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THESIS

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THE NEED FOR CROSS-BORDER INJUNCTIONS IN INTERNATIONAL COMMERCIAL ARBITRATION WITHIN THE EUROPEAN UNION

by

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« L’université n’entend ni
approuver ni désapprouver les
opinions particulières de l’auteur ».

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ABSTRACT

Traditionally the primary focus of the international commercial arbitral system was the effective protection of parties' rights through final and binding arbitral awards on the merits; because in good old days arbitration was faster than what it is nowadays. Consequently, there was no (or little) need to the interim measures.

But nowadays in international commercial arbitration the relief sought in the main proceeding may frequently be insufficient to protect effectively the rights or interest of the alleged innocent party. That is why, we need interim measures. These measures are temporary remedies aiming to prevent unjust results before the final substantive reliefs are rendered.

Taking into account, on one hand, the territoriality of traditional provisional measures and on the other hand, the need for provisional measures capable of crossing the borders of the seat of arbitration, which is a direct consequence of the seat of arbitration being in neutral country, we come to the conclusion that in contemporary international commercial arbitration, most of the times the traditional provisional measures are insufficient or unable to guarantee the smooth and efficient continuation of arbitral process and/or the effectiveness of a future final relief.

That is why, we turn toward especial kind of injunctions used in some jurisdictions with common law system which are interim measures capable of crossing the national borders. For convenience, we call them Mareva-type injunctions. As the law stands now, a Mareva- type injunction can be defined as a special type of interlocutory injunction which restrains defendants from dealing with or disposing of the whole or part of their assets, pending the outcome of existing or future dispute settlement proceedings. Since, the injunctions are

directed against individuals, not against the property; there is no reason to be concerned about their territorial reach.

Injunctions may be cross border either because of the significant effects they have on persons, property, or conduct located abroad; or on account of the fact that local courts lend their support to injunctions that a foreign court or a foreign arbitral tribunal has ordered in an action pending before it, either at the request of the foreign forum or at the request of a party to the foreign court or arbitration proceedings.

In view of the above, the scientific hypothesis of the thesis may be formulated as follow:

In the borderless European Union of the 21st century, the adoption of Mareva-type in personam cross-border injunctions, as it exists under the English legal system, is one of the best and most efficient ways in protecting the plaintiffs in international commercial arbitrations within the European Union.

The analysis conducted within the thesis leads us to the conclusion that in order to enhance the effectiveness of international commercial arbitration to meet the expectations of the parties in today's borderless European Union, we need to provide effective provisional measures consistent with needs of the era.

Relying on traditional territorial provisional measures will let mala fide defendants to escape the justice and make themselves judgment-proof against a potential final and enforceable arbitration award on the merits. While under the European Union framework, the defendants and their property can pass the national borders freely, limiting the scope of provisional measures is not logical. In passing the national borders within the European Union, provisional measures must be as free as the defendants and their property. Mareva-type cross- border European injunctions are good legal tools in this respect. They can cross borders without violating international law.

In this regard, some countries refraining from granting cross-border injunctions may recognize and enforce cross-border injunctions; this is another sign showing the gradual acceptance of the necessity of Mareva-type cross-border injunctions. So, in view of the above, the scientific hypothesis of the thesis is approved.

Keywords: Mareva injunctions, extraterritoriality, International Commercial Arbitration, Cross-border injunctions and Arbitral Tribunals.

Résumé en français

Traditionnellement, la procédure d'arbitrage commercial international avait pour principal objectif la protection effective des droits des parties à l'issue du procès sous la forme de sentences définitives et exécutoires au fond. En effet, la durée des procédures d'arbitrage était plus rapide par le passé qu'aujourd'hui, ce qui ne rendait pas nécessaire le recours à des mesures provisoires.

Mais à notre époque, dans l'arbitrage commercial international, la demande en réparation au titre de l'action principale au fond est souvent insuffisante pour protéger efficacement les droits et les intérêts de la partie présumée innocente. C'est pourquoi, l'objectif d'arbitrage commercial international a été étendu par la suite, intégrant désormais les mesures provisoires. Ces mesures sont des solutions temporaires visant à éviter des résultats injustes avant que la décision définitive au fond ne soit rendue.

Tenant compte, d'une part, de la territorialité des mesures provisoires traditionnelles et, d'autre part, de la nécessité de mesures conservatoires capables de franchir au-delà des frontières du siège de l'arbitrage, ce qui est une conséquence directe du fait que le siège de l'arbitrage soit en pays neutre, nous en arrivons au constat selon lequel dans l'arbitrage commercial international contemporain, les mesures provisoires traditionnelles sont la plupart du temps insuffisantes ou ne permettent tout simplement pas de garantir la poursuite efficace et sans heurt du processus arbitral et/ou l'efficacité d'une éventuelle décision définitive au fond.

C'est pourquoi nous nous intéressons à des injonctions spéciales utilisées dans certaines juridictions dotées d'un système de "common law", qui ont pour particularité d'être des mesures provisoires capables de traverser au-delà des frontières nationales. Pour des raisons pratiques, nous les appelons des injonctions de type Mareva. En l'état actuel du droit, une injonction de type Mareva peut être

définie comme une injonction interlocutoire qui empêche les défendeurs de traiter ou d'aliéner tout ou partie de leurs biens jusqu'à l'issue de la procédure de règlement des différends au fond en cours ou à venir. En tenant compte du fait que les injonctions sont prononcées directement à l'encontre des individus, et non de contre leurs biens ; il n'y a aucune raison de s'inquiéter de leur portée territoriale.

Les injonctions peuvent être transfrontalières en raison de leurs effets significatifs sur des personnes, des biens ou des comportements situés à l'étranger ; ou du fait que les tribunaux locaux soutiennent les injonctions ordonnées par un tribunal étranger arbitral ou judiciaire dans une procédure pendante devant lui, soit à la demande de l'instance ou tribunal arbitral étrangère, soit à la demande d'une partie à la procédure arbitrale ou judiciaire étranger.

Au vu de ce qui précède, cette hypothèse scientifique peut être formulée comme suit : *Dans l'Union Européenne sans frontières du XXIe siècle, l'adoption d'injonctions transfrontières in personam de type Mareva, telle qu'elle existe dans le système juridique anglais, constitue l'un des moyens les plus efficaces et performants de protéger les plaignants dans les arbitrages commerciaux internationaux au sein de l'Union Européenne.*

L'analyse menée dans tout au long de la thèse nous amène à la conclusion selon laquelle, afin d'améliorer l'efficacité de l'arbitrage commercial international tout en répondant aux attentes des parties dans l'Union Européenne sans frontières, il faut mettre en place des mesures provisoires efficaces correspondant aux besoins de l'époque.

Le recours aux mesures provisoires territoriales traditionnelles permet à des défendeurs de mauvaise foi d'échapper à la justice et de se prémunir contre d'une éventuelle sentence arbitral définitive et exécutoire au fond. Il n'est pas logique de limiter la portée des mesures provisoires alors que, dans le cadre de l'Union

Européenne, les défendeurs et leurs biens peuvent librement franchir les frontières nationales. En matière de franchissant des frontières nationales au sein de l'Union Européenne, les mesures provisoires doivent être aussi libres que les défendeurs et leurs biens. Les injonctions européennes transfrontalières de type Mareva sont des outils juridiques appropriés à cet égard. Elles peuvent traverser les frontières sans violer le droit international.

A cet égard, certains pays s'abstenant d'accorder des injonctions transfrontalières décident en revanche de reconnaitre et d'appliquer des injonctions transfrontalières ordonné par des tribunaux étrangers ou des tribunaux arbitraux étrangers ; c'est un autre signe qui montre l'acceptation progressive de la nécessité des injonctions transfrontalières de type Mareva. Ainsi, compte tenu de ce qui précède, l'hypothèse scientifique de la thèse est approuvée.

Mots clés : injonctions Mareva, extraterritorialité, arbitrage commercial international, injonctions transfrontalières et tribunaux arbitraux.

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Abbreviations

AAA	American Arbitration Association
ALI	American Law Institute
All ER	All England Law Reports
C. A.	Court of Appeal
CCG	Commercial Court Guide
CPR	Civil Procedure Rules (England)
ECHR	European Court of Human Rights
ECJ	European Court of Justice
ECR	European Court Reports
E. L. Rev.	England Law Review
e. g.	For example
EU	European Union
ICC	International Chamber of Commerce
ICC Rules	Arbitration and ADR Rules of the International Chamber of Commerce (2017)
ICDR	International Centre for Dispute Resolution
ICDR Procedures	International Dispute Resolution Procedures of the International Centre for Dispute Resolution (2014)
ICSID Rules	International Centre for Settlement of Investment Disputes Rules of Procedure for Arbitration Proceedings (2006)
ILA	International Law Association
LCIA	London Court of International Arbitration
QB	Law Reports Queen´s Bench Division
New York Convention	1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards

TRO	Temporary Restraining Order
UAPOA	Uniform Asset-Preservation Orders Act
UNCITRAL	United Nations Commission on International Trade Law
UNCITRAL Model Law	United Nations Commission on International Trade Law Model Law on International Arbitration (as amended in 2006)
UNCITRAL Rules	United Nations Commission on International Trade Law Arbitration Rules (as revised in 2010)
UNIDROIT	International Institute for the Unification of Private Law
WFO	worldwide freezing order

Introduction

Globalization, the emergence of internet and the expansion of trading frontiers, through establishing global and regional organizations such as the World Trade Organization and the European Union, have resulted in the increase of international trade. Although, the parties in international commerce usually perform their contractual obligations without any problem, disputes are almost inevitable occurrences in some international commercial transactions. Thus, the increase of international trade has led to the increase of international commercial disputes.

While historically national courts were the main forums for commercial dispute resolution, since the beginning of 20th century and especially in the era of globalization, international commercial arbitration has become the main method of dispute resolution in international commercial transactions. This is why the increase in international commercial disputes has resulted in an increase in the number of the international commercial arbitrations.

International commercial arbitration is designed and accepted particularly to assure parties that their disputes will be resolved in a binding, enforceable, rapid, inexpensive, flexible, confidential and neutral manner by specialized private persons selected by the parties.

The place of arbitration is a critical issue in any international commercial arbitration. The location of the arbitral seat has profound legal and tactical consequences and can materially alter the course of dispute resolution. It mostly determines, inter alia, the nationality of the award (which is relevant for the ultimate enforcement of the award), the court which can exercise supervisory and supportive roles in relation to the arbitration and, finally, it may also influence the law governing the arbitration and the application of mandatory procedural rules.

The place of arbitration is usually chosen by or on behalf of the parties, precisely because, inter alia, it is a place with which the parties have no connection. In other words, the place of arbitration is usually chosen in a neutral third country. Among the other more prominent legal factors influencing the choice of the place of arbitration are the suitability of the law on arbitral procedures of the place of arbitration, availability of a multilateral or bilateral treaty on enforcement of arbitral awards and decisions between the country where the seat of arbitration is going to be chosen and the country or countries where the awards and decisions may have to be enforced. Non-legal factors such as the convenience of the parties and the arbitrators, the availability and cost of necessary support services, available facilities, transportation, accommodation and telecommunication may also influence the choice of place of arbitration.

In view of the foregoing, it would be totally accidental if the parties happened to have assets situated within such a neutral country as the seat of arbitration. Normally if the arbitral award has to be enforced, it needs to be enforced in a country other than that in which it was made. This is why it is important that international arbitral awards be recognizable and enforceable internationally and not merely in the country in which they are made. Simply put, arbitration often takes place in a third, neutral country; a place where substantive assets of the parties are most likely not held. In such circumstances, if the awards of arbitral tribunals can only be executed at the seat of the arbitration, the effect of such decisions will be rather limited, which is why international commercial arbitrations are cross-border in nature. The extraterritoriality of international commercial arbitral awards is essential, because arbitral tribunals will be issuing awards in one country that are usually directed to parties and/or their property that are located in the country other than that of the seat of arbitration.

Traditionally, the primary focus of the international commercial arbitral system was the effective protection of parties' rights through final and binding

awards on the merits, because previously there was no big time gap between the commencement of dispute and the final award and, consequently, there was no (or little) need for the interim measures.

But nowadays the contemporary dispute settlement system in all developed legal systems is accompanied by procedural safeguards and opportunities for all of the parties to be heard. One of the consequences of these protections is a delay in the ultimate resolution of the parties' dispute, which can prejudice one party, sometimes even irreparably. On the other hand, new technologies and the internet have enabled the mala fide parties to transfer or hide their assets easily (for instance by click of a computer mouse) in jurisdictions beyond the reach of arbitral tribunals' award. This is why the relief sought in international commercial arbitration in the main proceeding may frequently be considered insufficient to effectively protect the rights or interest of the parties. In other words, due to the time gap between occurrence of commercial disputes or commencement of the substantive arbitration proceedings and the time the final relief on the merits is to be granted, irreparable and non-compensatory harm may occur. One of the parties, by dissipating or placing beyond reach the assets or the subject-matter in issue, may frustrate the rights of the other party and make enforcement impossible and render the final award a Pyrrhic victory. Therefore, interim measures are necessary to ensure that international commercial arbitration proceedings are not frustrated or undermined.

The modern international commercial arbitral system cannot operate fairly without enforceable interim measures. A final relief may be of little/no value to the successful party, if an action or an omission on the part of a recalcitrant party had rendered the outcome of the arbitration proceedings largely useless. Consequently, the interim measures can be at least as valuable as or even more worthwhile than final reliefs. Sometimes interim measures may have such a profound effect on the outcome of the dispute that we can say that these measures

actually decide the dispute. These measures are there because no party's rights should be damaged or affected due to the duration of adjudication.

Interim measures are not a new phenomenon and are rooted in ancient times. In fact, there were rules in ancient Roman law aimed at protecting property on a provisional basis.[1] However, despite their longevity and omnipresence in the legal systems of the world, making the availability of these measures as one of the general principles of law under the article 38 (1) (c) of the Statute of the International Court of Justice,[2] interim measures are generally without settled boundaries and have not yet received a really comprehensive and universally accepted legal definition. According to doctrine, the interim measures are temporary remedies aiming to avoid unjust results before the final reliefs are rendered. Although the expressions interim or provisional measures refer to the nature of the decision made, whereas the protective or conservatory measures refer to the purpose of the decision, in general the expressions interim measures, provisional measures, conservatory measures, preliminary injunctions or emergency/interim reliefs are often used interchangeably.[3] The effect of such measures is to distribute the risk for the duration of the main proceeding between the parties, shifting it from the party applying for the interim measures to the other party.

Some of the main features characterizing interim measures are as follow: it is their intrinsic function to protect, their essential nature to be provisional (temporary), their main purpose to be supportive (of the case on the merits) and, as a consequence, they must be proportional.

1. Ali Yesilirmak, Provisional Measures in International Commercial arbitration (Kluwer Law International 2005), p. 51

2. Lawrence Collins, Provisional and Protective Measures in International Litigation, 1992(111) RdC 9, 23, reprinted in. L. Collins, Essays in International Litigation and on the Conflict of Laws (Oxford: Clarendon Press 1994), 1-188.

3. Ali Yesilirmak, Op. Cit., p. 34

We may distinguish three basic objectives for provisional measures. The first basic objective of the provisional measures is ensuring that the very purpose of the litigation and/or arbitration is not frustrated while awaiting the pronouncement and enforcement of the decision on the merits. A second objective of provisional measures is to regulate the conduct of and the relations between the parties during the litigation/arbitral proceedings. A final objective is that provisional measures may conserve evidence and regulate its administration.[4]

In preventing bad-faith defendants from disposing of their assets other than in the ordinary course of business, there are plenty of provisional measures to which a plaintiff in international commercial disputes, while waiting final substantive relief, may wish to have recourse. Although, we may find some provisional measures functionally similar with the measures in the other countries, however, the types of the measures vary in nearly every national legal system. In general, it is difficult to determine clearly the types of measures that are available for the use in international commercial dispute resolution.

Notwithstanding all of the above-mentioned differences, generally the traditional interim measures have a common characteristic; they are generaly in rem remedies and apply directly to the res, the things, thus, the location of the things is important. This means that they are limited territorially and cannot normally cross national borders, especially if the forum issuing such measures is not the competent forum on the merits.[5] Because according to one of the basic norms of international law, "no state or nation can … directly affect or bind property out of its own territory".[6] In other words, since the enforcement of traditional provisional measures requires coercion and the states cannot use

4. Conserving evidence and regulating its administration is beyond the scope of this study. So, we are not going to develop it more.

