's decision in *Van Uden Maritime*⁴³⁸ where the court stated that:

"[T]he granting of provisional or protective measures on the basis of [Article 35 of the Brussels I Recast Regulation] is conditional on, inter alia, the existence of a *real connecting link between the subject matter of the measures sought and the territorial jurisdiction of the [Member State] of the court before which those measures are sought.*"⁴³⁹

By contrast, the court indirectly confirmed that a provisional or protective measure granted in support of domestic substantive proceedings (where the basis of jurisdiction is one of the provisions of the Brussels I Recast Regulation conferring substantive jurisdiction) is not subject to the real connecting link test: "the court having jurisdiction as to the substance of a case under one of the heads of jurisdiction laid down in the [Regulation] also has jurisdiction to order provisional or protective measures, *without that jurisdiction being subject to any further conditions*".⁴⁴⁰ The lack of any restrictions in the form of a real connecting link criterion in these circumstances has been confirmed by Gloster J (as she then was) in her first instance judgment in the long-running litigation in *Masri*.⁴⁴¹ She commented that the Court of Appeal in *Babanaft v Bassatne*⁴⁴² took an

⁴³⁵ See, for an example of a cautious approach, *Belletti v Morici* [2009] EWHC 2316 (Comm).

⁴³⁶ For the application of the real connecting link test in the context of an application for a post-judgment worldwide freezing injunction from the English court see *Banco Nacional de Comercio Exterior SNC v Empresa de Telecomunicaciones de Cuba SA* [2007] EWCA Civ 662. The Court of Appeal restricted the scope of the injunction to English assets. For comments on this case see especially Merrett L., 'Worldwide Freezing Orders in Europe' (2007) CLJ 495. The real connecting link criterion (and its purpose) was also considered *obiter* by Males J in *Cruz City 1 Mauritius Holdings v Unitech Ltd* [2014] EWHC 3131 (Comm).

⁴³⁷ However, there are some relatively recent cases which seem to suggest that the real connecting link criterion is even applicable in cases involving foreign substantive proceedings in a non-EU state: *Royal Bank of Scotland Plc v FAL Oil Company Ltd* [2012] EWHC 3628 (Comm), [37]. See also the author's discussion in chapter 15, section 15.6.

⁴³⁸ (C-391/95) *Van Uden Maritime BV (t/a Van Uden Africa Line) v Kommanditgesellschaft in Firma Deco-Line* [1999] Q.B. 1225 ('*Van Uden Maritime*').

⁴³⁹ *Ibid*, [40] (emphasis added).

⁴⁴⁰ [1999] Q.B. 1225, [22] (emphasis added).

⁴⁴¹ *Munib Masri v Consolidated Contractors International Company SAL & Another* [2007] EWHC 3010 (Comm), [57].

⁴⁴² [1990] Ch. 13.

unnecessarily long route to conclude that it could grant a post-judgment worldwide injunction – what is now Article 35 of the Brussels I Recast Regulation is irrelevant in the context of English substantive proceedings.⁴⁴³

12.5 Some reflections on the summary of jurisdictional preconditions

As already evident from the summary of jurisdictional preconditions, it appears to be difficult for practitioners to give clear and/or specific advice on how the courts will exercise their discretion. In cases involving foreign substantive proceedings, there is no guidance on the relationship between the test of expediency and the principle of comity.⁴⁴⁴ Is the latter principle subsumed within the test of expediency? The correct interpretation of the principle of comity itself is not clear.⁴⁴⁵ The potential relationship between the test of expediency and the principle of *forum non conveniens* is yet another ‘grey area’. The uncertainty surrounding the jurisdictional preconditions benefits financially strong claimants because they are prepared to ‘give it a shot’ to see whether they can obtain a worldwide freezing injunction. Unscrupulous claimants can take advantage of the uncertainty to unnecessarily increase the costs of litigation with the aim of forcing the defendant to settle or provide security by paying monies into court. In other words, the uncertainty in relation to the English court’s jurisdiction may encourage unmeritorious applications which are not made because the claimant has a genuine concern that the assets would be dissipated.

⁴⁴³ Ibid, [61].

⁴⁴⁴ For further discussion of this issue see chapter 15 of this thesis.

⁴⁴⁵ See chapter 13, section 13.9 of this thesis.

Chapter 13: Theoretical foundations of jurisdiction in private international law and their relationship with the international scope of freezing injunctions

13.1 Introduction

In the previous chapter we had an overview of the current jurisdictional preconditions for freezing injunctions. The overview was useful in giving us the ‘bigger picture’ of the international scope of freezing injunctions. Unfortunately, this picture does not seem to be very clear. In the light of the author’s *prima facie* concerns about the international scope of freezing injunctions, it is necessary to examine the extent to which the current jurisdictional preconditions for freezing injunctions are consistent with any theories which may underpin the rules of jurisdiction in private international law. These theories will be explored in this chapter. We have already seen in the previous chapter that there are several ‘grey areas’ concerning the relationship between some of the principles that may be relevant when an English court is dealing with the issue of jurisdiction to grant a freezing injunction. The existence of such grey areas makes it even more significant for us to think about the purpose of these principles in private international law and how they ought to be used in the context of freezing injunctions. Therefore, this chapter will analyse, *inter alia*, the possible functions of the principle of comity. As we will see, our view of the outer limits of the jurisdiction to grant a freezing injunction would depend on our perception of the functions of private international law rules and how the rules of jurisdiction should support these functions. Furthermore, the theoretical discussion in this chapter will highlight the importance of accurately using any terminology by distinguishing between different types of jurisdiction in the context of freezing injunctions.

13.2 The purpose of private international law rules – the “national school”, the “international school” and the “international systemic perspective”

The reason we need to think about the purpose of private international law rules is that it will have an influence on whether we agree or disagree with the current international scope of freezing injunctions.

The traditional approach, which reflects the views of the “national school”, is that private international law is a set of rules which form part of national law and whose purpose is to avoid injustice and inconvenience that would result from subjecting cases with foreign element to the same treatment as purely domestic disputes.⁴⁴⁶ On the other hand, the “internationalist school” argues that public international law provides an external foundation for private international law. Mann has famously argued that:

“All States have introduced rules of private international law and, indeed, a strong body of opinion asserts that every country is under a duty to have rules of private international law,

⁴⁴⁶ See, for example, Collins L. *et al* *The Conflict of Laws* (Sweet & Maxwell, 15th edn, 2016), chapter 1. See also: Bogdan M., *Private International Law as Component of the Law of the Forum* (Hague Academy of International Law, 2012), esp. p.41.

that it would be a breach of an international duty if the *lex fori* applied in all circumstances.”⁴⁴⁷

A contemporary version of this approach, which adopts an “international systemic perspective”, is that private international law provides a framework for determining which legal system applies to an event or set of facts.⁴⁴⁸ In other words, it is a system of international ordering administered by national courts. Private international law is not concerned with ensuring just outcomes in individual cases, but with the justness of international legal ordering. It is not concerned with private rights but with public powers. It recognises that there is no hierarchy of national private laws and their respective standards of justice. Therefore, it seeks to preserve the diversity of national laws and promotes “justice pluralism”⁴⁴⁹ and subsidiarity. International coordination of national rules of private law is necessary to reduce the inconsistent legal treatment of an event or set of facts.⁴⁵⁰ The international systemic perspective involves a rejection of the sharp distinction between private and public international law.

13.3 Some distinctions and categorisations regarding the concept of jurisdiction

In order to assess the impact of any theories about the functions of jurisdictional rules on the current jurisdictional preconditions for freezing injunctions, it is important to be clear about the meaning and use of the term jurisdiction. It is possible to categorise jurisdictional rules in several different ways. As we will see, a failure by the judges to distinguish between different types of jurisdiction and their tendency to use the terminology interchangeably is one of the main factors contributing to the theoretical flaws in the current framework of jurisdictional preconditions for obtaining a freezing injunction.

13.3.1 Adjudicatory jurisdiction, legislative jurisdiction, and enforcement jurisdiction

There is a distinction between adjudicatory jurisdiction, legislative jurisdiction, and enforcement jurisdiction. As explained by Von Mehren and Trautman, adjudicatory jurisdiction is concerned with “the circumstances in which a given political unit should furnish a law-applying agency for the adjudication of a given multistate dispute”.⁴⁵¹ Legislative jurisdiction is the authority to apply either procedural or substantive rules to a cross-border dispute. The author of this thesis takes the view that, in order to avoid confusion, a preferable term for legislative jurisdiction is regulatory authority. In the context of freezing injunctions, there is a close link between adjudicatory jurisdiction and regulatory authority. Enforcement jurisdiction is concerned with the authority to take executive action in pursuance of the rules.

⁴⁴⁷ Mann F.A. ‘The Doctrine of Jurisdiction in International Law’ (1964) 111 *Recueil des Cours* 1 (describing the roots of jurisdictional law in territorial sovereignty).

⁴⁴⁸ See Mills A. *The Confluence of Public and Private International Law* (CUP, 2009). See also: Singer J.W., ‘Real Conflicts’ (1989) 69 Boston. U. L. Rev. 1 (Criticising the view that the forum should simply adopt conflict rules that further the goals of its substantive laws. A forum must have a multistate concern about appropriate tolerance and respect for the choices of other normative and political communities).

⁴⁴⁹ Mills (2009), pp.5-6.

⁴⁵⁰ Ibid, pp.16-17.

⁴⁵¹ Von Mehren A.T. and Trautman D.T. ‘Jurisdiction to Adjudicate: A Suggested Analysis’ (1966) 79 *Harvard Law Review* 1121-1179. See also: Von Mehren A.T. and Trautman D.T, *The Law of Multistate Problems*, (Little, Brown & Co., 1965); Von Mehren, A.T., *Adjudicatory Authority in Private International Law* (Brill, 2007).

In order for the author of this thesis to carry out an assessment of the consistency of the jurisdictional preconditions for freezing injunctions with the theoretical foundations of jurisdictional rules, it is absolutely crucial to understand the functions of the rules of jurisdiction.

The rules of adjudicatory jurisdiction can be said to have two purposes, comprised of international and private purposes. The international purpose of adjudicatory authority is essentially concerned with the horizontal relationship between the states while the private purpose of adjudicatory authority materialises in a vertical dimension between the state and individuals. As regards the international purpose of jurisdiction rules, the main objective is to protect sovereignty through demarcation:

“restrictions on choice of law protect a state seeking to regulate local activities only against application of the substantive law of the forum state. By contrast, restrictions on personal jurisdiction ensure that disputes will be resolved in accordance with the entire legal environment of the regulating state.”⁴⁵²

Protection of sovereignty through jurisdiction rules is crucial because they have a direct impact on the extent to which the forum’s procedural law (including any injunctive relief) regulates matters not exclusively of domestic concern. Mills has observed that “without rules of jurisdiction...no dispute over whose regulatory authority should apply to a person or event would be capable of being resolved through law”.⁴⁵³ A number of commentators have underlined the link between rules of jurisdiction and their impact on the outcome of the case. As Maier and McCoy have argued, “[o]nce it is conceded that a forum has judicial jurisdiction, that forum unavoidably controls or determines the result in the case between the parties before it – even if the forum court decides to apply a foreign state’s rule of law”.⁴⁵⁴ Similarly, Brilmayer has stated that “the exercise of adjudicatory authority is a form of regulation whether or not the forum applies its own law”.⁴⁵⁵ As we will see, the author of this thesis will argue that this inextricable link between adjudicatory jurisdiction and regulatory authority is of particular importance in the context of adjudicatory jurisdiction over freezing injunctions because of their quasi-proprietary nature and the fact that there is no room for the application of foreign law on pre-judgment relief.⁴⁵⁶ In other words, there is an intersection between adjudicatory jurisdiction and legislative jurisdiction (regulatory authority) in this field.

What about the private purpose of the rules of adjudicatory jurisdiction? There is a close link between the international purpose of the rules of adjudicatory jurisdiction and their private purpose:

⁴⁵² Sterk S.E., ‘Personal Jurisdiction and Choice of Law’ (2012) 98 Iowa L. Rev. 101, pp.113-114.

⁴⁵³ See Mills A., ‘Rethinking Jurisdiction in International Law’ (2014) 84(1) BYIL 187, 188.

⁴⁵⁴ Maier H.G. and McCoy T.R., ‘A Unifying Theory for Judicial Jurisdiction and Choice of Law’ (1991) 39 Am. J. Comp. L. 249, 255.

⁴⁵⁵ Brilmayer L., ‘Related Contracts and Personal Jurisdiction’ (1988) 101 Harv. L. Rev. 1444.

⁴⁵⁶ For an explanation of the quasi-proprietary nature of freezing orders see below in chapter 16 the section entitled “The connecting factor for exclusive jurisdiction”.

“Limits on the forum state’s sovereign authority protect both the regulatory power of other states and a liberty interest of defendants who plan their behaviour to conform to the regulatory scheme of the jurisdiction in which they act.”⁴⁵⁷

Defendants cannot plan their behaviour without clear and predictable rules about the applicable regulatory scheme. If the defendants and their commercial dealings have connections with more than one jurisdiction, they need to know which regulatory scheme they need to comply with. Defendants may have legitimate expectations about which regulatory scheme is applicable. These aspects of the private function of jurisdictional rules will be highly relevant when scrutinising the English case law on freezing injunctions. Namely, it will be necessary to examine the extent to which the current jurisdictional preconditions provide clear and predictable guidelines on the applicable regulatory scheme.

The link between regulatory authority, the interests of defendants and jurisdiction rules is consistent with Keyes’ thesis that there are three types of limits on adjudicatory jurisdiction.⁴⁵⁸ First, there are limits required by the state’s relationships with other states. These include principles of public international law and the comity doctrine. Second, limits imposed by the individual litigants’ interests. According to Keyes, the relevant factors under this umbrella are the requirements of liberalism, equal treatment of individuals, maximising individual autonomy, and minimising private costs. Third, those necessitated by the state’s internal interests including constitutional limitations and the goal of minimising public costs. For the purposes of his assessment of the consistency of the jurisdictional preconditions for freezing injunctions with the theoretical foundations of jurisdiction, the author of this thesis will take into account the factors identified by Keyes. These factors will also have an influence on the author’s proposals for changes to the current jurisdictional preconditions.

13.3.2 The existence of jurisdiction vs the exercise of jurisdiction

We already came across the distinction between the rules on the existence and exercise of jurisdiction.⁴⁵⁹ The rules regarding the former are concerned with the power of the national courts to adjudicate the case whereas the latter rules determine whether the court will exercise its power to adjudicate the case. As we will see, the source of the rules on the existence of jurisdiction must be international law rather than the forum’s notions of substantive justice. If it were otherwise, each national court would be free to prescribe international law in the international arena. By contrast, rules on the exercise of jurisdiction are primarily shaped by the forum’s policies and include considerations of procedural efficiency. These rules can be discretionary as the national court may want to tailor the application of its policies on a case-by-case basis taking into account the characteristics of a particular case. It was evident from the summary of the jurisdictional preconditions in the previous chapter that the distinction between existence and exercise of jurisdiction is useful in the context of freezing injunctions.

13.3.3 Personal jurisdiction, subject matter jurisdiction, jurisdiction *in rem*, and jurisdiction to grant a freezing injunction

⁴⁵⁷ Sterk S.E., ‘Personal Jurisdiction and Choice of Law’ (2012) 98 Iowa L. Rev. 101.

⁴⁵⁸ Keyes M., *Jurisdiction in International Litigation* (Federation Press, 2005), chapter 6.

⁴⁵⁹ See in chapter 5 of this thesis the discussion of Lord Nicholls’ observations in *Mercedes Benz v Leiduck*. See also the summary of the jurisdictional preconditions in the previous chapter.

If all the jurisdictional preconditions are satisfied, it can be said that the English court has 'jurisdiction to grant a freezing injunction'. In the author's view, the term jurisdiction to grant a freezing injunction should be exclusively concerned with the international question of which court should consider the merits of the application for interim relief (a freezing injunction or its equivalent). The answer to this question determines which legal system's rules are applicable to determine the availability of interim relief. Jurisdiction to grant the injunction is directly concerned with the scope of the state's right under international law to regulate the defendant's conduct using its domestic law on freezing injunctions. The term jurisdiction to grant a freezing injunction has been used by the English courts in an inconsistent manner. In some cases it has been used to collectively refer to the substantive preconditions.⁴⁶⁰ The author's position is that the term jurisdiction to grant a freezing injunction should not be used to refer to any of the substantive preconditions.⁴⁶¹

Personal jurisdiction over the defendant (jurisdiction *in personam*) is concerned with the legal power to summon the defendant before the court.⁴⁶² Whereas personal jurisdiction (as its name suggests) is jurisdiction over the person, jurisdiction *in rem* is jurisdiction over the property. The latter is normally based on the presence of the property (*res*) within the territorial jurisdiction of the forum.

In freezing injunction cases, personal jurisdiction over the defendant is currently regarded as a necessary and sufficient jurisdictional precondition due to the widely-held view that freezing injunctions operate *in personam*.⁴⁶³ In other words, personal jurisdiction over the defendant is treated both as a necessary and sufficient requirement to establish jurisdiction to grant a freezing injunction. We have already seen that, as the law currently stands, personal jurisdiction over the defendant is automatically established if the English court has jurisdiction to adjudicate the substantive claim.⁴⁶⁴ However, the author will argue that personal jurisdiction over the defendant should not be the only jurisdictional precondition. In order to obtain a freezing injunction in a case involving a foreign element, it should also be a requirement (i.e. a jurisdictional precondition) that the English court has jurisdiction over the property (the assets) in respect of which the injunction is being sought.⁴⁶⁵

The author's argument that personal jurisdiction over the defendant should not be a sufficient requirement to establish jurisdiction to grant a freezing injunction is supported by the following important passage from Mann's Hague Lecture:

⁴⁶⁰ An example of the use of the term in such a manner is as follows: once the court is satisfied that there is a good arguable case on the merits and a real risk of dissipation, a conclusion may be made that there is jurisdiction to grant a freezing injunction. The author does not agree with the use of term in this manner.

⁴⁶¹ If the courts continue to use the term 'jurisdiction to grant the injunction' to refer to the substantive preconditions, the conflation of the requirements will create a real danger of illegitimate interference with the sovereignty of foreign states by allowing successful applications for an injunction in cases with no connection to the forum.

⁴⁶² Under the English common law rules of jurisdiction, personal jurisdiction depends on lawful service of the claim form on the defendant.

⁴⁶³ The author disagrees with the view that freezing injunctions operate *in personam* – see the next chapter.

⁴⁶⁴ See chapter 12.

⁴⁶⁵ See esp. the proposals in Part III of this thesis.

"The mere fact that a state's judicial or administrative agencies are internationally entitled to subject a person to their personal or 'curial' jurisdiction does not by any means permit them to regulate by their orders such person's conduct abroad. This they may do only if the state of the forum also has substantive jurisdiction to regulate conduct in the manner defined in the order. In other words, for the purpose of justifying, even in the territory of the forum, the international validity of an order, not only its making, but also its content must be authorised by substantive rules of legislative jurisdiction."⁴⁶⁶

The author of this thesis will argue that the fundamental mistake of the English courts in the context of the international scope of freezing injunctions is the failure to implement the above distinction advocated by Mann. The failure to make this distinction is evident from the fact that, in cases involving English substantive proceedings, personal jurisdiction over the defendant is currently regarded as a sufficient requirement to establish jurisdiction to grant the injunction. The only consolation is that there are already some, albeit very limited, statements which could be used by the courts as a springboard to implement the advocated distinction in future cases.⁴⁶⁷

As we have seen in the previous chapter, the concept of subject matter jurisdiction is actually concerned with jurisdiction over the subject matter of the proceedings. A well-known example of a case concerned with the application of the concept of subject matter jurisdiction is the so called *Moçambique* rule.⁴⁶⁸ In the author's view, the concept of subject matter jurisdiction has been incorrectly used in a number of English cases.⁴⁶⁹ In these cases, the courts effectively refused to exercise their discretion to grant an order against defendants who were subject to the court's personal jurisdiction (due to concerns about interference with the sovereignty of the foreign courts) but the explanation for their conclusion was the lack of subject matter jurisdiction.

The incorrect use of the concept of the subject matter jurisdiction stems from *Mackinnon v Donaldson, Lufkin & Jenrette*⁴⁷⁰ where the claimant sought an order under the Bankers' Books Evidence Act 1879 against the London branch of a New York bank and a subpoena addressed to one of its officers to produce documents in respect of accounts governed by New York law. The claimant was unsuccessful even though the court had personal jurisdiction over the bank. Hoffmann J (as he then was) rejected the claimant's argument that the defendant bank, having submitted to the English court's jurisdiction, could be required to comply with a subpoena in the same way as an English company. His reasoning was that the claimant's argument:

"confuses personal jurisdiction, i.e., who can be brought before the court, with subject matter jurisdiction, i.e., to what extent the court can claim to regulate the

⁴⁶⁶ Mann F.A., 'The Doctrine of Jurisdiction in International Law' (1964) 111 *Recueil des Cours* 1, 146. See also: Mann F.A., 'The Doctrine of Jurisdiction Revisited after Twenty Years' (1984-III) 186 *Recueil des Cours* 19 (reproduced in Mann F.A., *Further Studies in International Law* (Clarendon Press, 1990).

⁴⁶⁷ See chapter 17.

⁴⁶⁸ *British South Africa Co v Cia de Moçambique* [1893] AC 602.

⁴⁶⁹ See *Mackinnon v Donaldson, Lufkin & Jenrette* [1986] Ch. 482, *Societe Eram Shipping Co Ltd v Cie Internationale de Navigation et al* [2004] 1 AC 260, and *Parbulk II AS v PT Humpuss (The Mahakam)* [2011] EWHC 3143 (Comm). For similar comments, see Hartley T., 'Jurisdiction in conflict of laws - disclosure, third-party debt and freezing orders' (2010) LQR 194, 197.

⁴⁷⁰ [1986] Ch. 482.

conduct of those persons. It does not follow from the fact that a person is within the jurisdiction and liable to be served with process that there is no territorial limit to the matters upon which the court may properly apply its own rules or the things which it can order such a person to do.”⁴⁷¹

The author submits that Hoffmann J’s conclusion could have been justified without any reference to subject matter jurisdiction.⁴⁷² The court’s decision was based on the refusal to exercise discretion to grant the order. Why was it inappropriate to grant the order? In *Mackinnon*, Hoffmann J expressed concerns about interference with sovereignty and placed emphasis on the fact that the orders were sought against a foreign bank:

“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...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.”⁴⁷³

Overall, this passage from Hoffmann J’s judgment (and the decision in *Mackinnon* in general) is useful in reminding us about the importance of the author’s argument that personal jurisdiction over the defendant should not be a sufficient requirement to establish the English court’s jurisdiction to grant a freezing injunction. The first reason is the need to respect the interests of other states and their own right to regulate the conduct of defendants. The second and related reason is that interference with the sovereignty of other states could lead to the application of conflicting procedural rules in relation to the same assets. This would be unfair to defendants and third party holders of the assets and inconsistent with their legitimate expectations about the applicable regulatory framework.⁴⁷⁴ In order to achieve a level-playing field in international litigation it is necessary to prevent claimants from making multiple applications for interim relief in respect of the same assets.

13.4 Two paradigms of jurisdiction

Having clarified the numerous possible uses of the term ‘jurisdiction’, it is now possible to take a more sophisticated approach to our analysis of the theoretical foundations of the rules of jurisdiction. A deeper understanding of the various categories of jurisdictional rules would provide the reader with the ability to dissect the current jurisdictional preconditions for freezing injunctions.

⁴⁷¹ Ibid, 493.

⁴⁷² For evidence of confusion arising from the application of Hoffmann J’s reasoning in the context of freezing injunctions see: Spry I.C.F., *Equitable Remedies* (Thomson Reuters Australia, 9th edn, 2013) who seems to suggest that in the light of *Mackinnon* “subject matter jurisdiction” may be required where a freezing injunction is sought in respect of assets located abroad. For judicial application of the concept in the context of freezing injunctions see, in chapter 17 below, the discussion of *Parbulk II AS v PT Humpuss (The Mahakam)* [2011] EWHC 3143 (Comm).

⁴⁷³ [1986] Ch. 482, 494.

⁴⁷⁴ For more detail on legitimate expectations, see below in chapter 16 the section of this thesis entitled “The connecting factor for exclusive jurisdiction”.

This would in turn enable the reader to understand the reasons for the author advocating a departure from the current jurisdictional preconditions for freezing injunctions. In this section, the emphasis is on the theory that the functions of the rules of jurisdiction may depend on which paradigm they operate within.

If we take the traditional view (the national school) of the purpose of private international law, the existence of jurisdiction is a domestic matter. It depends entirely on whether the case falls within or outside the limits that national law sets for its own courts. This is so irrespective of whether the legal system adopts a power, relational, or fairness theory. The traditional view underpins what Michaels describes as “the US paradigm of jurisdiction”.⁴⁷⁵ This paradigm of jurisdiction is characterised by vertical, unilateral, domestic, and political approach to jurisdiction. It is vertical in the sense that the focus is on the relationship between the court and the defendant. Even the fairness theory’s main concern is with the fairness of asserting jurisdiction over the defendant. A unilateral approach is one which does not take into account the merits of any claim to jurisdiction other than that of the domestic court. If private international law is distinct from public international law then it is not difficult to accept a unilateral approach to jurisdiction. Finally, the traditional view provides room for political considerations and in particular the view that public intrusion into the defendant’s freedom must be justified.⁴⁷⁶ Thus, it has been argued that Locke’s social contract theory could be used to explain the basis for personal jurisdiction cases in the US.⁴⁷⁷ The defendant, representing the “governed”, either actually or impliedly consents to the power of the court, representing the “governor”.⁴⁷⁸ By obtaining benefits or creating risks within the forum in which the court sits, the defendant impliedly consents that court’s jurisdiction.⁴⁷⁹ This explanation of US personal jurisdiction supports its characterisation as unilateral because it suggests that protection of the defendant’s individual liberty is the main objective.⁴⁸⁰

If we take the international systemic perspective, the rules of adjudicatory jurisdiction function as one of the means for ensuring appropriate coordination of different national laws. From this perspective, the existence of jurisdiction is an international question rather than whether the parties are within or outside of the jurisdiction. The author of this thesis submits that the international systemic perspective underpins what Michaels describes as “the European paradigm of jurisdiction”. The characteristics of this paradigm are horizontal, multilateral, international, and apolitical rules on the existence of jurisdiction.⁴⁸¹ Horizontal rules focus on relations between countries rather than between the court and the parties. It is relevant to look at the connections between the case and the fora. A multilateral approach is designed to avoid concurrent jurisdiction. The courts of only one place should have jurisdiction within each category. It follows that a close connection test is not sufficient. The closest connection test, based on a comparison of the strength of connections

⁴⁷⁵ Michaels R., ‘Two Paradigms of Jurisdiction’ (2005-2006) 27 Mich. J Int’l L. 1003.

⁴⁷⁶ See Brilmayer L. ‘Jurisdictional Due Process and Political Theory’ (1987) 39 U. Fla. L. Rev. 294; Linarelli J., ‘Toward a Political Theory for Private International Law’ (2016) 26 Duke J Comp & Int’l L. 299.

⁴⁷⁷ Cappalli R.B., ‘Locke as the Key: A Unifying and Coherent Theory of In Personam Jurisdiction’, (1992-1993) 43 Case Western Res. L. Rev. 97.

⁴⁷⁸ Ibid, pp.101-102.

⁴⁷⁹ Ibid.

⁴⁸⁰ See also Brilmayer (1987).

⁴⁸¹ Michaels (2005-2006), 1045-1048.

between the case and different countries, would be acceptable.⁴⁸² Finally, as the claimant's private right against the defendant is regarded as the basis of the right of access to a court, the rules are apolitical.

13.5 The impact of public international law and the need for a multilateral approach to the existence of jurisdiction

In the following two sections of this chapter, the author will seek to show that, despite the existence of two different paradigms of jurisdiction, the multilateral approach to the rules on existence of jurisdiction is the preferred approach that is consistent with the theory that private international law rules are affected by public international law. In the author's view, we cannot turn a blind eye to the relevance of public international law to the question of existence of jurisdiction.

In the author's submission, the existence of jurisdiction in cases involving a foreign element should be a matter of international rather than domestic law. Support for the international systemic approach to the existence of jurisdiction is found indirectly in the American literature focusing on the inappropriateness of the current limits on personal jurisdiction in American cases involving foreign defendants.⁴⁸³ Since the mid-twentieth century,⁴⁸⁴ the outer limits of personal jurisdiction of the US courts have been primarily shaped by the defendant's due process individual liberty interest.⁴⁸⁵ Territoriality and allocation of sovereign authority have played a "secondary role".⁴⁸⁶ However, as Parrish has shown, the foundation for this approach is a flawed assumption that sovereignty plays little or no role in cases involving foreign defendants.⁴⁸⁷ He points out that in international law, adjudicatory jurisdiction is a doctrine concerned with the allocation of sovereign authority.⁴⁸⁸ Closely related and equally relevant is the principle of non-intervention in the domestic affairs of another state.⁴⁸⁹ Adherence to this principle is necessary to recognise the equality and exclusive territorial jurisdiction of each sovereign state. It is these principles of public international law which dictate the outer limits of the rules on the existence of jurisdiction in cases involving a foreign element. The reason for this is that the rules on the existence of jurisdiction are an exception to the dualist conception of the relationship between domestic and international law:

"The sovereignty paradigm holds that states are the ultimate and supreme political entities within their jurisdictional realms. Dualism interprets this to mean that states are self-contained, autonomous political entities with the capacity to determine which laws their own courts and other administrative institutions will follow. While

⁴⁸² Ibid.

⁴⁸³ Parrish A.L., 'Sovereignty, Not Due Process: Personal Jurisdiction over Non-Resident Alien Defendants' (2006) 41 Wake Forest L. Rev. 1, 13-14.

⁴⁸⁴ As a result of the US Supreme Court's landmark decision in *International Shoe Co. v Washington*, 326 U.S. 310 (1945).

⁴⁸⁵ Parrish A.L., 'Sovereignty, Not Due Process: Personal Jurisdiction over Non-Resident Alien Defendants' (2006) 41 Wake Forest L. Rev. 1, 13-14.

⁴⁸⁶ Ibid.

⁴⁸⁷ Ibid, p.38. This is reinforced his argument that the current approach in the US is based on the incorrect assumption that non-resident foreign defendants enjoy due process protections under the Constitution.

⁴⁸⁸ Ibid, p.40 (citing Perdue W., 'Aliens, the Internet, and "Purposeful Availment": A Reassessment of Fifth Amendment Limits on Personal Jurisdiction' (2004) 98 Nw. U. L. Rev. 455). See also Mann F.A., 'The Doctrine of Jurisdiction in International Law' 111 *Recueil des Cours* 1 (describing the roots of jurisdictional law in territorial sovereignty).

⁴⁸⁹ See Singer (1989).

the sovereignty paradigm gives the state the ability to control its own internal organs of administration, this control cannot extend to directing these organs to define the state's jurisdictional power itself. The state cannot grant its courts powers that it itself does not already have. Because, under the sovereignty paradigm, the definition of the state and its corresponding powers to exercise jurisdiction come from international law, under this paradigm these jurisdictional powers cannot be interpreted to provide that the state itself has the power to define their scope."⁴⁹⁰

It follows that, as a matter of international obligation, states should not unilaterally prescribe their own rules on the existence of jurisdiction in cases with a foreign element. Such unilateral action would amount to an attempt to prescribe international law in the international realm.⁴⁹¹

Consistently with his international systemic perspective, Mills has explained that:

"rules concerned with the *existence* of jurisdictional authority cannot reflect national policies or values, because this would beg the question as to whether there is power to apply those policies. This component of the determination of jurisdiction cannot be based on a national conception of private rights, because no national system could provide authority for a decision that such rights exist; it must therefore be international in character."⁴⁹²

Furthermore, convincing normative arguments have been advanced for applying the international law of jurisdiction rather than giving each state the freedom to draw its own jurisdictional boundaries.⁴⁹³ Only a coordinated, multilateral system of international jurisdictional rules would "promote an effective system of dispute resolution whereby opportunities for forum shopping will be minimized, foreign judgments will be satisfied, and jurisdictional conflicts will be avoided".⁴⁹⁴ For example, such an approach is the only way to ensure protection from overly broad assertions of jurisdiction.⁴⁹⁵ Mechanisms such as the doctrine of *forum non conveniens* alleviate such problems but they do not go far enough.⁴⁹⁶ American anti-trust litigation provides an illustration of the problems with a unilateral approach in the context of legislative jurisdiction.⁴⁹⁷

⁴⁹⁰ Strauss A.L., 'Beyond National Law: The Neglected Role of International Law of Personal Jurisdiction in Domestic Courts' (1995) 36 Harv. Int'l. L.J. 373, 414-415.

⁴⁹¹ Ibid, p.415.

⁴⁹² Mills (2009), p.7. See also Beale J., 'Jurisdiction of a Sovereign State' (1922-1923) 36 Harv. L. Rev. 241, 241 who states that "the sovereign cannot confer jurisdiction on his courts or his legislature when he has no such jurisdiction according to the principles of international law".

⁴⁹³ Strauss, (1995), p.416-423. For a contrary view, see Akehurst M., 'Jurisdiction in International Law' (1972-1973) 46 *British Yearbook of International Law* 145, 176-177 who concludes that "[i]n practice the assumption of jurisdiction by a State does not seem to be subject to any requirement that the defendant or the facts of the case need have any connection with that State; and this practice seems to have met with acquiescence by other States...(apart from the well-known rules of immunity for foreign States, diplomats, international organizations, etc.) customary international law imposes no limits on the jurisdiction of municipal courts in civil trials".

⁴⁹⁴ Strauss (1995), p.416.

⁴⁹⁵ Ibid, p.421.

⁴⁹⁶ See Waller S. W., 'A Unified Theory of Transnational Procedure' (1993) 26 Cornell Int'l L. J. 101 (advocating that the "doctrinal mess" created by such devices should be abandoned in favour of a single unified approach

Even under the traditional, nationalist view of the purpose of private international law, it could be argued that doing justice between the parties requires taking into account the interests of foreign countries and foreign proceedings. This view has been adopted by McLachlan who draws a distinction between the domestic and private international law conceptions of justice. The latter “must transcend the solutions of particular legal systems” in order to comply with the requirements of a cosmopolitan conception of the Rule of Law.⁴⁹⁸

13.6 Historical evidence in favour of an international and multilateral approach to the existence of jurisdiction

The aim of this section is to strengthen the author’s argument that public international law is relevant to the design of the rules on the existence of jurisdiction. The latter rules must respect the interests of other states and their sovereignty. This theoretical discussion has important implications on the jurisdictional preconditions for freezing injunctions because it means that English (domestic) notions of justice cannot be used as the exclusive source of criteria for determining the legitimacy of the international scope of freezing injunctions.

The common law systems are associated with the US paradigm of jurisdiction. However, there is historical evidence that the origins of the rules concerned with the existence of jurisdiction reflected principles of public international law. It has been demonstrated that, in the US, one of the purposes of the territorial service of process requirement was to ensure protection of each state’s sovereignty from encroachment by other states.⁴⁹⁹ This is contrary to Ehrenzweig’s thesis that, in their origins, the American rules on personal jurisdiction were based on a non-territorial standard based on convenience.⁵⁰⁰ The reasons for adopting a service of process rule to protect sovereignty were that, *inter alia*, it was a simple rule which would lead to an equal distribution of power and it would simultaneously ensure that the defendant would have knowledge of the proceedings.⁵⁰¹ This view of the origins of personal jurisdiction is consistent with Story’s assertion that:

“jurisdiction, to be rightfully exercised, must be founded either upon the person being within the territory, or upon the thing being within the territory; *for otherwise there can be no sovereignty exerted*”⁵⁰²

to the determination of the appropriateness of a US court as the forum for resolving the merits of international disputes).

⁴⁹⁷ As Michaels (2005-2006) points out, in the US, adjudicatory jurisdiction is in a majority of cases similar to legislative jurisdiction.

⁴⁹⁸ McLachlan C., ‘Lis Pendens in International Litigation’, (2008) 336 *Recueil des Cours* 199, 259-260. See also: McLachlan C., ‘The Influence of International Law on Civil Jurisdiction’ (1993) 6 *Hague Yearbook of International Law* 125.

⁴⁹⁹ Weinstein J., ‘The Early American Origins of Territoriality in Judicial Jurisdiction’ (1992-1993) 37 *St Louis U. L.J.* 1; Weinstein J. ‘The Federal Common Law Origins of Judicial Jurisdiction: Implications for Modern Doctrine’ (2004) 90 *Va. L. Rev.* 169.

⁵⁰⁰ Ehrenzweig A.A., ‘The Transient Rule of Personal Jurisdiction: The “Power” Myth and Forum Conveniens’ (1956) 65 *Yale L.J.* 289. See also: Hazard G. ‘A General Theory of State Court Jurisdiction’ (1965) *Sup. Ct. Rev.* 241 (arguing that the service of process rule stems from Story’s *Commentaries on the Conflict of Laws*, a treatise which was not an accurate reflection of international law principles). See also Ehrenzweig A.A., ‘From State Jurisdiction to Interstate Venue’ (1970-71) 50 *Oregon L. Rev.* 103.

⁵⁰¹ *Ibid.*, pp.36-37.

⁵⁰² Story J., *Commentaries on the Conflict of Laws* (Hillard, Gray & Co., 1834), p.754 (my emphasis).

In similar vein, Clermont has argued that “the principal thrust of America’s power theory was never authorization but instead a limiting delineation of the outer bounds of actual sovereign power”⁵⁰³ and that the true rationale was always “the desirable allocation of jurisdictional authority”.⁵⁰⁴

The above historical analysis is consistent with Mills’ thesis that it was as a result of the rise of the positivist approach to international law in the mid-nineteenth century that private international law rules came to be viewed as the product of domestic sovereignty.⁵⁰⁵ Mills places emphasis on the positivist idea of absolute state sovereignty as providing support for the distinction between international and national law. The author of this thesis submits, however, that a distinction should be made between positive and negative sovereignty. Positive sovereignty could be used to refer to the absolute power to lay down rules relating to relations with other states.⁵⁰⁶ Negative sovereignty could be used to refer to the absolute freedom from interference with domestic affairs. While it is true that *positive* sovereignty is inherently inconsistent with the international systemic perspective, *negative* sovereignty actually supports the need for an international and multilateral approach to the existence of jurisdiction. In order to protect negative sovereignty, it is necessary to adopt rules concerning the existence of jurisdiction which ensure an equal distribution of power. In the author’s view, the ideal mechanism for ensuring equal spheres of authority and eliminating encroachment would be an international convention on jurisdiction which prevents concurrent jurisdiction.⁵⁰⁷ By giving up some power to determine the nature of the rules on jurisdiction, states would actually protect their absolute power within their spheres of authority. An incidental effect would be to reduce the inconsistent legal treatment of cases.⁵⁰⁸

13.7 The limited impact of the international systemic approach in the context of freezing injunctions due to their characterisation as procedural

The purpose of this section of the chapter is to understand one of the key reasons for the absence of the international systemic approach in the context of jurisdictional preconditions for freezing injunctions. This section seeks to explain how the characterisation of freezing injunctions as procedural prevents the implementation of multilateral rules on the existence of jurisdiction.

⁵⁰³ Clermont K. M., ‘The Role of Private International Law in the United States: Beating the Not-Quite-Dead Horse of Jurisdiction’ (2004) Cornell Law Faculty Publications, Paper 14, p.88.

⁵⁰⁴ Ibid, p.99.

⁵⁰⁵ See Mills (2009), chapter 2.

⁵⁰⁶ This is similar to what has been described as sovereignty in the sense of allocation of power at the horizontal level: Jackson J.H., ‘Sovereignty-Modern: a New Approach to an Outdated Concept’ (2003) 97 Am. J. Int’l L. 782.

⁵⁰⁷ See Slaughter A.-M., ‘Sovereignty and Power in a Networked World Order’ (2004) 40 Stan. J. Int’l. L. 283 (*“States can only govern effectively by actively cooperating with other states and by collectively reserving the power to intervene in other states’ affairs”*). See also: Parrish A.L., ‘Reclaiming International Law from Extraterritoriality’ (2008-9) 93 Minn. L. Rev. 815 (arguing that international problems should be solved by resort to international law and international instruments rather than by means of extraterritorial application of national law); Simon A.M. and Waller S.W., ‘A Theory of Economic Sovereignty: An Alternative to Extraterritorial Jurisdictional Disputes’ (1986) 22 Stan J Int’l L. 337. For the author’s ‘bold’ proposal for an international instrument, see chapter 16 of this thesis.

⁵⁰⁸ For doubts about the need for uniformity of decision and its inherent philosophical flaws, see Fentiman R. ‘Choice of Law in Europe: Uniformity and Integration’ (2008) 82 Tul. L. Rev. 2021, 2034-2036 and 2045-2046. See also Maier and McCoy (1991) on the importance of jurisdiction in shaping the outcome of the case.

While a freezing injunction is an equitable creature,⁵⁰⁹ it has been integrated into English procedural law through the Civil Procedure Rules.⁵¹⁰ As there is no right to a free-standing claim for a freezing injunction, such injunctions have been treated as ancillary to substantive proceedings and they have been classified as procedural for the purposes of determining the applicable law. As a general rule, matters of procedure are always governed by the law of the forum. It is not possible for English courts to apply another country's law concerning freezing injunctions or equivalent orders. In his Hague Lecture, Lipstein explained the unilateral approach to procedural rules in private international law:

“...there are certain branches of law, primarily of a public law nature, where the problem is one of establishing the respective frontiers of legislation, but never that of applying foreign substantive law. In general, rules of Private International Law can be unilateral or bilateral, but when concerned with the application of private law they must always deal with the two-fold problem of when the *lex fori* and when foreign law must be applied. Certain branches of Conflict of Laws, however, rely exclusively upon unilateral rules, for the reason that they are concerned with a process of self-limitation and not with the process of choice of law. The law of procedure is such a branch, and the law of bankruptcy is another, as are the law of taxation, administrative law and modern anti-trust and currency legislation. The forum never applies such foreign laws. It is only concerned with the limits of operation of local and foreign laws bearing the character of public law, but the latter can be taken into account as a fact or datum. The principle of territoriality based upon the division of legislative spheres fulfils its proper function here.”⁵¹¹

While this passage focuses on the choice of law rules, the author of this thesis submits that it is neither necessary nor theoretically sound “to rely exclusively upon unilateral rules” in the context of freezing injunctions. The implication of the procedural characterisation of the rules concerning freezing injunctions is that their boundaries in the international context depend on the nature and scope of the rules of jurisdiction. In the author's view, the courts should recognise the opportunity, when considering the existence of jurisdiction, to determine whether the English courts or some foreign courts should decide upon the availability of a freezing injunction. The decision about the existence of jurisdiction needs to be understood as a decision about whether English procedural law or some foreign procedural law on the interim preservation of assets is applicable to the facts. By adopting a multilateral approach to the existence of jurisdiction, the English courts would no longer be in Lipstein's words “only concerned with the limits of operation” of the local freezing injunction. There is support in American case law for restricting adjudicatory jurisdiction in order to protect the ability of other states to apply their procedural law within their sphere of authority.⁵¹²

⁵⁰⁹ See Chapter 2 for the analysis of its historical foundations.

⁵¹⁰ CPR r.25.1(1)(f).

⁵¹¹ Lipstein K., ‘General Principles of Private International Law’ (1972) *Recueil des Cours* 135, 165 (footnotes omitted).

⁵¹² The majority of the US Supreme Court in *Asahi Metal Industry Co. v Superior Court*, 480 U.S. 102, 115 (1987) placed significance on the need to take into account “the procedural and substantive policies of other nations”.

Furthermore, the author of this thesis takes a firm view that the current unilateral approach to the existence of jurisdiction for freezing orders is partly based on the simplistic and theoretically flawed characterisation of freezing injunctions as procedural. The English courts' methods of characterisation in relation to substance and procedure have been convincingly criticised on theoretical grounds.⁵¹³ The distinction between substance and procedure depends on the undesirable common law distinction between rights and remedies: all matters which affect the rights of the parties are treated as substantive and all issues relating to remedies are treated as procedural.⁵¹⁴ According to Garnett, however, the concept of procedure could generally be limited to matters relating to the mode, conduct, or regulation of court proceedings rather than being based on any concept of 'remedy'. The author of this thesis submits that freezing injunctions are not limited to the conduct of court proceedings. The characterisation of freezing injunctions as procedural does not recognise that their functions and effects may extend beyond the traditional functions and effects of procedural rules, as explained in Part I of the thesis.⁵¹⁵ For example, freezing injunctions affects the legal relationship between third parties and the defendant.⁵¹⁶ Recognition of the unsatisfactory distinction between rights and remedies for the purposes of characterisation is applauded by the author of this thesis. This recognition can represent a significant erosion of the procedural characterisation of freezing injunctions and thereby undermine one of the legal foundations for the current unilateral approach to the existence of jurisdiction to grant a freezing injunction. As for the inadequacy and simplicity of the current characterisation of freezing injunctions, Garnett's work provides further support: with regards to the requirement that the claimant must show a good arguable case on the merits against the defendant, he argues that "such a question must surely be classified as substantive and governed by the law of the cause of action, given its direct connection to the rights of the parties".⁵¹⁷ The author of this thesis would agree with Garnett on this issue and the need to dissect the legal issues arising from an application for a freezing order when considering the applicable law. This approach is consistent with the well-established mechanics of characterisation, namely that different elements of the case may be governed by different laws.⁵¹⁸ Consequently it is possible to envisage a case where English law would apply to set the substantive preconditions for granting a freezing injunction but the question of whether there is a good arguable case on the merits would be governed by another law. This approach could be applicable to a case involving foreign substantive proceedings.⁵¹⁹ Given that such an approach may appear to overcomplicate the legal issues, one may ask whether it serves any useful purpose. The importance of characterisation of a legal issue and rule of law has been linked to the "underlying principle of...comity between competing legal systems" by Auld LJ in *Macmillan Ltd v Bishopsgate Investment Trust (No 3)*.⁵²⁰ The principle of comity will be considered in the next section.

⁵¹³ See Garnett R., *Substance and Procedure in Private International Law* (OUP, 2012).

⁵¹⁴ Ibid.

⁵¹⁵ See, inter alia, chapters 1 and 7 of this thesis.

⁵¹⁶ On the quasi-proprietary nature of freezing injunctions see chapter 14, section 14.3 of this thesis.

⁵¹⁷ Garnett (2012),

⁵¹⁸ See Forsyth C., 'Characterisation revisited: an essay in the theory and practice of the English conflict of laws' (1998) LQR 141, 145.

⁵¹⁹ Such an approach is contrary to the position of the Court of Appeal in *Motorola (No 2)* where it was stated that English law was applicable to determine whether the claimant had a good arguable case on the merits of the substantive claim – see *Motorola (No 2)* [2003] EWCA Civ 752, [102].

⁵²⁰ [1996] 1 WLR 387, 407B-C.

13.8 Theoretical perspectives on the principle of comity

We have already seen in the previous chapter that the current jurisdictional preconditions for some categories of cases potentially involve the application of the principle of comity. Even for the purposes of a concise summary of jurisdictional preconditions, it was not possible for the author to give a clear explanation of the circumstances in which the principle of comity would be satisfied. The negative practical consequence of this is that there is a lack of clarity about the international scope of freezing injunctions. The purpose of this section is to investigate the theoretical roots of the principle of comity in an attempt to clarify what the English courts mean when they invoke it in the context of freezing injunctions. Our ultimate aim will be to use the fruits of our investigation in this section to propose a solution to the current confusion surrounding the principle of comity.⁵²¹

The author submits that our perception of the role of the principle of comity will depend on the theoretical stance we take on the purpose of private international law rules. The principle of comity cannot be explained adequately without linking it with the emergence of nation states and the emphasis on territorial sovereignty following Bodin's ground-breaking work.⁵²² Huber's third maxim refers to comity as the reason for states giving effect to foreign elements and hence, to foreign laws.⁵²³ Story, subscribing to the views expressed by Bodin and Huber, states that "no state or nation can, by its laws, directly affect, or bind property out of its own territory, or bind persons not resident therein".⁵²⁴ It was with Story that the principle of comity was reduced "from an international duty to a domestic motive", as its application depended upon a state's "own express or tacit consent".⁵²⁵ This principle in general has been described as requiring states to respect each other's acts regardless of some injustices, and not to interfere with each other, even to right some injustices.⁵²⁶

With regards to worldwide freezing injunctions, the principle of comity seems to be designed to fulfil two vaguely described functions. First, it ensures "mutual respect for the territorial integrity of each other's jurisdiction".⁵²⁷ Second, it ought not to "inhibit a court in one jurisdiction from rendering whatever assistance it properly can to a court in another in respect of assets located or persons resident within the territory of the former".⁵²⁸ This description of its functions implies that comity approximates the permissible limits that states should act in the international sphere in the absence of formally constructed collective action such as treaty-regimes. In the author's view, however, the

⁵²¹ For the author's proposed solution in relation to the role of comity, see chapter 17.

⁵²² See Bodin J., *Six Books of the Commonwealth* (1576) (translated by Tooley M.; Basil Blackwell, 1955).

⁵²³ See, inter alia, Lorenzen E.G., 'Huber's De Conflictu Legum', (1919) 13 Illinois Law Review 375.

⁵²⁴ Story J., *Commentaries on the Conflict of Laws* (1834).

⁵²⁵ See Watson A., *Joseph Story and the Comity of Errors* (University of Georgia Press, 1992) (arguing that Story erred in his interpretation of Huber's theory of comity; under Huber's doctrine, one state had to abide by the laws of another state if the act or transaction in legal question occurred in the other state; in Story's misreading of Huber, a state could *choose* whether it wished to respect another state's laws).

⁵²⁶ See generally Childress D.E., 'Comity as Conflict: Resituating International Comity as Conflict of Laws' (2010-2011) 44 U.C. Davis L. Rev. 11.

⁵²⁷ Per Millett LJ in *Refco v Eastern Trading* [1999] Lloyd's Rep 159.

⁵²⁸ Ibid.

English courts' interpretation and application of the principle of comity fails to fulfil the aforementioned functions.⁵²⁹

As the case law currently stands, an argument based on an allegation of non-compliance with the principle of comity may be useful for defendants especially when faced with an application for a worldwide freezing order in support of foreign substantive proceedings.⁵³⁰ Application of the principle of comity in its current form ameliorates the problems arising from unilateral and domestic rules on the existence of jurisdiction through the exercise of self-restraint by national courts. The problem is that different legal systems (or even differently constituted courts within the same legal system) appear to be free to adopt their own version of the principle of comity. For example, in the context of anti-suit injunctions, the Canadian Supreme Court in *Amchem* adopted what has been described as a 'broad theory of comity' as opposed to the so called 'narrow theory' adopted by the House of Lords in *Airbus v Patel*.⁵³¹ Depending on the specific version adopted by the court, in cases such as our hypothetical scenario in the introduction of this thesis,⁵³² the principle of comity may or may not provide the English court with the option to decline to exercise its power to grant a freezing injunction. It operates only as a discretionary restriction on the *exercise* of jurisdiction; it does not control the *existence* of jurisdiction. Thus, the English courts' imposition of restrictions on the international scope of freezing injunctions by reference to the principle of comity does not represent a truly multilateral element of its framework in this field. The importance of making changes to the rules on existence rather than exercise lies in the fact that only the former can eliminate unmeritorious applications and stop them in their tracks: If the English court has concluded that jurisdiction exists to grant a worldwide freezing injunction, any arguments based on comity (whether or not the court should exercise its jurisdiction) would have to be advanced at the *inter partes* hearing. Putting forward arguments about how the court should exercise its discretion can prove too costly and time-consuming for the defendant and therefore may lead to an unnecessary and unfavourable settlement (or the provision of security for the claim). Due to the importance of cash-flow, a defendant, particularly in a commercial context, would be concerned to avoid any delay in discharging the injunction. By obtaining an injunction *ex parte*, the claimant would have already achieved a significant tactical victory.

This thesis will make a number of alternative proposals to deal with what the author sees as the failure of the English courts to address several concerns about the international scope of freezing orders. One of the author's proposals will involve clarification and/or reformulation of the principle of comity in the context of freezing orders.⁵³³ The principle of comity will therefore be examined

⁵²⁹ See also the discussion of *Refco v Eastern Trading* [1999] Lloyd's Rep 159 and other the case law in chapter 15.

⁵³⁰ Ibid.

⁵³¹ *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)* [1993] 1 S.C.R. 897 (an example of a 'broad theory' of comity); *Airbus Industrie GIE v Patel* [1999] 1 A.C. 119 (an example of a 'narrow theory' of comity). See also Collins L., 'Comity in Modern Private International Law', in J.J. Fawcett (ed.), *Reform and Development of Private International Law* (Oxford University Press, 2002), pp.95-97; Paul Joel R., 'Comity in International Law' (1991) 32 Harv. Int'l L. J. 1; Yntema E. H., 'The Comity Doctrine' (1966) 65 Mich. L. Rev. 9; Fentiman R. (2015), chapter 16.

⁵³² See chapter 1, section 1.6.

⁵³³ See chapter 17.

again, including any relevant case law where the courts have relied on the principle to justify their decision relating to the international scope of freezing orders.⁵³⁴

13.9 The link between the two paradigms of jurisdiction and the different perspectives on the legitimacy of extraterritorial rules of jurisdiction in the context of worldwide freezing injunctions

The summary of jurisdictional preconditions for freezing injunctions in the previous chapter has shown that, at least in some categories of cases, the issue of whether jurisdiction exists is unaffected by the existence of assets located abroad. Indeed, it appears that, as far as English law is concerned, there are no special jurisdictional requirements for restraining a defendant from dealing with his assets located abroad.⁵³⁵ Restraining dealings with assets located abroad could be regarded as an extraterritorial exercise of jurisdiction. In this section we will briefly explore the link between the theories of jurisdiction and extraterritoriality. When are extraterritorial rules justified? Any lessons will be useful to test the legitimacy of the jurisdictional preconditions for freezing injunctions.

As Michaels has explained, paradigmatic differences lead to different views of the potential problems with extraterritoriality.⁵³⁶ In the European paradigm of jurisdiction, the problem with extraterritoriality is interference with another state's jurisdiction. Crawford claims that principles of public international law dictate that jurisdiction over extraterritorial acts can only be lawful if three general principles are observed.⁵³⁷ First, there should be a substantial and bona fide connection between the subject matter and the source of the jurisdiction. Second, the principle of non-intervention in the domestic or territorial jurisdiction of other states must be observed. Third, a principle based on elements of accommodation, mutuality, and proportionality should be applied.⁵³⁸

In contrast to the European paradigm of jurisdiction, in the US paradigm of jurisdiction the only problem with extraterritorial jurisdiction is that it may exceed the forum state's power over the defendant. This is because the primary focus is on the relationship between the court and the parties, as opposed to "the horizontal relationship of equality between different states".⁵³⁹ This partly explains why, in the context of worldwide freezing injunctions, the English courts' concerns about sovereignty have been limited to the impact on third parties. From the English perspective, there is no problem with extending a freezing injunction to assets located abroad, as long as third parties are protected. With a narrow focus on third parties, Nicholls LJ in *Babanaft v Bassatne*⁵⁴⁰ asserted that:

"[i]f it is to be free from extraterritorial vice, the order must not attempt to regulate the conduct abroad of persons who are not duly joined to the English action in respect of property outside the jurisdiction. The actual residence or domicile of such persons, or their presence within the jurisdiction, is essentially irrelevant. For

⁵³⁴ See chapter 15.

⁵³⁵ CPR rule 25.1(1)(f)(ii), read together with s.37(3) of the Senior Courts Act 1981.

⁵³⁶ Michaels (2005-2006), pp.1057-1061.

⁵³⁷ Crawford J, *Brownlie's Principles of Public International Law* (OUP, 8th edn, 2012), p.486 and see also pp.474-475.

⁵³⁸ *Ibid*, p.486. Crawford explains that this principle means nationals resident abroad should not be constrained to violate the law of the place of residence.

⁵³⁹ *Ibid*, pp.1058-1059.

⁵⁴⁰ [1990] Ch. 13.

instance, Banque Nationale de Paris should not be affected by this order in respect of any money it may hold for the defendants abroad. This should be so whether or not it has a branch in London. Likewise with Lloyds Bank. It is resident here, but it should not be affected by the order in respect of any money it holds for the defendants abroad.”⁵⁴¹

It is easy to forget that the extraterritorial reach of freezing injunctions was not always seen as sensible by the English courts. In the case law prior to 1988, there was, at the very least, an assumption that the power of the English courts to grant freezing injunctions applies only to assets in England. This was illustrated by *The Bhoja Trader*⁵⁴² where arbitration proceedings were started in England by the claimants, the buyers of a vessel, against the defendants, the sellers, in respect of an alleged breach of the contract of sale. The London branch of a French bank issued a guarantee to the sellers as security for part of the price. The Court of Appeal rejected the buyers’ application for a freezing injunction to restrain the sellers from calling upon the fruits of the guarantee. The key factor in the court’s reasoning was that the guarantee provided for payment in Greece. Collins has commented that the decision in *The Bhoja Trader* could be justified solely on the basis of the court’s reluctance to interfere with the “life blood of commerce”.⁵⁴³ However, it is clear when we take into account the later decision in *Ashtiani v Kashi*⁵⁴⁴ that the Court of Appeal in *The Bhoja Trader* was actually concerned with the territorial scope of the English rules on freezing injunctions. In *Ashtiani* it was expressly enunciated that the scope of the English courts’ powers to grant freezing injunctions did not extend to assets located abroad. Dillon LJ provided four justifications for this restrictive approach: the potential for oppression of the defendant, the difficulty of policing enforcement proceedings in other jurisdictions, concerns about the defendant’s privacy, and the possibility that the claimant may use the information to obtain security abroad.⁵⁴⁵

13.10 A brief summary of the theories of jurisdiction and their general relationship with the jurisdictional preconditions for freezing injunctions

In the light of Mills’ thesis on the confluence of public and private international law and Keyes’ thesis on principles of jurisdiction, we must take into account the international systemic perspective when laying down the rules of private international law in a particular area of law, whether procedural or substantive. We have seen above that the importance of the international systemic perspective was especially evident upon a detailed analysis of the rules on jurisdiction. It is simply illogical for states to be free to lay down the limits of the rules on the existence of jurisdiction. Thus, the source of the criteria for determining the legitimate scope of application of English procedural rules on freezing injunctions cannot be exclusively national. It is true that the principle of comity and devices such as *forum non conveniens* ameliorate the potential for conflicting assertions of adjudicatory jurisdiction and regulatory authority resulting from unilateral rules. However, regardless of the chosen approach to comity or the outcome of the application of the principle of *forum non conveniens*, unless we change the rules on the existence of jurisdiction to grant a freezing order, claimants would still be able to take advantage of the jurisdictional preconditions for tactical, unmeritorious purposes. This is

⁵⁴¹ Ibid, 45.

⁵⁴² *Intraco Ltd. v. Notis Shipping Corp.* [1981] A.C. 557.

⁵⁴³ Collins (1989), pp.266-267.

⁵⁴⁴ [1987] Q.B. 888.

⁵⁴⁵ Ibid, 901.

because both the principle of comity and the doctrine of *forum non conveniens* are only considered at the discretionary stage when the court has to determine whether to exercise its jurisdiction to grant a freezing order. The author's view is that applications for freezing injunctions in respect of assets located abroad should never reach the discretionary stage. Comity could be broadly seen as the use of discretion for the purposes of increasing consistency with the practice of other states in a particular case or category of cases. However, as we will see from a number of comparisons of the English cases,⁵⁴⁶ it has not been possible to achieve consistency in the exercise of discretion (including the application of the doctrine of comity) even at the national level, let alone at the international level. A more effective method of achieving consistency would be to directly address the root of the problem – the absence of multilateral rules on the existence of jurisdiction.

⁵⁴⁶ See especially chapter 15 of this thesis.

Chapter 14: Application of jurisdictional theories to the current framework of jurisdictional preconditions for freezing injunctions in support of English substantive proceedings

14.1 Introduction

Having had the benefit of an in-depth analysis of the different theories of jurisdiction in the previous chapter, we will now embark on an assessment of the consistency of the current jurisdictional preconditions for freezing injunctions with the author's views on the functions of jurisdictional rules. In order to carry out this assessment, this chapter will involve analysis of the English case law concerned with the jurisdictional preconditions for freezing injunctions in support of English proceedings. We have already seen from the summary of jurisdictional preconditions in chapter 12 that the preconditions are different depending on the category of cases. Consequently, we will analyse the preconditions for cases involving foreign substantive proceedings in a separate chapter (chapter 15).

14.2 Jurisdictional preconditions for freezing injunctions in support of English substantive proceedings

In the author's submission, the current preconditions relating to the existence of jurisdiction do not sufficiently differentiate between purely domestic cases and international cases involving assets located abroad or a foreign party. In both domestic and international cases, jurisdiction to grant a freezing injunction exists if the court has personal jurisdiction over the defendant for the purposes of the substantive claim. Personal jurisdiction is based on a power theory and is established if the defendant can be lawfully served either within or outside the jurisdiction. If the order is sought in support of English substantive proceedings, the requirement of personal jurisdiction will be made out. In the context of anti-suit injunctions, Lawrence Collins LJ made it clear in that "[w]here a party is properly before a court, an anti-suit injunction is not a separate claim requiring its own basis of jurisdiction".⁵⁴⁷ The same applies to freezing injunctions. Thus, under the current approach, the English courts are only concerned with the narrow question of whether the defendant can be summoned before the English court (personal jurisdiction); they are not concerned with the question of whether the English court has jurisdiction over the assets in respect of which the injunction is sought (jurisdiction *in rem*). It is the author's position that both personal jurisdiction and jurisdiction *in rem* are required for the injunction to be within the scope of the state's right under international law to regulate the defendant's conduct using its domestic law on freezing injunctions (jurisdiction to grant a freezing injunction). The author submits that jurisdiction over the assets (jurisdiction *in rem*) is necessary in order to enable the English courts to avoid encroachment upon the sovereignty of foreign states.

Let us illustrate the features of the current English approach with one of the key cases. *Derby v Weldon (Nos 3 and 4)*⁵⁴⁸ was a pre-judgment case concerning allegations of fraud in connection with dealings in the cocoa market. One of the issues in the Court of Appeal was whether a pre-judgment worldwide freezing injunction should be granted against foreign defendants who had no assets within the jurisdiction. The leading judgment was given by Lord Donaldson MR. His Lordship rejected

⁵⁴⁷ *Masri v Consolidated Contractors International Co SAL and Another* [2008] EWCA Civ 625, [99].

⁵⁴⁸ [1990] Ch. 65.

the argument that the existence of assets within the jurisdiction was a precondition for obtaining worldwide relief and observed that:

“The existence of *sufficient* assets within the jurisdiction is an excellent reason for confining the jurisdiction to such assets, but, other consideration apart, the fewer the assets within the jurisdiction the greater the necessity for taking protective measures in relation to those outside it.”⁵⁴⁹

Putting aside the proviso for the protection of third parties, the Court of Appeal was not concerned about the absence of significant connections between the defendants’ assets located abroad and the English court. As the defendant companies were validly served out, the court had personal jurisdiction over the defendants. The Court of Appeal did not consider the strength of connections with other countries. It was irrelevant whether another court had jurisdiction to regulate the defendants’ conduct in relation to their assets located abroad. This illustrates the application of a unilateral approach to the question of whether there is jurisdiction to grant a freezing injunction. In the author’s view, the English courts need to recognise that personal jurisdiction over the defendant does not automatically give rise to jurisdiction to grant a freezing injunction. Jurisdiction of the English court to hear the substantive claim against the defendant should be regarded as a separate question from jurisdiction to grant a freezing injunction. This is a necessary step in order to restrict the scope of freezing injunctions to assets located in England.⁵⁵⁰ Such a restriction would reduce the possibility of conflict of procedural laws.⁵⁵¹ This would in turn have the effect of reducing the ability of unscrupulous claimants from taking advantage of the current regime through abusive forum shopping. For example, it would reduce the potential for relitigating legal issues relating to the substantive preconditions for a freezing injunction (or equivalent relief) in respect of the same assets. Eliminating such abusive forum shopping is an aim consistent with equipage equality, one of the key functions of freezing orders. The more room for abusive forum shopping, the further we are away from achieving a level-playing field between claimants and defendants. In the light of its link with equipage equality, the creation of a separate jurisdictional basis for asset preservation relief would provide due recognition to the important role of injunctive relief in commercial litigation.