5. Under the Recast Brussels I regulations, the provisional measures of the competent court on the merists are cross-border within European Union.

6. Ernest G. Lorenzen, Territoriality, public policy and the confict of laws, 33 Yale L.J. (1924), p. 737, available at https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=5578&context=fss_papers

coercive power to enforce provisional measures outside their territory, thus, these provisional measures are considered to be territorial. The effects of such measures are rather limited. They are not usually able to reach the defendants' assets in the foreign countries. Besides, to ask such a provisional measure a party should go where the property is located, which has its own difficulties, inter alia, that some countries don't have free-standing interim measures in dispute settlement proceedings taking place in foreign countries. On the other hand, taking into account the fact that defendant may have property in different countries, applying for multiple simultaneous provisional measures in different countries equally multiplies the costs of litigation, complexity and time. Besides, the multiplication of procedures cannot technically be totally simultaneous and this increases the risk of information being leaked to the defendant, ruining the surprise effect of provisional measure.

In view of the foregoing, traditional provisional measures are often insufficient or unable to guarantee the smooth and efficient continuation of the dispute settlement process and/or the effectiveness of a potential future final relief, especially in international commercial arbitration. A party may be forced to take additional steps to ensure that changes of circumstances during the pendency of the proceedings will not undermine the efficacy of the final relief on the merits.

Along with the aforementioned inadequacy and inability of traditional interim measures in protecting the rights of the parties, arising from the principle of territoriality of those measures, the following changes also necessitate the adoption of a new generation of provisional measures:

1. Disappearance of borders

Before the emergence of regional and universal organizations, national borders were very important, but nowadays, day by day, the borders are losing

their importance. In this regard the European Union is an excellent example. After a long history of wars between the European countries and the two world wars originating in Europe in the twentieth century, thanks to the European Union organization, the national borders have almost disappeared within the substantial parts of the European continent. The famous four freedoms are the very essence of the European Union; the free movement of goods, services, capital and persons within the European Union are guaranteed.

2. Emergence of internet and other new technologies

Before the Emergence of the internet and other new technologies, commerce and transfer of property were done through traditional ways. The conclusion of contracts and transfer of property were a long process, usually time-consuming, especially in international commerce. But today, thanks to the internet and other new technologies, international commerce and transfer of property can be as easy as clicking a mouse. Advantages such as rapidity and cost efficiency make the conclusion of the contracts through the internet much more common. Technology-based tools such as electronic bill of lading, Swift, Fintech, etc. allow for a more efficient transfer of money and property than traditional physical means.

3. Increase in the volume of transactions of intangible assets

Traditionally, the subject of commercial transactions was usually tangible assets. Intellectual property, if any, was rarely the subject of commercial interactions. But, nowadays the volume of transactions of intangible assets has increased substantially. Taking into account the intangibility of these assets, they can be transferred very easily, helping mala fide traders escape the justice easily.

In view of the above, a need to create a new generation of interim measures as a cutting-edge legal tool capable of countering mala fide defendants evading judgment, consistent with the needs and characteristics of the new era, becomes

clear.[7] In this respect, in personam injunctions of the English and U.S. legal systems, with their own specific enforcement mechanism, often not requiring the use of coercion beyond the boundaries of the forum issuing such injunctions, seem to have all the necessary requirements and can completely fit the framework of such a new generation of provisional measures. These injunctions are called Mareva injunctions in England and temporary restraining orders or preliminary injunctions (as the case may be) in the United States.[8] As the law stands now, a Mareva- type injunction can be defined as a special type of interlocutory injunction which restrains defendants from dealing with or disposing of the whole or part of their assets, pending the outcome of existing or future dispute settlement proceedings. Disobediance to these injunction can subject the the injuncted person to contempt of court punishment, i.e., a fine, the sequestration of assets or even imprisonmen.[9] Since, the Mareva-type injunctions are remedies in the form of a court or arbitral tribunal decisions directed against individuals, not against property, they believe that there is no reason to be concerned about their territorial reach. This means that they can cross national borders.[10] Injunctions may be cross border either because of the significant effects they have on persons, property, or conduct located abroad; or on account of the fact that local courts lend their support to injunctions that a foreign court or a foreign arbitral tribunal orders in an action pending before it, either at the request of the foreign forum or at the request of a party to the foreign country court or arbitration proceedings. In England, normally there is also an ancillary disclosure order as part of the Mareva-type injunctions which requires the defendants to disclose the full value, the nature

7. Provisional measures are normally ordered against defendants; however, such measures may affect third parties. Besides, sometimes provisional measures may be ordered against third parties too.

8. For convenience, we call these injunctions Mareva-type injunctions.

9. Contempt also places an offender on a special legal footing, by denying him access to the courts. But this is not an automatic sanction. It can be lifted by a special application, through an appeal against the decision which placed him in contempt, relying on the defence evidence submitted in other proceedings.

10. In this respect, the judgment of the Permanent Court of International justice in Lotus case is noteworthy, where it held that, “whereas States would be precluded from enforcing their laws in another State’s territory absent a permissive rule to the contrary, international law would pose no limits on a State’s jurisdiction to prescribe its rules for persons and events outside its borders absent a prohibitive rule to the contrary”

and whereabouts of their assets both within and outside the jurisdiction. Equally, in the U.S. legal system no obstacle exists to supplement a Mareva-type injunction with such a disclosure order.[11]

In this regard, in the European Union,[12] as a political and economic union of member states and the largest trade block in the world, inter alia, with goal of offering justice without internal borders, nowadays, the Recast Brussels I regulation and the cases of Court of Justice of European Union (CJEU) have set up the system for granting provisional measures.[13] As the rules of the European Union stand now, with regard to provisional measures, inter alia cross-border injunctions, there are two following possibilities:

Based on the first option, the courts having jurisdiction over the merits of a dispute can order provisional measures, inter alia injunctions, without any worries about their territorial reach. The provisional measures of the courts having jurisdiction over the substance of the dispute are cross-border within the European Union.[14] Since this study will only elaborate the situations in which the substance of the dispute is within the scope of jurisdiction of an international arbitral tribunal, this hypothesis will not be explained further.

According the second option, a court other than the forum having jurisdiction over the substance of the dispute can order provisional measures. Under this hypothesis, "application may be made to the courts of a Member State for such provisional, including protective, measures as may be available under the law of that Member State, even if the courts of another Member State have

11. Schlosser, Peter F., Coordinated transnational interaction in civil litigation and arbitraton, Michigan journal of international law 1990-1991, p.168

12. In this respect, it is needless to point out that the provision of the European Free Trade Association is also the same as that of the European Union.This means that, although for convenience, the analysis and explanations will usually be based on Brussels regime which include Brussels I regulation (recast), its predecessors, the Brussels I regulation and Brussels Convention, these analysis and explanations are usually applicable for the Lugano convention which covers the same scope for the EFTA member states.

13. Regulation (EU) No 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 (The Recast Brussels I regulation henceforth)

14. Recast Brussels I regulation, recital 33

jurisdiction as to the substance of the matter".[15] In this regard, based on the latter part of recital 33 of the Recast Brussels I regulation, "Where provisional, including protective, measures are ordered by a court of a Member State not having jurisdiction as to the substance of the matter, the effect of such measures should be confined, under this Regulation, to the territory of that Member State". This has over complicated the situation. This can mean that the judicial Mareva-type cross-border injunctions in support of proceedings in other member states of the European Union or in aid of international commercial arbitrations cannot use the recognition and enforcement mechanism provided by the Recast Brussels I regulation, because the court granting the measures is not the court having jurisdiction as to the substance of the matter; however, the English courts continue to order Mareva-type cross-border injunctions and, to the knowledge of the author, the latter courts' disposition has not trigred the opposition of the European Union. The English courts' attitude is probably based on the interpretation that Mareva-type injunctions, whether nationwide or worldwide, do not have any effect beyond the national borders of the court issuing these injunctions.

On the hypothesis that the existing conventions have provided a sufficient framework to ensure the proper and effective development of international commercial arbitration, member states of Brussels convention expressly excluded arbitration from the ambit of the above-mentioned convention. Even the subsequent transformation of the Brussels convention to Brussels I regulation and Recast Brussels I regulation did not change the principle of exclusion of arbitration.[16] In this regard, some cases of the Court of Justice of the European Union are also noteworthy.

15. Ibid, Article 35; it is noteworthy to emphasis that the courts of a member state other than the one having jurisdiction as to the substance of the matter can grant provisional measures, only if their national law has empowered them to do so; otherwise, according to prevailing doctrine, the Brussels regime don't confer any additional jurisdiction to the courts of member states in this regard.

16. For convenience, we may sometimes call the recast Brussels I regulation and its predecessors, i.e. the Brussels convention and Brussels I regulation, the Brussels regime.

In Marc Rich & Co. AG v Società Italiana Impianti PA,[17] trying to clarify the arbitration exclusion of Brussels Convention, the ECJ held that "in … order to determine whether a dispute falls within the scope of the Convention, reference must be made solely to the subject-matter of the dispute. If, by virtue of its subject-matter, such as the appointment of an arbitrator, a dispute falls outside the scope of the Convention, the existence of a preliminary issue which the court must resolve in order to determine the dispute cannot, whatever that issue may be, justify application of the Convention. It would also be contrary to the principle of legal certainty, which is one of the objectives pursued by the Convention for the applicability of the exclusion laid down in Article 1(4) of the Convention to vary according to the existence or otherwise of a preliminary issue, which might be raised at any time by the parties".[18] Later on, in Reichert and Others v Dresdner Bank case, [19] in response to questions referred to the Court by the Appeal Court of Aix-en-Provence, the European Court of Justice held, inter alia, that "The expression 'provisional, including protective, measures' … must therefore be understood as referring to measures which, in matters within the scope of the Convention, are intended to preserve a factual or legal situation so as to safeguard rights the recognition of which is sought elsewhere from the court having jurisdiction as to the substance of the matter".[20] Then, in Van Uden, as one of the most famous cases of the ECJ and the bedrock with regard to enforcement of provisional measures within the European Union, the ECJ held that,[21] "Where the parties have validly excluded the jurisdiction of the courts in a dispute arising under a contract and have referred that dispute to arbitration, no provisional or

17. ECJ, 25 July 1991, Case no 190/89, Marc Rich & Co AG v Società Italiana Impianti PA, [1991] ECR I 3894

18. Ibid; Julian D.M. Lew, Loukas A. Mistelis and Stefan M. Kröll (2003), Comparative International Commercial Arbitration, Kluwer International, 2003, p. 521; according to the court, Article 1(4) of the Convention must be interpreted as meaning that the exclusion provided for therein extends to litigation pending before a national court concerning the appointment of an arbitrator, even if the existence or validity of an arbitration agreement is a preliminary issue in that litigation.

19. ECJ, 26 March 1992, Case C-261/90, Reichert and Others v Dresdner Bank [1992] ECR I-27

20. Ibid, 2184

21. ECJ, 17 November 1998, Case no C-291/95, Van Uden Maritime BV trading as Van Uden Africa Line v Kommanditgesellschaft in Firma Deco-Line, [1998] ECR 1 7091, 7133

protective measures may be ordered on the basis of Article 5, point 1, of the Convention of 27 September 1968".[22] According to the court "Where the subject-matter of an application for provisional measures relates to a question falling within the scope ratione materiae of the Convention of 27 September 1968, that Convention is applicable and Article 24 thereof may confer jurisdiction on the court hearing that application even where proceedings have already been, or may be, commenced on the substance of the case and even where those proceedings are to be conducted before arbitrators".[23] Based on this part of ECJ's ruling, arbitration exclusion under the Brussels regime is not exclusion of the court-ordered provisional measures in aid of arbitration.[24] However, the subject-matter of an application for provisional measures should relate to a question falling within the scope ratione materiae of the Convention.

Since the European Court of Justice had also held that "the granting of provisional or protective measures on the basis of Article 24 of the Convention of 27 September 1968 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 Contracting State of the court before which those measures are sought",[25] in legal doctrine it has been derived from this restriction that the courts of the member states of the European Union not vested with jurisdiction for the main proceedings do not have jurisdiction for issuing any kind of interim measures, unless the measure affects only assets within the respective court's district.[26]

22. Ibid, I –7139

23. Ibid; article 24 of the Brussels Convention is now the article 35 of the Recast Brussels I regulation.

24. V. V Veeder, 'The Need for Cross-border Enforcement of Interim Measures Ordered by a State Court In Support of the International Arbitral Process' in van den Berg (ed) New Horizons in International Commercial Arbitration and Beyond, 2005, ICCA Congress series no. 12, p. 246.

25. Van Uden Maritime BV trading as Van Uden Africa Line v Kommanditgesellschaft in Firma Deco-Line, I – 7140

26. Peter F Schlosser, Jurisdiction and International Judicial and Administrative Co-operation, Martinus Nijhoff Publishers, The Hague/Boston/London, 2001 Recueil des cours Nº 284/Collected Courses Vol. 284., p. 188.

However, a close analysis yields that if their national law so requires, the courts of the member states of the European Union not vested with jurisdiction for the main proceedings do have jurisdiction for issuing any kind of interim measures and the jurisdiction of the courts in the field of interim measures of protection is not affected by the decisions of the European Court of Justice in Van Uden case, except in the context of interim payments.[27] Since the court did not define a real connecting link, it seems plausible that specific assets can be considered to be such a real connecting link.[28] It further seems that these restrictions were limited to interim measures in the form of provisional payments, thus other connecting link might be adequate in other cases non involving any payment.[29]

In view of the foregoing, only some aspects of Mareva-type cross-border injunctions fit the framework of the European Union. In other words, most of the aspects of Mareva-type injunctions, in particular active cross-border Mareva-type injunctions, may not properly and sufficiently suit the framework of European Union. This can mean that the European Union cannot provide an effective remedy for some plaintiffs.

Since according to the Charter of Fundamental Rights of the European Union, everyone whose rights, guaranteed by the law of the Union, are violated has the right to an effective remedy,[30] this thesis will suggest a combination of proposals that, collectively, seek to address such a lack of coherent structure regarding provisional measures under the European Union framework. Analyzing the existing framework of of Mareva-type cross-border injunctions, we are about to suggest propositions in the form of provisions that could be used by the national

27. Ibid.

28. V. V. Veeder, Op. Cit, p. 251.

29. Ibid.

30. Article 47, Charter of Fundamental Rights of the European Union (2016/C 202/02), Official Journal of the European Union, available at http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12016P/TXT&from=EN

and/or European legislators.Taking into account that almost all of the provisional measures available for the parties in litigation are also available in support of international commercial arbitrations, to explain the standards and principles of provisional measures, inter alia Mareva-type cross-border injunctions, this thesis will mostly analyze the litigation cases.

To be coherent, the study will focus on a limited number of legal systems, specially the English and the U.S. legal systems.[31] However, in appropriate circumstances the rules and judgments under the European Union framework, the UNCITRAL Model Law in international commercial arbitration, the International Law Association's Principles on Provisional and Protective Measures and some institutional rules, principles and judgements will be a center of focus.

Hypothesis

In view of the above, the scientific hypothesis of the thesis may be formulated as follow:

In the borderless European Union of the 21st century, the adoption of Mareva-type in personam cross-border injunctions, as it exists under the English legal system, is one of the best and most efficient ways in protecting the plaintiffs in international commercial arbitrations within the European Union.

Research methodology

In order to achieve its objectives, the main research methods used within the thesis are comparative method and descriptive method.

The comparative method entails focusing careful attention on the similarities and differences of Mareva-type cross-border injunctions in different legal systems. Going beyond the comparison, using positive aspects, avoiding

31. Taking into account that in France the provisional measures operate in rem and are strictly territorial in scope, the French system was not analyzed in the First Part. However, on one hand, in the view of the fact that under the French system the recognition and enforcement of Mareva-type in personam injunctions are accepted and, on the other hand the fact that it is an example of legal systems letting the arbitral tribunal to grant cross-border injunctions, in the Second Part, we will analysis French legal system too.

negative points and adapting the existing framework with that of the European Union, this thesis will try to formulate a number of tailor-made provisions to be used within the European Union.