In *Derby v Weldon (Nos 3 and 4)*, the third defendant was a Panamanian company which had no assets in Panama. At first instance, Sir Nicholas Browne-Wilkinson V-C refused to grant any order against the third defendant because there was no evidence that a freezing injunction could be enforced in Panama, even if it had any assets there. The Court of Appeal disagreed with his conclusion. Lord Donaldson MR considered that the fact that the court could bar the defendant’s right to defend provides a sufficient sanction.⁵⁵² Moreover, Panama was not the only forum in which the claimants would seek to enforce a future judgment against the third defendant. For these reasons he said that it was a mistake to spend time considering whether English orders and judgments could be enforced against Panamanian companies in Panama.⁵⁵³ Lord Donaldson MR’s refusal to take into consideration the regulatory regime of a legal system with a clear connection to

⁵⁴⁹ Ibid, 79G.

⁵⁵⁰ See the next section of this chapter on the need to restrict the scope of relief to assets located in England.

⁵⁵¹ On the significance of what the author of this thesis describes as the conflict of procedural laws, see further chapter 18, section 18.3.

⁵⁵² [1990] Ch. 65, 81D-E.

⁵⁵³ Ibid, 81H-82A.

the case underlines the unilateral nature of the English jurisdictional preconditions for freezing injunctions.

Several related characteristics of the current approach should be emphasised with reference to jurisdictional theories. First, the English courts adopt a unilateral, vertical, and domestic approach to the existence of jurisdiction to grant a freezing injunction. The focus is only on the relationship between the English court and the defendant. It is irrelevant whether another foreign court also has jurisdiction to grant a freezing injunction or similar relief. No comparison is made with the connections that other countries have with the dispute over the availability of interim relief. Second, there is no distinction between jurisdiction to decide on the substance of the dispute and jurisdiction to determine whether or not injunctive relief should be granted. This is based on the incorrect assumption that the same connections are always relevant for two different claims. The very existence and need for jurisdiction to grant freezing injunctions in support of foreign substantive proceedings shows that the relevant jurisdictional connections for the substantive claim and the claim for preliminary relief can be mutually exclusive.

The consequence of the automatic existence of jurisdiction to grant worldwide freezing injunctions in cases where the substantive proceedings are in England (or intended to be issued in England) is the possibility of granting *ex parte* injunctions despite a weak connection with the application for preliminary relief. Moreover, at the time of the hearing for injunctive relief, the issue of jurisdiction over the defendant for the purposes of the substantive claim in England may be very far from its final resolution. This is demonstrated by *VTB Capital v Nutritek*⁵⁵⁴ where Roth J (at first instance) granted an *ex parte* worldwide freezing injunction against Mr Malofeev (the fourth defendant) even though service of the claim form had not yet been effected in Russia.⁵⁵⁵ Given the possibility of obtaining a worldwide freezing injunction despite a weak or no connection with England, the current state of the law is unsatisfactory because the claimant can undermine the defendant's legitimate expectations regarding the applicable regulatory scheme for preserving assets.

14.3 The implications of the theoretical analysis on the availability of freezing injunctions in respect of assets located abroad

The author submits that in cases involving English substantive proceedings, the English court should not have jurisdiction to grant a freezing injunction in respect of assets located abroad.⁵⁵⁶ For the English court to have jurisdiction to grant a freezing injunction, it should be necessary to establish both personal jurisdiction and jurisdiction over the assets.

In the author's view, it was inconsistent with the international systemic perspective on the purpose of private international law rules for the English courts to extend the international scope of freezing injunctions to assets located abroad. The courts should recognise that freezing injunctions always indirectly regulate the rights and obligations arising from the property or contract covered by the order. The dispute between the claimant and the defendant over whether the defendant's conduct

⁵⁵⁴ [2011] EWHC 2526 (Ch).

⁵⁵⁵ Roth J was also aware of the fact that the first and second defendants who had been served with the claim form had made an application to set aside service. In *VTB Capital v Nutritek* [2013] UKSC 5 a freezing injunction had been wrongfully maintained up until the issue of jurisdiction to hear the substantive dispute was finally resolved by the Supreme Court. This problem will be discussed in more detail in chapter 15, section 15.5.1.

⁵⁵⁶ The normative position in relation to foreign substantive proceedings will be set out in the next chapter.

justifies a freezing order is effectively a dispute about whether the defendant should be temporarily deprived of the benefits under the law which governs the property or contract in question. A defendant against whom the injunction has been granted is deprived of the two essential features of property rights: the ability to freely transfer the asset and to exclude third parties from interfering with the asset.⁵⁵⁷ For these reasons, in the author's view, a freezing injunction could be classified as a quasi-proprietary form of relief which involves an indirect interference with contractual or property rights. In order to provide further justification for this proposed classification, the author would like to emphasise the ability of claimants to combine a freezing injunction with other orders to facilitate future enforcement against the assets covered by the freezing injunction. Such other orders include receivership orders and orders to transfer assets from one jurisdiction to another. Let us briefly examine the nature of each of these orders in turn by looking at some examples from the cases.

In *Derby v Weldon (No.6)*,⁵⁵⁸ it was held that the English courts even have a power to order the defendant to transfer his assets from one jurisdiction to another. The Court of Appeal's reasoning was that the *in personam* jurisdiction of the English court is "unlimited". Dillon LJ stated that the jurisdiction extended to:

"ordering the transfer of assets to a jurisdiction in which the order of the English court after the trial of the action will be recognised, from a jurisdiction in which that order will not be recognised and the issues would have to be relitigated, if...the only connection of the latter jurisdiction with the matters in issue in the proceedings is that moneys have been placed in that jurisdiction in order to make them proof against the enforcement, without a full retrial in a foreign court, of any judgment which may be granted to the plaintiffs by the English court in this action or indeed if the only connection with the latter jurisdiction is financial, as a matter of controlling investments."⁵⁵⁹

The author submits that if the defendant company is merely subject to English court's personal jurisdiction, this ought to be treated as insufficient connection as a matter of international law to enable the court to order the defendant to take positive steps in another jurisdiction in relation to a bank account not governed by English law. This decision provides a clear example of an order directly and actively interfering with the defendant's rights under a contract governed by foreign law.

Writing extra-judicially, Browne-Wilkinson has explained that: "the fiction that [a freezing injunction] only operates *in personam* becomes very thin indeed when the English court appoints a Receiver. Such an order does not operate only *in personam*: under English law the Receiver is entitled to take possession of the assets."⁵⁶⁰ The appointment of a receiver was made in *Derby v Weldon (Nos 3 and 4)* which we considered above. Indeed, the court can appoint a receiver in respect of assets located abroad either pre-judgment or post-judgment in support of a freezing injunction if there is a real risk

⁵⁵⁷ See Gray K., 'Property in Thin Air' (1991) 50 C.L.J. 252.

⁵⁵⁸ [1990] 1 W.L.R. 1139.

⁵⁵⁹ Ibid, 1151C-E.

⁵⁶⁰ Browne-Wilkinson N., 'Territorial Jurisdiction and the New Technologies' (1991) 25 Isr. L. Rev. 145.

that the defendant will disobey the freezing injunction.⁵⁶¹ To be more specific about the circumstances in which a receivership order will be made, as explained by the Court of Appeal in *JSC BTA Bank v Ablyazov*:⁵⁶²

“If...the method by which a defendant beneficially holds his assets is transparent, a receivership order may well not be necessary. But if it is opaque and there is a reasonable suspicion that such opacity will be used by a defendant to act in breach of a freezing order, it may well be the case that a receivership order is appropriate.”⁵⁶³

Agreeing with and reinforcing the above views of Browne-Wilkinson, one American author points out that:

“[g]iven the broad sweep of the prohibitions outlined in the [freezing] order and the debilitating effect the mere imposition of the order has on conducting business, it is doubtful that the distinction [between *in personam* and *in rem*] is of any meaningful, practical significance to a defendant...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.”⁵⁶⁴

The distinction between *in personam* and *in rem* becomes even less significant when we consider the claimant-friendly attitude of the English courts towards enforcement of worldwide freezing orders in certain jurisdictions. For a claimant to enforce a worldwide freezing order in another jurisdiction, it is necessary to first obtain permission from the English court. When considering whether to give such permission and how to exercise its discretion, the court will apply the guidelines developed in *Dadourian Group International Inc v Simms*,⁵⁶⁵ known simply as the ‘*Dadourian guidelines*’. The guidelines, *inter alia*, specifically ask the court to take into account the nature of the relief sought from the foreign court and in particular whether that relief would be “superior” to the existing relief obtained from the English court. Taken at its face value, it appears from this guideline that the *in personam* nature of English freezing orders should not be converted into a superior form of local relief with proprietary consequences. However, the practical reality is that an English court may well take a pro-claimant stance on this issue. This is evident from the recent decision of Males J in *Arcadia Energy (Suisse) SA et al v Attock Oil International Ltd et al*.⁵⁶⁶

⁵⁶¹ *Cruz City 1 Mauritius Holdings v Unitech Limited* [2014] EWHC 3131 (Comm), [50] per Males J (a case where a receiver was appointed post-judgment in respect of the defendants’ assets located abroad in support of a worldwide freezing order).

⁵⁶² [2010] EWCA Civ 1141 (a case where a receivership order was made in support of a freezing injunction because, *inter alia*, the assets were difficult to trace and there was inadequate disclosure).

⁵⁶³ *Ibid*, [14].

⁵⁶⁴ Wilson J.L., ‘Three If By Equity: *Mareva* Orders & the New British Invasion’ (2004-2005) 19 St John’s J. Legal Comment 673, 709 and 735 (footnotes omitted). In support of his thesis, Wilson refers, *inter alia*, to Crawford’s description that the effect of a freezing injunction is similar to a “conditional attachment”: Crawford J., ‘Execution of Judgments and Foreign Sovereign Immunity, (1981) 75(4) Am. J. Int’l L. 820.

⁵⁶⁵ [2006] EWCA 399.

⁵⁶⁶ [2015] EWHC 3700 (Comm). For a different but related issue of whether it is possible for the claimant to seek orders from the foreign court of a different nature (such as arrest of a vessel) in addition to the English order see the author’s earlier discussion of *Re LMAA Arbitration* [2013] EWHC 895 (Comm) where the court arguably took a claimant-friendly stance in that the claimant was not in breach of an undertaking not to seek “an order of a similar nature” under the worldwide freezing order by arresting a vessel and thereby obtaining security abroad. An analogy could be made with the liberal approach of the US Court of Appeals for the Fifth

The defendants (including former company officers) argued that the claimants (petroleum companies) should be refused permission to enforce the worldwide freezing order in Switzerland and Lebanon. One of the defendants' submissions was that the remedies sought from the Swiss and Lebanese courts were *in rem* and therefore superior to the English order. Males J acknowledged that the relief sought from the Swiss courts operated *in rem* but nevertheless rejected the defendant's argument observing that it was common practice to grant permission for enforcement in such circumstances. His Lordship noted that the superior form of foreign relief was not an absolute bar to permission. As an example of circumstances in which permission might be refused on grounds of superiority, it was observed that the foreign order should not prevent the use of funds in accordance with the provisos in the English order (such as the ability to use the funds for the purposes of legal costs and living expenses). Although the author notes that the liberal approach of the court in *Arcadia Energy* may have been influenced by the seriousness of the allegations of widespread fraud against the defendants, it cannot be denied that the common practice in the Commercial Court of granting permission in circumstances where the foreign order operates *in rem* dilutes the importance of the distinction between *in personam* and *in rem*.⁵⁶⁷

14.4 A summary of the problems with the jurisdictional preconditions for freezing injunctions in support of English proceedings

In the light of the analysis in the previous chapter, the current English approach to the existence of jurisdiction to grant a freezing injunction in support of English substantive proceedings is theoretically flawed - it ignores the international systemic view of private international law rules. The current approach fails to fulfil all of the functions of jurisdictional rules. To borrow the language of Michaels, the existence of jurisdiction to grant a freezing injunction should be justified vis-à-vis other states with a plausible claim to jurisdiction rather than vis-à-vis the defendant and his interest in protection from the court. As we have seen, one of the key flaws with the current approach is the lack of a distinction between jurisdiction over the substantive dispute and jurisdiction to grant a freezing injunction.⁵⁶⁸ In the next chapter we will examine similar problems with the current jurisdictional preconditions for another category of cases: freezing injunctions in support of foreign substantive proceedings.

Circuit in *The Belcher Company of Alabama Inc. v. M/V Maratha Mariner* 724 F.2d 1161 (5th Cir. 1984) (action *in rem* for the arrest was allowed despite parallel '*in personam*' attachment proceedings in the Netherlands).

⁵⁶⁷ In the author's view, the significance of the distinction is further diluted in the light of the decision of the New York court to recognise and enforce English default judgments resulting from non-compliance with an English freezing injunction in *CIBC Mellon Trust Co. v Mora Hotel Corp.*, 100 N.Y. 2d 215, 222 (2003). See also more recently the decision of the Swiss Federal Supreme Court in ATF 4A.366/2011 (31 October 2011) which "confirms the assumption that a party in the possession of a WFO [worldwide freezing injunction] has a legitimate interest in obtaining a declaration of enforceability from a Swiss court": Scherer M. and Nadelhofer S., 'Possible Enforcement of Worldwide Freezing Orders in Switzerland' <http://klowerarbitrationblog.com/blog/2012/03/23/possible-enforcement-of-worldwide-freezing-orders-in-switzerland/>.

⁵⁶⁸ For further discussion of the potential unfairness to defendants resulting from the absence of this distinction, see chapter 15, section 15.5.

Chapter 15: Application of jurisdictional theories to the jurisdictional preconditions for freezing injunctions in support of foreign substantive proceedings in a non-EU state

15.1 Introduction

In this chapter we will analyse the consistency of jurisdictional preconditions for freezing injunctions in support of foreign substantive proceedings with the author's views on the functions of jurisdictional rules, taking into account our discussion of jurisdictional theories in chapter 13. In this chapter it will be argued that the author's call for a separate jurisdictional rule for determining the merits of the application for a freezing injunction gains even more importance if we consider the uncertainty surrounding the circumstances in which the English courts would grant a worldwide freezing injunction in support of foreign proceedings in a non-EU state. Once again, as in the context of orders in support of domestic proceedings, one of the causes of the uncertainty is actually the inconsistent use of terminology and especially the use of the term jurisdiction. A further problem is the extent to which decisions about the international scope of the freezing injunction depend on the court's exercise of discretion. In practical terms, any discretion increases the costs of litigation and thereby creates obstacles for both parties. In *VTB Capital v Nutritek*,⁵⁶⁹ Lord Neuberger emphasised the need to avoid disproportionately complex and costly litigation, especially at the interlocutory stage. This author will argue that the English courts should curb the extent to which a question of jurisdiction to grant the injunction is dependent on discretion in the context of applications for freezing injunctions collateral to foreign proceedings. The author's concerns about the legitimacy of extending freezing injunctions to assets located abroad are more profound with additional foreign elements due to an even weaker connection with England. In particular, the inconsistency of the current regime with the international systemic objectives of private international law is exacerbated in the circumstances where the substantive proceedings are taking place or are intended to be commenced in a foreign court in a non-EU state.⁵⁷⁰

15.2 The current approach and its inconsistency with the international systemic perspective

In chapter 12 we had a short overview of the jurisdictional preconditions for freezing injunctions in support of foreign proceedings. This section will further develop the explanation of the jurisdictional preconditions and draw the reader's attention to the inconsistencies with the author's views on the functions of jurisdictional rules.

Section 25(1) of the Civil Jurisdiction and Judgments Act 1982 allows the courts to grant freezing orders in support of foreign substantive proceedings. The broad structure of the current approach for applications under section 25 is a two-step analysis.⁵⁷¹ The first question for the court is whether a freezing injunction would be granted if the substantive proceedings were in England. If the answer is in the affirmative, the second step for the court is to decide whether it is "inexpedient" to grant

⁵⁶⁹ [2013] UKSC 5.

⁵⁷⁰ This thesis will not analyse the consistency of jurisdictional theories with the current jurisdictional preconditions for freezing injunctions in support of foreign proceedings in an EU MS. The decision in *Van Uden* provides some support for the author's proposals to restrict the international scope of freezing injunctions. There does not seem to be much more that needs to be done in a system which is not unilateral and vertical as the English common law. The focus of this thesis is therefore on the English common law.

⁵⁷¹ *Refco Inc v Eastern Trading Co.* [1999] Lloyd's Rep 159, 170-171.

the freezing order. This second step is encapsulated in section 25(2) of the 1982 Act which provides that:

“On an application for any interim relief under subsection (1) the court may refuse to grant relief if, in the opinion of the court, the fact that the court has no jurisdiction apart from this section in relation to the subject matter of the proceedings in question makes it inexpedient for the court to grant it.”

Under the current approach the reasoning of the courts in some important decisions in this field appears to treat the existence of jurisdiction as a requirement that is *automatically* satisfied as a result of the very existence of section 25 of the 1982 Act.⁵⁷² The language of section 25(2) itself seems to support this view as the courts are asked to consider “the fact that the court has no jurisdiction *apart from this section* [...]”.⁵⁷³ In the aforementioned cases, according to this author’s interpretation of the judgments, the courts have proceeded on the assumption that jurisdiction always exists to grant a freezing injunction in support of foreign proceedings. The assumption about the existence of jurisdiction is being adopted even in the circumstances where the defendant has no presence in England because, in the view of the courts, it is always possible to serve the defendant out of the jurisdiction on the basis that an injunction is sought under section 25.⁵⁷⁴ The Court of Appeal has expressly confirmed that “in relation to the grant of worldwide relief, the jurisdiction is based on *assumed personal jurisdiction*”.⁵⁷⁵ In the author’s view, taking into account the need to ensure equipage equality at the international level,⁵⁷⁶ the assumption that jurisdiction always exists to grant a freezing order collateral to foreign proceedings would only be logical and legitimate if restricted to assets located in England.

With the exception of some *obiter* statements in only one case,⁵⁷⁷ the courts have not directly considered the question of whether England is a clearly more appropriate forum to determine the availability of asset preservation relief. In other words, in cases on freezing orders where the claimant has relied on paragraph 3.1(5) of Practice Direction 6B to serve the defendant out of the jurisdiction, the courts have accepted the existence of jurisdiction and avoided the application of the principle of *forum non conveniens*. On the other hand, it could be argued that the courts have perhaps indirectly addressed the question of whether England is a clearly more appropriate forum through their application of the test of expediency. On this view, any factors that would be relevant for the purposes of a *forum non conveniens* enquiry are subsumed into the list of five factors identified by the Court of Appeal in *Motorola v Uzan (No 2)* as being relevant for the purposes of the criterion of expediency. Alternatively or perhaps additionally, whether the English court is a clearly more appropriate forum is an issue which the courts already consider through their application of the principle of comity. There is insufficient evidence to support the last proposition but, even if it is true, in the author’s view, it is far from a satisfactory state of affairs because the issue of *existence* of jurisdiction deserves more attention than the issue of how the English courts should *exercise* their

⁵⁷² See, inter alia, the Court of Appeal’s decision in *Motorola v Uzan (No 2)*.

⁵⁷³ Emphasis added.

⁵⁷⁴ CPR, paragraph 3.1(5) of Practice Direction 6B.

⁵⁷⁵ *Motorola v Uzan (No 2)*, [114]. Emphasis added.

⁵⁷⁶ See chapter 7 of this thesis.

⁵⁷⁷ See *Cruz City 1 Mauritius Holdings v Unitech Limited* [2014] EWHC 3704 (Comm), [85]-[90] (albeit this was in the context of an application for a freezing injunction in aid of enforcement of a London arbitration award).

discretion. Ameliorating the problem of encroachment upon the regulatory authority of other states and excessively claimant-friendly criteria through the discretionary stage (including the principle of *forum non conveniens*) is an incomplete solution. In the author's submission, unless there is a well-designed, tailor-made rule dealing with the existence of jurisdiction to grant freezing orders in support of foreign proceedings which carefully balances the interests of all stakeholders, the risk of encroachment on the regulatory authority of foreign states and the risk of unfairness to defendants will remain significant. As we have learnt from the analysis of jurisdictional theories in chapter 13, the various interests which need to be balanced include not only the competing interests of the parties, but also the interests of the connected foreign states. It is inconsistent with the international purpose of the rules of jurisdiction to allow the English courts to make assumptions about the sensitive question of existence of jurisdiction and it is unacceptable to simply apply the forum's rules (including section 25 of the 1982 Act) whenever it is in the interests of "efficiency" or "expediency" from the English perspective (for example because of the practical inconvenience and costs for the claimant of having to apply for similar orders in numerous other countries). It is equally unacceptable to automatically apply section 25 of the 1982 Act to all cases and justify it by reference to the equitable roots of freezing injunctions (or the characterisation of the rules relating to freezing injunctions as procedural) – that amounts to putting the cart before the horse as it circumvents the proper order of legal issues required under the rules of private international law. Before we apply section 25, it is necessary to check whether English law or some foreign law is the applicable law to determine whether a freezing injunction (or equivalent relief) is available.

Given the lack of importance attached to the question of existence of jurisdiction, the fact that the only question for the courts is one of expediency clearly demonstrates a unilateral approach to the existence of jurisdiction to grant a worldwide freezing order in support of foreign proceedings. A further aspect of the unilateral approach is that a practice appears to have developed in the Commercial Court whereby the potential conflict with the outcome of an application for similar relief in another jurisdiction is dealt with upon a subsequent application to vary the terms of the order.⁵⁷⁸ The courts therefore seem to initially ignore the application in the foreign court and leave it to the parties to deal with any inconsistency with a foreign order once it arises.⁵⁷⁹ A unilateral approach tends to give disproportionate weight to the forum's policies and ignores the internationalist and systemic goals of private international law and its public international law roots. A unilateral approach could even be seen as based on the assumption about the superiority of the forum's regulatory framework or, perhaps from a somewhat cynical perspective, driven by the desire to increase the attractiveness of the forum as a venue for international commercial litigation for the benefit of the economy (and, in particular, its legal services sector). In the author's view, the likelihood of the English courts making assumptions about the superiority of injunctive relief is perhaps increased in the field of equitable remedies because of the judiciary's naturally and

⁵⁷⁸ This was the case, inter alia, in *Royal Bank of Scotland Plc v FAL Oil Company Ltd et al* [2012] EWHC 3628 (Comm) where the worldwide freezing injunction was subsequently (in an *ex tempore* judgment) restricted to exclude any assets in the United Arab Emirates (UAE) where the substantive proceedings were taking place. The claimants obtained attachment orders from the UAE courts.

⁵⁷⁹ See, however, *JSC VTB Bank v Skurikhin et al* [2014] EWHC 2254 (QB) where Eder J granted a worldwide freezing injunction but the order was not extended to assets in a number of countries due to the Russian court's policy of not granting orders in respect of particular assets. There was no application before the Russian court but Eder J was willing to take into account expert evidence on Russian law relating to freezing injunctions.

historically strong attachment to notions of justice, fairness and unconscionability which form the foundations for such remedies.⁵⁸⁰

15.3 The problems with the test of expediency and the controversial case law on collateral freezing injunctions extending to assets located abroad

Section 25 does not expressly tell us whether the jurisdiction to grant orders in support of foreign proceedings extends to assets located abroad. This issue, and the manner in which discretion should be exercised, has been considered by the English courts in a number of key cases which require detailed analysis. This section will analyse the key case law on collateral freezing injunctions with the aim of illustrating that, in this category of cases, the current international scope is inconsistent with the international systemic perspective on the purpose of the rules of jurisdiction. This is because the English courts are not interested in establishing jurisdiction over the assets (jurisdiction *in rem*). The author submits that jurisdiction over the assets is necessary due to the quasi-proprietary nature of freezing injunctions. The consequence of the current approach is that the international scope of freezing injunctions in this category is excessively claimant-friendly and contrary to the principle of equipage equality.

15.3.1 A dangerous precedent and an early example of a worldwide freezing injunction in support of foreign proceedings: *Republic of Haiti v Duvalier*⁵⁸¹

Let us first take a look at one of the earliest and extreme examples of a successful application for a worldwide freezing injunction irrespective of a weak connection with England. The case illustrates the author's argument that the current jurisdictional preconditions are insufficient to protect defendants and the interests of foreign states from an excessively claimant-friendly approach to the international scope of freezing injunctions. Contrary to the principle of equipage equality, the application of the jurisdictional preconditions in this case was such that the defendant was forced to defend the application for interim relief in an unexpected forum. This was the case of *Republic of Haiti v Duvalier* where the presence of the defendant's solicitors in England was relied upon as a justification for seeking a worldwide freezing injunction from the English court. In this case the Republic of Haiti started proceedings in France to recover USD 120 million alleged to be the Republic's money embezzled by the former President of Haiti and members of his family. The defendants were resident in France, had no assets in England, and were not present in the jurisdiction. The only connection with England was the presence of the defendants' solicitors with information about the location of the defendants' assets located abroad. The Court of Appeal granted a worldwide freezing order in support of the proceedings in France. Staughton LJ, in his leading judgment, placed emphasis on the need for international co-operation in the light of the admitted intention of the defendants to move their assets out of the reach of the courts.⁵⁸²

It can be seen from *Duvalier* that the court's approach to the question of jurisdiction to grant a *worldwide* injunction in support of foreign proceedings was not different to its analysis of jurisdiction to grant a *domestic* injunction in support of foreign proceedings. For example, there was no suggestion of the need for a stronger connection to England in order to provide some support for

⁵⁸⁰ See chapter 2 of this thesis.

⁵⁸¹ [1990] 1 Q.B. 202.

⁵⁸² *Ibid*, 216.

the existence of jurisdiction to grant worldwide relief. By taking into account the connections to France simply as one of the factors in considering whether to *exercise* its jurisdiction to grant the injunction (as opposed to a factor relevant to its *existence*), the court ignored the possibility that the English rules on ancillary interim relief, including the test of expediency, could be irrelevant in the first place.

Collins has commented that in *Duvalier* “[t]he exercise of jurisdiction can be justified on the basis that the solicitors could be treated as agents of the defendants, and the relevant information was located in England”.⁵⁸³ The author agrees that this justification is appropriate for making a worldwide *disclosure* order. As worldwide disclosure orders do not involve any indirect interference with the property, there is no need to restrict their availability to assets located in England. Worldwide disclosure orders do not involve any interference with the sovereignty of foreign state as long as there is personal jurisdiction over the defendant or his agent. Moreover, worldwide disclosure orders should be available as a free-standing form of relief.⁵⁸⁴ However, the author disagrees with Collins as far as he suggests that personal jurisdiction over the agents of the defendant could be used as a justification for granting a worldwide freezing injunction in support of foreign proceedings. A freezing injunction in support of foreign proceedings should not be available at all in respect of assets located abroad. The Court of Appeal’s order in *Duvalier* should be regarded as inconsistent with the public international law requirement for a substantial connection of the dispute to the forum in the context of any extraterritorial relief.⁵⁸⁵ A related criticism is that, despite its importance in this area of the law, the Court of Appeal did not even mention the principle of comity. A question which could have been asked is as follows: how is the worldwide freezing order in *Duvalier* compatible with the principle of comity? The author is unable to find a convincing answer. Even if the court had provided an unconvincing answer, this would have been better than complete silence – it would have made it easier to apply the principle of comity in future cases in a structured manner. The author’s view is that in respect of the French assets, the French court should have had exclusive jurisdiction to decide whether any interim relief, such as a *saisie conservatoire*, was available and if so on what terms. A worldwide freezing injunction should be seen as interfering with the regulatory authority of a foreign state in the field of interim relief.

15.3.2 The expansion of the international scope of collateral freezing injunctions: *Credit Suisse v Cuoghi*⁵⁸⁶

The next case that we need to analyse (*Credit Suisse v Cuoghi*) further demonstrates the English courts’ claimant-friendly application of the test of expediency. Contrary to the international systemic perspective on the rules of jurisdiction, the English court expanded the availability of worldwide freezing injunctions in support of foreign proceedings. This expansion of the international scope of freezing injunctions enables claimants to make multiple applications for freezing injunctions in respect of the same assets and is therefore inconsistent with the principle of equipage equality.

⁵⁸³ Collins (1989), p.281.

⁵⁸⁴ Free-standing disclosure orders are not available under the CPR – see chapter 9 for the author’s proposal for free-standing disclosure orders.

⁵⁸⁵ See section 13.10 of this thesis for the explanation of Crawford’s principles of public international law relating to jurisdiction over extraterritorial acts.

⁵⁸⁶ [1998] Q.B. 818.

In *Credit Suisse* the substantive proceedings were brought in Switzerland by the claimant Swiss company against its former employee who was Swiss domiciled and resident. The employee was alleged to have stolen money belonging to the claimant. For practical reasons, the claimant could not pursue its claim successfully against this employee. The claimant turned its focus to a claim against another defendant, Mr Cuoghi, who was allegedly complicit in the employee's fraudulent activities. Cuoghi was resident and domiciled in England. The problem encountered by the claimant was that under Swiss law, there was no jurisdiction to grant freezing and disclosure orders against Cuoghi because he was not resident in Switzerland. In such circumstances, the claimant asked the English court to grant freezing and disclosure orders extending to Cuoghi's assets worldwide. It was accepted by Cuoghi that there was a valid case for an injunction against his any assets located in England.

The Court of Appeal unanimously held that section 25 of the 1982 Act permitted worldwide relief to be granted in support of the Swiss proceedings. The English court did not explicitly distinguish between the issue of existence of jurisdiction and whether its jurisdiction, if any, should be exercised. Perhaps this is because the Court of Appeal assumed the existence of jurisdiction (even in respect of the defendant's conduct in relation to his assets located abroad) based on the wording of section 25 of the 1982 Act and/or the defendant's presence in England. The Court of Appeal was only preoccupied with how its discretion should be exercised – the question of whether it is "inexpedient" to grant a worldwide freezing injunction. The court's conclusion was that it was not inexpedient to grant worldwide relief. A number of factors were taken into account but the Court of Appeal placed emphasis on the ability to effectively enforce the injunction:

"Where a defendant and his assets are located outside the jurisdiction of the court seised of the substantive proceedings, it is in my opinion most appropriate that protective measures should be granted by those courts best able to make their orders effective. In relation to orders taking direct effect against the assets, this means the courts of the state where the assets are located; and in relation to orders *in personam*, including orders for disclosure, this means the courts of the state where the person enjoined resides."⁵⁸⁷

As Mr Coughi was resident in England, the Court of Appeal viewed the English courts as best able to ensure the effectiveness of protective measures. In the author's view, this strong link between the ability to enforce the order and the exercise of the court's discretion to grant extraterritorial protective measures demonstrates a claimant-friendly approach to the international scope of freezing injunctions.⁵⁸⁸ Such an approach does not take into account the application of foreign procedural law (to the issue of preserving assets located abroad) and foreign substantive law (to the issue of the strength of the claimant's case on the merits). Millett LJ considered that the foreign court would not find the order of the English court objectionable in the circumstances where it lacked jurisdiction to make an effective order.⁵⁸⁹ With regards to the argument that the extension of the order to assets located abroad constitutes an unwarranted interference with the jurisdiction of the foreign courts, Millett LJ's answer was that the terms of the order would not allow it to be

⁵⁸⁷ Ibid, 827 per Millett LJ.

⁵⁸⁸ As we will see below, the strength of this link was reinforced by the Court of Appeal in *Motorola v Uzan* (No 2).

⁵⁸⁹ [1998] Q.B. 818, 829.

directly enforced without an order of the local courts.⁵⁹⁰ His Lordship rejected the submission that by granting relief the English court would be remedying a perceived deficiency in Swiss law. Millett LJ viewed the grant of relief as supplementing the jurisdiction of the Swiss courts in accordance with the underlying policy of Article 24 of the Lugano Convention 1988 and principles which were internationally accepted.⁵⁹¹ Two reasons for this can be identified in Millett LJ's judgment. First, his Lordship considered that Article 24 was based on the principle that each contracting state should be willing to assist the courts of another contracting state by providing such interim relief as would be available if its own courts were seised of the substantive proceedings.⁵⁹² Second, Millett LJ stated that where the defendant was domiciled within the jurisdiction such an order could not be regarded as exorbitant or as going beyond what was internationally acceptable.⁵⁹³ In addition, Millett LJ placed emphasis on the need for co-operation in cases of international fraud.⁵⁹⁴ Indeed, it has been stated that the fact that no other court could grant a similar order and prevent the defendant from making himself judgment-proof provides a powerful reason for the grant of the injunction.⁵⁹⁵ In an attempt to lay down the boundary of what is permissible, Millett LJ added that where a claimant made an application for a similar order and the foreign court refused to grant it, it would generally be wrong for the English court to intervene.⁵⁹⁶ The court also rejected the argument that relief under section 25 could not be granted affecting assets in the country of the primary court.⁵⁹⁷

It seems that in *Credit Suisse* the justification for extending the injunction to assets located abroad lay in the need to close what the author of this thesis would describe as a 'regulatory gap'. But the reason for the regulatory gap was the insufficient development of Swiss law rather than the deliberate actions of the defendant. In the author's view, the English court provided assistance to the claimant to overcome what the English court saw as a gap in the availability of pre-judgment protection without consideration of unfairness to the defendant and the international systemic interest in restricting the relief to assets located in England. The unfairness to the defendant was, inter alia, that he could not have anticipated extraterritorial interference with his assets located abroad, especially as the interference was partly based on the English court's view of the nature and strength of the allegations made in the substantive proceedings in Switzerland. The author's view is that international law imposed no constraints on the Swiss court's jurisdiction to grant protective relief over any assets in Switzerland, but domestic policy reasons might have shaped the fact that Swiss law adopted a narrow approach to jurisdiction. Moreover, while it was true that there was no potential for conflict with the Swiss courts, *worldwide* relief was granted so there was potential for conflict with the procedural law of any jurisdiction other than Switzerland where the defendant had assets. For all these reasons, it was unconvincing for the court to justify the grant of worldwide relief on the basis that it was necessary to prevent injustice. To use Mills' terminology, the court in *Credit Suisse* was looking at the English jurisdiction rules from the domestic perspective of doing "private

⁵⁹⁰ Ibid, 828.

⁵⁹¹ Ibid, 827.

⁵⁹² Ibid.

⁵⁹³ Ibid.

⁵⁹⁴ Ibid.

⁵⁹⁵ *Motorola v Uzan (No 2)* [2003] EWCA Civ 752, per Potter LJ, para. 125. See Fentiman R., 'The Scope of Transnational Injunctions' (2013) 11 NZJPIIL 323 and especially (at p.335) his discussion of the possibility of "jurisdiction of necessity".

⁵⁹⁶ [1998] Q.B. 818, 829.

⁵⁹⁷ Ibid, 831-832.

justice” rather than identifying the proper scope of “public powers”, and it was influenced by the seriousness of the allegations against the defendant coupled with the lack of ability to obtain a free-standing disclosure order. As we will see from later cases in this chapter, the English courts have the tendency to ‘bend over backwards’ to grant relief in cases involving allegations of international fraud.

15.3.3 Further extension of the international scope of collateral freezing injunctions: *Refco v Eastern Trading*⁵⁹⁸

Further flexibility in the application of the test of expediency and a consequent expansion of the international scope of freezing injunctions was made by the Court of Appeal in *Refco v Eastern Trading*. This case is important because it created uncertainty regarding the relevance of the foreign court’s refusal to grant a freezing injunction. Any such uncertainty is incompatible with the principle of equipage equality as it creates incentives for financially strong claimants to make tactical applications for freezing injunctions with the aim of putting pressure on defendants. A related point is that the case of *Refco* is equally significant as an illustration of the possibility of forum shopping for the most favourable substantive preconditions for a freezing injunction.

The only common characteristic of *Refco* and *Credit Suisse* was that, in both cases, a freezing injunction was sought in aid of foreign substantive proceedings. The proceedings on the merits were in Illinois and the claimants sought to restrain the defendants from moving their assets in England. The key fact was that there was insufficient evidence relating to the dissipation of assets. For this reason, it was held that the injunction which had been granted *ex parte* by Tuckey J should be discharged. Nevertheless, *obiter*, the Court of Appeal considered whether it would have been inexpedient to grant the order if the threshold for the dissipation of assets had been satisfied. As the evidence relating to the dissipation of assets did not indicate deliberate evasion and therefore failed to meet the higher threshold required by the US courts at the time, the Illinois court would have refused to grant relief. Thus, in Illinois the substantive preconditions for granting an order similar to the English freezing injunction could not be satisfied. This can be contrasted with *Credit Suisse* where it was appropriate for the Swiss court to grant relief (the substantive preconditions were satisfied) but it did not have jurisdiction to grant it.

In the Court of Appeal, Morritt and Potter LJ considered that it would not have been inexpedient to grant relief because the foreign court would have denied relief on principles different to those applied by the English courts.⁵⁹⁹ According to the majority, it would not be “in aid of” substantive proceedings to grant a freezing injunction where the foreign court had applied the same principles differently; that would amount to reviewing the foreign court’s jurisdiction. For the majority, the crucial factor was “the unusual circumstance” that the Illinois court made it clear that it was content for the English proceedings for a freezing injunction to proceed.⁶⁰⁰ Millett LJ disagreed with the majority’s view that it would not have been inexpedient to grant a freezing injunction if such relief had been justified and the substantive proceedings had been brought in England. His Lordship drew attention to the fact that, unlike in *Credit Suisse*, the court was being asked to exercise a long-arm jurisdiction. Millett LJ placed significance on “judicial comity” which “requires restraint, based on

⁵⁹⁸ [1999] 1 Lloyd’s Rep. 159.

⁵⁹⁹ *Ibid*, 173-174.

⁶⁰⁰ *Ibid*, 174.

mutual respect not only for the integrity of one another's process, but also for one another's procedural and substantive laws".⁶⁰¹ Millett LJ said that this required an objective test to be applied. Thus, the lack of concern for the English proceedings on the part of the Illinois judge did not mean that the English court should feel free to grant relief. For Millett LJ the decisive factor was that the English court was "asked to grant relief which the Court seised of the substantive proceedings would have refused to grant even if the defendants were resident within its jurisdiction and had assets located there".⁶⁰²

The author submits that the reasoning of Millett LJ is preferable to that of the majority. The approach taken by the majority can lead to abusive forum shopping by allowing relitigation of issues (substantive preconditions) relating to interim relief in respect of the same assets. Millett LJ opined that "[a]ssisting a foreign court by supplying a want of territorial jurisdiction is plainly within the policy of the Act; assisting plaintiffs by offering them a lower standard of proof is not obviously within the legislative policy".⁶⁰³ However, the author would disagree with Millett LJ (implicit in his Lordship's approval of *Credit Suisse*) that assisting a foreign court by supplying a want of territorial jurisdiction includes the extension of English freezing orders to assets located abroad. The policy of supplying a want of territorial jurisdiction is only legitimate if the English freezing injunction is confined to assets located in England. The author submits that to ensure equipage equality at the international level it is not necessary for the English courts to go beyond an order preserving assets located in England.

Fentiman has questioned the emphasis placed by the majority on the fact that the principles for the grant of relief were different in Illinois, but notes that their approach reflects the understanding of comity adopted by Lord Goff in *Airbus v Patel* in the context of anti-suit injunctions.⁶⁰⁴ It follows from Fentiman's observations that it is too simplistic to criticise the majority in *Refco* on the basis that, unlike Millett LJ, they failed to take into account considerations of comity. One must be aware of the differences of opinion on the interpretation of the requirements of the principle of comity in the context of injunctive relief.⁶⁰⁵ It would therefore be more accurate to criticise the majority's view on the basis that they should have applied a different understanding of the requirements of comity. The author of this thesis will argue that the principle of comity is unnecessary.⁶⁰⁶ Commenting on the judgments in *Refco*, Fentiman has also challenged the reasoning of Millett LJ by observing that "it is unclear whether a coherent distinction can be drawn between a case where equivalent relief is unavailable in the foreign court (where worldwide relief is not recognized, or where it is but the court lacks the necessary jurisdiction), and one where it is available, but has been declined. In both, the position of the foreign legal system is that relief should not be granted."⁶⁰⁷ If the courts take the view that this distinction is incoherent, the *obiter dicta* in *Credit Suisse* would have to be reconsidered.

⁶⁰¹ Ibid, 175.

⁶⁰² Ibid, 174.

⁶⁰³ Ibid, 175.

⁶⁰⁴ Fentiman (2015), 17.179-17.180.

⁶⁰⁵ See the author's discussion of the different theoretical perspectives on comity in chapter 13 of this thesis.

For the author's proposal to reformulate the principle of comity see chapter 17.

⁶⁰⁶ See chapter 17.

⁶⁰⁷ Fentiman (2015), 17.181. See, however, Collins L. et al, *The Conflict of Laws* (Sweet & Maxwell, 15th edn, 2012), 8-035.

Both *Credit Suisse* and *Refco* could be regarded as cases where the essence of the problem for the claimants, and their reason for asking the English court to grant a freezing injunction, was that foreign law was deficient. From this perspective, it was not for the English court in *Credit Suisse* to help the claimants to overcome the Swiss court's inability to exercise long-arm jurisdiction. However, as confirmed by the decision of the Privy Council in *Jeanette Walsh v Deloitte & Touche Inc.*,⁶⁰⁸ the English courts have consistently been in favour of encouraging "international judicial co-operation".⁶⁰⁹

As in the cases considered earlier in this chapter, instead of dealing with the question of existence of jurisdiction to grant interim relief, the Court of Appeal in *Refco* first considered whether the substantive preconditions for the English freezing injunction had been satisfied and then immediately proceeded to apply the test of expediency. This means that the Court of Appeal made an assumption that jurisdiction exists to grant the order and that the only question relating to jurisdiction was whether to exercise its discretion to grant relief. The approach taken by the Court of Appeal should be contrasted with that of Rix J (as he then was) in the Commercial Court. His concern was to determine from the outset whether the English court or the American court was responsible for considering the merits of the application for interim relief as evident from the second paragraph of his judgment:

"I have...formed the firm view that the primary responsibility in this case for considering whether there should be interim relief by way of some form of attachment of assets, by some means analogous to what we in this jurisdiction call the *Mareva* injunction, should fall to the United States Court which is seised with the merits of the dispute between the parties before me, rather than to this Court."⁶¹⁰

He reached this conclusion by distinguishing *Credit Suisse*.⁶¹¹ The facts of this case differed from that of *Credit Suisse* in a number of aspects: the defendants were not resident or domiciled in England and there were no allegations of fraud against the defendants. Unlike in *Credit Suisse*, there was no concession by the defendants that a freezing injunction was appropriate in respect of their English assets. In *Refco*, apart from the existence of English assets, there was no other connection with England. Rix J saw the legal issue of risk of dissipation of assets as bound up with the merits of the substantive claim and therefore more appropriate for the American court to resolve.⁶¹² Moreover, in Rix J's view, it was for the American court to consider the impact of the exclusive jurisdiction clause which was potentially sufficient on its own to preclude the defendants from making the application for interim relief in England. As Rix J's conclusion was that the relevant American procedural rules on interim relief (including the test for dissipation of assets) were applicable, he was cautious not to express any views on the application of substantive preconditions for the English freezing injunction.⁶¹³ The approach taken by Rix J is consistent with the emphasis in this thesis on the need to consider whether the English rules on interim relief are applicable at all, even if the English court

⁶⁰⁸ [2001] UKPC 58.

⁶⁰⁹ *Ibid*, [22]. See also *Ryan v Friction Dynamics Ltd.* [2001] CP Rep 75.

⁶¹⁰ [1999] 1 Lloyd's Rep. 159, 160.

⁶¹¹ *Ibid*, 163-164.

⁶¹² *Ibid*, 166. This link (or conflation of the two substantive preconditions) is unsatisfactory due to the different functions of the two requirements. See Part I of this thesis, chapter 8.

⁶¹³ [1999] 1 Lloyd's Rep. 159, 161.

has *in personam* jurisdiction over a defendant. His multilateral analysis of the connections to England and Illinois focused on the application for interim relief with the aim of identifying the most appropriate forum to determine the merits of that application. Rix J did not make the assumption that section 25 gave him unlimited regulatory authority to apply the English rules on interim relief subject only to the requirement that its exercise would be inexpedient. Overall, Rix J's approach did ensure that the English procedural rules did not encroach upon what he saw as the American court's exclusive jurisdiction to consider whether the defendant's conduct warranted American forms of interim relief. Although the author of this thesis agrees with the approach of Rix J, his Lordship was wrong in his ultimate conclusion that the English rules on interim relief were not applicable. Due to the quasi-proprietary nature of freezing injunctions, the single most important connecting factor should be the location of the assets in respect of which the relief is sought.⁶¹⁴ In *Refco*, the assets were located in England. It would have been illogical if the Illinois court had purported to grant pre-judgment attachment of the assets located in England. As the Illinois judge correctly observed, "[t]he freezing of the plaintiffs' assets in England and Wales is a matter of the law of that jurisdiction, not this jurisdiction".⁶¹⁵ Rix J asked the right question but, in the author's view, his answer should have been that the English court had regulatory authority to consider the merits of the application for interim relief in respect of assets located in England.

What about Rix J's concern about the potential impact of the jurisdiction clause? The author submits on this point that the English position should be that an exclusive jurisdiction clause can never be capable of precluding a party from seeking interim relief from the courts of the country where the assets are located. This appears to be consistent with the European framework under the Brussels I Recast Regulation and in particular the gateway in Article 35. The alternative position would be dangerous as it would lead to potential gaps in protection for claimants, especially in the absence of availability of extraterritorial orders; it would encourage unscrupulous parties to rely on exclusive jurisdiction clauses to undermine equipage equality in international litigation.

Our analysis of the limits of the international scope of freezing injunctions and the flexibility of the test of expediency would not be complete without looking at yet another Court of Appeal decision: *Motorola Credit Corporation v Uzan (No 2)*.⁶¹⁶ The author will use this case as a further illustration of the theoretical flaws inherent in the current jurisdictional preconditions for freezing injunctions. The decision of the Court of Appeal confirmed that the mere ability to enforce the injunction in England may be sufficient for the claimant to obtain worldwide relief in support of foreign proceedings.

15.3.4 Further clarification of the flexibility of the jurisdictional preconditions for collateral freezing injunctions: *Motorola v Uzan (No2)*

A number of questions about the application of section 25 were still left unanswered after *Duvalier*, *Credit Suisse*, and *Refco*. First, it was unclear whether it would be "inexpedient" to grant a worldwide freezing order in aid of foreign substantive proceedings in circumstances where the defendant was neither domiciled nor resident and had no assets within the jurisdiction. To put the question differently, what is the minimum degree of connection with the territorial jurisdiction of the English court? The second and related question was whether the mere presence of assets within the

⁶¹⁴ See chapter 16 and especially the section entitled "The connecting factor for exclusive jurisdiction".

⁶¹⁵ *Eastern Trading Co v Refco Inc* No. 97 C 6815 (ND Ill., December 22, 1997).

⁶¹⁶ [2003] EWCA Civ 752.

jurisdiction was sufficient to make it expedient to grant worldwide relief? The latter question was not addressed in *Refco* because the application was for a freezing injunction only in respect of assets located in England. All these questions arose in *Motorola v Uzan (No 2)* a case concerning allegations of international fraud against four Turkish citizens. The first defendant (D1) was resident in Turkey but had substantial assets in England. The second and third defendants (D2 and D3) were resident in Turkey and had no assets in England. The fourth defendant (D4) was resident and had assets in England. The claimant company commenced substantive proceedings in New York. However, in the US, pre-judgment preliminary injunctions could only be granted in limited circumstances following the decision of the US Supreme Court in *Grupo Mexicano de Desarrollo S.A. v Alliance Bond Fund Inc.*⁶¹⁷ In this context, the claimant sought worldwide relief from the English court. Counsel for the defendants made three main submissions. First, that it was inexpedient to grant worldwide relief because the court seised of the substantive proceedings had no “jurisdiction” to grant such relief. The Court of Appeal stated that the same argument had been rejected in *Credit Suisse* and, adopting Millett LJ’s reasoning in *Refco*, highlighted the difference with the situation where the primary court had refused a similar order due to a failure to fulfil the substantive preconditions. The second submission was that, due to D1 – D3’s strong connections with Turkey, relief should have been properly sought in that jurisdiction. In response, the court simply said that weight should be attached to the likelihood of conflict between the Turkish court and the English court. The third and principal submission was that since D2 and D3 had no connection with the English jurisdiction and D1 had no sufficient connection, it was inexpedient to grant *Mareva* relief. The court held that worldwide relief was only expedient in relation to D1. Unlike in the case of D2 and D3, the presence of D1’s assets in England meant that the court had the means to enforce its order. Reliance was placed here on the principle in *Derby v Weldon* that the court should refrain from making orders where there are no effective means for their enforcement.⁶¹⁸

The Court of Appeal failed to consider Mann’s emphasis on legislative jurisdiction (regulatory authority) and the author’s argument that personal jurisdiction over the defendant should not be a sufficient requirement to establish jurisdiction to grant the injunction. The English court did not have jurisdiction over the assets located abroad. It is difficult to understand how the Court of Appeal concluded that mere presence of assets in England was a valid basis for establishing jurisdiction to grant a *worldwide* freezing injunction in support of foreign proceedings. A possible way to rationalise the decision in *Motorola (No 2)* to grant a worldwide freezing injunction against D1 is to openly accept the inconsistency with the international systemic perspective on the rules of jurisdiction and confine such an order to a narrow category of circumstances involving international fraud. To use the author’s terminology developed in chapter 18 of this thesis, we can explain the reasoning as an application of a ‘functional theory of jurisdiction’.⁶¹⁹ The court was very keen to accept the existence of English assets as providing a sufficient connection in order to further the underlying substantive policy – combating and deterring sophisticated, large-scale international fraud. Nevertheless, it is still difficult to understand why the order was extended to assets located abroad rather than limited to assets located in England. The explanation could be that, just like in *Duvalier*, the court wanted to find a way to grant a worldwide disclosure order – this was probably the ultimate aim of the claimants too. In other words, the application for a worldwide freezing injunction provided a

⁶¹⁷ 527 US 308 (1999).

⁶¹⁸ See *Derby & Co v Weldon (Nos 3 and 4)* [1990] 1 Ch 65, 81B-C, per Lord Donaldson M.R.

⁶¹⁹ On functional theories of jurisdiction and their relationship with freezing injunction see chapter 18 below.

foundation for the claimant's application for an ancillary worldwide disclosure order. The author does not seek to question the potential benefit of a worldwide disclosure order. However, if that was the most important reason for the court's decision then an appropriate solution is to make changes to the ability of the courts to grant disclosure orders by allowing them to grant free-standing worldwide disclosure orders. Further support for the author's view that free-standing disclosure orders would be helpful is found in the judgment of Males J in *Cruz City 1 Mauritius Holdings* where he discussed, *obiter*, the factors that would affect the court's exercise of discretion:

"[B]ut one of the claimant's problems is that it does not know where the *Chabra* defendants have their assets...They have not revealed where such assets are located, save to say that they have no assets within the jurisdiction of this court. In those circumstances their submission that the claimant should apply for interim relief in the places where the *Chabra* defendants' assets are to be found is difficult to accept. On the other hand, it would be possible for the claimant to apply in the jurisdictions where the *Chabra* defendants are incorporated, but that would require separate applications in India, Cyprus and the Isle of Man and would therefore result in, rather than avoid, duplicative proceedings. I recognise that the grant of a freezing order here might lead to further proceedings in the jurisdiction or jurisdictions where the *Chabra* defendants' assets are located once that information is known and that ultimately that is where any enforcement against those assets would have to take place, but it seems more efficient for the question whether the claimant is entitled to a freezing order and disclosure order in accordance with the *Chabra* principles to be determined in a single proceeding here rather than in separate proceedings in three different jurisdictions where the *Chabra* defendants are incorporated."⁶²⁰

With respect, the problem with such reasoning is that it is difficult to see the justification for a worldwide freezing order in addition to a worldwide disclosure order. The author does not dispute Males J's justification for a worldwide disclosure order. Males J acknowledged that there would have been a need for separate enforcement proceedings in other jurisdictions where the assets were located. So how would a worldwide freezing order (as opposed to a free-standing worldwide disclosure order) promote efficiency? In the author's view, instead of asking whether it is "*more efficient* for the question whether the claimant is entitled to a freezing order...to be determined in a single proceeding",⁶²¹ the courts should be concerned with a preliminary question of whether such a question is for the English court to decide at all – whether the English court has regulatory authority to apply the English rules on freezing injunctions? This preliminary issue should not be answered by reference to procedural efficiency because that would create a risk of interference with foreign procedural rules and unfairness to defendants.

In fraud cases, the courts are bending over backwards to find that the order is expedient in accordance with section 25(2) of the 1982 Act and that there is a sufficient connection for jurisdictional purposes. Briggs has commented in a similar manner that:

⁶²⁰ [2014] EWHC 3704 (Comm), [89].

⁶²¹ *Ibid*, emphasis added.

“Taken all together, the decision [in *Motorola v Uzan (No 2)*] demonstrates that expediency is a complex and subtle concept which allows a court to highlight certain aspects of it to reach a decision with which it feels comfortable.”⁶²²

The courts have expressly acknowledged the need to make the most of their wide and flexible discretion in international fraud cases with Neuberger J (as he then was) in *Ryan v Friction Dynamics*⁶²³ asserting that factors such as comity and the need to stop international fraud mean that the court should not be timid about granting an injunction under section 25, if satisfied that good grounds exist.⁶²⁴

It is evident from decisions such as *Motorola (No 2)* that the nature of the facts (i.e. the conduct of defendants) in such cases have lead the courts to see justice in granting a worldwide freezing injunction even though they were aware that a strict application of the principles of private international law would lead to a different decision. It is difficult to find support in jurisdictional theory for the Court of Appeal’s view that there was sufficient connection with England to grant a worldwide freezing order against D1.⁶²⁵ It is not possible to find any authority in support of establishing jurisdiction in relation to assets located abroad on the basis of the court’s ability to enforce the order against local assets in the event of contempt of court.

In the author’s view, we cannot ignore the interests of foreign states (as required by the international purpose of the rules of jurisdiction) in some cases and respect it in others. The equitable characteristics of a freezing order cannot allow us to flexibly interpret the rules on the existence of jurisdiction. Such equitable characteristics are part of national private law and accordingly should only play a role at the discretionary stage once the court has already established the existence of jurisdiction. As we have seen, the existence of jurisdiction to grant a freezing injunction is purely a question of international law.⁶²⁶ In accordance with Keyes’ thesis on jurisdiction, even the private element of private international law rules requires us to consider the position of all stakeholders – the claimant, the defendant and any third parties. Contrary to this, it appears that the Court of Appeal in *Motorola (No 2)* was only focused on finding a creative way to help the claimant.⁶²⁷

15.3.5 The impact of the foreign court’s decision to grant the equivalent of a worldwide freezing injunction on the international scope of English freezing injunctions

The author’s argument that the current jurisdictional preconditions are inconsistent with the international systemic perspective and the principle of equipage equality is reinforced by the potential for overlapping freezing orders. What if the court is aware of a pre-existing order of another court? The position was clarified in *Ryan v Friction Dynamics*,⁶²⁸ a case which demonstrated that an English court is not prevented from granting an overlapping order, at least in relation to

⁶²² Briggs A., *Civil Jurisdiction and Judgments* (Informa Law, 6th edn, 2015), 6.17, pp.616-617.

⁶²³ [2001] CP Rep 75.

⁶²⁴ For a more detailed analysis of *Ryan v Friction Dynamics* see below.

⁶²⁵ For similar criticism of the decision in *Motorola v Uzan (No 2)*, see Fentiman R., ‘The Scope of Transnational Injunctions’ (2013) 11 NZJPI 323.

⁶²⁶ See chapter 13 above.

⁶²⁷ For further criticism of the English courts’ view that they are providing assistance to the foreign court see Briggs A., *Private International Law in English Courts* (OUP, 2014), 5.81.

⁶²⁸ [2001] CP Rep 75.

English assets and/or defendants resident and domiciled within the jurisdiction. To reduce the acknowledged risk of double jeopardy for defendants and the opportunity for forum shopping by claimants, Neuberger J suggested that an overlapping English freezing order should include provisions to clarify which particular court would have the primary role of enforcing the overlapping order. The court did express concerns about the increased cost and court time resulting from overlapping applications for freezing orders. However, it seems that the court put aside these concerns, possibly due to the proprietary basis of the claim (and the value of the claim), and it was keen to assist the claimants to reinforce the existing US order. The burden was on the claimants to show that an overlapping freezing order from the English court would confer some extra justifiable and valuable benefit. On that issue, the claimants could only point out that third parties (such as banks holding the defendants' assets within the jurisdiction) would be more amenable to complying with a domestic order. The English courts are aware of the potential use of freezing orders as a "powerful weapon of oppression", even if the underlying claim is on a proprietary basis.⁶²⁹ Neuberger J emphasised that there is a strong case for discouraging multiple applications for overlapping freezing orders against the same defendants in respect of the same assets in different jurisdictions. He cited the words of Dillon LJ in *Re BCCI SA (No 9)*⁶³⁰ that a freezing order from the English court should not be "enforced oppressively by a multiplicity of applications in different countries throughout the world".⁶³¹ Indeed it was recognised that there is a risk in cases involving overlapping orders that a defendant may be in breach of one order or the other.

Having analysed some of the case law on an individual basis, the author will now reflect on the international scope of collateral freezing injunctions in general. The main concerns will be highlighted.

15.4 The author's reflections on the purpose of freezing orders in support of foreign proceedings

In the author's submission, the specific purpose of freezing injunctions *in support of foreign proceedings* should be seen as ensuring that a recalcitrant defendant cannot take pre-emptive steps to render himself immune from future enforcement proceedings in those jurisdictions where his assets are located.⁶³² Such an injunction (if confined to assets located in England) is necessary to strike a fair balance of rights between the parties and ensure equipage equality at the international level because orders from the foreign court should not interfere, even indirectly, with the English court's jurisdiction over assets located in England. In summary, the author submits that the English courts should recognise that freezing injunctions in support of foreign proceedings are necessary, logical, and justifiable *only in respect of assets located in England*. Their extension to assets located abroad is difficult to justify.⁶³³ It has already been shown in the previous chapter that, due to their quasi-proprietary nature, freezing orders in respect of assets located abroad constitute an illegitimate interference with contractual and property rights of the defendant, even in the

⁶²⁹ *Grupo Mexicano v Alliance Bond Fund* 119 Supreme Court 1961 (1999), cited by Neuberger J in *Ryan v Friction Dynamics* [2001] CP Rep 75.

⁶³⁰ *In Re Bank of Credit & Commerce International SA (No.9)* [1994] 1 WLR 708.

⁶³¹ *Ibid*, 713. However, see the author's discussion in chapter 14, section 14.3, and especially the analysis of Males J's decision in *Arcadia Energy (Suisse) SA et al v Attock Oil International Ltd et al* [2015] EWHC 3700 (Comm).

⁶³² See also the discussion in section 7.4 in part I of this thesis.

⁶³³ Possible counter-arguments will be considered in chapter 18 which deals with the functional approach to jurisdiction.

circumstances where the English court has personal jurisdiction over the defendant. The cases on foreign proceedings provide a clear illustration of how the international scope of freezing injunctions is inconsistent with defendants' legitimate expectations.

15.5 The risk of wrongfully granted injunctions and the unfairness to defendants

15.5.1 Wrongfully granted injunctions due to the lack of a separate jurisdictional basis for freezing injunctions

This section will demonstrate that the current jurisdictional preconditions undermine equipage equality due to the lack of a separate jurisdictional basis for freezing injunctions. The failure of the English courts to distinguish between jurisdiction to hear the substantive claim and jurisdiction to grant a freezing injunction leads to an increased risk of wrongfully granted injunctions. Several cases will be used to illustrate this problem.

All of the above judgments on freezing injunctions in support of foreign proceedings, including those where the relief was ultimately refused, were the end product of applications by defendants to discharge pre-judgment injunctions which had been granted *ex parte*. For example, in *Refco*, the injunction was granted *ex parte* on 19 December 1997. Despite his finding that the English court should not express its view on the merits of the application for interim relief, on 4 March 1998 Rix J maintained the injunction on a holding basis to allow the claimants to submit the question to the Illinois court. Then on 3 June 1998, at which stage it was clear that the application to the Illinois court would be bound to fail, Rix J continued the injunctive relief pending the determination by the Court of Appeal of the application for leave to appeal. It was not until 17 June 1998 (more than six months since the *ex parte* order had been granted) that it finally became clear that the English court had no power to grant the order.

The benefit of placing applications for freezing orders on a separate jurisdictional basis and establishing exclusive jurisdiction to grant such orders would be twofold. First, it would reduce the incentive for claimants to make tactically-motivated, unmeritorious *ex parte* applications. Second, it would reduce the unfairness to defendants caused by wrongfully granted injunctions in situations where the court grants the *ex parte* order but it later emerges that there was no personal jurisdiction over the defendant. Let us take a look at some examples from high-profile commercial cases where different findings on jurisdiction have affected the freezing injunction and thereby caused unfairness to defendants. In *VTB Capital v Nutritek*,⁶³⁴ the worldwide freezing order which had been granted *ex parte* was maintained by the Commercial Court despite its ruling that there was no jurisdiction over the defendant. Uncertainty over whether the English court should exercise its jurisdiction had to be resolved by the Supreme Court. It was not until the Supreme Court's ruling that the injunction was discharged. In the Supreme Court, Lord Neuberger observed that:

"In the light of this court's dismissal, by a majority, of the appeal in relation to forum, it can now be seen that Mr Malofeev has continued to be subject to a worldwide freezing order for some 14 months beyond the time when it was proper for such an order to have continued. For in November 2011 Arnold J rightly decided that the proceedings should take place in Russia; and the freezing order should then

⁶³⁴ [2013] UKSC 5.

have expired. It was extended only because of the pendency of two successive appeals which can now be seen both to have failed. Such a state of affairs is bad enough...The degree of economic inhibition caused to a person in the position of Mr Malofeev by a worldwide freezing order made in England remains to be seen. At first sight, however, he is entitled to complain that it was an oppressive restraint on his economic activities.”⁶³⁵

But is there really a straightforward route to complain about the oppressive restraint on the defendant’s economic activities? The author submits that the answer is negative due to the possibility of complicated, lengthy, and costly litigation about recoverable losses under the cross-undertaking in damages.⁶³⁶

Alliance Bank JSC v Aquanta Corporation et al,⁶³⁷ a case involving allegations of fraud against the former directors of a Kazakh bank, could be seen as a relatively recent example of an unmeritorious *ex parte* application for a worldwide freezing injunction. In the usual, almost automatic manner, the Commercial Court, on the *ex parte* application, had granted both the worldwide freezing order and permission to serve the claim form out of the jurisdiction on the defendants.⁶³⁸ In the Court of Appeal, more than one year after the *ex parte* application, Tomlinson LJ explained that:

“[the] dispute has very little if any real connection with this jurisdiction. None of the alleged torts was committed here, none of the agreements was made here and none of the loss was suffered here. None of the parties was domiciled or resident here. In reality the only connection is that some of the instruments used in order to further the fraud were expressly governed by English law. That is however incidental to the real essence of the dispute, which concerns alleged dishonesty on a grand scale by the officers of a bank in Kazakhstan.”⁶³⁹

It is clear from this paragraph alone that the worldwide freezing order had been wrongfully granted by the Commercial Court. As counsel for one of the defendants suggested, the claimant bank’s principal reason for the English proceedings was to obtain the worldwide freezing order.⁶⁴⁰ Similar relief was not available from the Kazakh court.⁶⁴¹ If the bold proposal in this thesis were to be adopted, the risk of wrongfully granted freezing injunctions would be reduced: on the *ex parte* application, the Commercial Court would consider the question of jurisdiction to grant the injunction in a straightforward manner. This would involve one question: are there any assets located in England? Section 25 of the 1982 should not be applicable at all to applications in respect of assets located abroad. If in the majority of cases, even on a typical Friday afternoon in the Commercial Court, this would be a simple exercise with a low risk of a different finding on jurisdiction at the *inter parte* stage or on appeal.

⁶³⁵ Ibid, [160].

⁶³⁶ See chapter 9 of this thesis for the author’s criticisms relating to the current state of the law on the cross-undertaking in damages.

⁶³⁷ [2012] EWCA Civ 1588.

⁶³⁸ The third defendant was amenable to service within the jurisdiction.