The descriptive method, as its name suggests, describes the state of affairs as it exists at present. It describes the phenomenon or situation under study and its characteristics.

In order to reach its aim, this thesis will examine the following matters:
The definition of Mareva-type cross-border injunctions;
The requirement and preconditions for granting such injunctions;
The legal safeguards for the defendants subject to such injunctions;
The scope of the proposed in personam cross-border injunctions;
The effects of these injunctions over the third parties;
The forum to seek aforementioned injunctions;
The law applicable to such injunctions; and
The recognition and enforcement of these injunctions.

The thesis will be divided into two parts, forming together a complex solution to the issue of lack of Mareva-type cross-border in personam injunctions in protecting the plaintiffs in international commercial arbitrations within the European Union.

The First Part of the thesis is called direct cross-border injunctions. In its Title 1, the general framework of the Mareva-type in personam injunctions is going to be dealt with. Because of such an approach to the issue of cross-border injunctions included in Title 1, the thesis will be able to determine, already at the initial stage of reasoning, what are and should be the definition, the main characteristics and the standards of these injunctions. Determining the scope of Mareva-type injunctions, the relationship between these injunctions and third parties, and the legal safeguards given to the defendants are also issues to be

determined in Title 2 of this the First part.

The Second Part of the thesis is going to deal with the conflict of laws issues. In its Title 1, it deals with the conflict of jurisdictions and conflict of laws in the narrow sense. The Title 2 of the Second Part is going to deal with the issues of the recognition and enforcement of interim measures. Taking into account the fact that the recognition and enforcement is an indirect acceptance of extraterritoriality of provisional measures, the Second Part completes the First Part of the thesis.

First Part. Direct cross-border injunctions

We can look at cross-border injunctions from two different angles. From the first standpoint, a forum may issue an injunction having effects abroad. From the second angle, a forum may lend its support to injunctions ordered by foreign forums. This means that in the process of cross-border injunctions, two different legal systems may be engaged, the legal system issuing such injunctions and the legal system lending its support to the injunctions of foreign courts or arbitral tribunals.

The First Part of this thesis aims to alaborate the issue at hand from the above-mentioned first angle, where a court or an arbitral tribunal issues an injunction having effects abroad. Although based on territoriality principle mostly they doubt about the legitimacy of cross-border provisional measures, inter alia injunctions, some legal systems believe that issuing cross-border injunctions is possible.

In view of the above, the goal of the First Part of this thesis will be to propose provisions regarding active cross-border injunctions. In the Title 1, the general framework is going to be discussed. The Chapter I is dedicated to the definition and preconditions. The Chapter II will analysis the requirements for garanting Mareva-type injunctions and legal safeguards for the respondent. In the Title 2, the scope of Mareva-type injunctions and the involvement of third parties will be analyzed.

Title 1. General framework

Clarifying the general framework of every legal proposal is always important. Such a clarification can function like a kind of road map guiding

everybody about the subject matter at issue. Under this title, by analyzing the definition, meanings, requirements and the legal safeguards for the adverse party of Mareva-type injunctions, we are about to propose a suitable general framework for our proposed European injunction. In Chapter I, the definition and the meanings are going to be analyzed; in the Chapter II, requirements and the legal safeguards for the adverse party are going to be analyzed.

Chapter I. Definition of Mareva-type injunctions and the meanings of assets and dissipation

In dealing with the legal issues, especially in proposing the legal texts to be adopted by an organization or a state, the definition of legal terms is one of the most important tools in clarifying the subject matter at issue. In this respect, the definition of proposed Mareva-type European injunction will help us in better understanding the subject matter in which is going to be analyzed. As the above-mentioned injunctions restrain the injuncted person from dissipating or dealing with certain assets, clarifying the meaning of disposal and assets gets also necessary.

Thus, in Section 1 of this chapter we will propose a proper definition for the proposed European injunction. In Section 2, we will elaborate the meanings of assets and dissipation.

Section I. Definition of Mareva-type injunctions

In the legal world, we need to know exactly the definitions; otherwise we can not determine properly the boundaries of a specific matter from that of the others. The latter can in its turn lead to chaos and uncertainty.

Taking into account the common law origin of the Mareva-type injunctions, first the definitions proposed by the English and U.S. legal systems are going to be elaborated. Later on, suitability or otherwise of the definition of provisional

measures proposed by the Court of Justice of European Union for our purpose in this thesis is going to be analyzed.

In this respect, in England a Mareva injunction, which is also referred to as a freezing injunction, is defined as an order: (i) restraining a party from removing from the jurisdiction assets located there; or (ii) restraining a party from dealing with any assets whether located within the jurisdiction or not.[32] The definition given by English legislator has some flaws, making it unsuitable for our proposed European injunction.

On one hand, it is in the form of an order. Such an approach can unnecessarly limit the power of the forum issuing the injunction. It wold be better, if the form of a Mareva injunction was not limited to orders and the forum issuing the injunction could decide the form of the injnuction. On the other hand, based on this definition, the lagislator's purpose is unclear. Because, in part (i) of the definition only the assets located whitin the jurisdiction of the court can be restricted, but in part (ii) there is no deffrence betwenn assets located within the jurisdiction and the assets beyond the jurisdiction of the court. Taking into account that the expression "dealing with" is broad enough to include "removing from the jurisdiction assets located there", it seems that the part (i) of the definition of the English legislator is redundant. Even if, some claim that these two parts are dealing with different issue, the different attitude of legislator in these two parts does not seem acceptable. That is why, from author's point of view, such a definition is not suitable for our proposed European injunction.

With regard to the disposition of the U.S. legal system regarding the definition of Mareva-type injunctions, on one hand and based on Federal Rules of Civil Procedure, we have a doctrinal definition for temporary restraing order, which is equivalent to the English ex parte Mareva injunction and a definition for

32. Civil Procedural Rules, 1998, Part 25.1 f (i) and (ii), available at https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part25

preliminary injunction, which is equivalent to the English inter parte Mareva injunctions. A temporary restraing order is defined as "A court order preserving the status quo until a litigant's application for a preliminary … injunction can be heard".[33] A preliminary injunction is an inter parte (upon notice) judicial process or mandate operating in personam by which a party is required to do or refrain from doing a particular thing.[34] On the other hand, after the emengence of Asset-preservation Orders Act, which is the latest demontration of the U.S. legal system's disposition regarding the U.S. equivalent of the English Mareva injunctions, an"Asset-preservation order means an in personam order preserving an asset by restraining or enjoining a person from dissipating an asset directly or indirectly.[35]

Whereas, the doctrinal definitions based on the U.S. Federal Rules of Civil Procedure are outdated and especially it seems that they don't cover arbitral Mareva-type injunctions, the definition proposed by Asset-preservation Orders Act, despite being up to date, is not also suitable from author's point of view. Because, it seems that in the latter definition, the emphasis is more on the asset. But, from author's point of view, the main emphasis should be on the person restrained. So, the difinitions of the U.S. legal system are not also suitable for the proposed European injunctions.

In this respect, within the framework of the European Union, neither the Recast Brussels I regulation nor its predecessors have provided a definition for provisional measures, inter alia injunctions. There is only a definition of provisional measures granted by the European Court of Justice in Reichert and Others v Dresdner Bank case.[36] According to the ECJ, "The expression

33. Black's Law Dictionary, Ninth edition, 2009, p. 1603

34. Ibid, p. 855; Federal Rules of Civil Procedure, article 65, available at https://www.law.cornell.edu/rules/frcp/rule_65

35. Uniform Asset-preservation Orders Act, (2012) (Amended in 2014), drafted by the national conference of commissioners on uniform State laws and by it approved and recommended for enactment in all the States, Section 2. 2

36. Reichert and Others v Dresdner Bank

'provisional, including protective, measures' within the meaning of Article 24 must therefore be understood as referring to measures which, in matters within the scope of the Convention, are intended to preserve a factual or legal situation so as to safeguard rights the recognition of which is sought elsewhere from the court having jurisdiction as to the substance of the matter".[37]

For the purpose of this thesis, the definition of the Court of Justice of the European Union on provisional measures is far from satisfactory. Because, inter alia, in its definition the court has referred to Article 24 of Brussels Convention 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters (now article 35 of Recast Brussels I regulation) and the aforementioned article covers only the applications that may be made to the courts of a Member State for such provisional, including protective, measures. In other words, applications for arbitral tribunals for provisional measures, inter alia Mareva-type cross-border injunctions, are not within the scope of abovementioned article. Besides, based on above-mentioned definition, in the absence of a national basis of jurisdiction for the Mareva-type injunctions in the legal system of the vast majority of the member states, the European Union has not established an independent basis for this kind of injunctions. This means that, since in the vast majority of Member States there is no national or European basis for granting Mareva-type cross-border injunctions, even the courts are unable to grant such injunctions.

In the view of above, a new comprehensive definition for Mareva-type injunctions is indispensable. This definition needs to be wide enough to cover both arbitral cross-border injunctions and judicial cross-border injunctions in aid of international commercial arbitration. To make it more appropriate in European context, it is proposed to name it a European injunction.

37. Ibid, 2184; this definition was given when the Brussels Convention was applicable. After the transformation of the above-mentioned convention into the Brussels I regulation and subsequently the Recast Brussels I regulation, now such provisional measures are covered by the article 35 of the Recast Brussels I regulation.

My proposed definition for the European injunction is as follow:

A European injunction is a remedy, in any form, whereby, at any time prior to the execution of the relief by which the substantive international commercial dispute is finally decided, a court, an arbitral tribunal or any other third party appointed by the parties restrains defendant or third parties from dealing with or disposing of the whole or part of defendant's assets.

Alternatively, an European injunction can be defined as a remedy, in any form, whereby, at any time prior to the execution of the relief by which the substantive international commercial dispute is finally decided, a court, an arbitral tribunal or any other third party appointed by the parties, orders the defendant or third party to do or refrain from doing certain act leading to the dealing with or disposing of the whole or part of defendant's assets.

In this respect, to clarify the above-mentioned definition some points are noteworthy.

Firstly, it is necessary to emphasise that European injunction will only be granted based on an application of a party. This means that the national court, the arbitral tribunal or any other third party designated by the parties such as emergency arbitrator or arbitral institution cannot grant the injunction on its own initiative.

Secondly, in all of the definitions the court, the arbitral tribunal or any other third party appointed by the parties addresses a person personally. This means that the European injunction is an in personam remedy addressed to a particular person. It does not affect directly the assets. In other words, it is not an "in rem" remedy.

Thirdly, the addressee of a European injunction can be defendant or a third party. Normally it is addressed to the defendant, however, sometimes under certain circumstances it may be addressed to a third party.

Fourthly, the name given to a European injunction of a court, an arbitral tribunal or a third party appointed by the parties is not important. In so far as the injunction has fulfilled specific requirements of an order or an arbitral award, it merits full respect and should benefit from all advantages of an order or arbitral award, irrespective of its name.

Fifthly, the definition of the European injunction is an open-ended definition. This means that, as long as the court, arbitral tribunal or third party appointed by the parties addresses a person personally to do or refrain from certain act or omission with regard to the defendant's assets, it can be a European injunction, provided that it is within the scope of the proposed model which is limited to in personam injunctions in international commercial arbitration.

Sixthly, regarding the third party designated by the parties, it seems that in so far as it is authorized to grant enforceable injunction against a person, the name given to such a third party should not be important. Because, a dispute settlement system is not necessarily considered arbitration only by virtue of its name, on the contrary, the powers and competences of a designated dispute settlement can qualify it as arbitration even if the name given to such a system is not arbitration.

Seventhly, based on this definition a European injunction can be ordered prior the execution of the relief by which the substantive dispute is finally decided by an international commercial arbitral tribunal. This means that the life of a European injunction is not limited to the time prior to the issuance of the award by which the dispute is finally decided. Limiting the European injunction to the period prior to the issuance of the arbitral award on the merits can put the applicant in danger; because, if the injunction gets obsolete upon the issuance of arbitral award on the merits, in such circumstances in the time between the issuance of arbitral award in the merits and the recognition and/or enforcement of the award, the defendant or third party subject to European injunction can freely disregard the injunction and even make the arbitration award a pyrrhic victory. Although,

in definition of European injunction, we could limit the life of the injunction to the time prior to the issuance of the award by which the dispute is finally decided, and then establish a mechanism to transform the European injunction to another injunction with the same level of protection, it seems that continuation of the life of the European injunction until the execution of arbitral award on the merits is more practical, efficient, faster and simpler. That is why, limiting the life of the European injunction to the time prior to the issuance of the award by which the dispute is finally decided, is the author's alternative and less bold proposed definition.

Eighthly, the application can be made even before beginning of arbitration proceeding in the merits. In other words, application for European injunction in aid of a future international commercial arbitration is possible. In such circumstances, the applicant usually needs to start arbitration proceedings either within a specified period of time or within a reasonable period of time if time is not specified.

Ninthly, under the application to the European injunction, the movant cannot request the execution of his/her substantive claims. In other words, the European injunction is proposed only to assist the international commercial arbitration system in resolving the substantive disputes between the parties, it is not about to substitute the international commercial arbitration in resolving substantive dispute between the parties.

Finally, the European injunction is neither about to change the legal situation nor it creates any kind of priority in case of bankruptcy of the defendant. Thus, although the defendant's liberty with respect to his property is limited, the property remains, nevertheless, that of the defendant and if the defendant gets bankrupt, the movant can only apply for collecting the proceeds of the final substantive arbitral award as a normal creditor.

Section II. The meaning of assets and dissipation (disposal)

Given that a Mareva-type injunction restricts or prohibits a person from disposal or dissipation of assets, clarify the meanings of assets and disposal or dissipation has outmost importance. The persons subject to such an injunction need to know in advance that what are assets for the purpose of a Mareva-type injunction and what they cannot do with the assets subject to such an injunction; otherwise, they cannot be blamed for acting against the Mareva-type injunctions. In this respect in this section, the meanings of assets and dissipation will be analysed respectively.

§ I. The meaning of assets

In understanding the definition of Mareva-type injunctions, clarifying the meaning of assest is one of the first steps. Keeping in mind the above, we are about to determine what is the meaning of asset for Mareva-type injunction's purpose. The applicants, defendants and, sometimes, even third parties need to know carefully what may constitute assets for the purposes of the Mareva-type injunctions. Generally, we can define an asset as anything that a person owns and can be used to pay a debt. However, it goes without saying that such a definition cannot sufficiently shed light into the meaning of asset for Mareva-type injunction's purpose. After an overview of the English and U.S. systems' disposition regarding the meaning of asset for Mareva-type injunction's purpose, we will elaborate the meaning of assets for the author's proposed Mareva-type European injunctions.

In England, the legal system has tried, to some extent, to clarify the meaning of assets through Practice Direction and some cases. Under the Practice Direction, Mareva injunction "… applies to all the Respondent's assets whether or not they are in his own name and whether they are solely or jointly owned. For the purpose of this order the Respondent's assets include any asset which he has the power,

directly or indirectly, to dispose of or deal with as if it were his own. The Respondent is to be regarded as having such power if a third party holds or controls the asset in accordance with his direct or indirect instructions".[38]

Whereas, according to the Court of Appeal in Federal Bank of the Middle East v Hadkinson case, the expression "his assets and/or funds" in the standard form of Mareva injunction, appended to the Practice Direction supplementing Civil Procedure Rules Part 25, did not include assets and/or funds which, though held in the name of the respondent (as a trustee), were owned beneficially by someone else,[39] in JSC BTA Bank v Kythreotis & ors the Court of Appeal, relying on the standard form of Mareva injunction in the Commercial Court Guide, held that words "his assets" include assets which the respondent to the order holds as a trustee or nominee for a third party.[40] This means that standard form of Mareva injunction in the Commercial Court Guide had considerably enlarged the scope of the assets cought by the Mareva injunction since the Court of Appeal's decision in Federal Bank of the Middle East. This expansion of the scope arose because of some differences between above-mentioned paragraph 6 of the standard form of freezing order under the Practice Direction 25A of Civil Procedure Rules and paragraph 6 of the standard form of Mareva injunction in the Commercial Court Guide. According to the paragraph 6 of the CCG, Mareva injunction "… applies to all the Respondent's assets whether or not they are in its own name and whether they are solely or jointly owned and whether the Respondent is interested in them legally, beneficially or otherwise".[41] The phrase of "and whether the Respondent is interested in them legally, beneficially or otherwise" which appears in CCG version of standard form of Mareva injunction, does not appear in the standard

38. Civil Procedure Rulee 25A (Interim Injunctions), Practice Direction, Paragraph 6

39. Federal Bank of the Middle East v Hadkinson and Others: CA 16 Mar 2000

40. JSC BTA Bank v Kythreotis & ors [2010] EWCA Civ 1436

41. The Commercial Court Guide, Appendix 11, 6

form of Mareva injunction under the Practice Direction 25A of Civil Procedure Rules.