⁶³⁹ Ibid, [118].

⁶⁴⁰ Ibid, [102].

⁶⁴¹ Ibid.

15.5.2 Wrongfully granted freezing injunctions due to the courts' conflation of substantive and jurisdictional preconditions

The author's argument that we need to distinguish between compliance with the substantive preconditions on the one hand, and the jurisdictional preconditions for a freezing injunction on the other, is supported by some parts of Flaux J's judgment in *Belletti v Morici*.⁶⁴² In that case a worldwide freezing order was sought against the parents of the first defendant because of their alleged assistance in hiding the first defendant's assets. The order had been granted *ex parte* by Andrew Smith J but it was set aside by Flaux J whose conclusion was that it was inexpedient to grant the order. There was no evidence of any connection between the parents and England. The parents were domiciled in Italy and there were no assets under their control which were situated in England. With respect, it is difficult to see how Andrew Smith J found the jurisdictional basis for granting the order and this underlines the author's argument that we need clear cut rules to protect defendants from claimant-friendly and knee-jerk decisions at the *ex parte* stage. Clear cut rules on the lines proposed by the author (in part III of this thesis) would also reduce unnecessary costs for both parties and reduce the volume of applications reaching the appellate courts. A key element of a clear framework for freezing orders is to eradicate the tendency to mix up the substantive preconditions and the English court's jurisdiction to grant the order. As Flaux J explained:

"Where the English court had territorial jurisdiction over the parents, it would clearly be appropriate to grant such an ancillary order, but as I see it the appropriateness of the order cannot in itself justify the exercise of extra-territorial jurisdiction, where there would otherwise be no jurisdiction over the parents. Where the relevant defendants have no connection with the jurisdiction and the relevant assets are not located here, it will rarely if ever be appropriate or expedient for the court to assume jurisdiction under section 25 of the 1982 Act."⁶⁴³

15.6 The potential to obtain a freezing injunction in cases involving no connection with England: "rare" or "exceptional circumstances"

The last sentence of the above passage from *Belletti* leads to the following question: precisely what sort of rare circumstances did Flaux J have in mind? When exactly would it be appropriate (from the viewpoint of the English courts) to grant a freezing injunction against a defendant who has no connection with England and whose assets are located abroad? This particular issue was elaborated to a limited extent in *ICICI Bank UK v Diminco NV*,⁶⁴⁴ a case where an English bank sought a worldwide freezing order and an ancillary worldwide disclosure order in support of Belgian proceedings. The former was granted *inter partes* by Eder J but Popplewell J set aside the order despite the existence of four bank accounts in London belonging to the defendant (a diamond distributor) which used to contain substantial funds. As the defendant was not subject to the *in personam* jurisdiction of the English court and the court was not in a position to enforce an order for disclosure, it was inexpedient to grant both the worldwide freezing order and the ancillary worldwide disclosure order. The claimant put forward an argument that a disclosure order is "less

⁶⁴² [2009] EWHC 2316 (Comm).

⁶⁴³ *Ibid*, [54].

⁶⁴⁴ [2014] EWHC 3124 (Comm).

intrusive and less draconian than a freezing order”⁶⁴⁵ but Popplewell J rejected it on the basis of its ancillary nature and the lack of a greater connecting link in comparison to freezing assets located in England. It is notable that in *Diminco*, Popplewell J’s summary of the principles applicable to applications under section 25 of the 1982 Act confirms that there are “exceptional circumstances” in which the English courts are prepared to grant a freezing order extending to assets located abroad even though the defendant is not subject to their *in personam* jurisdiction.⁶⁴⁶ Popplewell J identified at least three requirements that the claimant would need to establish for an order to be granted in such exceptional circumstances. The first requirement is the real connecting link criterion in the *Van Uden* sense. Second, that “the case is one where it is appropriate within the limits of comity for the English court to act as an international policeman in relation to assets abroad; and that will not be appropriate unless it is practical for an order to be made and unless the order can be enforced in practice if it is disobeyed”. Third, the five discretionary factors identified by Potter LJ in *Motorola (No 2)* would need to be satisfied. With respect, the author’s view is that such an explanation of the principles leaves questions unanswered. For example, what are the “limits of comity” within which the English court can act as an international policeman? To what extent is there an overlap between the second and third requirements? With regards to his first requirement, is Popplewell J suggesting that the *Van Uden* test is applicable even outside the scope of the relevant European framework? If so, when and how would the *Van Uden* test be satisfied in respect of assets located abroad in a situation where the defendant is not subject to the *in personam* jurisdiction of the English courts? It is unlikely, given his reliance on *Banco Nacional v Empresa* in the same paragraph of the judgment, that Popplewell J was suggesting that the presence of assets in England would constitute “a real connecting link” with any assets located abroad and enable the court to extend the injunction to assets located abroad.⁶⁴⁷ Given the express acknowledgement of the court of the need for “exceptional circumstances” where an order is granted in respect of assets located abroad against a defendant who is not subject to its *in personam* jurisdiction, it is to some extent surprising that clearer ‘rules’ (or guidelines) have not been laid down about what amounts to “exceptional circumstances”.

The exceptional circumstances requirement is even more confusing when one looks back at the judgment of the Commercial Court in *Royal Bank of Scotland v FAL Oil*. The English court did not have jurisdiction over the substantive claim and there were no assets within the territorial jurisdiction of the English court.⁶⁴⁸ Nevertheless, a worldwide freezing order was continued. Applying Popplewell J’s principles set out in *Diminco*, in the author’s view, the only possible category for *FAL Oil* is that it represents a case where there were exceptional circumstances. However, it is difficult to see what exactly was exceptional in *FAL Oil* and the circumstances were not described as being exceptional by the court. Walker J in *Mobil Cerro Negro* appeared to suggest that allegations of fraud may constitute exceptional circumstances and justify a worldwide freezing order despite the

⁶⁴⁵ Ibid, [32].

⁶⁴⁶ Ibid, [27].

⁶⁴⁷ As Popplewell J’s intention was to summarise the principles from the existing case law, this author believes that his Lordship probably had in mind Gloster J’s statement about the need for a real connecting link in *Royal Bank of Scotland v FAL Oil Company Ltd* [2012] EWHC 3628 (Comm), [37]. If that is correct, it appears that the real connecting link test may be satisfied if a defendant has “acquired substantive English law rights” ([2012] EWHC 3628, [43]).

⁶⁴⁸ This was an application for a worldwide freezing injunction in support of substantive proceedings in the United Arab Emirates.

absence of any significant connection to England. The problem is that in *FAL Oil* there were no allegations of fraud and, in the author's view, given the similarities with the facts of *Mobil Cerro Negro*, the injunction should have been discharged due to the lack of sufficient connection with the forum. The court primarily placed reliance on what could be described as 'legal connections' between the defendants and the forum and in particular the English governing law and exclusive jurisdiction clauses in the loan agreements.⁶⁴⁹ The author submits that these legal connections would have been directly relevant to establishing jurisdiction in respect of the substantive claim but that was not the legal issue before the court. The actual question was whether the court had jurisdiction to grant a worldwide freezing injunction. The author submits that the connections relied upon were peripheral to the subject matter of the freezing injunction (the defendants' assets). The conclusion should have been that the court had no jurisdiction over the defendant's assets located abroad. There was no attempt to draw upon the reasoning in *The Mahakam* even though the same judge had delivered the judgment in that case. This reinforces the author's argument that the exercise of discretion in *FAL Oil* could not be regarded as a principled exercise of discretion and that the judgment contributes to the uncertainty surrounding the discretionary stage. The decision may have been influenced by the fact that it was not possible for the claimants to obtain a worldwide disclosure order from the UAE courts.

It should be noted that the summary of the principles in *Diminco* partially lends support to the author's emphasis in this thesis on the importance of assets covered by the freezing order – Popplewell J made it clear that, irrespective of whether the court has *in personam* jurisdiction over the defendant, the English court would be the "appropriate" court to grant "a domestic freezing order" where there is reason to believe that the defendant has assets in England.⁶⁵⁰ This is consistent with the author's argument that equipage equality at the international level would be impossible to achieve unless freezing injunctions are available in such circumstances.⁶⁵¹

15.7 Is there any recent evidence of a more restrictive approach to the international scope of collateral freezing injunctions?

In our overview of the case law on worldwide freezing injunctions in support of English proceedings in chapter 12, there was limited evidence of a more restrictive approach to the international scope of the relief. Are there any similar signs of a more restrictive approach in the context of injunctions in support of foreign proceedings? Once again there are very limited examples of such cases. The reasoning in *Credit Suisse* was relied upon in *Yossifoff v Donnerstein*⁶⁵² to reach the conclusion that a proprietary freezing injunction should not be granted by the English court because it was not best able to make its orders effective: on the facts, the actions sought be restrained concerned "a person resident in Israel in relation to shares located in Israel".⁶⁵³ The court added that a decision whether or not to restrain such actions would require a detailed understanding of the proposed refinancing of the shares in question – something that the Israeli court was best placed to deal with.

⁶⁴⁹ The court also placed reliance on the fact that the defendants "held themselves out as having operational presence in England", adding that "this emphasises the real connection between the Defendants and [England]": [2012] EWHC 3628, [45] per Gloster J.

⁶⁵⁰ *Ibid.*

⁶⁵¹ See in Part I of this thesis the section entitled "Equipage equality at the international level".

⁶⁵² [2015] EWHC 3357 (Ch).

⁶⁵³ *Ibid.*, [56].

A further example of a cautious approach and a judgment which recognises the need to separate the question of existence of jurisdiction from the question of enforceability of the injunction is that of Walker J in *Mobil Cerro Negro v PDV*.⁶⁵⁴ As Walker J explained:

“I do not accept that the true nature of the focus on a need for some connection with England and Wales, in cases under s. 25, is merely the desirability that the court should have some means of enforcing its order, especially in circumstances where the court knew that those subject to that order would disobey it. That desirability may well be highly relevant or even determinative. It is not, however, the same thing as consideration of the extent to which it is appropriate for this court to make an order affecting assets not located here.”⁶⁵⁵

While Walker J made several references to “considerations of comity”, it appears that he did not provide a clear explanation of their content and how such considerations have an effect on the court’s exercise of discretion. The explanation could lie in his emphasis on the requirement of a “sufficiently strong link” with England in the absence of exceptional circumstances such as fraud. A possible interpretation is therefore that he equated comity with the requirement of sufficient connection. Walker J expressly pointed out that the court *cannot* proceed on the assumption that “presence of the respondent here will necessarily be sufficient to warrant the exercise of discretion in favour of an applicant — although...it may weigh in favour of granting relief”.⁶⁵⁶ The cautious approach of Walker J should be applauded and his careful separation of jurisdictional and enforcement issues should help to prevent the potential to rely on the injunction’s enforceability in England to obtain an unprincipled extension of the territorial scope of English freezing injunctions. The outcome in *Mobil* is undoubtedly correct. Nevertheless, the reasoning is still far from the ideal and inconsistent with the arguments advanced in this thesis. The most significant question – whether the English rules on freezing injunctions were applicable at all – should not be left to the discretionary stage.⁶⁵⁷ If the English court had first addressed the question of its regulatory authority in relation to assets located abroad, it would not have been necessary to spend any time dealing with the arguments about the test of expediency. In the author’s view, given the complete absence of connection between the defendant’s assets and England, it was unacceptable for *Mobil* to obtain the *ex parte* injunction in the first place. The English court did not have jurisdiction over the defendant’s assets located abroad and therefore the question of discretion (i.e. whether to exercise jurisdiction) was not applicable at all on the facts of the case.

15.8 The potential impact of developments in relation to other types of injunctive relief on the international scope of freezing injunctions

15.8.1 Developments with a negative impact on the author’s argument that personal jurisdiction should be insufficient to establish jurisdiction to grant the injunction

⁶⁵⁴ *Mobil Cerro Negro Ltd v Petroleos de Venezuela SA* [2008] EWHC 532 (Comm). For comments on this case see especially Johnson A., ‘Interim Injunctions and International Jurisdiction’ (2008) 27 CJQ 433.

⁶⁵⁵ [2008] EWHC 532 (Comm).

⁶⁵⁶ *Ibid.*

⁶⁵⁷ For the author’s detailed analysis of the proper role of discretion, see part III of this thesis. In broad terms, the author’s proposals for reform of this area of the law envisage a very limited role for discretion. If there is no jurisdiction over the defendant’s assets (i.e. if the assets are not located in England), then the discretionary stage should not arise at all.

It should be noted that some developments in related areas of injunctive relief (specifically in the field of anti-enforcement injunctions) do not show any signs of the English courts recognising that the question of personal jurisdiction over defendant for the purposes of the substantive claim is distinct from the issue of jurisdiction to grant an injunction. The *in personam* operation of injunctions was relied upon by the Court of Appeal in *Bank St Petersburg v Arkhangelsky*⁶⁵⁸ to justify the ability of the English courts to grant a worldwide anti-enforcement injunction. At first instance Hildyard J took the view that such an injunction would constitute an unwarranted interference with the sovereignty of the foreign courts “even by the indirect process of a personal jurisdiction”.⁶⁵⁹ One of the factors which led to that conclusion was the fact that the Bulgarian courts had already recognised the Russian judgments prior to the application for the anti-enforcement injunction before the English court and granted a freezing injunction in respect of the Bulgarian assets.⁶⁶⁰ The applicants were actively participating in the Bulgarian proceedings at the time of Hildyard J’s decision. Consequently, Hildyard J considered that it would be inappropriate to indirectly “undo” the process in the Bulgarian courts by way of an injunction. By contrast, the Court of Appeal disagreed and reversed the decision of Hildyard J observing that “[i]t is the Bank and Mr Savelyev who will be required (temporarily) to cease continuation of enforcement proceedings and not to initiate new ones. That is an order that affects them, not the foreign courts.” The Court of Appeal ignored the argument about indirect interference with the jurisdiction of the foreign courts and the fact that Hildyard J had specifically recognised that the anti-enforcement was “personal in theory”.⁶⁶¹

15.8.2 Special treatment of fraud cases – lessons from other types of relief

A recent case on the availability of *Norwich Pharmacal* relief could be seen as a useful reminder of the importance of resisting temptations to relax the rules of jurisdiction in the context of allegations of fraud.⁶⁶² *Norwich Pharmacal* orders may initially be granted *ex parte* in cases involving a person “mixed up” in fraud and they are based on a duty on such a person to assist the person wronged by giving him information which would assist him in righting the wrong. Despite the importance of the relief in tackling international fraud, the court was not willing to take a liberal view of the requirements for service out of the jurisdiction. Instead, the court acted cautiously by not granting any measures which would be inconsistent with the bank’s obligations under local law. The expert evidence of foreign law played an important role as it demonstrated that compliance with the *Norwich Pharmacal* order would have constituted a breach of UAE penal law.⁶⁶³ The case provides further support for the argument that the liberal approach to jurisdiction taken by the Court of Appeal in cases such as *Motorola (No 2)* is unacceptable: allegations of fraud should not provide a ‘cart blanche’ for any orders which are enforceable within the jurisdiction. The English courts still need to avoid any orders inconsistent with the interests of foreign states and a party’s obligations under local law.

15.9 A short summary of the case law on injunctions collateral to foreign proceedings

⁶⁵⁸ [2014] EWCA 593.

⁶⁵⁹ [2013] EWHC 3529 (Ch), [81].

⁶⁶⁰ *Ibid.*

⁶⁶¹ *Ibid.*, [79].

⁶⁶² *Ab Bank Ltd Off-Shore Banking Unit (OBU) v Abu Dhabi Commercial Bank PJSC* [2016] EWHC 2082 (Comm).

⁶⁶³ *Ibid.*, [23].

A *domestic* freezing injunction (i.e. an injunction limited to assets located in England) in support of foreign proceedings is not problematic. If the courts were to restrict collateral freezing injunctions to assets located in England and adopt the author's call for free-standing worldwide disclosure orders,⁶⁶⁴ claimants would remain protected. The current factors taken into consideration in relation to the exercise of discretion under section 25 of the 1982 Act are largely driven by functional considerations including in particular the claimant's need to extract information about the extent and location of the defendant's assets located abroad (as evident from *Duvalier* and *Motorola (No 2)*).⁶⁶⁵ The courts seem to be keen to provide assistance to claimants to overcome what could be described as 'gaps' in, or obstacles to, the availability of protection in other legal systems (as evident from *Credit Suisse*) but there is insufficient consideration of potential unfairness to defendants and the interests of foreign states. The courts should recognise the role of equipage equality as the theoretical foundation for freezing injunctions instead of promoting a narrow view of freezing injunctions as a weapon against unscrupulous defendants. Although the guidance from the Court of Appeal in *Motorola (No 2)* suggests that any conflict with the orders of the foreign courts needs to be taken into account when considering whether to exercise jurisdiction, this author has argued that such an attempt to cure the problems associated with encroachment is 'too little and too late' to protect defendants and the interests of foreign states. It is insufficient to remove the tactical incentives for financially-strong claimants to make speculative *ex parte* applications to harass the defendant, and it does not prevent from the outset the indirect interference with the regulatory authority of foreign states in this field. A variety of proposals for reform to deal with the existing problems in this area will be made in the next part of this thesis.

⁶⁶⁴ On the need for free-standing disclosure orders see above chapter 8, section 8.2.5.

⁶⁶⁵ For the analysis of the so called 'functional' theories of jurisdiction and their relationship with freezing injunctions see chapter 18.

PART III: Proposals for restricting the international scope of freezing injunctions

In the next two chapters we will attempt to answer the questions which arise from the criticism of the current jurisdictional preconditions for freezing injunctions. What changes should be made to the jurisdictional preconditions of freezing injunctions in order to effectively fulfil the international function of the rules of jurisdiction? By what means and on what basis should we allocate regulatory authority in this field of law? This would depend on the criteria we use to judge whether there is a just allocation of regulatory authority. Such criteria may vary between different legal systems with the unfortunate effect that it is impossible to completely eliminate the conflict of procedural rules. However, states are free to achieve agreement on the relevant criteria and encapsulate the agreement in an international instrument. The author's 'bold proposal' for an international agreement will be discussed in the next chapter. While that would be the ideal solution in this field of law, the author will also propose some modest solutions which only require the implementation of changes at the domestic level. The modest solutions will be discussed in chapter 17. A prerequisite for any solution is a rejection of the sharp distinction between public and private international law. The effect of that rejection would be to eliminate the assumption that, in cases involving English substantive proceedings, section 37 of the Senior Courts Act 1981 provides unlimited jurisdiction to grant a freezing injunction irrespective of the location of the assets. The counter-arguments to the author's proposals based on functional theories of jurisdiction will be considered in chapter 18.

Chapter 16: The author's bold solution: an international instrument and the need for exclusive jurisdiction

16.1 The need for exclusive jurisdiction in the field of freezing injunctions

Consistently with the author's theoretical position, the ideal means for allocating jurisdiction to grant a freezing injunction would be an international instrument. As for the basis for allocating jurisdiction, only one country's courts should have adjudicatory jurisdiction and regulatory authority to determine an application for a freezing injunction *in respect of one set of assets*. In other words, the author submits that adjudicatory jurisdiction and regulatory authority in the field of freezing injunctions needs to be exclusive. In the hypothetical case from the introduction to this thesis,⁶⁶⁶ only one court should have had exclusive jurisdiction to grant relief in respect of the New York bank account. By allocating jurisdiction on an exclusive basis, the scope of each country's procedural rules concerning freezing injunctions or similar relief would be equal. There would be no possibility for overlapping assertions of jurisdiction to grant injunctive relief and therefore no possibility of conflict of procedural laws. It would eliminate the possibility of encroachment upon another country's sovereignty. Further support for the author's proposal is found in the reasoning of the United States Supreme Court in *Grupo Mexicano de Desarrollo S.A. v Alliance Bond Fund Inc*⁶⁶⁷ and the Court of Appeals of New York in *Credit Agricole v Rossiyskiy Kredit Bank*.⁶⁶⁸ Both courts were adamant in rejecting the argument that the current English approach (the availability of worldwide freezing injunctions) should be adopted in the United States. The courts made observations about "the

⁶⁶⁶ See Chapter 1, section 1.6 of this thesis.

⁶⁶⁷ 527 US 308 (1999).

⁶⁶⁸ 729 N.E.2d 683 (N.Y. 2000).

profound effects that the availability of world-wide *Mareva* injunctions would have on world-wide commerce” and explained that “the wide-spread use of [worldwide freezing injunctions] would drastically unbalance existing creditors’ and debtors’ rights...and substantially interfere with the sovereignty and debtor/creditor/bankruptcy laws of, and the rights of interested domiciliaries in, foreign countries.”⁶⁶⁹ The author agrees with these observations. In the author’s view, the position taken in the United States provides a powerful argument in favour of restricting the current international scope of English freezing injunctions. This is especially because the United States is another common law jurisdiction where the judiciary is all too familiar with the flexibility of equity.

Exclusive jurisdiction would be beneficial for the English courts in that it would eliminate the risk of foreign courts interfering with the sovereignty of the English courts in this area of the law. There is evidence in a number of cases involving orders of the foreign court (outside the field of freezing injunctions) where the English courts have expressed concerns about the purported interference with sovereignty.⁶⁷⁰

For the above reasons, the bold solution would promote the functions of private international law rules under the international systemic perspective. It would be consistent with the need to take into account principles of public international law when constructing private international law rules in a specific area of the law. Under the bold solution, the limited international scope of these injunctions would also reflect the fact that a freezing injunction is an exception to the general rule on non-interference with the defendant’s property rights before judgment. The next question is which country’s courts should have exclusive jurisdiction when there are connections to more than one country?

16.2. The connecting factor for exclusive jurisdiction

Principles of public international law do not provide an instant answer as to the appropriate connecting factor. Under public international law, the preferable view is that there is no hierarchy of principles of jurisdiction.⁶⁷¹ Both territorial and personal connecting factors should be treated as equally valid justifications for the assertion of adjudicatory jurisdiction. Nevertheless, it is the author’s view that it is possible to identify, on an *a priori* basis, a single connecting factor for all applications for freezing injunctions that would ensure a fair and just allocation of adjudicatory jurisdiction and the regulatory authority to apply procedural rules on asset preservation. It is at this identification stage that we turn to the “private” element of private international law by looking at the characteristics of freezing injunctions and the interests of all the parties, including the holder of the assets.

⁶⁶⁹ 729 N.E.2d 683 (N.Y. 2000), 689 per Levine J.

⁶⁷⁰ See the following case law: *British Nylon Spinners Ltd v Imperial Chemical Industries Ltd* [1952] 2 All ER 780; *Rio Tinto Zinc Corporation et al v Westinghouse Electric Corporation* [1978] 1 All ER 434; *X AG et al v A bank* [1983] 2 All ER 464; *Libyan Arab Foreign Bank v Bankers Trust* [1989] 1 Q.B. 728.

⁶⁷¹ See Bianchi A., ‘Unity v. Fragmentation: The Customary Law of Jurisdiction in Contemporary International Law’ in Meessen K.M. (ed.) *Extraterritorial Jurisdiction in Theory and Practice* (Kluwer Law International, 1996), p.74 where he explains that there is a disagreement over this issue (for example, Oppenheim takes the view that priority should be given to the principle of territoriality).

The English courts have placed significance on the connection between the defendant and the forum because they see a freezing injunction as operating only against the person and not against the assets. The term “*in personam*” is not simply being used as a convenient label. The English courts are using it to give legitimacy to the existence of a power to grant relief in respect of assets governed by foreign law. However, this author has shown that the English courts should recognise the quasi-proprietary nature of freezing injunctions.⁶⁷² Moreover, the author has shown that the narrow perception of the function of a freezing injunction as a weapon against unscrupulous defendants ignores the principle of equipage equality.⁶⁷³ If we accept the quasi-proprietary nature of freezing injunctions and the important role of equipage equality, what should be the single connecting factor for adjudicatory jurisdiction (and in turn the application of the forum’s rules on asset preservation)? The author’s proposal is that exclusive jurisdiction should be given to the courts of the country where the assets are located. This rule of jurisdiction should apply in cases involving applications for freezing injunctions in support of English proceedings and in cases involving applications in support of foreign proceedings. This approach is consistent with the principles of territoriality and subsidiarity. The diversity of each country’s rules on asset preservation relief and their underlying values and policies would be protected, promoting justice pluralism.⁶⁷⁴ For this reason, such a framework would enhance international judicial co-operation.⁶⁷⁵ Overall, this solution would ensure a horizontal, multilateral, and international approach to the existence of jurisdiction in this field.

16.3 Some arguments in support of the author’s choice of a connecting factor

It is useful to note that the author’s proposed private international law framework for freezing injunctions would be consistent with the territorial scope of the related framework for property freezing orders in the criminal law context as evident from *Serious Organised Crime Agency v Perry*.⁶⁷⁶ In that case, the key issue before the Supreme Court was the international scope of the High Court’s powers under Part 5 of the Proceeds of Crime Act 2002 to grant property freezing orders. The majority of the Supreme Court’s interpretation of the 2002 Act was that the High Court did not have the power to grant “property freezing orders” or civil recovery orders in respect of property situated outside the United Kingdom. SOCA’s argument that the High Court had extraterritorial jurisdiction to grant property freezing orders was regarded by the majority as unprecedented and inconsistent with an international convention, namely the Strasbourg Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime. The consistency of the majority’s conclusions with the Strasbourg Convention illustrates the international community’s approach to property freezing orders. This could be regarded as another source of legal rules influencing the legitimate expectations of the parties in favour of a restricted framework for freezing orders, even in the commercial context: it is possible for commercial parties

⁶⁷² See chapter 14 of this thesis.

⁶⁷³ See chapter 7 of this thesis.

⁶⁷⁴ Thus, the proposed framework is different from the European Account Preservation Order which essentially involves harmonisation of the substantive preconditions for granting freezing injunctions: see Regulation (EU) No 655/2014 of the European Parliament and of the Council of 15 May 2014 establishing a European Account Preservation Order procedure to facilitate cross-border debt recovery in civil and commercial matters. See the discussion of this Regulation in section 16.5 of this chapter.

⁶⁷⁵ On international judicial co-operation, see Schlosser P., ‘Jurisdiction and International Judicial and Administrative Co-Operation’ (2000) 284 *Recueil des Cours*.

⁶⁷⁶ [2012] UKSC 35. The claimant will be referred to as ‘SOCA’.

to be influenced by their knowledge of the limited international scope of freezing orders in the field of criminal law.

Given the quasi-proprietary nature of a freezing injunction,⁶⁷⁷ it is also useful to draw further support for the author's proposal by making an analogy with governmental interference with contractual rights which is "only effective if its country's law coincides with the proper law of the contract, since it is that law which can alter the rights and obligations under the contract".⁶⁷⁸ A bank account is a contract usually governed by the law of the branch at which the account is held. This thesis adopts a strict view that a defendant's legitimate expectations are that interference with his contractual rights through freezing injunctions or equivalent relief could only be made by the courts of the country where the assets are located.⁶⁷⁹

The freezing injunction's links with procedural law must not distract us from taking lessons from the landscape of private international law rules relating to the substantive claims based on equitable obligations and equitable proprietary claims.⁶⁸⁰ Here there is a consensus among the courts and the academic commentators that the law of the forum should not automatically apply to equitable claims.⁶⁸¹ One commentator has made the following conclusion:

"It remains true that equity must act *in personam* on the conscience of the defendant, but a defendant is entitled and often obliged to adapt his behaviour to the rules of law of the country with which his dealings or relationship is most closely connected. Equity cannot properly enforce matters of conscience if it ignores a foreign law to which the parties were subject."⁶⁸²

For our purposes, the significance of these arguments in the context of freezing injunctions is that equity should not ignore the law of the country where the asset is located in respect of which the injunction is sought. In the specific context of an application for a freezing injunction, the law of the country where the assets are located is the one with which the defendant's dealings with such assets is arguably most closely connected. For example, when entering into a contract with a bank, a defendant company is usually obliged to adapt itself to certain rules of the country in which the branch is located (i.e. the governing law of the contract with the bank). Apart from being subject to obligations, the company should also be entitled to rely on the local rules (i.e. the rules of the country where the branch is located) for protection against any interference with the assets held by the branch; any interference should not be inconsistent with the local requirements for preservation of assets.

16.4 A limited discretionary stage

⁶⁷⁷ See chapter 14, section 14.3.

⁶⁷⁸ Rogerson P.J. (1990), p.459.

⁶⁷⁹ For possible counter-arguments to the author's proposals, see chapter 18 of this thesis.

⁶⁸⁰ See the author's criticism of the simplistic characterisation of freezing injunctions as procedural in chapter 13 of this thesis.

⁶⁸¹ See Panagopoulos G., 'Restitution in Private International Law', (Hart Publishing, 2000), pp.57-60 and the cases cited therein.

⁶⁸² White R.W., 'Equitable Obligations in Private International Law: The Choice of Law' (1986) Syd. L. Rev. 92, 112.

If we now assume that the author's bold proposal is adopted and the English court does have exclusive jurisdiction to grant a freezing injunction, should the court have any discretion to refuse to exercise its jurisdiction? If so what is the proper role of discretion in such circumstances? The author's view is that in order to create an equitable balance of rights between the parties, it is necessary for the court to have some (albeit very limited) discretion to refuse to grant the injunction. There are two main factors which the English court should consider at the discretionary stage.

First, it would be relevant for the court to take into account any applications by the claimant for asset preservation relief in any foreign courts. This would include applications for proprietary forms of relief (such as pre-judgment attachment under the law of New York). Where the claimant has already obtained some asset preservation relief abroad, it would be necessary to consider whether a freezing injunction from the English court would create undue pressure for the defendant. The courts would need to be alert to the possibility that the claimant's application to the English court may be designed for the sole purpose of harassing the defendant.

Second, it would be relevant to take into account any delay on the claimant's part in applying for a freezing injunction. The claimant should have an opportunity to provide a convincing explanation for any delay. Although, there is some existing case law on the issue of delay in interim injunctions,⁶⁸³ this is a fact-sensitive issue and therefore there is limited value in any attempt to derive some concrete guidance from the case law. It would not be helpful to create any rigid guidance on this discretionary issue.

16.5 Summary of the author's bold proposal

The author's bold proposal could be summarised as follows:

(1) An international instrument would provide that the courts of the country where the assets are located would have exclusive jurisdiction to grant a freezing injunction in respect of such assets. This means that the English courts would only have jurisdiction to grant a freezing injunction in respect of assets located in England.

(2) If this requirement is satisfied (i.e. if the English court does have exclusive jurisdiction), then the court would still have some limited discretion to refuse to exercise its jurisdiction. Two factors would have to be taken into consideration at this discretionary stage:

(a) Whether the claimant has already obtained any asset preservation relief from any foreign courts. If the answer is in the affirmative, the court needs to consider whether an injunction from the English court would create undue pressure on the defendant.

(b) Whether there is any unexplained delay on the claimant's part in applying for the injunction. If the answer is in the affirmative, this may reduce the likelihood of obtaining an injunction.

(3) If the above requirements are satisfied, the court would still need to consider whether the claimant has satisfied the substantive preconditions.⁶⁸⁴ These include the need to show a good

⁶⁸³ See, for some example in the context of other interim injunctions: *Raks Holdings AS v Ttpcom Ltd* [2004] EWHC 2137 (Ch); *AAH Pharmaceuticals Ltd et al v Pfizer Ltd & another* [2007] EWHC 565 (Ch).

⁶⁸⁴ For a detailed discussion of the substantive preconditions, see part I of this thesis.

arguable case on the merits and objective evidence of the defendant's intention to avoid enforcement (i.e. intention to dissipate the assets).

(4) A number of safeguards for the defendant would be required including inter alia a cross-undertaking in damages.⁶⁸⁵ Unless exceptional circumstances exist, the claimant would need to provide security for this cross-undertaking.

This bold proposal would be consistent with the need for equipage equality at the international level by protecting defendants from multiple applications for freezing injunctions in relation to the same assets. The benefit of using an international instrument, such as a Hague Convention, would be to ensure that every Convention state adopts the same connecting factor for the application of its rules on asset preservation relief. This proposal would have the benefit of preserving the diversity of the substantive preconditions for freezing injunctions in different jurisdictions. If we recognise that one of the purposes of private international law rules is global co-ordination of the application of national laws in such a way as to protect their equality, diversity and certain exclusive spheres of authority, no legal system should have jurisdiction to grant freezing injunctions in respect of assets located abroad. Every sovereign state should have the freedom to implement and apply its own regulatory framework for pre-judgment asset preservation without unwarranted interference from other states. Private international rules should ensure an equal distribution of that freedom. However, given the difficulties of reaching agreement on an international instrument, it is useful to look for a more modest solution to the excessive scope of freezing injunctions. What could be done at domestic level to bring English law in this field closer to the international systemic approach and ensure a more equitable balance of rights between the parties? Let us look at some of the options.