In JSC BTA Bank v Ablyazov, where the issues were, inter alia, whether the respondent's right to draw down under certain loan agreements is an "asset" within the meaning of the Mareva injunction; and whether the proceeds of the loan agreements were "assets" within the meaning of the extended definition in paragraph 5 of the Mareva injunction on the basis that the respondent had power "directly or indirectly to dispose of, or deal with the proceeds as if they were his own", the UK Supreme Court held that the definition of assets in paragraph 6 of the current standard form Commercial Court Mareva injunction includes proceeds of loan agreements to which a defendant was party.[42]

Finally, in Lakatamia Shipping Company Ltd v Su & Ors case, the English Court of Appeal, trying to clarify the meaning of assets for the purpose of the standard form Mareva injunction, confirmed that the assets belonging beneficially to a wholly owned company are not directly caught by an injunction against that company's sole shareholder.[43]

Regarding the meaning of assets for the purpose of Mareva-type injunctions in the U.S. legal system, based on the information known to the author, there is no case specifically elaborating this subject matter; however the Uniform Asset-Preservation Orders Act has provided a brief definition for assets. Accordingly, under the above-mentioned act, asset means anything that may be the subject of ownership, whether real or personal, tangible or intangible, or legal or equitable, or any interest therein, which is not exempt from execution under applicable law.[44]

42. JSC BTA Bank v Ablyazov [2015] UKSC 64 (21 October 2015), available at http://www.bailii.org/uk/cases/UKSC/2015/64.html

43. Lakatamia Shipping Company Ltd v Su & Ors [2014] EWCA Civ 636 (14 May 2014), http://www.bailii.org/ew/cases/EWCA/Civ/2014/636.html; the appeal was, however, dismissed on other grounds.

44. Uniform Asset Preservation Orders Act, Section 2 (1)

In the view of above, despite some excellent clarification being made, it seems that clarification of the meaning of assets has only received insufficient attention and it needs more clarification. In this respect, in the English system especially the difference between paragraph 6 of the standard form of freezing order under the Practice Direction 25A of Civil Procedure Rules and paragraph 6 of the standard form of freezing order in the Commercial Court Guide is, from author's point of view, inacceptable, illogical, far from common sense and can lead to the chaos.

Taking into account that in bypassing the eventual relief and making themselves judgment-proof, the defendants use, day by day, more complicated procedural and technological tools, it seems that the meaning of defendant's assets must be defined as broad as possible. In this respect, the additional wording in paragraph 6 of the standard form of freezing order in the Commercial Court Guide sounds a good rule, helping the plaintiffs to fight mala fide defendants. Equally, the definition provided by UAPOA seems also broad enough to cover all the assets in which the movant can used in execution of final relief in his/her favour.

Thus, the author's proposed European injunction's will apply generally to all the respondent's assets whether or not they are in his own name, whether they are solely or jointly owned and whether the respondent is interested in them legally, beneficially or otherwise. The respondent's assets include any asset which he has the power, directly or indirectly, to dispose of or deal with as if it were his own. The respondent is to be regarded as having such power if a third party holds or controls the asset in accordance with respondent's direct or indirect instructions. Alternatively, anything that may be the subject of ownership, tangible or intangible, or any interest therein, which is not exempt from execution under applicable law, can be asset for the purpose of European injunctions.

§ II. The meaning of dissipation

Clarifying the meaning of dissipation is also another important step in understanding the concept of Mareva-type injunctions. That is why, this subsection is about to determine the meaning of dissipation. To shed some light for this aspect of above-mentioned injunctions, after a general overview of the meaning of dissipation, first we will have a look to some developments in the English and U.S. legal systems, and then we will elaborate our proposed definition for dissipation.

Generally, the term dissipate includes the concept of waste or "to use up wastefully".[45] In the context of Mareva-type injunctions, the common sense concept of the meaning of "dissipate" is disposition of assets outside the normal course of events or the ordinary course of business.[46] In other words, dissipation means dealing with the assets in a manner clearly distinct from usual or ordinary course of events so as to render the possibility of enforcement of final substantive relief remote, if not impossible in fact or in law. However, sometimes such definitions are far from being sufficiently clear for determining the meaning of dissipation for Mareva-type injunctions' purpose.

Regarding the meaning of dissipation, some cases of English courts are noteworthy. In Law Society v Shanks case,[47]the defendant was subject to a Mareva injunction, restraining him by himself, his servants, or agents or otherwise…from disposing, pledging or transferring or dealing with any assets of his within the jurisdiction including any gratuity to be received from ministry of

45. Prefactory note and comments on Uniform Asset-preservation Act, 2014, p.14

46. Ibid

47. Law Society v Shanks [1988] 1 FLR 504

Defence, which had been the employer of the defendant.[48] Relying on some passages of Lord Denning M.R. in Z Ltd v A-Z and AA-LL that a third party must not hand the asset over to the respondent, the Ministry did not pay the defendant either the gratuity or his pension.

The defendant sought to set aside the Mareva injunction. In the court of appeal, Sir John Donaldson M.R., with whom the other members of the court agreed, refusing to follow the observations of Lord Denning M.R. in Z Ltd v A-Z and AA-LL, stated that "handing the asset over to its owner did not amount to a dissipation or a disposal. That does not amount to a dissipation or disposal of any kind whatsoever. In special circumstances, where it is known that the sole purpose of requiring the asset to be handed over to the defendant is to facilitate a dissipation of that asset, different considerations may arise"[49]. In this regard, SA Development Ltd v Fair Fashion Co Ltd v Wing Hang Bank Ltd case is also helpful.[50]

Where in the High Court, the claimant had obtained a judgment and a Mareva injunction against the defendant restraining him from disposing or otherwise dealing with his assets, save in so far as they exceeded a specified sum.

Whereas, the claimant was about to enforce its judgment by obtaining a charging order on land owned by the defendant,[51] the defendant's land had been mortgaged to a bank and according the conditions of the mortgage, in case of default by the mortgagor, the mortgagee was entitled to possess the property. When, the defendant defaulted under the mortgage and voluntarily delivered up

48. Steven Gee Q.C., Commercial Injunctions, Fifth edition, Sweet & Maxwell (2006), p. 86

49. Ibid, p. 86-87

50. SA Development Ltd v Fair Fashion Co Ltd v Wing Hang Bank Ltd [1997]

51. Steven Gee Q.C., Op. Cit., pp. 89-90

possession of the property to the bank, who sold it at public auction, the plaintiff launched proceedings in contempt against the defendant and officers of the bank.[52]

Rejecting the arguments of the plaintiff, the Court of Appeal held that the plaintiff should not have leave to pursue contempt proceedings, because by voluntary giving up possession to the mortgagee bank, the defendant had simply recognized the existing legal right of the bank to possess that property. The defendant had not disposed of his assets; he had just recognized the bank's pre-existing rights as mortgagees, which included property rights over the land.[53] In other words, the exercise or enforcement by a creditor of his rights, including rights to enforce his security or to obtain execution, so long as there is no dealing with by the person restrained with his assets, will not be a breach of the Mareva injunction.[54]

Regarding the meaning of dissipation under the U.S. legal system, although it is common term in American jurisprudence which judges apply on a daily basis;[55] the Uniform Asset-preservation Orders Act has provided a tailor-made definition of dissipation for Mareva-type injunctions' purpose. Under the above-mentioned Act, "Dissipate means to take an action with regard to an asset of a debtor to defeat satisfaction of an existing or future judgment, including:

(A) Selling, removing, alienating, transferring, assigning, encumbering, or similarly dealing with the asset;

(B) Instructing, requesting, counseling, demanding, or encouraging any other person to take an action described in subparagraph (A); and

52. Ibid, p.90

53. Ibid

54. Ibid

55. Prefactory note and comments on Uniform Asset-preservation Act, p. 14

(C) Facilitating, assisting in, aiding, abetting, or participating in an action described in subparagraph (A) or (B)".[56]

In the view of above, dissipation is a flexible concept which includes actions such as the transfer of assets outside the usual or ordinary course of events, waste of assets, and actions taken with the specific intent or effect of making the assets in fact or in law unavailable to satisfy an eventual substantive relief.

In so fas as the injuncted person is not dealing with his assets in a manner clearly distinct from usual or ordinary course of events so as to render the possibility of enforcement of final substantive relief remote, or impossible in fact or in law, he is not dissipitating his assets for Mareva-type injunctions' purpose.

Taking into account that the U.S. system has provided a tailor-made definition of dissipation for Mareva-type injunctions purpose, its disposition is prefered over the English one. However, small changes in the definition of dissipation under the Uniform Asset-preservation Orders Act seem necessary. From the author's point of view, the section 2(5) of the Uniform Asset-preservation Orders Act needs to be changed to the following manner. At first, the term "debtor" should be replaced with the term "defendant"; because before the end of substantive proceeding, it is not clear if the defendant is a debtor or not. Later on, the term "substantive relief" should replace the term "judgment". Because, the rules of Asset-preservation Orders Act are applicable to the decisions of arbitral tribunals, so, it is better to use a general and comprehensive word, otherwise the term "judgment" may create problems.

Thus, under the author's proposed model, dissipation means to take any action with regard to asset/s of a defendant to defeat satisfaction of an existing or future substantive relief, including:

56. Uniform Asset-preservation Orders Act, Section 2(5)

(A) Selling, removing, alienating, transferring, assigning, encumbering, or similarly dealing with the asset;

(B) Instructing, requesting, counseling, demanding, or encouraging any other person to take an action described in subparagraph (A); and

(C) Facilitating, assisting in, aiding, abetting, or participating in an action described in subparagraph (A) or (B).

Altenatively, we can define the dissipation briefly as dealing with the defendant's assets in a manner clearly distinct from usual or ordinary course of events with the specific intent or effect of making the assets, in fact or in law, unavailable to satisfy an eventual substantive relief.

Conclusion of Chapter I

Taking into account the importance of a clear definition in law world, we found that there was no satisfactory definition of Mareva-type in personam injunctions for our purpose in this thesis. Thus, trying to establish a good framework helping all the actors in international commercial arbitration, we proposed an up to date and efficient definition for our proposed in personam injunctions, covering both arbitral cross-border injunctions and judicial cross-border injunctions in aid of international commercial arbitration.

Since the proposed model is addressed to European Union and/or its member satates, trying to establish an autonomous definition the author has called this injunction European injunction. Based on definition of the European injunction, the author has tried to put the hands of the arbitral tribunal, court or any other third party appointed by the parties open to grant in personam European injunction preventing the defendant or third party from making the defendant judgment-proof, irrespective of its name given to such an injunction.

Thanks also to the research conducted in this chapter, under the author's proposed model, the persons subject to Mareva-type European injunctions will know, in advance, what the assets are for the purpose of Mareva-type injunctions and what they cannot do with the assets subject to such injunctions.

The research also showed that in bypassing the eventual relief and making themselves judgment-proof, the defendants use, day by day, more complicated procedural and technological tools; that is why, we need to provide a tailor-made definition of dissipation for Mareva-type injunctions' purpose.

In the view of the above, adapting the existing definition with the framework of the European Union and elaborating a proper meaning of assets and dissipation for our proposed European injunction, this chaper tried to provide a kind of road made in the beginning of the thesis. Having this in mind, the next

chapter is going to analyze the requirements for garanting Mareva-type injunctions and legal safeguards for the respondent.

Chapter II. Requirements for garanting Mareva-type injunctions and legal safeguards for the respondent

To grant provisional measures, certain requirements should meet; otherwise the forum dealing with the interim measures will refrain from granting such measures. In this respect, the Mareva-type injunctions, as an especial kind of provisional measures with draconian force, have also their own requirements, different from that of the other provisional measures. In this chapter, first at Section I, we are going to analyze these requirements. Then in Section II, the legal safeguards for the respondant will be analyzed.

Section I. Requirements for granting Mareva-type injunctions

To decide about the granting or otherwise of every kind of provisional measure the court, arbitral tribunal or any other third party appointed by the parties needs to verify whether certain conditions are met or not. Depending on severity or otherwise of requested provisional measure, these requirements may vary. There is consensus that the grant of provisional measure should fit the circumstances of the case. The court, arbitral tribunal or third party must not interfere with the respondent's rights any more than necessary. The more harmful a measure is to the respondent, the higher are the standards set by the Court, arbitral tribunal or any other third party appointed by the parties.[57] Since Mareva type injunctions are strong procedural weapons in the plaintiff's hands, they should not be ordered in every ordinary case. In other words, taking into account the draconian nature of these injunctions, the threshold for granting Mareva-type injunctions should be higher than the threshold for other provisional measures. In the following subsections, we are going to analyze these requirements.

57. Philipp J. Dickenmann, CMS Guide to Interim Measures - Switzerland, available at https://www.lexology.com/library/detail.aspx?g=90bb1d0e-20c4-4300-8785-7fefc5012dac

§ I. Good arguable case (likelihood of success on the merits)[58]

The issue in this subsection is whether or not the underlying merits of the action at the stage of the application for an interim injunction needs to be taken into account.

In this respect, despite the fact that the draconian nature of Mareva-type injunctions necessitates some requirements higher than normal requirements for granting other provisional measures, that doesn't necessarily mean that in an application for a Mareva-type injunction the merits of the underlying dispute should be adjudicated. In this regard, the experiences of English and U.S. (legal systems can be useful.

Traditionally, in England before 1975 a plaintiff seeking an interim injunction needed to show that he/she had a probability of ultimate success at trial, or at any rate a strong prima facie case. Consequently, courts generally assessed the rights underlying an application for an interlocutory injunction as they would have at trial, and therefore essentially adjudicated on the merits. In other words, before 1975, in order to ensure that neither party's rights are unduly infringed or restrained, even if only temporarily, courts had to proceed to a mini-trial at the interlocutory stage. That test was altered in American Cyanamid Co.v. Ethicon Ltd., where the House of Lords decided that the court must merely be satisfied that the claim is not frivolous or vexatious, i.e. that there is a serious question to

58. This requirement implies the existance of a dispute between the parties. In applications for any kind of provisional measure, a very important, but often implied, requirement is the existance of dispute between the applicant and defendant. In the absence of this precondition, no court, arbitral tribunal or any other third party appointed by the parties will deal with the applications for provisional measures. In this respect neither the English legal system nor the U.S. legal system has elaborated expressly this precondition. However, based on the definition of provisional measures in different international, regional and national laws, rules and case laws, inter alia UNCITRAL Model Law in international commercial arbitration, the necessity of existence of at least a dispute between the defendant and plaintiff is an essential precondition in any application for any kind of provisional measures. Sometimes provisional measures can be granted even though the movant's legal right has not yet been infringed, but seriously threatened to be infringed. In other words, sometimes imminent threat of infringement of applicant's legal right can also justify application for provisional measures. In this regard, it is noteworthy to emphasis that the application for provisional measure can be made before applying for dispute settlement process in the merits. In the latter hypothesis, the applicant needs to start substantive proceeding within specified or reasonable period of time, otherwise the provisional measure, if it is granted, can be set aside. In the view of above and to make the author's proposed European injunction as clear as possible, in the author's proposed model, existence of a legal dispute between the parties will expressly be mentioned.

be tried.[59] Thus, the present practice is that the court does not consider the underlying merits of the action at the stage of the application for an interim injunction.[60]

To the above-mentioned general rule that a judge should not engage in an extensive review of the merits, two exceptions may arise.[61] The first arises when the result of the interlocutory motion will in effect amount to a final determination of the action; this will be the case either when the right which the applicant seeks to protect can only be exercised immediately or not at all, or when the result of the application will impose such hardship on one party as to remove any potential benefit from proceeding to trial.[62] The second arises whenever applications for interlocutory injunctions are argued over a question of law, a complete factual record.[63]

With regard to the applicability of aforementioned prima facie case test over the Mareva injunctions and the meaning of good arguable case Ninemia Maritime Corp v Trave Schiffahrtsgesellschaft GmbH (The Niedersachen) is noteworthy.[64] Where, Mustill J stated that a good arguable case is "one which is more than barely capable of serious argument, and yet not necessarily one which the judge believes to have a better than 50% chance of success".[65]

In this respect in the U.S. legal system, normally, the term of "substantial likelihood of success on the merits" or "proof of the likelihood of success on the

59. American Cyanamid Co v Ethicom Ltd [1975] AC 396

60. Under the English legal system, the court may grant a Mareva-type injunction if, in the view of the court, it is just and convenient to do so. To stablish that it is just and convenient, the requirements of this subsection needs to meet.

61. NWL Ltd v Woods: HL, 1979, 1 WLR 1294, [1979] ICR 867, [1979] 3 All ER 614; Jean-Philippe Groleau, Interlocutory Injunctions: Revisiting the Three-Pronged Test, (2008) 53 McGill L.J. 269, p. 285

62. Ibid

63. Ibid

64. Ninemia Maritime Corp v. Trave Schiffahrtsgesellschaft mbH & Co [(1984) 1 All ER 398]

65. Ibid; In this regard, in the case of a post-judgment application for a Mareva Injunction, the applicant would only need to show that there is a risk of dissipation of assets.

merits" is used to describe one of the factors considered in evaluating whether or not to grant a temporary restraining order or preliminary injunction. Since temporary restraining order and preliminary injunction are unusual and very strong remedies, a plaintiff seeking them must establish, inter alia, that he/she is likely to succeed on the merits. This means that the standard articulated by Supreme Court cases requires a temporary restraining order or preliminary injunction' movant to demonstrate that it is more likely than not to succeed on its underlying claims, or in other words, that a movant must show a greater than fifty percent probability of success on the merits.[66] Under such an approach, it is necessary to evaluate whether the party seeking the injunction has put forth a plausible and appropriately authenticated prima facie factual set of claims which, in the framework of the applicable legal doctrines, looks like a winner.[67]

Believing that requiring in every case a showing that ultimate success on the merits is more likely than not is unacceptable as a general rule, some U.S. courts require a party seeking a temporary restraining order or preliminary injunction to show the likelihood of success on the merits or sufficiently serious questions going to the merits.[68] The recent standard permits the court to grant a Mareva-type injunction in situations where it cannot determine with certainty that the moving party is more likely than not to prevail on the merits of the underlying claims, but where the costs outweigh the benefits of not granting the injunction.[69] The Asset-preservation Orders Act has not changed the disposition of the U.S. legal system from this point of view.[70]

66. Citigroup Global Markets, Inc. v. VCG Special Opportunities Master Fund, No. 08-6090 (2d Cir. 2010), available at http://caselaw.findlaw.com/us-2nd-circuit/1521822.html

67. Ibid

68. Ibid

69. Ibid

70. Asset-preservation Orders Act, Section 4 (a) (1)

In this respect the judgment of the U.S. District Court for the Southern District of New York in Citigroup Global Markets, Inc. v. VCG Special Opportunities Master Fund case is noteworthy. Where, on November 12, 2008, the district court held that although CGMI had had failed to make a showing of "probable success" on the merits, it had provided evidence that raised "serious questions" as to whether VCG was in fact a customer of CGMI with respect to the swap transaction and granted the preliminary injunction on that basis.[71]

In view of the above, it seems that the approach of the English legal system is more reasonable. Because, although under this system the standards in granting Mareva-type injunctions are higher than the standards of normal injunctions, such higher standards do not necessarily stem from assessing the underlying merits of the action at the stage of the application for an interim injunction. In this respect, the forum must merely be satisfied that the claim is not frivolous or vexatious, i.e. that there is a serious question to be tried, but it does not mean necessarily that the forum should engage in an extensive review of the merits. In other words, under the English approach, on one hand, the applicant's case needs to have a solid basis and some strength which prevents the use of the court's authority to grant draconian Mareva-type injunction in aid of trivial, vexatious or frivolous claims, and in the other hands, there is no need to show a greater than fifty percent chances of winning the substantive claim, which is burdensome. Only exceptionally may the strength of each party's case be considered at the interlocutory stage.

Taking into account that at the stage of an interlocutory injunction the evidence is usually incomplete and untested by cross-examination, as well as the temporary nature of Mareva-type injunctions as means of mitigating the risk of injustice pending the trial, as a general rule, the extensive review of the underlying merits of the action at the stage of the application for a Mareva-type injunction is

71. Ibid

not acceptable. Because, it can lead to unwanted consequences, such as mistakenly granted Mareva-type injunctions, bias in the early stages of proceedings in favor of one of the parties and making application for injunctions time-consuming. Besides, it puts a burdensome pressure on the forum to determine, in a short period of time, chances of success of the applicant on the merits only based on a preliminary estimate of the strength of plaintiff's suit.

Contrary to the English legal system's disposition, in the U.S. legal system the proof of likelihood of success on the merits standard for the entry of a Mareva-type injunction seems to be a very high threshold. Because, it puts a burdensome pressure on the forum to determine, in a short period of time, chances of success of the applicant on the merits only based on a preliminary estimate of the strength of plaintiff's suit. In this respect, it sounds that the "serious questions" standard of some U.S. courts has softened a little bit the strict "proof of likelihood of success on the merits" standard. Because, it seems that the serious questions standard is more flexible and lighter than the "likelihood of success" standard.

Keeping all the above in mind, for the author's proposed model the English approach can be a good role model. Because based on this approach, neither the forum deciding about the application is under burdensome pressure of establishing more than fifty percent probability of success on the merits nor the injunction is granted in aid of trivial, vexatious or frivolous claims. Thus, under the author's proposed model, one of the key requirements for obtaining European injunctions is existence of a serious question to be tried, the way it exists in English legal system. Whereby, only exceptionally, may the strength of each party's case be considered at the interlocutory stage.

§ II. Risk of dissipation

Taking into account that Mareva-type injunctions are only granted based on proof of high standards, whether or not the risk of dissipation should be one of

above-mentioned standards is this subsection's subject. In this respect, the English and U.S. legal systems may help us in elaborating the question at issue.

In English legal system, to get a Mareva injunction the proof of risk of dissipation is necessary.[72] An applicant has to show either: (1) a real risk that a judgment or award will go unsatisfied, in the sense of a real risk that, unless restrained by injunction, the defendant will dissipate or dispose of his assets other than in the ordinary course of business; or (2) 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.[73]

In this respect, in JSC BTA Bank v. Ablyazov & Ors as an example of English cases, the court held that a party can satisfy the requirement for obtaining an Mareva injunction if it can show that there is a real risk that, unless restrained by an injunction, the defendant will dissipate or dispose of his assets other than in the normal course of business.[74] The Western Moscow case is also noteworthy.[75] Where, Christopher Clarke J, reaffirming his previous remarks that the real risk of dissipation is not a complete statement of the law and that something more than a real risk that the judgment will go unsatisfied is required, stated that, 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 goes unsatisfied or is very difficult to enforce.[76]

Concerning the disposition of the U.S. legal system with regard to proof of

72. Mareva Compania Naviera S.A. v International Bulkcarriers S.A (the Mareva), [1980] 1 all E.R. 213, (Eng. C.A.)

73. Congentra AG v Sixteen Thirteen Marine SA [2008] EWHC 1615 (Comm) at [49] ; Richard Ascroft & Hugh Sims QC, Urgent injunction applications: best practice and pitfalls to avoid, Guildhall Chambers April 2016, p. 5, available at http://www.guildhallchambers.co.uk/uploadedFiles/Paper_Urgent_HSQC_%20RA[1].pdf

74. JSC BTA Bank v. Ablyazov & Ors, [2009] 2 C.L.C.

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

76. Filip Saranovic, Private International Law Aspects of Freezing Injunctions (Dissertation), Hughes Hall, 5th May 2017, p. 56, available at https://www.repository.cam.ac.uk/bitstream/handle/1810/270457/Saranovic-2018-PhD.pdf?sequence=1&isAllowed=y

risk of dissipation as a test in granting temporary restraining orders and preliminary injunctions, it is necessary to state that, traditionally, within the U.S. system the risk of dissipation has not been not one of four-factor tests for the issuance of temporary restraining orders and preliminary injunctions. However, it may be considered under the irreparable harm test. In this respect, In re Estate of Ferdinand Marcos, Human Rights Litigation is interesting.[77] Where the Ninth Circuit held that the district courts had the authority to issue preliminary injunctions where the plaintiff could show that monetary damages would be inadequate due to the fact that the defendant had engaged in a pattern of dissipating assets to avoid judgment.[78] Nowadays, based on Uniform Asset-Preservation Orders Act, to obtain an asset-preservation order the party seeking the order must show and the court must find that "if the order is not granted, there is a substantial likelihood the assets of the party against which the order is sought will be dissipated so that the moving party will be unable to receive satisfaction of a judgment because of the dissipation".[79]

In the view of above, both of the English and U.S. systems, especially with the emergence of Asset-preservation Orders Act in U.S., have more or less a similar approach. In both of the legal systems, the goal is to prevent the defendant or third party from a conduct that can make the enforcement of final substantive relief impossible or at least unjustly very difficult. The proof of risk of dissipation get necessary, because dissipation is one of the main reasons making the enforcement of final substantive dispute impossible or at least unjustly very difficult. Thus, nowadays, in essence in both of the above-mentioned systems, the

77. In re ESTATE of Ferdinand Marcos, Human Rights Litigation. Maximo HILAO, et al., Class Plaintiffs; Vicente Clemente, et al., Class Plaintiffs; Jaime Piopongco, et al., Class Plaintiffs. Plaintiffs - Appellees, v. ESTATE of Ferdinand MARCOS, Defendant -Appellant. No. 92 -15526.United States Court of Appeals, Ninth Circuit, 1993 available at http://hrlibrary.umn.edu/research/Philippines/Hilao v Marcos, 25 F 3d 1467.pdf

78. Carlos Fabano, Maximizing plaintiff protection in the world of asset freezing and bypassing the due process requirement of notice: The Mareva injunction as an alternative to the American legal remedies, ILSA Journal of International & Comparative Law [Vol. 9:131, p. 134 available at https://nsuworks.nova.edu/cgi/viewcontent.cgi?referer=https://www.google.fr/&httpsredir=1&article=1412&context=ilsajournal

79. Uniform Asset-preservation Orders Act, Section 4 (a) (2)

applicant needs to show that the defendant and/or third party's conduct leads to irreparable harm of the applicant.

In both of the English and U.S. legal systems, in assessing the risk of dissipation different factors include, inter alia, the structure and the nature of the defendant's business and assets, the financial standing of the respondent and his/its credit history, the length of time the defendant has been in business, any intentions expressed by the defendant about future dealings with his assets, any connections which the defendant may have with other companies which have defaulted on arbitration awards or judgments and the defendant's conduct during the course of actual or previous litigation such as non-compliance with any orders of the court and a failure to make any voluntary disclosure of assets. In other worlds, in order to determine whether there is a risk of the assets being dissipated it is necessary to look at all of the circumstances. Under this factor, since the focus is on the intention of the defendant as regards his/her assets, it is rarely susceptible to direct proof. The question is whether a specific behavior of the defendant (actual or potential) may lead the forum to grant a Mareva-type injunction.

In both of the English and U.S. legal systems, a Mareva-type injunction will not be granted merely based on an unsubstantiated assertion or just based on the probability of dissipation claimed by the applicant; it will only be granted if the claimant can prove, based on solid evidence, that there is a real risk that the judgment or award will go unsatisfied, unless the injunction is ordered.

In this respect it is important to interpret the concept of risk of dissipation as flexible as possible, so that it can encompass all the possible scenarios that the defendant intends to evade unfairly the consequences of an adverse final substantive relief.

From the author's point of view, taking into account that if the dissipation of assets is not harmful to the plaintiff, it is not usually forbidden, establishing the

risk of dissipation doesn't sound to be an autonomous goal in itself; on the contrary, it seems that the real goal is to prevent the defendant from unjustifiable disposals of his/her assets otherwise than in the ordinary course of business with the intention, or having the effect, that any final substantive relief against the defendant goes unsatisfied or is very difficult to enforce.

Thus, under the author's proposed model, the defendant and/or third parties will be prevented from unjustifiable disposals of the defendant's assets otherwise than in the ordinary course of business with the intention, or having the effect, that any final substantive relief against the defendant goes unsatisfied or is very difficult to enforce; in other words, the risk of dissipation will be taken into account, however, this factor will not necessarily be an autonomous factor. It can also be considered within the irreparable harm test.

§ III. Irreparability of harm or inadequacy of final monetary relief to compensate the plaintiff's damages

This subsection is about to discuss, whether or not the irreparability of harm or inadequacy of final monetary relief to compensate the plaintiff's damages is relevant factor in applications for Mareva-type injunctions. If so, what are irreparable damages and inadequate final monetary reliefs?

Taking into account that, in our study, the provisional measures are temporary remedies pending the execution of final substantive relief decided by an international commercial arbitral tribunal, these measures should fit with the circumstances of the claim/s of the applicant. If the rights of the applicant can be protected properly by less destructive provisional measure, there is no reason to issue other types of provisional measure, inter alia the Mareva-type injunctions as one of the nuclear weapons of the law. In this respect, the analysis of the English and the U.S. legal systems can lead us to right answer to the above-mentioned questions.

In English legal system in dealing with the applications for interim injunctions, inter alia Mareva-type injunctions, the court needs to consider the adequacy or otherwise of damages in case of moving party's success at the final substantive proceedingthe. According to Lord Diplock "the governing principle is that the court should first consider whether, if the plaintiff were to succeed at trial in establishing his right …, he would be adequately compensated by an award of damages for the loss he would have sustained as a result of the defendant's continuing to do what was sought to be enjoined between the time of the application and the time of the trial. If damages … would be [an] adequate remedy and the defendant would be in a financial position to pay them, no interim injunction should normally be granted."[80]

Damages may not be an adequate remedy for the applicant, including, if the refusal of an injunction would lead to the destruction of the applicant's business, loss of goodwill and trade reputation or where the respondent has no assets against which a judgment could be readily enforced.[81]

In this respect, the U.S. legal system is similar to the English system. A party seeking a temporary restraining order or preliminary injunction must show that he/she will suffer irreparable harm if the order or injunction is not granted. The harm is irreparable when it cannot be redressed through a monetary award. Thus, where money damages are adequate, temporary restraining orders or preliminary injunctions will not be issued.[82] Thus in the U.S. legal system, this factor is one of the main factors in which any applicant for temporary restraining order or preliminary injunction should establish. Regarding the cases elaborating the concept of irreparable harm, the U.S. system is very rich.

80. American Cynanamid Co. v Ethicon Ltd [1975] AC 396

81. Evans Marshall & Co v Bertola SA [1973] 1 WLR 349 at 379 – 380 available at http://swarb.co.uk/evans-marshall-and-co-ltd-v-bertola-sa-ca-1973/

82. Jeffrey L. Wilson, Three if by Equity: Mareva Orders & the New British Invasion, Journal of Civil Rights and Economic Development, Volume 19 Issue 3, Article 5, Summer 2005, p.53

The decision of the Seventh Circuit in Roland Machinery Company v. Dresser Industries Inc is one of the best cases clarifying the meaning of irreparable harm.[83] Where, claiming a breach of the Clayton Act, plaintiff sued and sought a preliminary injunction enjoining the defendant from cutting off the supply of its equipment.[84]

The district court, concluding that if defendants were allowed to cut off plaintiff pending the trial of the case, the plaintiff would probably go out of business, granted the preliminary injunction. On appeal the Seventh Circuit, concluded that, "… No harm is irreparable if money damages will make good the wrong; therefore, to be irreparable, the money damages remedy must be somehow inadequate".[85]

According to the court, "a … remedy might be inadequate without being wholly ineffectual. Inadequacy could occur in any of four ways: (1) damages come too late to save the plaintiff's business; (2) the plaintiff will be unable to shoulder the costs of litigation because his business is destroyed in the interim; (3) the ultimate award is unsatisfied because of the defendant's insolvency; or, (4) the nature or extent of plaintiff's damages may not be susceptible to quantification"[86].