16.6 Some comparisons of the author's bold proposal with the European Account Preservation Order (EAPO)

The author's bold proposal for an international instrument is bolstered by the EU Regulation establishing the European Account Preservation Order (EAPO) procedure,⁶⁸⁶ illustrating, at the very least, some evidence of a desire for a co-ordinated approach at the international level. It will be demonstrated that the author's bold solution has a number of advantages in comparison to the EAPO Regulation and could therefore be said to better protect the interests of all parties.

The EAPO procedure enables the claimant to block the defendant's bank accounts in all participating Member States or, depending on national law, the banks may be able to transfer the defendant's assets to a designated account for preservation. The UK has chosen not to opt into the EAPO Regulation.⁶⁸⁷

The EAPO Regulation contains some significant gaps in relation to its scope. As the claimant must have a pecuniary claim, proprietary claims (the significance of which we have seen in part I of this

⁶⁸⁵ Ibid.

⁶⁸⁶ Regulation 655/2014 of the European Parliament and of the Council of 15 May 2014 establishing a European Account Preservation Order procedure to facilitate cross-border debt recovery in civil and commercial matters ("the EAPO Regulation"). The EAPO Regulation should not be confused as being a replacement for existing forms of relief available under national law of the participating states: the availability of an EAPO could be regarded as an alternative or a supplement to such relief.

⁶⁸⁷ It should be added that applicants for an EAPO must be domiciled in a participating Member State. This means that claimants domiciled in the UK will not be able to apply for this form of relief.

thesis) are not covered by the EAPO Regulation. By contrast, the author's bold solution is not restricted to pecuniary claims and therefore protects a wider number of potential claimants. Moreover, the EAPO Regulation is restricted to preservation of funds in bank accounts.

The existence of the EAPO Regulation could be seen as recognition by some states that negotiation and cooperation between states in this field is a more effective method to promote the interests of all stakeholders compared to increasing the international and substantive scope of relief available under national law on a case by case basis. We have seen that the latter method leads, *inter alia*, to possible conflicts of procedural rules and claimant-friendly forum shopping in the context of interim relief. The support in some EU Member States for the EAPO Regulation provides some hope for the adoption of the author's bold solution in the future.

A claimant cannot make an application for a pre-judgment EAPO anywhere other than the courts of the Member State with jurisdiction over the substantive proceedings.⁶⁸⁸ In the author's view, a real concern for both claimants and defendants is that such a provision creates uncertainty because of the potential problems of identifying the court with jurisdiction over the substantive claim. What if the claimant has already obtained a similar order available under national law relying on Article 35 of the Recast Regulation as the relevant gateway? In such circumstances, under Article 16(4) of the EAPO Regulation the court has discretion to determine whether it is appropriate to issue the EAPO, in full or in part.⁶⁸⁹ Given the inherent uncertainty of the jurisdictional rule in the EAPO Regulation, the author's bold solution is preferable – it does not depend on identifying the court with jurisdiction over the substantive claim.⁶⁹⁰

A further useful lesson from the EAPO Regulation is that territorial boundaries remain significant. This is evident from the requirement to enforce the order in the participating Member State where the bank account is held. The EAPO, if successfully obtained, is not automatically enforceable in all participating Member States.⁶⁹¹

⁶⁸⁸ Article 6 of the EAPO Regulation.

⁶⁸⁹ There are similarities here with the author's proposed discretionary stage in the bold solution and the modest solutions.

⁶⁹⁰ It should be noted that the Green Paper suggested a considerably wider scope of adjudicatory jurisdiction, namely that the claimant should also be able to obtain an EAPO from the courts of the defendant's domicile and/or the courts of the Member State in which the account is located.: see the Green Paper on improving the efficiency of the enforcement of judgments in the European Union: the attachment of bank accounts {SEC(2006) 1341}, COM/2006/0618 final, [3.5].

⁶⁹¹ This represents a compromise solution in contrast to the proposal in the Green Paper that the order should take effect directly throughout the European Union without any intermediary procedure (like a declaration of enforceability) in the Member State requested being required.

Chapter 17: The author's 'modest solutions' for restricting the international scope of freezing injunctions

17.1 Introduction

The objective of the author's modest solutions is to restrict the scope of English freezing injunctions to assets located in England. Modest solutions should be focused on making changes to the current jurisdictional preconditions for freezing injunctions at the domestic level without any need for international agreements. The first solution (the requirement of jurisdiction over the assets) involves making changes to the requirements for the existence of jurisdiction to grant freezing injunctions. The author's second modest solution involves 'beefing up' and clarifying the discretionary stage (the question of whether the court should exercise its jurisdiction to grant a freezing injunction) and thereby ameliorating the broad brush approach to the existence of jurisdiction. This second solution relating to the discretionary stage represents an alternative solution and accepts the unfortunate reality that the courts are very reluctant to make changes to their treatment of the issue of existence of jurisdiction to grant the injunction.

17.2 Introducing the requirement of jurisdiction over the assets for all freezing injunctions⁶⁹²

The aim of this proposal is to prevent interference with the sovereignty of foreign courts through judicial imposition of restrictions on the scope of the forum's regulatory authority. The author's proposal is for the English courts to draw upon the reasoning in a number of existing cases in order to justify imposing restrictions on the current international scope of all freezing injunctions. A possible interpretation of the judgments is that the English courts have recognised that personal jurisdiction over the defendant does not constitute a sufficient requirement to justify an order which regulates the defendant's conduct outside of the territorial jurisdiction of the English court, irrespective of whether the order is classified as operating *in rem* or *in personam*.

17.2.1 Drawing upon the restrictions on the international scope of third party debt orders

In the context of third party debt orders the English courts have already imposed restrictions on their international scope in order to protect the interests of other states and any individuals that may be affected. This is evident from *Societe Eram Shipping Co Ltd v Cie Internationale de Navigation et al.*⁶⁹³ From the author's perspective, the case demonstrates that the *in personam* operation of an English court order does not ensure that it is free from illegitimate interference with another court's regulatory authority. Part of the author's proposal is to see such reasoning being employed in all freezing injunctions cases in order to create an incentive for the courts to consider the question of jurisdiction over the assets. In other words, the first step towards the introduction of a requirement to consider jurisdiction over the assets in freezing injunction cases is to recognise that personal jurisdiction over the defendant is an insufficient requirement for the existence of jurisdiction.

In *Societe Eram*, the House of Lords considered whether a third party debt order could be granted in respect of a foreign debt where the order would not discharge the liability of the third party under foreign law. The judgment debtor had an account with a Hong Kong bank which had a branch in London. The account was held in Hong Kong and was governed by the law of Hong Kong. The court

⁶⁹² On the see also the author's discussion in chapter 13, section 13.4.

⁶⁹³ [2004] 1 AC 260.

refused to grant a third party order even though it had personal jurisdiction over the bank. Lord Bingham reasoned that there was “no jurisdiction” to grant the order because, on the facts, it would not have achieved what was legislatively stipulated as a necessary consequence: had the order been granted, the third party would not have been relieved of liability to the judgment debtor under Hong Kong law. There was undisputed evidence that the English third party debt order would not have been recognised in Hong Kong. Lord Bingham added that if the English court had had the jurisdiction to make a third party debt order, he would not have exercised his discretion to grant it because, *inter alia*, “it is inconsistent with comity owed to Hong Kong court to purport to interfere with assets subject to its local jurisdiction”.⁶⁹⁴ This statement provides evidence of his awareness of the need to protect the sovereignty of a foreign state even though the English court had personal jurisdiction over the party against whom the order was sought. It is the author’s view that their Lordships’ concerns about potential interference with Hong Kong’s jurisdiction should equally apply to freezing injunctions.

However, a potential problem with relying on the reasoning in *Societe Eram* is that their Lordships appeared to make an unhelpful distinction between a third party debt order and a freezing injunction. They explained that the former had a proprietary effect and was a method of execution.⁶⁹⁵ With respect, their Lordships’ characterisation of third party debt orders as proprietary could be seen as misleading. The effect of a third party debt order is to impose a positive *personal* obligation on the third party to pay the judgment creditor rather than the judgment debtor.⁶⁹⁶ The judgment creditor does not obtain a proprietary right in the assets of the third party. As Rogerson has explained in her comment on *Societe Eram*:

“[t]heir Lordships classified third party debt orders as *in rem* orders as they operate to discharge the contractual liability of the bank and transfer the debt to the judgment creditor. This analysis does not take us very far. Any judgment of the English court over a contract operates merely as a judgment on the liability and discharge of the bank, but would not be defined as *in rem*.”⁶⁹⁷

The author of this thesis would agree with this comment. The issue of whether a third party order operates *in personam* or *in rem* is an unnecessary distraction which does not help to answer the key question in such cases: does the English court have jurisdiction to grant a third party debt order on the facts of the particular case? On the facts of *Societe Eram*, had the English court granted the order it would have made an illegitimate interference with the sovereignty of the courts of Hong Kong. The interference would have been illegitimate because the garnishee’s legitimate expectation was that any interference with its contractual rights could only be made by the courts of Hong Kong where the bank account was held. The same arguments could be used (by way of an analogy) to restrict the international scope of freezing injunctions to assets located in England.

17.2.2 Drawing upon the analysis of the international scope of receivership orders

⁶⁹⁴ Ibid, [26].

⁶⁹⁵ Ibid, [88], per Lord Millett.

⁶⁹⁶ On garnishment of intangible property see Rogerson P.J., *Intangible Property in the Conflict of Laws* (Ph.D. dissertation, University of Cambridge, 1989), chapter 6 and especially the comparison, at p.158, between the effect of a third party debt order and the enforcement of a judgment by execution and sale of the judgment debtor’s goods under a writ of *fiери facias*.

⁶⁹⁷ Rogerson P.J., ‘Third party debt orders (garnishee order) - foreign bank accounts’ (2003) CLJ 576, 579.

We will now turn to receivership orders where the courts have also exercised caution and referred to principles which, if interpreted and applied in the correct manner, could be a useful foundation for restricting the international scope of freezing orders. We will see that the concept of “subject matter jurisdiction” was used in a confusing manner and it was unhelpfully associated with a vague requirement to determine whether there is a “sufficient connection” with England. The author’s modest proposal involves drawing upon the reasoning in existing cases with a twist: to eliminate uncertainty and prevent any interference with the sovereignty of the foreign courts, the courts should recognise that jurisdiction over the assets (jurisdiction *in rem*) is required in the context of freezing injunctions.

In *Masri v Consolidated Contractors International (UK) Ltd (No 2)*⁶⁹⁸ it was submitted on behalf of the defendants that in the light of *Societe Enam, Kuwait Oil Tanker Co SAK v Qabazard*,⁶⁹⁹ and the decision of the CJEU in *Turner v Grovit*:⁷⁰⁰

“the position could no longer be maintained that a post-judgment freezing order did not interfere with the exclusive jurisdiction of the foreign court, on the grounds that it is made *in personam* and binds only the defendant. He submitted that, by analogy with the third-party debt orders which were the subject of the two House of Lords cases, a post-judgment freezing order must be regarded as “directed at the assets”, as opposed to the person of the defendant, and that, accordingly, any such order indirectly interfered with the powers of the foreign court where enforcement against the assets takes place.”⁷⁰¹

Gloster J, as she then was, rejected the above arguments of Professor Nuyts by distinguishing a post-judgment worldwide freezing injunction from a third party debt order and explaining that the former did not create a security right. In the author’s view, Gloster J’s readiness to grant a worldwide freezing injunction (and reject some of Professor Nuyts’ arguments by mere reference to previous cases such as *Babanaft*) was influenced by three aspects of the case which made it stand out: first, the particularly bad conduct of the defendants;⁷⁰² second, the fact that it concerned a post-judgment injunction;⁷⁰³ third, that it was unlikely that any other court would grant relief which would preserve the interest in the concession in the necessary time frame.⁷⁰⁴

The key issue in the Court of Appeal was whether the claimant could obtain a receivership order in respect of revenues from an oil concession outside of the English court’s territorial jurisdiction. Just like a worldwide freezing injunction, an order to appoint a receiver in respect of foreign receivables had been classified as operating *in personam* well before the issue arose for decision in *Masri (No 2)*.⁷⁰⁵ The Court of Appeal approved the first instance decision to grant both the receivership order

⁶⁹⁸ [2009] Q.B. 450.

⁶⁹⁹ [2004] 1 AC 300.

⁷⁰⁰ Case C-159/02 *Turner v Grovit* [2004] 1 Lloyd’s Rep. 216.

⁷⁰¹ *Masri v Consolidated Contractors International (UK) Ltd (No 2)* [2007] EWHC 3010 (Comm), [64]. It is noted that the submission was made by Professor Arnaud Nuyts.

⁷⁰² *Ibid*, [82].

⁷⁰³ *Ibid*, [85].

⁷⁰⁴ *Ibid*, [79].

⁷⁰⁵ See, for example, the 31st edition of McGhee J. (ed.), *Snell’s Equity* (Sweet & Maxwell, 31st edn, 2005), para 17-25.

and a freezing injunction in respect of the oil concession. Therefore, this is a decision which could be seen as inconsistent with the author's thesis. However, Lawrence Collins LJ expressly stated that:

"the mere fact that an order is *in personam* and is directed towards someone who is subject to the personal jurisdiction of the English court does not exclude the possibility that the making of the order would be contrary to international law or comity, and outside the subject matter jurisdiction of the English court."⁷⁰⁶

Lawrence Collins LJ invoked the concept of "subject matter jurisdiction" to highlight the existence of a restriction on the international scope of the English receivership order:

"Subject matter jurisdiction is concerned, inter alia, with the extent to which the law or the court's orders applies extra-territorially...Typically in the United States the question of subject matter jurisdiction arises when the court is asked to consider whether legislation applies to conduct abroad, for example whether the Securities Exchange Act applies to fraudulent misrepresentation in England."⁷⁰⁷

In the author's view, it is unfortunate that Lawrence Collins LJ used the term subject matter jurisdiction.⁷⁰⁸ It is clear from the example he provides that the term "subject matter jurisdiction" was actually being used to denote legislative jurisdiction or regulatory authority. As Hartley has sought to explain:

"In England, jurisdiction to prescribe is sometimes called "subject-matter jurisdiction"; however, this term is best avoided since it is used in a different sense in the United States. The term "extraterritoriality" is also used. The idea behind all these phrases is that one state should avoid trespassing on the sovereignty of another. Since sovereignty is essentially territorial, the limits of jurisdiction to prescribe are also territorial."⁷⁰⁹

Thus, to use the appropriate terminology, Lawrence Collins LJ found that the English court did have regulatory authority⁷¹⁰ because the defendant company had sufficient connection with the English jurisdiction: it submitted to the English court's jurisdiction, defended the case on the merits, and had a substantial English judgment outstanding against it. With respect, Lawrence Collins LJ's classification of receivership orders as *in personam* and his reliance on that classification to support his conclusion on the legitimacy of their application to foreign receivables is unsatisfactory. Just like a freezing injunction involves interference with the legal relationship between the defendant and a third party bank, a receivership order involves interference with the legal relationship between the judgment debtor and his third party debtor. As counsel for the defendants submitted in *Masri (No 2)*:

⁷⁰⁶ *Masri v Consolidated Contractors International (UK) Ltd (No 2)* [2009] Q.B. 450, 465.

⁷⁰⁷ *Ibid*, 464.

⁷⁰⁸ See the author's clarification of the concept of subject matter jurisdiction in chapter 13 of this thesis.

⁷⁰⁹ Hartley T., 'Jurisdiction in conflict of laws - disclosure, third-party debt and freezing orders' (2010) LQR 194, 197.

⁷¹⁰ Note that, in comparison to Hartley, the author of this thesis prefers the term regulatory authority rather than "jurisdiction to prescribe".

“The fact that the order does not have a proprietary effect does not prevent the court lacking subject matter jurisdiction. In any event, to the extent that it is relevant, a receivership order does have a proprietary or quasi-proprietary effect. The judgment debtor, if he obeys, has to hand over his property; or to direct his debtors to hand over his property, to the receiver; and it will then find its way to the judgment creditor, via the receiver or the court, at which point the judgment debtor's title will, at the latest, be extinguished. A receivership order interferes with the rights inter se between a third party debtor of the judgment debtor and the judgment debtor and prevents the third party debtor obtaining a good discharge from the judgment debtor. The third party will be put in a quandary: he cannot pay his creditor, who is refusing to accept payment. This in itself amounts to an interference with his rights and obligations as against his creditor.”⁷¹¹

While Lawrence Collins LJ did refer to worldwide freezing injunctions, at no point did his Lordship suggest that a more restrictive approach should be taken than that in *Derby v Weldon (Nos 3 and 4)* which we considered above. He even asserted that:

“the extension of the *Mareva* jurisdiction to assets abroad was justifiable in terms of international law and comity provided that the case had some appropriate connection with England, that the court did not purport to affect title to property abroad, and that the court did not seek to control the activities abroad of foreigners who were not subject to the personal jurisdiction of the English court”⁷¹²

This thesis takes the view that if the relevant asset is located abroad, the English courts should not have jurisdiction to grant a freezing injunction. This is in contrast to Collins’ view that the English court may have jurisdiction to grant a freezing injunction in relation to assets located abroad provided there is “sufficient connection” between the case and the forum. The author of this thesis submits that, with respect, the language of sufficient connection is too vague as demonstrated by the decision in *Duvalier* where the presence of the defendant’s solicitors amounted to a sufficient connection.⁷¹³ The concept of sufficient connection, as it currently stands, is open to creative extensions by counsel and the courts and is therefore unsuitable for the purposes of determining the scope of regulatory authority in the field of interim relief. The problem with the requirement of “sufficient connection” is threefold. First, it is not possible to give clear advice to the parties on what the court will deem to be a sufficient connection. Therefore, there is uncertainty as to whether an English court can grant a freezing injunction. Second, the requirement of sufficient connection cannot eliminate concurrent jurisdiction (in relation to the same asset) and the consequent unfairness to defendants. Third, the English courts’ consideration of the issue of sufficient connection (just like the principle of comity) is currently treated as an element of whether the court should *exercise* its discretionary power to grant a freezing injunction. Under the current approach, sufficient connection is not treated as a matter relevant to the *existence* of jurisdiction. The above problems with the requirement of sufficient connection have a common link – the inconsistency of the sufficient connection requirement with the principle of equipage equality.

⁷¹¹ Ibid, 454.

⁷¹² Ibid, 465.

⁷¹³ For the analysis of *Republic of Haiti v Duvalier*, see chapter 15 of this thesis.

17.2.3 The existing use of the concept of subject matter jurisdiction in the context of *Chabra*-style freezing injunctions: *Parbulk II AS v PT Humpuss (The Mahakam)*⁷¹⁴

For the author's modest proposal to be adopted, the English courts could build on the existing statements about subject matter jurisdiction in *The Mahakam*, although care would need to be taken to use more appropriate terminology and prevent a narrow interpretation of this case.

In *The Mahakam*, the claimant owners of a vessel obtained an arbitration award against the charterers (Heritage), a Panamanian company, for unpaid hire and damages, and a summary judgment against the guarantors (HIT), an Indonesian company. Heritage and HIT were part of the same group of companies as HSTPL, a Singaporean company. The claimant did not have a cause of action against HSTPL. Nevertheless, the claimant sought a worldwide freezing injunction against HSTPL in respect of the full amount of the judgment and the award against HIT and Heritage respectively. The claimant was concerned that HIT, as HSTPL's 100% shareholder, would procure the dissipation of HSTPL's assets in order to render HIT itself judgment-proof.

The claimant satisfied the court that substantive preconditions were made out for granting a *Chabra*-type freezing injunction. The court had personal jurisdiction over HSTPL but it was held that a freezing injunction should only be granted in respect of its assets in England.⁷¹⁵ The domestic order was granted even though HSTPL did not have any assets within the jurisdiction. Gloster J's reasoning was that at some future date, HSTPL might bring assets within the jurisdiction given the nature of the group's business and its utilisation of English law and London arbitration. The justification for the refusal to grant a worldwide injunction was that the defendant's connection to the English court was "minimal" as it arose only as a result of HSTPL's failure to challenge its jurisdiction.⁷¹⁶ Had HSTPL challenged the jurisdiction of the English court, Gloster J would have discharged the order granting the claimant permission to serve the arbitration claim form on HSTPL out of the jurisdiction.⁷¹⁷ In such circumstances and drawing upon the words of Lawrence Collins LJ in *Masri (No 2)*, Gloster J concluded that there was no "subject matter jurisdiction" to grant relief in respect of assets located abroad because of the absence of a sufficient connection with England.⁷¹⁸ The author submits that the problem with this reasoning is the unnecessary use of the concept of sufficient connection to explain the refusal of the court to interfere with the sovereignty of the foreign court.

17.2.4 Reflections on the above case law and the author's proposal

The common theme running through all of the above cases is that the English courts were concerned about the impact that their orders would have on the sovereignty of foreign legal systems. The judges felt the need to protect the relevant foreign country's interest in applying its own regulations and policies to the defendant's conduct. The cases remind us that despite the extensive literature about its fragmentation or erosion, the principle of sovereignty (coupled with the principle of territoriality) continues to shape the international scope of English court orders. For the purposes of this thesis, the decision in *The Mahakam* is particularly important because it could be regarded as evidence of recognition by some English judges that, despite their *in personam* classification,

⁷¹⁴ [2011] EWHC 3143 (Comm).

⁷¹⁵ *Ibid*, [98].

⁷¹⁶ *Ibid*, [95].

⁷¹⁷ *Ibid*.

⁷¹⁸ *Ibid*.

freezing injunctions in respect of assets located abroad actually involve a subtle interference with the sovereignty of the foreign courts. Although the Singaporean company in *The Mahakam* submitted to the jurisdiction of the English court through its failure to contest its jurisdiction, this was not sufficient for the court to regulate its conduct abroad. Consistent with Hoffmann J's reasoning in *Mackinnon* and Mann's warning about the limits of personal jurisdiction,⁷¹⁹ the Commercial Court in *The Mahakam* was cautious about the territorial scope of injunctive relief. However, it may be possible for that decision to be interpreted narrowly by confining it to *Chabra*-type freezing injunctions. Although the author would disagree, this narrow interpretation could be formulated follows. Where an application is made for an injunction to freeze the assets of a party against whom there is no cause of action, such an injunction is inherently intrusive and theoretically difficult to justify. If we were to combine the numerous judicial extensions to the substantive scope of the *Chabra* injunction,⁷²⁰ with the excessive expansion of the international scope of freezing injunctions, the product would be unfair to defendants and damaging for relations with other states. In these circumstances, it is not surprising that the Commercial Court in *The Mahakam* was concerned about the strength of connection with the forum and underlined the need for something more than personal jurisdiction over HSTPL. As the law currently stands, *Chabra* injunction cases will probably be the type of cases where the courts will be more reluctant to grant worldwide orders: the *Chabra* defendants normally have a weaker connection to the substantive dispute compared to defendants against whom there is a cause of action. Due to the unusual nature of *Chabra* injunctions, there is an increased risk of a conflict between the English and foreign procedural rules in respect of this category of freezing orders.⁷²¹ Nevertheless, the author submits that the cases involving *Chabra* injunctions could be used to highlight the importance of considering jurisdiction over the assets (jurisdiction in rem) in all applications for freezing injunctions (whether *Chabra*-type cases or not) in order to ensure adequate protection for defendants and the interests of foreign states. The author therefore favours a broad interpretation of *The Mahakam* in that the requirement to consider the issue of jurisdiction over the assets arises in all freezing injunction cases. Such an interpretation, if adopted by the courts, could provide a foundation for restricting the scope of freezing injunctions to assets located in England.

17.3 Modest solutions relating to the discretionary stage (the exercise of jurisdiction to grant the injunction)

17.3.1 A requirement to consider the most appropriate forum for a freezing injunction

In the author's view, one alternative option is for the courts to highlight an express requirement for judges to consider whether the English court is the most appropriate forum to deal with the claimant's application for asset preservation relief. This proposal seeks to deal with the problem of encroachment through a more rigorous discretionary stage by forcing the courts to distinguish between orders in respect of assets located in England and orders in respect of assets located

⁷¹⁹ See above chapter 13 of this thesis.

⁷²⁰ On the substantive scope of these injunctions see chapter 6 of this thesis.

⁷²¹ See, for example, *JSC VTB Bank v Skurikhin et al* [2014] EWHC 2254 (QB), [15] where there was expert evidence that the Russian courts do not grant freezing injunctions in respect of assets "which are not held in the name of the defendant". It also appeared from that evidence that Russian courts very rarely grant orders in respect of assets located abroad, unless Russia has an international (bilateral) agreement with a particular country.

abroad. If an injunction is sought in relation to assets located abroad, there would be a *limited* discretion to grant the injunction if the claimant can show exceptional circumstances. Exceptional circumstances would exist if the courts of the country where the assets are located are unable to grant any asset preservation relief due to the absence of jurisdiction. This discretion is necessary in order to adequately protect claimants from any potential ‘gaps’ in protection arising from overly rigid jurisdiction rules in the country where the assets are located.

It is possible for the Court of Appeal to give prominence to the enquiry about the most appropriate forum by drawing upon statements in the existing case law on freezing injunctions. For example, Males J should be applauded for separately addressing the question of jurisdiction to grant the injunction from the issue of discretion to grant the relief. This was in *Cruz City 1 Mauritius Holdings v Unitech* where he stated that “If I am wrong as to jurisdiction, the question of discretion arises...Accordingly the claimant must show that England is clearly the most appropriate forum for the determination of the application for a freezing order against the *Chabra* defendants”.⁷²² This is a rare case where the court actually asked the question whether England is “clearly the most appropriate forum” for the determination of the application for a freezing order. The author submits that the Court of Appeal could highlight and place reliance on the judgment of Rix J in *Refco v Eastern Trading*,⁷²³ in addition to the more recent judgment of Males J in *Cruz City 1*. The ingredients for a possible modest solution therefore already exist in some judgments. For the avoidance of doubt, the author is advocating that the Court of Appeal ought to make it a mandatory part of the discretionary stage in a similar manner to the method adopted by Rix LJ in *Star Reefers v JFC Group Co Ltd* to clarify and beef up the role of the discretionary stage of granting an anti-suit injunction (by giving more prominence to the principle of comity).⁷²⁴ The fact that a freezing injunction is equitable and simplistically classified as procedural should not provide a licence to the courts to ignore the safeguards for defendants. One of the key safeguards for defendants could be the requirement to show that England is the most appropriate forum to seek asset preservation relief. Ignoring the full spectrum of the rules of English private international law in the context of freezing injunctions makes it easier for claimants to put improper pressure on defendants. It amounts to wilful blindness to the fact that connections with other states need to be carefully examined given the diversity and potential conflict of national procedural rules. Any improper pressure, such as applications for similar relief in respect of the same asset in more than one jurisdiction, may undermine equipage equality by placing the claimant in a stronger position.

This is a modest solution because it does not depend on the introduction of unfamiliar factors at the discretionary stage. The English courts are very familiar with the application of the principle of *forum non conveniens* and consequently their exercise of discretion is regarded by commentators and judges as principled.⁷²⁵

⁷²² [2014] EWHC 3131 (Comm).

⁷²³ See the analysis above in chapter 15.

⁷²⁴ *Star Reefers Pool Inc v JFC Group Co Ltd* [2012] EWCA Civ 14. For comments on the implications of this decision on the role of comity in anti-suit injunctions, see Fentiman R., ‘Anti-Suit Injunctions – Comity Redux?’ (2012) CLJ 273.

⁷²⁵ Famously, Lord Goff made the following observation about the principle of *forum non conveniens*: “since it is founded upon the exercise of self restraint by independent jurisdictions, it can be regarded as one of the most civilised of legal principles”: *Airbus v Patel* [1999] 1 AC 119, 141.

Let us look at how the author's modest proposal might have had an impact on the legal reasoning in a case involving an application for an injunction extending to assets located abroad. In *Babanaft*,⁷²⁶ a well-known case credited with a significant development, the claimant company obtained a judgment against the defendants who were brothers and its two former directors. The defendants were Lebanese nationals and both were resident abroad. The first defendant spent considerable time in England and was served with the proceedings when he was in hospital in England. He owned three substantial residential properties in England. The second defendant submitted to the jurisdiction even though he had no apparent connection with England. A post-judgment worldwide freezing injunction was granted against both defendants. The issue in the Court of Appeal was whether there was jurisdiction to grant a freezing injunction over assets located abroad. The judgments failed to deal with a number of related questions which would have been considered under the modest proposal outlined above. In particular, was England the most appropriate forum for obtaining relief in respect of the defendants' assets located abroad? The claimant had a choice to commence proceedings for interim relief in the place where the assets were located. Why should the English court assist the claimant against foreign-resident defendants in respect of their assets located abroad? Counsel for the defendants argued that the court ought to be slow to exercise its jurisdiction to grant relief in respect of assets located abroad "especially where the defendants are non-resident here...and alternative remedies are available".⁷²⁷ While recognising the discretionary nature of a freezing injunction, the Court of Appeal did not consider whether a foreign court would have been in a better position to police the conduct of the defendants. The issue of whether it was appropriate to grant worldwide relief, including *inter alia* the degree of connection with the forum, should have been considered separately for each defendant.

The modest proposal would serve to dispel some of the assumptions which hamper the ability of the courts to use their discretion to consider the interests of a wider range of stakeholders. If the English court is the most appropriate forum to hear the substantive proceedings, it does not necessarily follow that it is also the most appropriate forum for interim relief. When considering other factors, how should the court address the fact that the claimant does not have knowledge about the whereabouts of the defendant's assets located abroad (as was the case in *Babanaft*)? In the author's view, that should not provide a justification for granting a worldwide freezing injunction, whether pre- or post-judgment.⁷²⁸

17.3.2 The principle of comity: possible options

Part of the modest solution could be for the courts to clarify the role of the principle of comity and its impact in this field. Maier has argued that "the resolution of claims of authority arising from concurrent jurisdiction is found in an accommodation process operating outside the limits of formal international law (the principle of international comity)".⁷²⁹ The author of this thesis takes the view that the principle of international comity is not the ideal method for resolving concurrent jurisdiction. The principle is unnecessary and unhelpful in the context of freezing injunctions if any of the above proposals are adopted by the English courts. In the event that the English courts are

⁷²⁶ [1990] Ch. 13.

⁷²⁷ Ibid, 18.

⁷²⁸ See chapter 15.

⁷²⁹ Maier H., 'Jurisdictional Rules in Customary International Law', chapter IV, in Meessen K.M. (ed.) *Extraterritorial Jurisdiction in Theory and Practice* (Kluwer Law International, 1996).

reluctant to dispense with the principle of comity, they should urgently clarify or reformulate its meaning and thereby ensure its consistent application.

There are several possible routes that the English courts could take if they were to reformulate the principle of comity. One possible approach for the courts to take is to treat all *worldwide* freezing injunctions as inconsistent with comity. This would be a straightforward solution. In order to adopt this solution, the Supreme Court would need to reject the application of the sufficient interest or connection test as a relevant interpretation of the principle of comity. The proposed interpretation of comity would effectively amount to recognition that the problem with freezing orders in respect of assets located abroad is their interference with another state's regulatory authority. This would represent a shift away from the current view that the provisos are sufficient to address any concerns about the legitimacy of extraterritorial orders.

In the author's view the principle of comity could also play a useful role if it is separated from its association with the discretionary question of whether jurisdiction should be exercised in a particular case. This in turn means separation of the principle of comity from any domestic notions of substantive justice. The principle could be useful if the courts were to reformulate it as a strict requirement to determine whether the English court has regulatory authority in the relevant field. Such a question is relevant when considering the existence of jurisdiction and it cannot be affected by policies underlying the substantive law of the forum. Clarification (or reformulation) in accordance with the author's suggestion would prevent the courts from being distracted by the current uncertainty surrounding the principle of comity.

Even in the context of anti-suit injunctions where the indirect interference with the adjudicatory jurisdiction of other states is more prominent, some commentators have recognised that the English courts' current use of the principle of comity is difficult to understand and unhelpful.⁷³⁰ As a possible solution, it has been argued that the principle of comity could be useful as an explanation for the need to apply choice of law rules and thereby resist the temptation to characterise the issue as procedural and apply the *lex fori* simply because the nature of the relief is equitable:

"Whilst some may prefer to have their equitable anti-suit 'pudding' first, the automatic invocation of equitable jurisdiction reverses the accepted order of analysis of a conflict of laws issue. This is an indulgence which is incompatible with the contemporary treatment of equitable doctrines in choice of law and ought no longer be condoned."⁷³¹

As we have seen, such automatic application of *lex fori* is equally pervasive and problematic in the field of freezing injunctions. Despite this tendency of the courts to ignore the issue of regulatory authority in the context of equitable forms of relief, there is hope for the future in that some judges have been careful to identify characterisation as the starting point of their analysis. This is evident from *The Yusuf Cepnoglu*,⁷³² a recent case where the Court of Appeal had to determine whether or not to grant an anti-suit injunction. Longmore LJ recognised that the "first question is whether that issue [whether it is appropriate for the English court to grant an anti-suit injunction] should be

⁷³⁰ Sim C., 'Choice of Law and Anti-suit Injunctions: Relocating Comity' (2013) ICLQ 703.

⁷³¹ Ibid,

⁷³² [2016] EWCA Civ 386.

determined in accordance with English law or some other law”.⁷³³ The link between comity and regulatory authority was recognised by McLachlan:

“The courts have had substantially the same experience in delimiting the effect of worldwide freezing injunctions. Thus, it came early to be held that such orders operated extraterritorially only on the defendant himself. Their effect on third parties was strictly territorially limited. As Millett L.J. (as he then was) put it: “It is becoming widely accepted that comity between the courts of different countries requires mutual respect for the territorial integrity of each other’s jurisdiction ...”. Although the English courts have used the language of “comity”, it is submitted that the true principle is the permissible extent of subject matter jurisdiction as a matter of public international law.”⁷³⁴

The author would broadly agree with McLachlan because the problem with using the language of comity is that it introduces uncertainty due to its inconsistent use, lack of a defined meaning and association with a variable degree of discretion. Although an assumption could be made that the contemporary impact of the principle of comity may be limited due to the more detailed and specific guidance on the application of foreign law, the English courts have continued to invoke the principle in international commercial litigation. For example, the courts have utilised the language of comity in order to justify their reluctance to grant anti-enforcement injunctions.⁷³⁵

The principle of comity was recently considered in relation to an order similar to a freezing injunction by the Hong Kong Court of Final Appeal in *Compania Sud Americana De Vapores S.A. v Hin-Pro International Logistics Limited*,⁷³⁶ where the only judgment was given by Lord Phillips. The claimant (a Chilean company) had already obtained an English judgment against the defendant (a company incorporated in Hong Kong) and an anti-suit injunction from the English court in support of an English exclusive jurisdiction agreement.⁷³⁷ The claimant sought a *Mareva* injunction⁷³⁸ from the Hong Kong court in order to facilitate future enforcement of the English judgment in Hong Kong. The Court of Appeal of Hong Kong discharged the injunction and placed emphasis on, *inter alia*, the requirement to have regard to judicial comity. The latter was seemingly relevant due to the conflict between the English decisions on the one hand and those of the PRC courts on the other.⁷³⁹ The Court of Final Appeal reinstated the *Mareva* injunction. Lord Phillips explained that granting a *Mareva* injunction would have amounted to a breach of comity if the award of damages in England had been made in breach of comity towards the PRC courts. However, that was not the case on the facts as the English judgment was enforceable in Hong Kong. In the author’s view, the decisions of the Hong Kong courts in this case do not provide a sufficiently detailed explanation of their use of the principle of comity. The disagreement between the Court of Appeal of Hong Kong and the Court of

⁷³³ Ibid, [14].

⁷³⁴ McLachlan C., ‘International Litigation and the Reworking of the Conflict of Laws’ (2004) LQR 580, 611 (footnotes omitted).

⁷³⁵ *E.D. & F Man (Sugar) Ltd v Haryanto* [1991] 1 Lloyd’s Rep 161 and *The Eastern Trader* [1996] 2 Lloyd’s Rep 585. However, see *Bank St Petersburg v Arkhangelsky* [2014] EWCA 593.

⁷³⁶ FACV 1 of 2016, 14 November 2016.

⁷³⁷ For the English Court of Appeal’s judgment in this litigation see *Hin-Pro International Logistics Limited v Compania Sud Americana De Vapores S.A.* [2015] EWCA Civ 401.

⁷³⁸ As it is still called in Hong Kong.

⁷³⁹ Court of Appeal (Hong Kong) judgment, para 53.

Final Appeal only serves to reinforce the author's comments about the current potential for inconsistent interpretation and application of the principle of comity, even within a single legal system.

In summary, the author's primary argument is that the principle of comity would be unnecessary if any of the author's proposals are adopted. It would undermine certainty and thereby destabilise the balance of rights between the parties. The author's alternative argument is that in the event that the English courts choose to continue to rely on the principle of comity in the context of freezing injunctions, they must urgently reformulate the principle and use it in a more consistent manner.

17.3.3 Support for the author's proposals from the treatment of freezing injunctions from the foreign courts

The attitude of the English courts towards any worldwide freezing orders granted by foreign courts, as epitomised by the reasoning in *D'Hoker v Tritan Enterprises Ltd*,⁷⁴⁰ indirectly provides support for the author's proposals to restrict the scope of English freezing injunctions to assets located in England. The reasoning could be interpreted as showing a general reluctance to recognise foreign freezing orders because of the inability of the English courts to supervise such orders. The example of this problem with supervision from *D'Hoker* was that any application to vary the original freezing order had to be made to the Greek court even though the order was treated as an order of the English court following its registration in England. The defendant's finances in England were effectively subject to the control of the Greek court. Such a state of affairs was viewed by the English court as "unsatisfactory" due to the "considerable expense" and "complications".⁷⁴¹ Jack J made the following statement:

"I would simply ask that my judicial colleagues in Athens should consider whether the position might not be better arranged if the order of the Athens court was limited in its effect to Greece, leaving it to the English court to determine what order was appropriate here."⁷⁴²

The reasoning in *D'Hoker* should be of equal importance whenever there is an application for an English freezing order in respect of assets located abroad. More specifically, the complications arising from the inability of the relevant foreign courts to supervise an English freezing order should carry some weight under the author's modest proposal to impose a requirement for the English courts to consider whether England is the most appropriate forum for regulating the availability of asset preservation relief. In the author's submission, where a claimant has already obtained a worldwide freezing order from a foreign court and intends to freeze assets in England, the only viable option is to make a fresh application in England.⁷⁴³ Although there is a theoretical possibility that an English court could register a foreign worldwide freezing order as a judgment, the decision in

⁷⁴⁰ [2009] EWHC 949.

⁷⁴¹ Ibid, [20].

⁷⁴² Ibid.

⁷⁴³ This view is reinforced by the recent decision in *Cyprus Popular Bank Public Co. Ltd v Andreas Vgenopoulos and others* [2016] EWHC 1442 (QB) where, instead of making an application for an English freezing injunction, the claimant unsuccessfully attempted to take a 'short cut' by registering a Cypriot worldwide freezing order as a judgment under Article 38 of the Brussels I Recast Regulation.

D'Hoker shows that it is not difficult for the English court to refuse such registration on the grounds of public policy.⁷⁴⁴

17.4 Summary of the author's modest proposals

Two alternative modest solutions have been proposed in this chapter in order to restrict the international scope of English freezing injunctions and create a more equitable balance of rights between the parties.⁷⁴⁵ In order to adopt either of these proposals, the courts would need to broadly draw upon the existing case law and make some 'modest' changes.

Under the first proposal the claimant would need to satisfy the following requirements:

- (1) The court would need to be satisfied that it has personal jurisdiction over the defendant.⁷⁴⁶
- (2) In addition to the above, the court would need to be satisfied that it has jurisdiction over the assets (jurisdiction *in rem*) in respect of which the order is sought. This requirement would only be satisfied if the assets are located in England.
- (3) If the above requirements relating to the *existence* of jurisdiction are satisfied, the English court would still be able to refuse to *exercise* its jurisdiction grant the injunction.⁷⁴⁷ This discretion should be limited in scope.⁷⁴⁸
- (4) If the above requirements are satisfied, it would be essential for the claimant to fulfil all the substantive preconditions (e.g. good arguable case on the merits etc.) and provide the necessary safeguards and provisos (e.g. a cross-undertaking in damages).

The second proposal focuses on making changes to the discretionary stage and it is based on the assumption that the English courts may be more receptive to the idea of reducing the international scope of freezing injunctions in a less rigid manner. The requirements for obtaining relief would be as follows:

- (1) Personal jurisdiction over the defendant.
- (2) If the above requirement is satisfied, the court should proceed to examine whether England is the most appropriate forum for determining the merits of the application for asset preservation

⁷⁴⁴ The recognition was refused under Article 34(1) of the Brussels I Regulation (now Article 45(1)(a) of the Recast Regulation). As explained by Rogerson P., *Collier's Conflict of Laws* (CUP, 2013), pp.236-237, non-money judgments from a non-EU Member State (including injunctions) can be recognised as giving rise to issue estoppel but cannot be enforced.

⁷⁴⁵ Note that the proposals would apply to applications for freezing injunctions in support of English substantive proceedings and also any applications in support of foreign substantive proceedings.

⁷⁴⁶ Lawful service of the claim form in England or lawful service of the claim form out of the jurisdiction would satisfy this requirement.

⁷⁴⁷ The factors for this discretionary stage would effectively be the same as under the bold proposal in the previous chapter – see section 16.4 of this thesis.

⁷⁴⁸ At this discretionary stage, the court would take into account any applications for asset preservation relief in the foreign courts. Any unexplained delay on the claimant's part would also be relevant. It should also be noted that under the author's proposal for this new discretionary stage the courts would dispense with what the author considers as unhelpful, unnecessary and uncertain principles: expediency and comity.

relief.⁷⁴⁹ If the assets are located in England, then the court should usually exercise its discretion by granting the injunction unless there are strong reasons not to.⁷⁵⁰ If the assets are located abroad, the court should normally refuse to grant the injunction in respect of such assets in order to prevent interference with the sovereignty of states where the assets are located. However, the English court would have limited discretion to grant an order in respect of assets located abroad if the claimant can show exceptional circumstances. Exceptional circumstances would only exist if the courts of the country where the assets are located are unable to grant any asset preservation relief due to the absence of jurisdiction. This limited discretion is necessary in order to avoid a potential 'gap' in the protection of claimants in cases where the foreign court's jurisdiction rules are too rigid.

(3) The claimant would need to fulfil the substantive preconditions, provide safeguards and include the usual provisos.

⁷⁴⁹ It should be noted that under the author's proposal for this new discretionary stage the courts would dispense with what the author considers as unhelpful, unnecessary and uncertain principles: expediency and comity. Consequently, the parties would be in a much better position to know where they stand.

⁷⁵⁰ Once again, strong reasons would include factors such as whether sufficient relief has already been obtained elsewhere and any unexplained delay on the claimant's part.

Chapter 18: Possible counter-arguments to the author's proposals based on functional theories of jurisdiction

18.1 Introduction

In this chapter, the author will consider possible counter-arguments to the author's proposals to restrict the international scope of freezing injunctions. In other words, these arguments could potentially be employed by those who would be keen to keep worldwide freezing injunctions, at least in some categories of cases. The counter-arguments to the author's proposals are founded on the so called 'functional theories of jurisdiction'.⁷⁵¹ However, this author will argue that one of the key problems with the use of any functional theories of jurisdiction to support the availability of worldwide freezing injunctions is that they are inconsistent with the principle of equipage equality. The use of functional theories to justify worldwide freezing injunctions would require placing reliance on the incorrect assumption that freezing injunctions are only concerned with protecting claimants from the actions of unscrupulous defendants. As the author has demonstrated in part I of this thesis, freezing injunctions are actually concerned with creating a level-playing field in litigation. They balance the rights of the parties and this includes protecting defendants from unnecessary interference with their assets. Taking the international systemic perspective, the functional theories are inconsistent with this author's view of the purpose of private international law and the objective of reducing the risk of overlapping exercises of regulatory authority in the field of interim relief. The latter objective is consistent with the need for a level-playing field in litigation.

18.2 What are the general features of a functional approach to jurisdiction?

Under the functional approaches to jurisdiction, jurisdiction rules should be tailored to best perform the functions or to achieve the purposes of the rule of substantive law whose application depends on the court's assertion of jurisdiction. First of all, such an approach requires identification of the functions or purposes of, and the policies behind, the relevant domestic procedural or substantive rule. Second, it involves considering whether or not asserting jurisdiction in a particular case, or categories of cases, would be consistent with the purposes and policies of the relevant rule. Proponents of this modern approach are prepared to sacrifice the more traditional principles of jurisdiction, grounded in states' territorial sovereignty, in order to tackle cross-border regulatory harm. From their perspective, the courts should not be afraid of asserting jurisdiction in cases with tenuous connections to the forum as long as it promotes the functions of the rule of substantive law in question. Moreover, extraterritorial application of national law and its potential for overlapping exercise of jurisdiction is often seen as necessary or unavoidable rather than problematic. There is no single functional theory of jurisdiction. While some commentators advocate a widespread application of a functional approach, others limit their analysis to certain confined areas of regulatory law.⁷⁵² Any functional approach to jurisdiction rules is consistent with the perception of private international law as an integral part of national private law. The essence of a functional

⁷⁵¹ Alternative labels could include "purposive" and "instrumental" but this author's preference is for the term functional.

⁷⁵² See Buxbaum H.L., 'Transnational Regulatory Litigation' (2005-2006) 46 Va. J. Int'l L. 251, who discusses "policy argument[s] for broad jurisdictional rules" in American anti-trust, securities, and anti-corruption law; Wai R., 'Transnational Liftoff and Juridical Touchdown: The Regulatory Function of Private International Law in the Era of Globalization' (2001-2) 40 Colum. J. Transnational L. 209, states that "more expansive assumption of jurisdiction by state courts may assist in the regulatory oversight of transnational activity by national laws".

approach to jurisdiction is a pragmatic allocation of regulatory authority in a way that will most effectively promote the policies of the forum's substantive law. In this chapter, we will seek to apply a functional approach to jurisdiction to the English courts' powers to grant freezing injunctions. This involves 'exporting' the functional analysis from substantive law to procedural law. It has been shown in part I of this thesis that it is important to distinguish between different categories of freezing injunctions. As the functions of freezing injunctions vary from one category to another, we will consider each category separately. Let us first consider more closely the general impact of a functional approach on the principle of territoriality given its importance in the field of asset preservation.

18.3 The general relationship between functional approaches to jurisdiction, the principle of territoriality in public international law, and worldwide freezing injunctions

One of the key implications of adopting a functional approach to jurisdiction is a lesser role for the principle of territoriality. The essence of the argument is that, in a globalised commercial environment, companies are causing economic harm by easily taking advantage of the diversity of legal cultures to evade unfavourable regulation. Territorial constraints on the scope of jurisdiction are therefore seen as an obstacle to catching the unscrupulous actors into a domestic regulatory net.⁷⁵³ Back in 1964, Mann wrote in relation to the territorial theory of jurisdiction that:

“...a test developed in wholly different economic, social and technical conditions and at a time when corporations did not yet play a predominant role in international life is unlikely to satisfy a generation which is suspicious of rigidity and, indeed, of principles.”⁷⁵⁴

Various 'solutions' have been proposed to overcome the functional 'limitations' of territorial jurisdiction. The most radical option would be to ignore territoriality altogether and focus solely on other possible bases of jurisdiction.⁷⁵⁵ A more modest option would be to re-conceptualise territory by enriching existing territorial concepts with non-topological spaces and adopting more non-state bases of jurisdiction.⁷⁵⁶ However, a common problem with any of these proposals is the continuing significance of the state and the central role played by national courts in international commercial disputes. As jurisdiction is an emanation of state sovereignty, territoriality remains relevant. Consequently, as Michaels explains, it is simply not possible to have completely non-territorial rules.⁷⁵⁷

What are the possible obstacles of a territorial approach in the context of English freezing injunctions? The defendant's assets in one jurisdiction may not be sufficient to cover the value of the claim and in such circumstances the claimant may need to prevent the defendant from dissipating his assets located abroad. The limits of territoriality are particularly evident at the enforcement

⁷⁵³ Buxbaum H.L., 'Territory, Territoriality, and the Resolution of Jurisdictional Conflict' (2009) 57 Am. J. Comp. L. 631, 633 (observes that many proposals "focus primarily on the lack of functionality of territory-based jurisdictional theories in today's economy.")

⁷⁵⁴ Mann, p.37.

⁷⁵⁵ Michaels R., 'Territorial Jurisdiction after Territoriality' in P.J. Slot et al (ed.), *Globalisation and Jurisdiction* (Kluwer Law International, 2004).

⁷⁵⁶ See Berman P.S., 'Conflict of Laws, Globalization, and Cosmopolitan Pluralism' (2005) 55 Wayne L. Rev. 1105.

⁷⁵⁷ Michaels R. (2004).

stage. As direct enforcement of an English freezing order abroad is not possible, the claimant would usually need to use any information about the defendant's assets located abroad and seek similar relief from the local court with territorial jurisdiction over the defendant's assets. Seeking relief in several jurisdictions may be expensive, time-consuming and knowledge of an application for relief in one jurisdiction may alert the defendant, giving him the time to dissipate or conceal the assets in other jurisdictions.

Given the dissatisfaction with territorial-based jurisdiction rules, it is not surprising that some commentators regard extraterritorial jurisdiction as legitimate and more suitable to meet the challenges of globalisation. Dodge has put forward two arguments in favour of extraterritorial jurisdiction in anti-trust law. First, "because of the incentives facing national legislators, underregulation of international business in areas like antitrust can be avoided only through concurrent jurisdiction or through international negotiation".⁷⁵⁸ This argument views unilateralism, in the form of extraterritorial jurisdiction, as "necessary to correct for failures in the legislative process".⁷⁵⁹ Coupled with the second argument that judicial unilateralism would promote international negotiation, Dodge concludes that the advantages of concurrent jurisdiction outweigh its disadvantages. His description of the arguments as "process-based" confirms a clear influence of a functional approach to jurisdiction.

The author of this thesis submits that the fundamental problem with Dodge's first argument, which highlights the dangers of a functional approach in general, is that it does not treat foreign legal systems as co-equal sovereigns. What is seen as a "legislative failure" by an American court could simply be a reflection of the different policy choices in another jurisdiction. In the context of worldwide freezing injunctions, the English court should not be correcting what it sees as deficiencies in foreign procedural rules on interim relief. There may be two types of supposed deficiencies with the foreign rules on interim relief. First, the *international scope of relief* may be limited to certain types of claims (e.g. proprietary or non-proprietary claims). Second, the *substantive preconditions* for obtaining relief may be more difficult for the claimant to satisfy (in other words, the *substantive scope of relief* may be different). If either the international scope of relief or substantive preconditions are different, the English courts should respect such differences. In those circumstances, even if no order is sought from the foreign court, the claimant should not be allowed to circumvent the law applicable to the assets (whether tangible or intangible property) in question. If the applicable law to the asset is foreign law, why should the English court be able to ride roughshod over the contractual or property rights arising under that foreign law? Arguably, the "legitimate expectations" of commercial entities are that their substantive rights arising under a bank account located abroad can only be interfered with by the courts of the country where the relevant branch is located. The argument gains even greater force if we think of interference with land located abroad. In many legal systems, it is a well-established principle of private international law that *lex fori* is the applicable law to any disputes concerning land.

A more principled thesis in favour of policy-influenced, non-territorial application of national substantive law was developed by Buxbaum.⁷⁶⁰ She identified two features of cases or categories of

⁷⁵⁸ Dodge W.S., 'Extraterritoriality and Conflict of Laws Theory: An Argument for Judicial Unilateralism' (1998) 39 Harv. Int'l L.J. 101, 152.

⁷⁵⁹ Ibid, p.152.

⁷⁶⁰ Buxbaum (2009).

cases in which the court's adoption of broad jurisdiction rules would be justifiable. First, there must be a substantive norm that is shared in the international community. In other words, there needs to be a consensus on certain regulatory standards as opposed to a conflict of substantive regulatory provisions. Second, the application of domestic law must promise a global regulatory benefit. Thus, for example, in cases dealing with hard-core price-fixing involving global cartels, there is an internationally shared norm against such conduct which is capable of harming competitive conditions worldwide. While the benefit of Buxbaum's limited approach is that it avoids conflicts of *substantive* law, she conceded that there was still room for conflict of *procedural* laws. It seems that Buxbaum did not see the need to make any attempts to propose possible solutions to this conflict because, in her view, it was "a second order conflict".⁷⁶¹ The author of this thesis submits that this does not recognise the significance of a conflict of procedural laws. Differences in procedural laws, such as the availability and scope of interim relief, can be based on policies which affect the very ability of the parties to start the process of litigation on issues of substantive law. Indeed, we have already seen in Part I of the thesis that pre-judgment freezing injunctions have an important role in ensuring equipage equality. A conflict in respect of the substantive preconditions for obtaining a freezing injunction can have a direct impact on a claimant's ability to satisfy any future judgment in its favour. Thus, whether the goals of substantive law can be fulfilled may depend on the choice between two sets of procedural rules. For these reasons, it is an understatement to describe a conflict of procedural laws as "a second order conflict".

18.4 Analogy with the existing use of a functional approach in the context of other equitable forms of relief

Proponents of the use of a functional approach to jurisdiction in the context of freezing injunctions would be searching for any existing case law from related areas of the law that may provide support for their arguments. One possible argument is that a functional approach has been adopted by the English courts in related branches of equity, namely in relation to the power to appoint receivers by way of equitable execution. The statutory source for such a power is exactly the same provision as the source for freezing injunctions: section 37(1) of the Senior Courts Act 1981. In a recent summary of the key principles which the court would apply when considering an application to appoint an equitable receiver, Males J confirmed that "[t]he overriding consideration in determining the scope of the court's jurisdiction is the demands of justice. Those demands include the promotion of the policy of English law that judgments of the English court and English arbitration awards should be complied with and, if necessary, enforced."⁷⁶² Given that "the demands of justice" is an equally overriding consideration for the courts when dealing with an application for a freezing order, it can be inferred that the international scope of freezing orders should also promote the policy of compliance with the judgments of the English court. This argument could be employed to justify the availability of worldwide freezing injunctions. If we were to take a more cautious approach to interpretation, however, it is possible to say that Males J was using the words "the scope of the court's jurisdiction" to refer to what the author of this thesis has labelled as the substantive scope of the order. There is nothing usual or theoretically flawed in the substantive scope of the power to grant equitable relief being shaped by the desire to promote the policies of the forum. Nevertheless, the fact that a functional approach extended to the *international scope* of the order could be seen

⁷⁶¹ Ibid, p.270.

⁷⁶² *Cruz City 1 Mauritius Holdings v Unitech Ltd* [2014] EWHC 3131 (Comm), [47].

from Males J's observation that it is "unnecessary" for the court to deal with questions involving "disputed issues of foreign law" relating to the likely effectiveness of the order.

18.5 Application of the functional theories to specific categories of freezing injunctions

The analysis of the historical and theoretical foundations in part I of this thesis has shown that we can categorise freezing injunctions as follows: proprietary and non-proprietary pre-judgment freezing injunctions, *Chabra* injunctions, and finally post-judgment freezing injunctions. Given the emphasis on promoting the underlying policies under the functional theories, it will be necessary to examine the possible arguments about the application of a functional approach to each category of freezing injunctions.

18.5.1 Post-judgment freezing orders

Given their function as an aid to enforcement, from a functional perspective, the scope of such orders should be as wide as possible in order to maximise the ability of judgment creditors to recover the judgment debt. As we have seen in part I of this thesis,⁷⁶³ the theoretical foundations of post-judgment freezing injunctions are perceived by the courts as considerably more stable in comparison to those of pre-judgment freezing injunctions. Taking that into account, a possible argument could be that a post-judgment worldwide freezing injunction does not involve interference, or at least the same degree of interference, with the sovereignty of the foreign courts.

Proponents of functional approach could find indirect support for the extraterritorial scope of post-judgment freezing injunctions in the United States where a distinction has been drawn between the international scope of pre-judgment attachment and post-judgment garnishment. Back in 1977, the Supreme Court in *Shaffer v Heitner*⁷⁶⁴ had noted in a footnote that:

"Once it has been determined by a court of competent jurisdiction that the defendant is a debtor of the plaintiff, there would seem to be no unfairness in allowing an action to realize on that debt in a State where the defendant has property, whether or not that State would have jurisdiction to determine the existence of the debt as an original matter."⁷⁶⁵

While this footnote created uncertainty, one possible interpretation was that post-judgment garnishment was not conditional upon jurisdiction over the judgment debtor. In its landmark decision in *Koehler v Bank of Bermuda Ltd*,⁷⁶⁶ the majority of the New York Court of Appeals held that a judgment creditor could garnish a non-resident's assets located abroad provided that the garnishee is subject to the state's personal jurisdiction. On the facts of that case, neither the dispute nor the parties had any connection to New York. A Maryland judgment was domesticated in New York but the judgment debtor's stock certificates were held by the Bank of Bermuda in Bermuda. The judgment creditor successfully obtained a turn-over order against the New York branch of Bank of Bermuda directing it to transfer the stock certificates into New York. It follows that, unlike for pre-judgment attachment, there was no requirement that the judgment debtor maintains the requisite

⁷⁶³ See chapter 4, section 4.9 of this thesis.

⁷⁶⁴ 433 U.S. 186 (1977).

⁷⁶⁵ *Ibid*, fn. 36.

⁷⁶⁶ 12 N.Y.3d 533, 537-38 (2009).

“minimum contacts” with the garnishing forum. The New York Court of Appeals explicitly distinguished post-judgment garnishment from the more limited scope of pre-judgment attachment. The latter can only be granted against the assets located within the territorial jurisdiction of the state in which it is sought. The court’s explanation of the distinction rested on its characterisation of pre-judgment attachment as operating *in rem* and post-judgment garnishment as operating *in personam*.⁷⁶⁷ The majority relied on a well-established rule in the United States that jurisdiction over judgment debtors included the power to order them to bring their assets located abroad within the jurisdiction to satisfy an existing judgment. As one author has explained, the basis for this rule is the “general rule that a court has the power to order a person subject to its jurisdiction to obey its orders, even if that requires the performance of an act in another jurisdiction.”⁷⁶⁸ The reasoning in the dissenting judgment was that the majority’s holding opened a forum shopping opportunity for any judgment creditor. Concerns have been expressed about the significant administration burdens and the accompanying costs for banks and the risk of conflicting adjudications.

More controversial than *Koehler* is a later decision of the New York Court of Appeals in *Hotel 71 Mezz Lender v Falor*.⁷⁶⁹ The decision in *Falor* is an indication that some of the courts in the US are willing to adopt a more flexible approach to the territorial scope of pre-trial relief regardless of the obstacles posed by the well-established jurisdictional rules. In that case the key issue was whether the claimant could attach intangible personal property (the defendant guarantor’s uncertificated ownership interests in various out of state limited liability companies) under CPLR article 62. A crucial factor was that the garnishee of the defendant’s intangible property voluntarily submitted to the personal jurisdiction of the New York court. The judgment of the Court of Appeals has been interpreted by some commentators in the United States as effectively allowing the assertion of personal jurisdiction over a foreign company with no minimum contacts in New York.⁷⁷⁰ This is because of the overlap between *quasi in rem* jurisdiction and personal jurisdiction. It has been heavily criticised as unconstitutional and inconsistent with a number of decisions of the US Supreme Court.⁷⁷¹

If we take a functional approach to jurisdiction, flexible rules on post-judgment injunctions which can reach assets outside the territorial jurisdiction of the court could be seen as necessary to adequately protect claimants: the ability of the judgment debtors to control the location of the property is dangerous as it may enable them to frustrate the enforcement of the judgment. In the author’s view, while it is not difficult to understand the desire of the courts to reach an outcome that would assist judgment creditors, claimants should not be able to circumvent the need to fully address legal issues arising under private international law. The flexibility of the rules on post-judgment injunctions and any extraterritorial effects must be sensitive to the interests of innocent

⁷⁶⁷ Support for the court’s explanation is found in Weinstein D.H., ‘New York: The Next Mecca for Judgment Creditors? An Analysis of *Koehler v. Bank of Bermuda Ltd.*’, (2010) 78(6) Fordham L. Rev. 3161. For criticism, see McGarry Jr. M.A., ‘Vestiges of Jurisdiction: On the *In Rem* Nature of Pre-judgment Attachment in New York’ (2010-2011) 32 Cardozo L. Rev. 1581 (argues that the notion that pre-judgment attachment operates against property rather than persons is highly suspect and that there is nothing problematic about attachment of extraterritorial assets).

⁷⁶⁸ *Ibid*, Weinstein (2010), footnote 149.

⁷⁶⁹ 926 N.E.2d 1202 (N.Y. 2010).

⁷⁷⁰ See, for example, Schroeder J.L. and Carlson D.G., ‘Where Corporations Are: Why Casual Visits to New York are Bad for Business’ (2012-2013) 76 Alb. L. Rev. 1141.

⁷⁷¹ *Ibid*.

third parties operating outside the territorial jurisdiction of the English court. The mere fact that an injunction is being granted post-judgment does not diminish its potential to affect the interests of third parties who may have been subject to the conflicting obligations (or relied upon the conflicting rules) of a foreign legal system. Furthermore, from the perspective of equipage equality, claimants should not be able to use an extraterritorial post-judgment order to circumvent any obstacles that they would face in obtaining a similar order from the foreign court in the country where the assets are located. Thus, to use a functional approach in the context of post-judgment freezing injunctions would be inconsistent with equipage equality and the author's proposal to prevent encroachment upon the regulatory authority of a foreign state whose law is applicable to regulate any interference with the assets. In conclusion, the international scope of post-judgment freezing injunctions from the English courts should also be restricted to assets located in England.⁷⁷²

18.5.2 Pre-judgment proprietary freezing injunctions

In part I of this thesis, it has been shown that the key function of proprietary freezing injunctions is the protection of claimant's property rights from any interference by the defendant before judgment.⁷⁷³ Unlike pre-judgment freezing injunctions in respect of contractual claims, it has to be established up to the standard of a good arguable case that the assets in the possession of the defendant are the property of the claimant. In other words, it is necessary to show a link between the claim and the assets in respect of which the order is sought. With this background in mind, it is submitted that there are at least two possible routes if a functional approach to jurisdiction rules is applied to this category of freezing injunctions.

First, it could be argued that the English jurisdiction rules need to be as broad as possible in order to provide maximum deterrence against fraud. Indeed, the majority of applications for freezing injunctions in this category involve allegations of fraud including misappropriation of company's assets. In the context of legislative and adjudicatory jurisdiction, Brilmayer has argued that:

"Some of the community's norms are properly designed to apply to member's activities wherever they occur, and where a legal rule is silent as to its territorial applicability, *the fact that the rule embodies an important moral purpose should be taken into account in determining its extraterritorial reach.*"⁷⁷⁴

On this view, the ability to grant worldwide freezing injunctions in this category is absolutely essential, even in the circumstances where there is a weak connection to England. Arguably, this is especially important for English freezing injunctions because of London's status as one of the world's leading financial centres. Even if a foreign company has no assets and is not present (or no longer present) in England, a breach of a worldwide freezing injunction would cut it off from London's capital markets.⁷⁷⁵ Moreover, while worldwide freezing injunctions do not have a direct impact abroad, such orders nevertheless create a possibility of foreign recognition and enforcement by co-

⁷⁷² Note that the author's proposals for reform (bold and modest solutions) from the previous two chapters of this thesis are equally applicable to post-judgment freezing injunctions.

⁷⁷³ See chapter 3 of this thesis.

⁷⁷⁴ Brilmayer L., 'Liberalism, Community, and State Borders' (1991-1992) 41 Duke L.J. 1, 25 (emphasis added).