As another example of the U.S. courts' case in this field, in Airlines Reporting Corporation v. Barry, rather perfunctorily rejecting defendants' claim that the district court did not have the power to issue the injunction, relying on Deckert, Teradyne, and Roland, among other cases, on the grounds that plaintiff

83 Roland Machinery Company, Plaintiff-appellee, v. Dresser Industries, Inc., Defendant-appellant, 749 F.2d 380 (7th Cir. 1984)

84. Ibid.

85. James R. Theuer, Pre-Judgment Restraint of Assets for Claims of Damages: Should the United States Follow England's Lead?, 25 N.C.J. Int'l L. & Com. Reg. 419 1999-2000, Op. Cit, p.457

86. Ibid; finally, believing that the District court had failed in sound discretion of proof of the likelihood of success on the merits, the seventh Circuit reversed the district court's decision on the grant of the injunction. In this respect, the author believes that insolvency of defendant in ordinary cours of business is not a reason justifying the garanting of Mareva-type injunctions.

had demonstrated a clear probability that defendants will not be able to satisfy an award of adequate damages, the Eight Circuit held that the plaintiff is entitled to a preliminary injunction to protect its remedy.[87]

Then, in Tri-State Generation and Transmission Association, Inc. v. Shoshone River Power, Inc. case[88], the Tenth Circuit held that the difficulty in collecting a damage judgment may support a claim of irreparable injury. If the plaintiff cannot collect a money judgment, then failure to enter the preliminary injunction would irreparably harm it.[89]

In the light of the foregoing, proving irreparable harm or inadequacy of final monetary relief to compensate the damage suffered or likely to be suffered by the claimant is one of the most important and indispensable, if not the most difficult, requirements for the issuance of Mareva-type injunctions. Usually, it is here where applications for Mareva-type injunctions will win or lose. No matter how well the other requirements are met, if the damages are repairable or the final substantive monetary relief is able to compensate the damage suffered or likely to be suffered by the claimant and the defendant would be in a financial position to pay them, Mareva-type injunctions will not be granted. In other words, in deciding whether to grant a Mareva-type injunction, the forum should considers whether the wrong can be adequately compensated with a substantive final financial relief, if money damages are a sufficient remedy and the defendant is in in a financial position to pay them, the forum should not grant Mareva-type injunction. Because, Mareva-type injunctions are strong provisional measure, they should only be granted when the plaintiff has suffered or is likely to suffer inadequate or irreversible damages; if the damages of the claimant is reversible and the

87. Ibid, p.459; Airlines Reporting Corporation v. Barry,825 F.2d 1220 (8th Cir. 1986), available at https://openjurist.org/825/f2d/1220/airlines-reporting-corporation-v-j-barry-a-k-airlines-reporting-corporation

88. Tri-State Generation and Transmission Association Inc v. Shoshone River (1986) 805 F.2d 351, available at http://openjurist.org/805/f2d/351/tri-state-generation-and-transmission-association-inc-v-shoshone-river-power-inc-h-s

89. James R. Theuer, Op. Cit, p. 463

defendant and is in in a financial position to pay them, the applicant may only apply for less destructive provisional measures.

In this respect, from the author's point of view, the irreparable harm and inadequacy of damages as remedy sound to be the two sides of a coin; because, both of them lead to the plaintiff's damages not to be repaired properly. However, literally they are not the same; sometimes the damages may be in essence recoverable, but the fact they come too late or the defendant is not financially in a position to pay the damages may make them inadequate. In other words, a remedy might be inadequate, while the damages are in essence (technically) repairable.

With regard to the irreparability of damages and inadequacy of final monetary relief to compensate the plaintiff's damages, it is noteworthy to emphasis that damages may be irreparable or inadequate either because of the nature of damages, for example like the loss of goodwill and trade reputation or because of financial position of the defendant, as well as because of the delay in which that damages come, for example when damages come too late to save the plaintiff's business. In proving the irreparability of harm or inadequacy of final monetary relief, the applicant's evidence should be clear and not speculative. Otherwise the grant of such a strong injunction just based on some speculative and/or vague evidences will be too claimant friendly. An applicant needs to demonstrate that he/she will suffer irreparable injury if the injunction is denied. In this regard, the evidence showing occurrence of general harm is not sufficient, it is necessary to prove the irreparable nature of the harm. When the harm is irreparable, the injunction sought is the only way to compensate the party seeking it and the damage which is or may be suffered by the claimant is not capable of being remedied by a final monetary relief.

Thus, in the light of the above, under the author's proposed European injunction, the party seeking the injunction must show and the forum must find

irreparability of harm or inadequacy of final monetary relief to compensate the damage suffered or likely to be suffered by the claimant, otherwise, the forum will refrain from issuing the European injunction. In other words, if the plaintiff can be redressed in full, simply by an award of damages in the final substantive relief and the defendant would be in a financial position to pay them, the forum will not grant the European injunction.

§ IV. Balance of convenience

In this subchapter, we are about to analyze whether or not the balance of convenience (also known as balance of hardships in the U.S. legal system) should be one of the factors in dealing with the application for Mareva-type injunctions. The balance of convenience test means that in making a determination as to the applications for Mareva-type injunctions, the forum dealing with thses applications balances the costs and inconveniences which is likely to be caused to the defendant by the grant of the injunction (if the defendant succeeds finally at the determination of the substantive proceeding) with the inconvenience of a denial of the grant of the injunction to the plaintiff (if the applicant prove to be successful).

If the balance of convenience test is considered as one of determinating factors in the grant or otherwise of a Mareva-type injunctions, where the comparative mischief, hardship or inconvenience which is likely to be caused to the other party is greater than that of the plaintiff in not granting the injunction, the forum will refuse to grant the injunction; on the contrary, where the forum is satisfied that the amount of mischief, hardship or inconvenience done or likely to arise to the plaintiff, by refusing the injunction, will be greater than the same against the other party by granting the injunction, the forum may grant the Mareva-typeinjunction, provided that other requirements for the grant of a Mareva-type injunction have met.

Taking into account the fact that the object of Mareva-type injunction is to protect the plaintiff against damages caused by violation of his right for which he could not be adequately compensated in damages if the uncertainty were resolved in his favour at the final relief, normally the plaintiff's need for such protection must be weighed against the corresponding need of the defendant to be protected against inconvenience resulting from his having been prevented from exercising freely his own legal rights; in other words, the Court must weigh one need against another and determine where " the balance of " convenience " lies.[90]

In assessing the balance of convenience, the extent to which the inconveniences of each party, in the event of that party's ultimate success at the proceeding, would be capable or incapable of being compensated in damages, will be an important factor. In deciding where the balance lies, listing all the various matters which may need to be taken into consideration and the relative weight to be attached to them are not possible; so, it should be decided on the case by case basis. The balance of inconvenience makes sense as a criterion only where the interlocutory injunction is sought as a holding operation pending trial, otherwise, where the injunction is used as the final determination of a dispute, it is nonsensical to apply a test used to determine the most equitable way to preserve the rights of the parties pending trial.[91]

In this respect in dealing with the applications for Mareva-type injunctions in both of the English and U.S. systems, balance of convenience is one of the factors to be considered.[92] Although, the U.S. system uses usually the term of

90. American Cyanamid Co v Ethicom Ltd [1975] AC 396

91. Jean-Philippe Groleau, Op. Cit., p. 295; this is known as Woods exception. in cases falling within the Woods exception, the court's only task is to evaluate whether the applicant has made a strong prima facie case, failing which the interlocutory injunction must be refused. If the applicant is successful in making out a strong prima facie case, there should be no need to consider the balance of inconvenience because the respondent should be given no opportunity to cause irreparable harm to the applicant without a strong justification to pursue his course of conduct.

92. Russell v. Fariey, 105 U.S. 433 (1882)

balance of hardship, but the balance of convenience and balance of hardship mean the same.

In the view of above, balance of convenience is rightly considered as one of the necessary factors in determination as to applications for Mareva-type injunctions. Taking into account that the pre-judgment injunctions subject to this study are temporary remedies pending the final determination of the merits of the case by an international commercial arbitration, all applications for Pre-judgment Mareva-type injunctions are subjected to this test. In other words, in dealing with the applications for pre-judgment Mareva-type injunctions the forum will weigh the likely inconvenience or damage which would be suffered by the movant if the injunction is not granted against the likely inconvenience or damages for the respondent if it is granted. Without assessing this factor, the granting or refusing the grant of a pre-judgment Mareva-type injunction may create bad consequences for the plaintiff or defendant. In this regard, it seems that if the balance of convenience is equal for the plaintiff and the defendant, the forum dealing with applications for a Mareva-type injunctions should refrain from granting such injunctions, because the grant of a Mareva-type European injunction inflicts hardship on the defendants, their legitimate interests must prevail over those of the plaintiffs, who seek to obtain security for a claim which may appear to be well-founded but which still remains to be established at the trial. However, it should be emphasized that in post-judgment[93] applications for Mareva-type injunctions the balance of convenience test is irrelevant. Because, in this phase the applicant's right is stablished, so it should prevail to that of the defendant, which now is under obligation to pay the applicant's damages.

The other important remark about the balance of convenience test is the effects of other factors in determining this factor. The low or high likelihood of

93. In this sens and for our purpose in this part of thesis, judgment means both court judgments and arbitral awards.

success of the plaintiff on the merits, irreparability or otherwise of damages and the public interest may affect the balance of convenience.

In the view of the above, under the author's proposed model the forum dealing with the application for a European injunction will consider the balance of inconvenience of the defendant and claimant only in pre-judgment applications. This means that in pre-judgment applications for European injunctions, if the forum finds that the damages the plaintiff may suffer without the injunction outweighs the damage the other party will suffer with the injunction, provided that the other requirements are met, it may grant European injunctions. However, in post-judgment applications for European injunctions the balance of convenience test is irrelevant.

§ V. Public interest

This subsection is about to analyze whether or not the public interest should be one of the factors in dealing with applications for Mareva-type injunctions. In this respect, it is noteworthy that whenever a Mareva-type injunction is rightly granted or denied, the justice between the parties gets established and the latter in its turn serves the public interest to some extent. So, similar to the other means of establishing the justice between the parties, the grant or refusal to grant a Mareva-type injunction can serve the public interest. In this sense, the public interest is not determining factor in the grant or otherwise of a Mareva-type injunction, it is only the consequence of making the right decision. Form this point of view, apart from taking care in making the right decision, there is no special need to take into account the Mareva-type injunction's effects on the public, as the people of a nation or community as a whole. But this subsection is about to consider whether or not the granting or otherwise of a Mareva-type injunction is good for the community as a whole. In other words, should the forum dealing with the applications for Mareva-type injunctions take into account the effects of granting

or otherwise of such injunctions on the community as a whole? The English and U.S. systems' disposition may help us in finding the rights answer to the above-mentioned question.

In this regard, in English legal system, the applicant needs to show that in all the circumstances of the case, it is just and convenient for the court to exercise its discretion in favour of the grant of the Mareva injunction.[94] In determining what is "just and convenient", the court must consider whether the harm caused to the respondent, third parties and especially public interest outweighs the benefit that would be gained by the applicant. From author's point of view, in English legal system, the public interest is taken into account under balance of convenience factor. In other words, the public interest is not considered as an independent factor, but a subset of balance of convenience test. But, in the United States, although there were some doubts about public interest being a factor in granting or refusing a preliminary injunction, now, contrary to the English system, it is undoubtedly one of the standards in granting temporary restraining orders and preliminary injunction.[95] A U.S. court must consider the public interest in both granting and denying the injunction. In this respect, the decision of the U.S. Supreme Court in Winter case is very important.[96] Where, examining the preliminary injunction standards, the Supreme Court stated the four factors, including public interest, for a preliminary injunction as if they were each individual requirement to be met.[97]

Keeping the above in mind, it seems that while in England the public interest may have effects in determination of the forum dealing with applications for the Mareva-type injunctions, in the U.S. the public interest is necessarily one

94. Senior Courts Act 1981, Section 37 (1)

95. Uniform Asset-preservation Orders Act, Section 4 (a) (4)

96. Winter v. Natural Resources Defense Council, 129 S. Ct. 365 (2008)

97. Kevin J. Lynch, The Lock-in Effect of Preliminary Injunctions, 66 Fla. L. Rev. 779 (2015), , p.798, available at: http://scholarship.law.ufl.edu/flr/vol66/iss2/5

of the main and indispensable factors in granting or refusing a temporary restraining order, preliminary injunction and Asset-preservation order. In other words, these two legal systems have taken different approaches in dealing with public interest issue in granting or otherwise of Mareva-type injunctions. While one legal system considers the public interest as an independent and indispensable factor, for the other system the public interest is not necessarily relevant in all applications for Mareva-type injunctions; for the recent system the public interest will only be taken into account when it is relevant.

Although the public interest needs to be protected and Mareva-type injunctions, if issued, should not be adverse to the public interest, it seems that in international commercial disputes the effects of granting or otherwise of Mareva-type injunctions is mostly limited to the parties and only rarely the public interest can be relevant. Thus, it sounds that only when it is relevant, the forum should consider the injunction's possible effect on the public interest; if the public interest would be harmed by the Mareva-type injunction sought, then it weighs in favor of denying the injunction, but if the public interest would be positively affected, then it weighs in favor of granting the injunction. Therefore, from the author's point of view, the public interest is not an independent factor to be considered in any application for Mareva-type injunction, only whenever it is relevant, the forum dealing with the application for such an injunction will take it into account. In other words, the public interest is rarely determinative in granting or denying injunction. Usually, it simply makes weight for supporting a decision in granting or denying the injunction primarily based on other factors.

Taking the above in mind, it sounds that setting up public interest as one of the main factors to be considered in all applications for Mareva-type injunctions is inappropriate, because, as it was explained, the public interest is not relevant in majority of applications for Mareva-type injunctions. In such circumstances, putting the burden of showing the public interest on the shoulders of the plaintiff

in all application for Mareva-type injunctions will make the proceeding unnecessarily complicated.

Thus, under the author's proposed model, the public interest is not one of the main and indispensable factors to be proven in all applications for European injunctions. However, whenever the public interest is relevant, the forum dealing with the applications for European injunctions will take it into account.

Section II. The legal safeguards in granting Mareva-type injunctions

Taking into account the force and nature of Mareva-type injunctions, granting these injunctions can harm the defendant or the third party subject to such injunctions badly, unless we set up mechanisms for protecting the person injuncted. In other words, without sufficient safeguards for the defendant or the third party subject to a Mareva-type injunction, granting such injunctions will be too claimant-friendly. Establishing a mechanism to protect the defendant or the third party subject to a Mareva-type injunction balances the dispute settlement proceeding in this regard. Otherwise, one-sided protection of the plaintiff is far from standards of justice in the 21th century. Thus, the goal of this section is to elaborate the safeguards in granting Mareva-type injunctions. In this respect, in subsection I, we will elaborate the duties and undertakings envisaged for the applicants of Mareva-type injunctions; it goes without saying that these obligations are distinct from the conditions required in granting this type of injunctions, as explaned in previous chapter. In subsection II, we will elaborate the rights of the defendant or the third party subject to a Mareva-type injunction; along with above-mentioned obligations of the applicant's, these rights afford the injuncted person safeguards against adverse effects of Mareva-type injunctions.

§ I. The duties and undertakings of the applicant

To ensure that the Mareva-type injunction is only used to fulfil its purpose and nothing more, some duties and undertakings are usually imposed on the applicant of these injunctions. These duties and undertakings try to protect the injuncted person against the effects of abusive and unjust applications for Mareva-type injunctions. The applicant's inability to provide these undertakings or to fullfil these duties may lead to refusal and/or discharge of injunction by the forum. In this subsection, we are about to analysis these inssues in detail.

A. Applicant's duty to provide cross-undertaking in damages

To soften the harsh adverse affects which may result from the granting of Mareva-type injunctions, different mechanisms have been established. Requiring the applicant to give undertaking in damages is one of those mechanisms.[98] The aim is to ensure that the defendants and/or third parties subject to a Mareva-type injunction are able to receive compensation for any damages which they may suffer as a result of the grant of the injunction if it turns out that it ought not to have been granted. 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 for Mareva-type injunctions by claimants.[99]

If the applicant refuses to give the undertaking, the forum cannot force the applicant to give it. However, the forum will usually refuse to grant the injunction. In other words, the ability or otherwise of the applicant for an injunction to meet its potential liability under cross-undertaking is taken into account in deciding whether or not to grant an injunction. In this respect, despite some differences, the English and U.S. are mostly similar.

In English legal system, any order for an injunction, including a Mareva

98. It is noteworthy to emphasis that in post judgment applications, it seems that cross-undertaking should not normally be provided, because there is usually no risk of damages to the defendant and/or third party.

99. Filip Saranovic, Op. Cit., p. 70

injunction, unless the forum orders otherwise, usually contains an undertaking by the applicant to the forum to pay any damages which the injuncted person sustains and the forum considers the applicant should pay it.[100] In other words, in granting an interim injunction, including a Mareva injunction, the forum normally requires the applicant to provide a cross-undertaking to the forum to pay any damages which the defendant may suffer as a result of the injunction and which the forum considers the claimant should pay. Only in cases brought by the Crown, local authorities and similar law enforcement agencies acting in the public interest to enforce the law, the applicant will not be required to give an undertaking to the respondent. Despite the fact that in English legal system providing an undertaking by the applicant to the forum to pay any damages which the respondent and/or third party may sustain as a result of a wrongfully granted Mareva injunction is normally mandatory, however, the undertaking may be as easy as plaintiffs' promise to compensate the damages, leaving the defendant subject to such an injunction in a weaker position. Besides, the requirements which a defendant must satisfy to be granted an order of fortification is very high, which can lead to unfortified undertakings, which creates imbalances in favour of the plaintiff. The forum may even order the applicant's solicitors to give undertakings.[101]The usual wording of the undertaking in standard form freezing injunction 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".[102]

With regard to third parties, whereas for other injunctions the court is required to consider whether to require an undertaking by the applicant to pay any damages sustained by a person other than the respondent, including another party

100. Civil procedure rules, Part 25, Practice Direction 25A – Interim Injunctions, paragraph 5.1, available at https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part25/pd_part25a; the cases within the Aarhus Convention are treated in a specific manner.

101. Ibid, Paragraph 6.2

102. The standard form freezing injunction, Schedule B, Paragraph (1); a failure by the claimant to comply with the undertaking would amount to contempt of court.

to the proceedings or any other person who may suffer loss as a consequence of the order,[103] for Mareva injunctions, an undertaking protecting everyone including non-parties is part of the example order.[104] In some circumstances, the court may even require the claimant to "fortify", or provide security for, the cross-undertaking, for example by providing a bank guarantee. Concerning this issue, in Energy Ventures Partners Ltd v Malabu Oil and Gas Ltd case the Court of Appeal identified three requirements which a defendant must satisfy to be granted an order of fortification:

1. The court must be able to make an intelligent estimate of the likely amount of any loss which might result from the injunction;

2. The party requiring fortification must show a sufficient level of risk of loss to require fortification; and

3. The court must be satisfied that the loss has been or is likely to be caused by the grant of the injunction.[105]

Regarding this issue, SCF Tankers Ltd & Ors v Privalov & Ors case is also noteworthy.[106] Where, the English Court of Appeal applied the principles governing the award of damages against the party who has provided a cross-undertaking in damages in the course of obtaining an interim injunction.[107] According to the Court of Appeal:

a) The burden is on the party seeking to enforce the undertaking to prove

103. Civil Procedural Rules, Part 25, Practice Direction 25A – Interim Injunctions, Paragraph 5.2

104. Steven Gee QC, Injunctions and Recent Developments in Interim Relief, lecture at London Solicitors Litigation Association, Friday, 6 February, 2015, p. 4, available at https://www.lsla.co.uk/sites/default/files/lecture_materials/Injunctions%20-%20Steven%20Gee%20QC.pdf; further support for this argument is found in schedual B (7) of the standard form freezing injunction, as follow: (7) The Applicant will pay the reasonable costs of anyone other than the Respondent which have been incurred as a result of this order including the costs of finding out whether that person holds any of the Respondent's assets and if the court later finds that this order has caused such person loss, and decides that such person should be compensated for that loss, the Applicant will comply with any order the court may make.

105. Energy Ventures Partners Ltd v Malabu Oil and Gas Ltd [2014] EWCA Civ 1295

106. SCF Tankers Ltd & Ors v Privalov & Ors, Court of Appeal - Civil Division, November 21, 2017, [2017] EWCA Civ 1877, available at https://app.vlex.com/#vid/697301161

107. Ibid

that its loss would not have been sustained but for the injunction;

b) Once that party had established a prima facie case that its loss was caused by the injunction then (in the absence of material to displace it) the court was entitled to draw the inference of causation;

c) Like with other damages claims, it is open to the paying party to try to minimise the level of payout by alleging failure on the part of the receiving party to mitigate its loss.[108]

In this respect, the U.S. legal system is, to some extent, similar to the English system. “The court may issue a preliminary injunction or a temporary restraining order only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained. The United States, its officers, and its agencies are not required to give security”.[109]

Although, the federal courts interpreted the Rule 65(c) of the federal Rules of Civil Procedure, as the origine of above-mentioned rule, as a mandatory provision for the first forty years of its history, however, some circuits now consider it a discretionary provision, reasoning that the phrase "such sum as the court deems proper" literally allows the trial judge to dispense with the bond.[110] In this respect, in practice the discretionary" or "mandatory" interpretations of Rule 65(c) makes little difference in the way that federal courts subscribing to "discretionary" or "mandatory" interpretations of Rule 65(c) treat the bond requirement, because with few exceptions, bonds are automatically imposed, at a

108. Ibid

109. Federal Rules of Civil Procedure, Rule 65(c), as amended to December 1, 2016; these requirements are typically drafted using the term "security;" however, the customary form of security is a bond.

110. Reina Calderon, Bond Requirements Under Federal Rule of Civil Procedure 65(c): An Emerging Equitable Exemption for Public Interest Litigants, Boston College Environmental Affairs Law Review, volume 13, issue 1, article 5, 9-1-1985, p. 145, available at https://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1612&context=ealr

level measured by the defendant's potential economic loss.[111] Applicants for preliminary injunctions who have successfully established all other required elements for relief will nevertheless be denied it if they do not post these bonds (security).[112] "An adequate bond is critical because, except in rare circumstances, the amount of the bond will limit the recovery of damages suffered due to the erroneous issuance of a preliminary injunction. Thus, if there is no bond, no damages caused by the wrongful issuance of a temporary injunction will be awarded".[113] The fact that in the U.S. system the amount of bond is determined in the beginning may make it impossible to the defendant and/or third parties to ask for all the damages suffered. What is more, the bond can even be nominal, leaving the defendant in a weaker position. In this regard, Dickey v. Rosso case is noteworthy.[114] Where, the trial court granted temporary restraining orders and then a preliminary injunction against the defendant.[115] But pursuant to a hearing on the merits the trial court, refusing to issue a permanent injunction, dissolved the preliminary injunction, and awarded the defendant damages against Dickey for the delay in construction caused by this action. Although the defendant stipulated that damages exceeded $2,000, the trial court limited its award to $2,000, the value of a bond posted in support of one of the temporary restraining orders.[116]

In this respect, the disposition of the Uniform Asset-Preservation Orders Act is surprisingly consistent with the interpretation of circuits considering the article 65 (c) of the Federal Rules of Civil Procedure a discretionary provision,

111. Ibid

112. Ibid, p. 132

113. Bernard J. Nussbaum, Temporary Restraining Orders Preliminary Injunctions - The Federal Practice, 26 Sw L.J. 265 (1972), p. 578, available at http://scholar.smu.edu/smulr/vol26/iss2/2; if it appears that the temporary restraining orders and/or preliminary injunctions were maliciously obtained damages may rarely be awarded even though there was no bond.

114. Dickey v Rosso (1972) 23 CA3d 493. Civ., available at http://caselaw.findlaw.com/ca-court-of-appeal/1823604.html

115. Ibid

116. Ibid

where it states that "The court may require security from a party on whose behalf an asset-preservation order is issued. If the court determines that security is required, it shall require the party to give security to pay for costs and damages sustained by the party against which the order is issued if the order is later determined to have been improvidently granted"[117]

Keeping the above in mind, before granting a Mareva-type injunction, an applicant is normally required to give the forum an undertaking in damages, known as the cross-undertaking or security. The undertaking is given to the forum not the defendant, thus non-performance is a contempt of court (when the forum issuing the injunction is a court); however, it is for the benefit of the respondent in the event that the claim fails or the Mareva-type injunction is later set aside and the respondent suffers loss as a result of the order.[118]

Although, it was mostly thought that the practice of requiring the applicant to provide a cross-undertaking in damages is that it is the price for ex parte applications for injunction, but nowadays the practice has evolved and a cross-undertaking in damages is usually expected whether or not the application is made ex parte (without notice).

Whereas, in English system the undertaking is not automatically fortified and only under certain circumstances the forum may require the applicant to fortify or give security for the undertaking; in other words, as the law stands now in the English system, depending on the financial standing of the applicant, the forum may direct that monies be paid into forum and held in an account until determination of the matter at trial and alternatively, the forum may simply rely upon an undertaking from an applicant to pay damages if, for example, the applicant is of significant financial standing, such as a bank or other financial

117. Uniform Asset-Preservation Orders Act, Section 7 (a)

118. Richard Ascroft & Hugh Sims QC, Op. Cit., p. 15

institution. In the U.S. legal system, the customary form of security is a bond, which is kind of fortified undertaking. However, under the U.S. system, for some circuits cross-undertaking (security) requirement under the article 65 (c) of the Federal Rules of Civil Procedure is a discretionary provision, allowing the forum to dispense with the cross-undertaking. Besides, it seems that the Uniform Asset-Preservation Orders Act is also considering cross-undertaking as a discretionary issue for the forum.

In the view of above, with regard to the issue of cross-undertaking the English and the U.S. systems, which are similar to some extent, are not satisfactory from the author's point of view. The level of protection of the defendants subject to a Mareva-type injunction is far from being well-balanced in both of the systems. Based on the English and U.S. systems' present practice, it seems that the defendants receive usually a weak protection under the cross-undertaking and the grant of a Mareva-type injunction imbalances the procedure heavily in favor of the plaintiff.

With regard to the recovering the damages under the cross-undertaking, based on both of the English and U.S. legal systems the normal rules of damages, which place a heavy burden on the defendant and/or third party, apply. Consequently, a defendant or third party goes without compensation if his damages are hard to quantify or where it would be regarded as too speculative under ordinary principles of remoteness. From author's point of view, if the applicant is ultimately unsuccessful in the substantive proceedings or the Mareva-type injunction is subsequently set aside, a specific amount of damages should be paid to the defendant and/or third party, just based on the request of them, without any need to prove the damages. Otherwise, taking into account that the procedure to grant damages under a cross-undertaking normally follows the normal principles of damages in contracts, it is a heavy burden on the defendant and/or third parties, making it unduly difficult for a defendant or third party to be

compensated for the damages suffered as a result of wrongfully granted injunction. Such an approach runs counter to the goal of a fair balance between the parties in front of justice. Besides, taking into account that it takes normally a long time to prove the damages, cross-undertaking may come after a long time from date of discovering unjust grant of an injunction. Consequently, it may be too late to avert the crippling effect the initial grant of the injunction had on the business of injuncted person. That is why, it sounds that it is necessary to facilitate the burden of proof in favour of defendants and/or third parties who have been unjustly harmed by the grant of Mareva-type injunctions. In this respect, it would be advisable to insert a liquidated damages clause in the undertaking for some specific amount of damages and, then to follow the normal rules for the proof of the rest of the alleged damages of the defendant and/or third parties. Because, using wrongfully the nuclear weapon of law is always harmful at least to some extent.

Taking into account that the current safeguards for defendants and/or third parties are inadequate to protect them and are inconsistent with equality of the parties in front of justice, under the author's proposed model it is necessary to protect the defendants and/or third parties in the plaintiffs' level, through a well-balanced procedure. From this angle, requiring a cross-undertaking in damages is a powerful and invaluable safeguard for the injuncted person. Such a cross-undertaking should not be considered like a mere formality. It is a fair price which the applicant of a Mareva-type injunction may end up paying for. By imposing a cost on the applicant for obtaining a powerful injunction which is later proved unnecessary, we would be creating a powerful incentive to avoid spurious applications. Thus, under the author's proposed model, the undertaking will have the following characteristics.

Firstly, it will be an open-ended undertaking of the applicant of a European injunction to compensate all reasonable (foreseeable) damages suffered by the

defendant or third party as a result of issuing a European injunction. In this regard, since determining a specified amount as the upper limit of the plaintiff's liability under the undertaking can lead to situations where the damages beyond the upper limit are unrecoverable, it is not acceptable. Every person who causes damages for the others needs to compensate it fully. Although the forum provisionally may specify a specific amount, this amount should be considered as indication of primary estimation of the damages; if based on subsequent evaluation of the forum the damages exceed that specified amount, the applicant of an injunction should compensate the full damages. In other words, limiting the recovery of damages, caused by an improper issuance of an injunction, to the amount of the undertaking is an outmoded and unreasonable rule.

Secondly, under the author’s proposed model the forum needs to make sure that the party applying for the injunction has the means to meet any liability under the cross- undertakings. Based on the applicant’s financial situation, the forum can choose one of the several forms of guarantying the ability of the applicant ranging from payment into court, the provision of bonds and etcetera. In this regard, in order to avoid the potential for prejudice in cases involving vulnerable claimants, whose undertaking is worthless, there should be some limited discretion to enable the forum to dispense with the need for security in exceptional circumstances, especially where the poverty of the applicant is as a result of defendant’s action or omission. Owing to the fact that it is generally accepted that the poor should not suffer procedural disadvantage because of his poverty. However, in such circumstances, the forum may exempt the movant from providing cross-undertaking only if the moving party can demonstrate that it is unable to provide such an undertaking or, alternatively, provides positive evidence that no damage will result as a consequence of the injunction requasted. Besides, the forum needs to pay close attention to the merits of plaintiff's case; otherwise, the poor plaintiffs may exploit their poverty to put undue pressure on defendants.

Finally, the applicant should be under a continuous obligation to inform the forum and the defendant about the changes in his financial status. The forum may change or modify its decision based on the latest circumstances.

B. Applicant's undertaking not to use the information for other purposes

Taking into account the importance of information in today's world, especially in the business world, the information obtained as a result of a Mareva-type injunction and disclosure order must be protected; otherwise it can cause a lot of difficulties and/or damages to the defendant (sometimes even for third party). Especially the defendant's duty to inform the applicant's lawyers of the nature, amount and location of all his property immediately after service of the injunction puts the defendant in a big danger, because the applicant can use the defendant's information or reveal them to the public or any other third party. Thus, it is necessary to set up a mechanism to safeguard the legitimate interest of the defendant and/or third party subject to a Mareva-type injunction. In this respect, the English legal system has tried to establish a well-balanced mechanism.

According to disposition of the English court in, Ashtiani case, Dillon L.J. expressed the view that "…prima facie at any rate the plaintiffs should be required to give an undertaking not to use any information disclosed without the consent of the defendant or the leave of the court". Nowadays, based on the standard form Mareva (freezing) injunction, the applicant will not without the permission of the court use any information obtained as a result of Mareva injunction for the purpose of any other civil or criminal proceedings, either in England and Wales or in any other jurisdiction.[119]

In the view of above, the importance of establishing a good framework to protect the information obtained as a result of a Mareva-type injunction is

119. Civil Procedure Rules, Practice Direction supplementing Civil Procedure Rules, Schedule B (9), Part 25

understood well. Despite the fact that under the standard form Mareva injunction, the applicant is not obliged to refrain from using any information obtained as a result of Mareva injunction for the commercial purpose, it is self-evident that the applicant cannot use above-mentioned information for his/her commercial interest. Bisides, the applican is under a duty to refraing from disclosing the information obtained as a result of Mareva injunction to the public or third party. If the applicant disrespects the undertaking to refrain from using any information disclosed without the consent of the defendant or the leave of the forum, he/she can be punished. Based on the form of forum (court or arbitral tribunal), this punishment can be inprisonment, payment of damages and etcetra.