⁷⁷⁵ For evidence of such factors influencing the decisions of the Commercial Court see *Royal Bank of Scotland Plc v FAL Oil Company Ltd et al* [2012] EWHC 3628 (Comm) and especially para [46] of Gloster J's judgment; see also *Parbulk II AS v PT Humpuss* [2011] EWHC 3143 (Comm).

operative jurisdictions, and this in turn increases the deterrent effect.⁷⁷⁶ Permission is commonly granted by the English courts to enforce an English order in the foreign court.⁷⁷⁷

The second, alternative application of a functional approach is that proprietary freezing injunctions should be restricted to applications in respect of proprietary claims under English law and/or the claimant's property rights governed by English law. If we consider the legitimate expectations of the parties, the defendant cannot complain that English courts are able to provide assistance to the claimant to protect English property rights. There is a clear link in such cases between English law and the specific assets located abroad. For this reason, there is arguably an important difference for the purposes of jurisdiction rules between this scenario (proprietary claim) and an application for a freezing injunction in respect of a non-proprietary claim. A freezing injunction may be a powerful tool to protect the claimant's property rights but is it the function of English rules to protect property rights governed by foreign law? Protection of foreign property rights might not be necessary because most sovereign states are under an international obligation to protect property rights and therefore provide some protective measures through its national substantive and procedural law. Preventing the loss of property rights before judgment is an important element of such protection. As a compromise, the English courts could grant worldwide freezing orders (and ancillary worldwide disclosure orders) on an interim basis pending the application for local relief. This would reduce the risk of dissipation during the interim period while the claimant is giving instructions to local counsel in the relevant jurisdictions.

18.5.3 Pre-judgment non-proprietary freezing injunctions

Typical cases under this category involve a failure to comply with a contractual obligation for payment because of the defendant company's financial difficulties. As we have seen in part I of the thesis, the functions of freezing injunctions in this category are different from both post-judgment orders and proprietary orders. Unlike in proprietary cases, there is no function of preserving the claimant's property rights. In an application for a non-proprietary freezing injunction, the claimant's allegations are only capable of giving rise to personal rights against the defendant. There is no link between the claim and the assets in respect of which the order is sought. Even from a functional perspective on jurisdiction, the differences between non-proprietary freezing injunctions and other categories of freezing injunctions could lead proponents of functional theories to question the need for a broad brush approach to territorial scope in this particular category. Using Buxbaum's terminology, a potential argument is that, unlike with proprietary and post-judgment orders, it may be difficult to identify "international consensus" or "substantive norm shared by the international community" in the category of pre-judgment non-proprietary freezing orders.

Nevertheless, this argument is probably an optimistic attempt to impose restrictions on the international scope of freezing injunctions even under a functional theory of jurisdiction. It is more likely that a functional jurisdiction theory would be employed to justify the current, excessively

⁷⁷⁶ See, for example, the decision of the New York court to recognise and enforce English default judgments resulting from non-compliance with an English freezing injunction in *CIBC Mellon Trust Co. v Mora Hotel Corp.*, 100 N.Y. 2d 215, 222 (2003). See also: Scherer M. and Nadelhofer S., 'Possible Enforcement of Worldwide Freezing Orders in Switzerland' <http://kluwerarbitrationblog.com/blog/2012/03/23/possible-enforcement-of-worldwide-freezing-orders-in-switzerland/>.

⁷⁷⁷ See the analysis of *Arcadia Energy (Suisse) SA et al v Attock Oil International Ltd et al* [2015] EWHC 3700 (Comm) in chapter 14, section 14.3 of this thesis.

claimant-friendly, jurisdictional preconditions. Indeed, a possible criticism of the author's proposals to restrict the scope of freezing injunctions to assets located in England is that dishonest defendants would take advantage of the strict application of a largely territorial approach to jurisdiction by dissipating their assets located abroad before the application in the relevant foreign courts. In this context, if a narrow view of the functions of freezing injunctions is being promoted, a functional theory of jurisdiction would be invoked justify maximising the power of the freezing injunction as a weapon against unscrupulous defendants. The argument would be as follows: instead of being chained by rigid rules of jurisdiction and taking no steps to stop unjust dissipation of assets until the implementation of some harmonised system of rules, national courts should be free to interventionist and expand the international scope of their rules on freezing assets so as to reduce the possibility of any gaps in the protection of claimants.

Proponents of a functionalist approach to jurisdiction might also utilise arguments based on the principle of procedural efficiency to criticise the author's proposals. They would place less emphasis on the traditional principles of private international law and only pay lip service to the principles of public international law. For these reasons, cost efficiency (including consolidation of proceedings) would usually be prioritised over the interests of other states. A subtle interference with sovereignty can be sacrificed in favour of cost efficiency provided that the foreign state in question ignores or accepts the interference. Both cost efficiency and consolidation of proceedings are relevant to worldwide freezing injunctions especially in disputes involving multiple defendants with connections to and assets in several countries. In such cases, a functionalist approach might seek to minimise costs by enabling the claimant to obtain a worldwide freezing injunction, even in support of foreign substantive proceedings.

18.5.4 *Chabra*-style injunctions

Cost efficiency and consolidation arguments might even be stretched to justify extending worldwide freezing injunctions to *Chabra*-type defendants against whom a claimant does not have a cause of action.⁷⁷⁸ In the context of *Chabra*-style injunctions, if the cause of action (CAD) defendant's connection to England is weak, then it is highly likely that *Chabra*-type defendants may have an even weaker or no connection with England. However, from a functionalist perspective, it could be argued that a separate set of foreign proceedings against *Chabra*-type defendants would unnecessarily increase costs for the claimant. The need for separate applications may also allow those defendants to hide or dissipate the relevant assets if they were to receive early notice that a freezing order has been issued against the CAD defendant. Thus, if *Chabra*-type defendants have assets located abroad which might be used to satisfy the eventual judgment against the CAD defendant, proponents of a functional approach might argue that the interests of procedural efficiency (and the policy of the forum to protect claimants from unscrupulous defendants) should trump any inconsistency of the order with the traditional principles of private international law. The absence of jurisdiction *in rem* over assets located abroad as an argument against a worldwide injunction, as opposed to a domestic injunction, would probably be seen as allowing defendants to escape liability through reliance on

⁷⁷⁸ Analogy could be made with the manner in which the English courts exercise their discretion in cases involving multiple proceedings and multiple parties some of whom are not bound by the exclusive jurisdiction agreement: see *Donohue v Armco* [2002] 1 Lloyd's Rep 425.

some 'old-fashioned' jurisdictional theories. In their view, national rules of jurisdiction must actually be used to achieve internationalist regulatory goals.⁷⁷⁹

18.6 Summary and reflections on the functional approach

The counter-arguments to the author's proposals are based on functional theories of jurisdiction. A functional approach treats the rules on the existence jurisdiction in private international law as the machinery which is supposed to provide support for and increase the effectiveness of the forum's substantive law. Apparently, the ultimate objective of this approach is to provide a benefit for the international community. Its main methodology is to increase the reach of national law, including national procedural law, in such a way as to fill in the gaps caused by the perceived insufficient development of and deficiencies in foreign legal systems. It inevitably plays down the existence of public international law limits on the jurisdiction of national courts. Indeed, functional-based arguments in favour of extraterritorial jurisdiction usually start with the premise that public international law either recognises extraterritorial jurisdiction as legitimate in certain circumstances,⁷⁸⁰ or that it imposes no effective constraints.⁷⁸¹

The ultimate aim of the functionalist approach in the context of freezing injunctions could be explained as compensating for the lack of an international instrument, or perhaps exploiting its absence, by extending the international reach of the English rules to assets located abroad. Such extension is only designed to maximise protection of the claimant's interests and facilitate the enforcement of a future judgment by closing down on opportunities for the defendant to make himself judgment-proof. The traditional principles of private and public international law are sometimes seen as responsible for creating such opportunities for defendants. However, it is the author's view that the use of a functionalist theory to justify the availability of worldwide freezing injunctions overlooks the need to safeguard the interests of defendants and innocent third parties. In particular, it ignores the important role of the principle of equipage equality and the need for a level-playing field in international litigation.

In stark contrast to the functional theories, the author's proposals are consistent with the theoretical foundations of private and public international law and the need to protect the legitimate expectations of all parties. Indeed, private international law rules are not limited to resolving conflicts between sovereign states.⁷⁸² As we have seen from the author's proposals in the previous chapter, opportunities for evading judgments can be reduced without the need for encroaching upon the regulatory authority of other states. The diversity of the substantive preconditions for freezing injunctions would be preserved and this in turn means that claimants would have to take any forum as they find it – consistently with ensuring equipage equality at the international level,

⁷⁷⁹ See, *inter alia*, Buxbaum H.L., 'Transnational Regulatory Litigation' (2005-2006) 46 Va. J. Int'l L. 251.

⁷⁸⁰ For a recent example in relation to global market anti-trust cases and f-cubed securities cases see Sigmund E., 'Extraterritoriality and the Unique Analogy Between Multinational Antitrust and Securities Fraud Claims' (2010-2011) 51 Va. J. Int'l L. 1047, 1052 (although Sigmund recognises the need for "a robust limitation on extraterritorial jurisdiction" due to considerations of comity).

⁷⁸¹ See, for example, Born G.B., 'A Reappraisal of the Extraterritorial Reach of US Law' (1992-1993) 24 Law & Pol'y in Int'l Bus 1, 6.

⁷⁸² See Lehmann M., 'Liberating the Individual from Battles between States: Justifying Party Autonomy in Conflict of Laws' (2008) 41 Vanderbilt Journal of Transnational Law 381.

they cannot circumvent any protection afforded to the defendant available from the courts of the country where the assets are located.

Chapter 19: Conclusions

19.1 Rethinking the substantive scope of freezing injunctions

Due to the frequency of successful applications for freezing injunctions in the English courts, it is easy to forget that in 1975 the decisions in *Karageorgis and The Mareva* caught the practitioners by surprise. Indeed, as we have seen in part I of this thesis, the doctrinal foundations of freezing injunctions are far from stable. The reasoning in *Rasu Maritima* and the preceding cases was inadequate to justify the creation of a non-proprietary freezing injunction.⁷⁸³ In particular, the Court of Appeal in these cases did not provide convincing reasons for departing from the position that pre-judgment injunctions were restricted to proprietary claims. Instead, the Court of Appeal exploited the fact that the *Lister v Stubbs* line of cases did not directly deal with non-proprietary claims. The author has sought to start from a clean slate and identify any principles which could explain the extension of freezing injunctions to non-proprietary claims. Equipage equality has been identified in this thesis as the most potent justification.⁷⁸⁴ For a level-playing field in litigation to be achieved in accordance with the principle of equipage equality, it is essential for any injunction to contain exceptions and safeguards for the benefit of the defendant. Any exceptions (such as the ordinary and proper course of business proviso) must be capable of being implemented without difficulty. Any available remedies for the benefit of the defendant must be capable of being enforced without engaging in costly satellite litigation.⁷⁸⁵

The current substantive preconditions for non-proprietary freezing injunctions are excessively claimant-friendly.⁷⁸⁶ The root of this problem appears to be the incorrect assumption that freezing injunctions are simply a weapon against unscrupulous defendants. A more sophisticated and rigorous set of substantive preconditions should be adopted to achieve a fairer balance of rights between claimants and defendants. The author submits that the current test for a real risk of dissipation is susceptible to at least two different interpretations, resulting in the possibility of a lower or a higher threshold being applied to the facts. One possible interpretation is that the test may be satisfied if the conduct is such so as to make it more difficult than usual to enforce the judgment. More recent case law suggests that it is necessary to show some unjustified dealings with the assets. The author submits that in the context of non-proprietary claims, when assessing whether the conduct of the defendant warrants a freezing injunction, we need to remind ourselves that the touchstone for any equitable relief is injustice. There is nothing unjust about the bare fact that the circumstances of the case (e.g. the location of the assets) are such as to make it more difficult than usual to enforce a future judgment. The court's focus should be on the presence or absence of wrongful conduct on the defendant's part. The term dissipation is easily associated with hiding assets with an intention to avoid enforcement and it has been expressly acknowledged by the Court of Appeal that a freezing injunction carries a reputational stigma. For these reasons, in the author's view, the claimant should show objective evidence of the defendant's conduct consistent with an intention to evade any future judgment.⁷⁸⁷ It is sufficient if the court can draw an inference of such intention from the objective evidence. The conduct should be such that it cannot be capable

⁷⁸³ See chapter 4.

⁷⁸⁴ See chapter 7.

⁷⁸⁵ See chapter 9.

⁷⁸⁶ See chapter 8.

⁷⁸⁷ Ibid, section 8.2.3.

of being explained other than as an attempt to put the assets beyond the reach of courts. The conduct relied upon by a claimant should be closely linked to the assets in the defendant's possession. Adoption of the author's proposal would constitute a departure from the more flexible present practice. The proposal, it is submitted, is a principled way forward in order to bring the freezing injunction in line with the principle of equipage equality: preventing intentional evasion of judgments as opposed to assisting claimants with overcoming potential difficulties with enforcement arising without any wrongdoing from defendants. In the absence of any wrongdoing it is difficult for equity to justify a draconian intervention in the form of a freezing injunction.

A freezing injunction is more difficult to justify in relation to any assets in the hands of third parties against whom there is no cause of action. Although there was something unusual about restraining third parties right from the outset, there is no doubt that the power of the courts to grant a *Chabra* injunction was originally developed for well-intentioned reasons: to keep up with the new methods of hiding assets.⁷⁸⁸ However, the ever increasing scope of the court's powers has turned the *Chabra* injunction into an unwieldy beast. Consistently with this author's proposal on the risk of dissipation, it is submitted that, when considering an application for a *Chabra* injunction, it is crucial to determine whether any alleged difficulties with enforcement could be attributed to the defendant's wrongful conduct. If the alleged difficulties could be explained by reference to the defendant's legitimate actions, the courts should resist from providing assistance to the claimant.⁷⁸⁹ The courts should accordingly take the earliest opportunity to re-examine the substantive scope of the *Chabra* injunction and cast doubt on any case law inconsistent with this proposal. The author's proposal in relation to wrongful conduct would ensure consistency in the application of a key substantive precondition across different categories of freezing orders.

The current safeguards for defendants are inadequate to protect defendants and inconsistent with equipage equality.⁷⁹⁰ In the commercial context, it is crucial for a cross-undertaking in damages to be fortified by security.⁷⁹¹ This is because of the potential destruction of the defendant's business coupled with the imperfections and difficulties of assessing the strength of a claimant's case at the interlocutory stage. Given the potential prejudice to defendants, the courts should not be swayed by any arguments about the alleged prejudice to the claimant arising from fortification. Nevertheless, in order to avoid the potential for prejudice in cases involving vulnerable claimants, there should be some limited discretion to enable the courts to dispense with the need for security in exceptional circumstances. There is sufficient evidence from the reported cases (the latest example being one of the recent 'episodes' in the *Fiona Trust* litigation) which confirms the need to better protect commercial defendants from wrongfully granted freezing injunctions.⁷⁹² The current practice in relation to cross-undertakings in damages does not go far enough to protect defendants as evident from the unnecessary complexity of the issues in *Pugachev*.⁷⁹³ Similarly, although the courts do

⁷⁸⁸ See chapter 6.

⁷⁸⁹ *Ibid*, section 6.5.

⁷⁹⁰ See chapter 9.

⁷⁹¹ *Ibid*, section 9.4.

⁷⁹² *Ibid*.

⁷⁹³ *Ibid*.

make the distinction between transactions in the ordinary and proper course of business and dissipation, there is evidence of unnecessary obstacles for defendants in utilising the exception.⁷⁹⁴

As for the pre-condition about the strength of the claimant's case on the merits of the substantive claim, there is a general concern in English law about the good arguable case test. The author's view is that the test of a good arguable case is particularly problematic when the courts are faced with allegations of dishonesty, complex questions of law (including foreign law) and complex questions of fact. The author has welcomed the attempt by the courts to ameliorate the difficulties with the test in the context of freezing injunctions by disregarding the *Canada Trust* gloss.⁷⁹⁵ Without this unnecessary gloss, the uncertainty surrounding the current test will be reduced – this would benefit both parties as it would reduce the risk of wrongfully granted injunctions. Furthermore, it would also help to reduce the evidential burden on the claimants who may have had a 'mountain to climb' in order to demonstrate that they have a better case on the material available. The judges would have an easier and less time-consuming task, making the process more cost efficient for both parties.

The courts have acknowledged that they take into account their analysis of the strength of a claimant's case on the merits in order to assess whether the conduct of a defendant gives rise to a real risk of dissipation of the assets.⁷⁹⁶ In other words, their conclusion on the former precondition may have an influence on their view of the latter. In the author's submission, it would be preferable to avoid, as far as possible, conflating the two requirements. They serve different purposes and any conflation increases the risk of making assumptions about the risk of dissipation and undermines the need for a level-playing field in litigation. Conflating the two requirements is an excessively claimant-friendly approach because it allows claimants to circumvent a key substantive precondition. This does not adequately protect defendants from unnecessary interference with their assets. A related point is that when faced with an application for a freezing injunction, judges should resist from a possible 'emotional' temptation to fit their findings on the preconditions to their desired outcome – a temptation which may be particularly strong in the following circumstances: the judge is already satisfied that the claimant has a good arguable case on the merits and the application for the injunction is being heard *ex parte*. The equitable nature of the relief and the "just and convenient" wording in the statute should not lead judges to downplay the significance of technical points of law and fact in relation to each precondition.⁷⁹⁷

Overall, the author's proposals for reform of the current substantive preconditions would bring benefits for both parties in that they would be in a better position to know where they stand. For claimants, the proposed changes would have the general effect of highlighting the importance of placing reliance on relevant and cogent evidence. As for defendants, the proposed changes would make it easier to discharge a freezing injunction at the *inter partes* hearing. All of the author's proposals (including those relating to the international scope) take account of the exceptional nature of freezing injunctions and the fact that the claimant's successful application would normally represent an important tactical (and possibly irreversible) victory at a very early stage of litigation. Any early signals from the court about the strength of the claimant's case may play an important role in settlement negotiations. Thus, the courts should shy away from continually reviewing the

⁷⁹⁴ See chapter 9, section 9.3.

⁷⁹⁵ See chapter 8.

⁷⁹⁶ *Ibid.*

⁷⁹⁷ *Ibid.*

current requirements as the significance of ensuring a level-playing field in freezing injunctions cases cannot be overestimated.

19.2 Rethinking the international scope of freezing injunctions

Despite the sheer number of judgments (including those from the appellate courts) dealing with the international scope of freezing injunctions, there are still some grey areas about the extent of the court's powers.⁷⁹⁸ Unfortunately this creates an unnecessary incentive for costly litigation and may be exploited by a financially stronger party, even if that party has a weaker case, to obtain an important strategic advantage such as security. Concerns about the international scope of freezing injunctions are amplified by the above concerns about their current substantive scope – any encroachment on another legal system's sphere of regulation is exacerbated by the failure of the encroaching rules to achieve a fair distribution of rights between parties in accordance with the principle of equipage equality.

There is no doubt that the equitable characteristics of freezing injunctions have been heavily relied upon by the English courts to justify their extension to assets located abroad. One particular characteristic stands out as the most influential in shaping the freezing injunction's international scope: the traditional view that freezing orders operate *in personam*. In the author's submission, the courts have placed so much weight on the apparent *in personam* operation of freezing orders that they have lost sight of the need to carry out the usual assessment of the permissible international scope of their powers just like in any other category of cases involving a foreign element. Furthermore, contrary to the traditional view, it has been shown that freezing injunctions are quasi-proprietary in that they often indirectly result in interference with the defendant's property rights.⁷⁹⁹ Under the traditional view, the order does not interfere with the defendant's property rights because, unlike an attachment order, it does not create any proprietary rights.⁸⁰⁰ However, it is crystal clear that the defendant may not freely exercise all of his property rights without being in breach of an English court order. Indirect interference is more noticeable when freezing orders are combined with receivership orders. Moreover, in order to increase the effectiveness of the freezing order, the court may make an order requiring the defendant to bring his assets located abroad within the territorial jurisdiction of the English court. The apparent significance of the distinction between *in personam* and *in rem* orders is further undermined by the English courts' claimant-friendly approach to the application for permission to enforce an English freezing injunction in another jurisdiction, even in the circumstances where it is clear that the foreign court would grant a superior form of relief.⁸⁰¹ The creation and existence of numerous provisos in the standard form freezing order should be seen as a confirmation that there is concern about their extraterritorial effects. In order to curb some of its extraterritorial excesses, the courts had to take action to protect banks operating abroad. Finally, we should not underestimate the willingness of some foreign banks to comply with a worldwide freezing order without the need to take formal steps to enforce the order in the local courts.

⁷⁹⁸ See especially chapter 15.

⁷⁹⁹ See chapter 14, section 14.3.

⁸⁰⁰ See chapter 4, sections 4.6-4.7.

⁸⁰¹ See especially the analysis of *Arcadia Energy (Suisse) SA et al v Attock Oil International Ltd et al* [2015] EWHC 3700 (Comm) in chapter 14, section 14.3.

The current jurisdictional preconditions for freezing injunctions are based on unilateral and vertical rules on the existence of jurisdiction. This is inconsistent with the international systemic perspective on the function of private international law rules which requires a horizontal and multilateral approach to the existence of jurisdiction.⁸⁰² The case law on the international scope of freezing injunctions blurs the line between jurisdiction of the English court to hear the substantive dispute, jurisdiction to grant a freezing injunction, and the substantive preconditions to grant the injunction.⁸⁰³ This is partly due to the use of the term jurisdiction without specifying the type of jurisdiction that the court is referring to. Even if jurisdiction is occasionally treated as a separate enquiry from the substantive preconditions, it is not clear from the case law when exactly do the English courts have jurisdiction to grant a freezing injunction? There is legal uncertainty in this area which needs to be resolved as a matter of urgency because of the freezing injunction's importance for equipage equality and the normal functioning of international commercial transactions. A related reason for ensuring that the international scope of freezing injunctions is readily foreseeable and reflects the parties' legitimate expectations is the potential for severe penalties in the event of non-compliance with the order.⁸⁰⁴ In the author's view, the courts have to start using the term jurisdiction with greater accuracy in a context-specific manner, carefully differentiating between different types of jurisdiction.⁸⁰⁵

One of the most fundamental flaws with the current jurisdictional preconditions is that the English courts have failed to recognise the significance of Mann's warning about the limits of personal jurisdiction.⁸⁰⁶ The traditional view seems to be that personal jurisdiction over the defendant is sufficient to establish the existence of jurisdiction to grant a freezing injunction. It follows from this traditional view that, in the context injunctions in support of English proceedings, personal jurisdiction over the defendant for the purposes of the substantive dispute between the parties means that the court automatically has jurisdiction to grant a freezing injunction.⁸⁰⁷ The absence of a separate jurisdictional basis for freezing orders and the traditional view that personal jurisdiction over the defendant is sufficient can be linked to the widely held view that private international law is simply a component of national private law concerned with achieving substantive justice and that it has nothing to do with public international law. The more internationalist (and the author's preferred) philosophical stance is that we have to take into account private international law's international function: the allocation of regulatory authority between different legal systems.⁸⁰⁸ Regulatory authority should be allocated in accordance with certain values. Although there is potential for disagreement about what these values should be, this author would agree with Mills that justice pluralism and subsidiarity are among the most important values.⁸⁰⁹ Preserving the diversity of national rules on interim relief and avoiding any conflict of procedural laws (overlapping exercises of regulatory authority) on interim relief would be consistent with these values.

⁸⁰² On the international systemic perspective see chapter 13.

⁸⁰³ See chapter 14 (injunctions in support of English proceedings) and chapter 15 (injunctions in support of foreign proceedings).

⁸⁰⁴ For examples of the seriousness of the potential implications of contempt of court (such as imprisonment) see chapter 7, section 7.2.

⁸⁰⁵ For the author's explanation of the different types or categories of jurisdiction see chapter 13, section 13.4.

⁸⁰⁶ For the quotation from Mann's famous lecture and its analysis see esp. chapter 13, 13.4.

⁸⁰⁷ See chapter 14, section 14.2.

⁸⁰⁸ See chapter 13 for the author's analysis of the theoretical foundations of jurisdiction.

⁸⁰⁹ For discussion of Mills' thesis see chapter 13.

Somewhat surprisingly, even though the courts are pre-occupied with the *in personam* operation of freezing orders, there are judgments (following an *inter partes* hearing) where the lack of personal jurisdiction over the defendant was simply disregarded.⁸¹⁰ Ordinarily, there is no enquiry at all into the need to establish whether the English court has regulatory authority to grant the relief. The judges make an assumption that section 25 gives the court regulatory authority and they then proceed to solely focus on whether it would be “inexpedient” to grant the order. It is theoretically flawed to use expediency as a justification for expanding the scope of regulatory authority in this field. Expediency cannot answer the question about the *existence* of jurisdiction to grant the injunction – the question whether section 25 of the 1982 Act is applicable at all. In these cases on collateral foreign proceedings, the courts appear to be tempted to grant an injunction over the defendant’s assets located abroad because it is the only way for the claimant to obtain disclosure of the defendant’s assets located abroad.⁸¹¹ Part the problem of encroaching upon other courts’ jurisdiction can be linked to the absence of the ability to obtain a pre-judgment free-standing disclosure order.⁸¹² The courts seem to be ‘bending over backwards’ to justify their conclusion that it is expedient to grant a collateral freezing injunction,⁸¹³ especially in cases involving allegations of international fraud.⁸¹⁴

On the positive side, the judgment of Lawrence Collins LJ in the Court of Appeal’s decision in *Masri (No 2)* could be seen as a message of caution to the lower courts to carefully consider the strength of connection with the territorial jurisdiction of the English court. Since the judgment in *Masri (No 2)*, in the author’s view, that message has been taken into account by some judges in the Commercial Court. This was expressly demonstrated in *The Mahakam* by the court’s willingness to treat the mere existence of personal jurisdiction over the relevant parties as insufficient connection with the forum. The court took into consideration the reason for the existence of personal jurisdiction in order to obtain a more accurate assessment of the strength of connection with the forum. Unfortunately, there is some indication that the Commercial Court appears to have reserved the cautious approach to cases involving *Chabra*-type defendants who are not present within the jurisdiction.⁸¹⁵ Although the cautious approach of the court in *The Mahakam* is a welcome step towards imposing restrictions on the international scope of freezing injunctions, it does not go far enough.

From the overall examination of all case law it is not possible to distil a clear and separate jurisdictional rule relating to freezing injunctions under the current jurisdictional preconditions. Together with the uncertainty over the use of appropriate terminology, this is the root of the problem of encroachment upon other states’ regulatory authority and simultaneous unfairness to defendants. In an attempt to resolve these concerns, this author has made a number of alternative proposals for clarifying and restricting the territorial scope of freezing injunctions, including injunctions collateral to foreign substantive proceedings. The author’s proposals for restricting the territorial scope of freezing injunctions would ensure a level-playing in international litigation

⁸¹⁰ See, inter alia, in chapter 15, the analysis of the Court of Appeal’s reasoning in *Motorola v Uzan (No 2)*.

⁸¹¹ See, for example, in chapter 15 the analysis of *Republic of Haiti v Duvalier* and *Motorola v Uzan (No 2)*.

⁸¹² See chapter 8 on the need for free-standing disclosure orders to ensure a level-playing field.

⁸¹³ See, inter alia, the analysis of *Royal Bank of Scotland Plc v FAL Oil Co Ltd* [2012] EWHC 3628 (Comm) in chapter 15.

⁸¹⁴ See, for example, in chapter 15 the analysis of *Republic of Haiti v Duvalier* and *Motorola v Uzan (No 2)*.

⁸¹⁵ See, for example, in chapter 15 the liberal attitude to the question of jurisdiction in *Royal Bank of Scotland Plc v FAL Oil Co Ltd* [2012] EWHC 3628 (Comm).

because it would prevent multiple applications for freezing injunctions in respect of the same assets. The most ambitious proposal is for an international instrument which identifies one court with exclusive jurisdiction to grant a freezing injunction in respect of a particular asset. The author has chosen the location of the assets as the ideal connecting factor for exclusive jurisdiction to grant a freezing order.⁸¹⁶ Why do we need special private international law rules, including carefully selected connecting factors, for freezing injunctions? In short, the answer to this is that, in the light of the diversity of procedural laws in the field of asset preservation, the rules of private international law must ensure a clear delineation of regulatory authority in order to protect the freedom and equality of all sovereign states to apply their own rules and policies on interim relief. Foreign procedural rules on asset preservation deserve equal treatment and an important element of equal treatment is the international scope of their application.

The author's modest solutions involve modifications to the current decision-making process of the courts only at the domestic level.⁸¹⁷ Their objective is to broadly restrict the scope of freezing injunctions to assets located in England and thereby create a more equitable balance of rights between the parties. One of the proposals is to introduce the mandatory requirement of jurisdiction over the assets (jurisdiction *in rem*) for all freezing injunctions by broadly drawing upon statements in the existing case law. It may prove easier for defendants to persuade the court to adopt the author's second modest solution concerned with changes to the discretionary stage. This solution relies on the introduction of a familiar requirement that England is the most appropriate forum to determine the application for a freezing injunction. The second modest solution would be attractive to both counsel and judges who are sceptical of introducing radical changes as it would enable the courts to grant an injunction in respect of assets located abroad in exceptional circumstances. Any concerns about potential 'gaps' in protecting claimants are thereby ameliorated.

For any of the author's solutions to be effective, the author submits that the courts would need to desist from using the terminology of "sufficient interest or connection". The latter terminology is susceptible to creative interpretation in a given case and does not provide legal certainty. One further cause of uncertainty at the discretionary stage is the reluctance of the courts to provide clear guidance on the requirements of the principle of comity. The author's preferred solution to this problem would be for the courts to dispense with the principle of comity in the context of freezing injunctions.⁸¹⁸

The counter-arguments to the author's proposals have been shown as unconvincing and over reliant on maximising the assistance to claimants.⁸¹⁹ A functionalist approach to jurisdiction rides roughshod over the well-established principles of private and public international law. A functionalist approach provides a licence to the English court to act as an international policeman, ignore the interests of foreign states and undermine equipage equality. With regards to equipage equality, a functional approach allows courts to destabilise the equality of the parties by allowing

⁸¹⁶ See chapter 16.

⁸¹⁷ See chapter 17.

⁸¹⁸ The English courts also have the option to adopt the real connecting link criterion from the *Van Uden Maritime* case even in respect of cases involving proceedings outside the EU. Apart from the fact that the English courts are already familiar with the real connecting link criterion, it has the benefit of ensuring consistency with the approach under Article 35 of the Brussels I Recast Regulation.

⁸¹⁹ See chapter 18.

claimants to avoid any local barriers of protection to which the defendant is entitled to under the law applicable to the relationship between the defendant and a third party holder of the asset. The claimant is free to invoke a powerful form of relief with potentially debilitating effects regardless of the defendant's legitimate reliance on the restrictions on such interference imposed by another legal system with an undisputed, internationally recognised authority to regulate the relevant obligation or property right. When adjudicating on an issue of regulatory authority, the forum courts should ask themselves whether the application for a similar type of relief is actually within the proper domain of foreign policies, including those policies embodied in foreign procedural rules.

In the context of applications for freezing orders in the commercial context, legal certainty means that the courts should not be afraid of adopting a rough-and-ready rule, as long as such a rule itself has been developed or chosen because it is the best reflection of the legitimate expectations of commercial parties. Instead of providing a single proposal, the author has developed a range of proposals each of which takes a slightly different route to dealing with the problem of illegitimate interference with the sovereignty of foreign states. The modest proposals may have a higher chance of being adopted as they do not depend on reaching an international agreement with other states. Nevertheless, the author believes that even the adoption of the modest proposals would have the beneficial effect of encouraging other states to take the same (or similar) steps or resist any future temptation to expand the international scope of similar relief. Encouraging other states to avoid extraterritorial injunctive relief is in the long-term interest of the English courts and London's status as an internationally leading centre for financial and legal services. The overall combined effect of the author's proposals for reform of the scope of freezing injunctions (both international and substantive) would have important and positive consequences for all stakeholders, including the courts: the law in this area would be simplified and it is highly likely that the number of applications for freezing injunctions would be reduced. Such a reduction should be welcomed by the courts as the burden of long lists together with the shortage of judges is all too familiar.⁸²⁰

⁸²⁰ These burdens were expressly acknowledged by the Court of Appeal in *Ecobank Transnational Incorporated v Thierry Tanoh* [2015] EWCA Civ 1309, [132] per Christopher Clarke LJ.

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