From the author's point of view, it is necessary to emphasize clearly that the applicant cannot use any information obtained as a result of the Mareva injunction for other purposes, unless the forum provides otherwise or the defendant consents. In this regard, despite the silence found in the legal writing about the U.S. legal system's disposition concerning the applicant's obligation and undertaking to refrain from using any information disclosed as a result of Mareva-injunction, it seems that this is a consequence that results from Mareva-type injunctions and applicants even in the U.S. system have to comply with it.

Thus, under the author's proposed model, to obtain a European injunction the plaintiffs will be required to give an undertaking not to use any information obtained as a result of European injunction for other purposes, unless with the consent of the defendant or the leave of the forum issuing such an injunction.

C. Undertaking to refrain from seeking to enforce Mareva-type injunction in any other country or seeking an order of a similar nature

To protect the defendant, an applicant for a Mareva-type injunction must provide several undertakings. In this subsection we are about to elaborate whether or not the applicant needs to give an undertaking requiring the applicant to refrain

from seeking to enforce Mareva-type injunction in any other country or seeking a provisional measure of a similar nature against the defendant or the defendant's assets without the permission of the forum issuing the injunction.

The aim of such an undertaking is the protection of the defendant against damages caused by enforcement of Mareva-type injunction in other countries or obtaining multiple provisional measures. In the absence of such an undertaking, the applicant may apply arbitrarily in different jurisdictions and enforce Mareva-type injunction or obtain other provisional measures of a similar nature, putting the defendant under undue pressure. Overall, such an undertaking can ensure that the Mareva-type injunction is not used unjustly, and that the interests of the claimants, defendants and any third parties, that may be affected by the enforcement or seeking of a provisional measure of a similar nature to the Mareva-type injunction, are protected properly. In this respect, the English legal system's disposition is noteworthy.

According to the standard form freezing (Mareva) injunction, the applicant will not without the permission of the court seek to enforce Mareva injunction in any country outside England and Wales or seek an order of a similar nature including orders conferring a charge or other security against the respondent or the respondent's assets.[120] In this regard, the Dadourian Group International Inc v Simms case is also noteable.[121] Where, the claimants had undertaken not to enforce a Mareva injunction in a foreign jurisdiction unless the English courts allowed them to do so. Following the court's permission to enforce the worldwide Mareva injunction in Switzerland, the defendants appealed. Dismissing the appeal, the Court of Appeal gave guidelines that should be applied to the exercise of discretion to grant permission to enforce a worldwide Mareva injunctions

120. Ibid, Schedule B (10), Part 25

121. Dadourian Group International Inc v Simms (Damages) [2009] EWCA Civ 169 (13 March 2009)

abroad; incidentally, henceforth, these will be known as Dadourian guidelines as follow:[122]

1. The grant of permission should be just and convenient and not oppressive to the parties to the English proceedings or to third parties who may be joined to the foreign proceedings;

2. Consideration should be given to granting relief on terms, (for example, extending to third parties the requirement of giving an undertaking to for costs) and to the proportionality of the steps proposed to be taken abroad, as well as the form of any order;

3. The interests of the applicant should be balanced against the interests of the other parties to the proceedings and any new party likely to be joined to the foreign proceedings;

4. Permission should not normally be given in terms that would enable the applicant to obtain relief in the foreign proceedings which is superior to the relief given by the worldwide Mareva injunction;

5. The evidence in support of the application for permission should contain all the information (so far as it can reasonably be obtained in the time available) necessary to enable the judge to reach an informed decision, including evidence as to the applicable law and practice in the foreign court, evidence as to the nature of the proposed proceedings to be commenced and evidence as to the assets believed to be located in the jurisdiction of the foreign court, as well as the names of the parties by whom such assets are held*;*

6. The standard of proof requires proof of a real prospect that such assets

122. Ibid; these guidelines must not be treated as exclusive. The particular circumstances of an individual case need to be considered in exercising discretion to grant permission to enforce a worldwide Mareva injunction abroad.

are located within the jurisdiction of the foreign court in question;

7. There must be evidence of a risk of dissipation of the assets in question;

8. Normally, the application should be made on notice to the respondent, but in cases of urgency, where it is just to do so, the permission may be given without notice to the party against whom relief will be sought in the foreign proceedings but that party should have the earliest practicable opportunity of having the matter reconsidered by the court at a hearing of which he is given notice.[123]

In the view of above, the importance of applicant's undertaking to refrain from seeking the enforcement of a Mareva-type injunction in another country or seeking an order of a similar nature against the defendant or the defendant's assets, without the permission of the forum issuing the injunction, is rightly reognized. However, form the author's point of view the equal treatment of seeking to enforce Mareva- type injunction in another country with seeking an order of a similar nature to the Mareva-type injunction in another country is not acceptable. Whereas, in seeking to enforce a Mareva- injunction in another country, the plaintiff is not about to obtain anything more than the initial Mareva-type injunction; he/she is only about to implement the content of the initial injunction; therefore, the permission to enforce the Mareva- injunction in another country should be given easily. The forum dealing with the issue of permission needs only to make sure that the applicant will not put the defendant or third party under unfair pressure; otherwise, when there is a need to the enforcement of the Mareva-type injunction in other countries, if its enforcement gets excessively difficul, the Mareva-type injunction loses its attraction. Regarding the undertaking of the plaintiff not to seek a provisional measure of a similar nature to the Mareva-type

123. Ibid

injunction in another country, it seems that in so far as there are not special circumstances justifying such applications, the forum should only give the applicant the option to choose between obtaining a similar provisional measure in other countries and keeping the Mareva-type injunction. Because, on one hand it is not fair to prevent the plaintiff from protecting himself in the safest manner, and on the other hand, it is not fair to put the defendant under the unjust pressure of multiple provisional measures. In other words, the claimants' interest has to be weighed against the risk of oppression to a defendant from a multiplicity of suits and the associated costs.

In all hypotheses, the forum must ensure that the maximum protection provided by the provisional measures, whether domestic or foreign, does not exceed the amount of alleged caims of the applicant.

In the view of the above, under the author's proposed model, the applicant will not be able, without the permission of the forum issuing the European injunction, to seek the enforcement of the injunction in other country or seek a provisional measure of a similar nature against the defendant or the defendant's assets. With regard to the permission to enforce the European injunction in another country, the forum dealing with the issue of permission needs only to make sure that the applicant will not put the defendant or third party under unfair pressure. Regarding the applicant's undertaking not to seek a provisional measure of a similar nature to the European injunction in another country, in so far as there are not special circumstances justifying such applications, from the author's point of view, the forum must only give the applicant the option to choose between obtaining a similar provisional measure in other countries and keeping the European injunction.

§ II. Full and frank disclosure in ex Parte applications

Normally based on the fundamental principle of fairness, no person can be

judged without a fair hearing; where each party is given a reasonable opportunity to be heard and to respond to the evidence in front of a neutral forum. Regarding Provisional measures, if it is urgent or 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, ex parte applications for provisional measures, inter alia Mareva-type injunctions, have been recognized.

An ex parte injunction is issued after the forum has heard from only the moving party, without notice to or argument from the adverse party. Thus, where the plaintiff has evidence of an imminent and improper dissipation of assets, he/she would be able to apply for an ex parte Mareva-type injunction. Application for Mareva-type injunctions is often made without notice so that the defendant cannot take immediate steps to dissipate or hide his assets before the claimant has had the opportunity to be granted an injunction by the forum. Otherwise, thanks to technological developments and disappearance of borders, the defendant and/or third party may make the injunction useless.

However, ex parte application for Mareva-type injunctions imposes a duty to the applicant, the duty of full and frank disclosure. This duty has two aspects. The first aspect concerns the applicant's duty to make full and frank disclosure of all material relevant to the granting of the injunction, including those that might be adverse to the applicant's case (A). The second aspect concerns the plaintiff's duty to deliver all the information related to the ex parte proceeding to the adverse party (B).

A. Duty of full and frank disclosure

This section is about to elaborate the applicant's duty of full and frank disclosure in ex parte applications for Mareva-type injunctions. Since a Mareva-type injunction can cause substantial prejudice to the adverse party, extremely high standards are imposed upon the applicant. One of the safeguards to reduce

unfairness to the adverse party is the plaintiff's duty to make full and frank disclosure of all matters material to the forum dealing with ex parte applications, including matters which may be adverse to an application for the Mareva-type injunction.[124] 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".[125] In this regard, the English and U.S. legal systems provide us good sources.

In English legal system, the court cannot grant an ex parte injunction, including Mareva-type injunctions, unless giving notice would enable the defendant to take steps to defeat the purpose of the injunction, or when there is some exceptional urgency, which means that there is no time to give notice before the injunction, which is required to prevent the threatened wrongful act.

In applications for ex parte Mareva-type injunctions, the applicant has a duty of full and frank disclosure of all material facts, which is an old principle of English system applied to all ex parte applications in civil proceedings.[126] According to this principle, the applicant is under an obligation to the forum to make the fullest possible disclosure of all material facts within his knowledge, if he does not make that fullest possible disclosure, then he may not obtain any advantage from the proceedings, and he can be deprived of any advantage he may have already obtained by means of the injunction which has thus wrongly been obtained by him.[127] When, there is a failure to disclose the facts fully and frankly:

1) If the non-disclosure would have resulted in the order not being made initially then the proper remedy will be for the order to be discharged;

124. Filip Saranovic, Op. Cit., p. 73

125. Ibid

126. Richard Ascroft & Hugh Sims QC, Op. Cit., p. 11

127. Ibid

2) If an order could properly have been made even if the material fact or matter had been disclosed, the court may nevertheless continue the order, or make an order on new terms, particularly where the failure was innocent and not grave;
3) A material non-disclosure which was intentional, or grave even if not intentional, will tend to tip the balance in favour of discharge;
4) Other factors may still be relevant however, including the speed with which the failure is cured, whether the consequence of the breach was remediable and has been remedied.[128]

In this respect, Roman Frenkel v Arkadiy Lyampert (1) and La Micro Group (UK) Ltd (2) [1] case is also noteworthy.**[129]** Where, a Mareva injunction had been granted on the claimant's ex parte application. At the return hearing, however, in deciding whether or not the Mareva injunction should be continued, it became clear to the court that the applicant had failed to disclose some material facts. In other words, the movant had been guilty of material non-disclosure. Thus, finding the claimant's failure to give full and frank disclosure serious and significant, the court discharged the Mareva injunction.

In this respect, in the U.S. legal system based on Federal Rules of Civil Procedure the court may issue a preliminary injunction only on notice to the adverse party.[130] It may only issue a temporary restraining order without written or oral notice to the adverse party or its attorney only if:

(A) specific facts in an affidavit or a verified complaint clearly show that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition; and

128. Ibid

129. Roman Frenkel v (1) Arkadiy Lyampert and (2) La Micro Group (UK) Limited [2017] EWHC 3121 (Ch)

130. Federal Rules of Civil Procedure, Title VIII, Rule 65 (a) (1)

(B) The movant's attorney certifies in writing any efforts made to give notice and the reasons why it should not be required.[131]

Every ex parte temporary restraining order must state the date and hour it was issued; describe the injury and state why it is irreparable; state why the order was issued without notice; and be promptly filed in the clerk's office and entered in the record.[132] Normally the temporary restraining order expires at the date fixed by the court, maximum 14 days. However, the court can extend the time by explaining its reasons for such an extension. Anyway, whenever a temporary restraining order is granted ex parte, the motion for a preliminary injunction must be set for hearing at the earliest possible time, taking precedence over all other matters except hearings on older matters of the same character. At the hearing, the party who obtained the order must proceed with the motion; if the party does not, the court must dissolve the order.[133] If the adverse party challenges ex parte temporary restraining order, the court will hear and decide the motion as promptly as justice requires. Despite the fact that the duty of full and frank disclosure is not mentioned in the Federal Rules of Civil Procedure and the author was not able to find U.S. cases in this regard, taking into account that it is an old principle in common law system, it seems that duty of full and frank disclosure in application for ex parte temporary restraining orders must have been existed. Besides, nowadays the Uniform Asset-Preservation Orders Act has provided a good solution to this problem in the U.S. legal system. According to the latter act, a party moving for an ex parte asset-preservation order must conduct a reasonable inquiry and disclose in the affidavit or verified pleading all material facts that weigh against the issuance of the order; and disclose in the affidavit or verified pleading all efforts to give notice or the reasons why notice should not be

131. Ibid, Rule 65 (b)

132. Ibid, Rule 65 (b) (2)

133. Ibid, Rule 65 (b) (3)

required.[134]

Keeping the above in mind, generally where an application for a Mareva-type injunction is made ex parte, the applicant has a duty to make full and frank disclosure of all material facts relevant to the granting of the injunction, including those that might be adverse to the applicant's case.[135] In other words, there is a high duty to make full, fair and accurate disclosure of all material information to the forum and to draw the forum's attention to significant factual, legal and procedural aspects of the case.

The test as to materiality is an objective test. It is not for the claimant to decide the question of relevance. The duty to disclose applies to facts that are known to the claimant or his agents and also facts that they would have known, had they made all the inquiries which should reasonably have been made prior to the application.[136] This duty extends even after the making of the ex parte injunction, if a material fact becomes known to the claimant or some changes happened, then there is a duty to return to the forum to inform it of the new development.

A failure to comply with the duty of full and frank disclosure can result in the Mareva-type injunction being discharged by the forum. Especially, where there had been deliberate non-disclosure or misrepresentation, the forum will usually discharge the injunction. When the notice is given in such a short time that it makes it impossible to the defendant to prepare the response, it should also be considered ex parte and the duty of full and frank disclosure should be imposed on the applicant.

In the view of above, form author's point of view the clear emphasize on

134. Uniform Asset -preservation Orders Act, Section 5 (b) (1) and (2)

135. Richard Ascroft & Hugh Sims QC, Op. Cit.

136. Ibid

the duty of full and frank disclosure under the English system and the U.S. Uniform Asset-Preservation Orders Act make the above-mentioned systems well-balanced. However, for the author's proposed European injunction the English and U.S. model need to be improved. On one hand, it is suggested that the forum should impose financial sanctions or other kind of sanctions for intentional non-disclosure. Since, in such a circumstance, the applicant abuses the process, such an abuse should not go unpunished. This is one of the ways in which the forum can minimise the risk of unmeritorious applications from the outset and limit the scope of the risk of prejudice to the defendant. On the other hand, taking into account that it is unrealistic to expect an applicant to disclose fully all the material in favour of his opponent, the forum should play an active role in finding all the material in favour of absent adverse party. The forum should do its best to find arguments in which an average defendant would present in such a situation.

B. Plaintiff's duty to deliver all the information related to the ex parte proceeding to the adverse party

Taking into account the risk of substantial prejudice to a defendant in ex parte application for Mareva-type injunctions, aforementioned duty of to make full and frank disclosure is not sufficient. The applicant has also a duty to deliver all the information related to the ex parte proceeding to the adverse party. In other words, the duty to keep a full and proper note of the ex parte applications for Mareva-type injunctions, and to provide a copy to the respondent, is also essential; it is better understood however as being a duty which enables the respondent to ascertain whether or not the duty of full and frank disclosure has been complied with and is intended to remedy, as best it can, the absence of the respondent at the first hearing, and provides the respondent with the chance to attend any subsequent on notice hearing, or the return date, with the best possible knowledge

of the earlier hearing.[137]

"Non-compliance with these additional, or ancillary duties, is likely to have the same or similar consequences to non-compliance with the duty of full and frank disclosure to the court. The applicant must be careful therefore not to allow the efficacy of the injunction to be attacked on the grounds of tardy transmission of the note of the hearing, or for that failure to be part of a long list in a tactical discharge application".[138]

In this respect, the English Civile Procedure Rules are noteworthy.[139] Where, in ex parte applications the applican has an undertaking to the forum to serve the application, evidence in support and any Mareva-type injunction made on the respondent as soon as possible; besides, applicants for an interim measure on a ex parte basis are under a duty to provide full notes of the hearing to any party that would be affected by the relief sought, and a failure to do so may result in an award of indemnity costs in favour of the party affected.[140] In this regard, Interoute Telecommunications (UK) Ltd v Fashion Gossip Ltd case is also helpfull.[141] Where, it was held that full notes of the hearing should be supplied with all due expedition to any party.

In the view of above, on ex parte applications for Mareva-type injunctions a duty to serve the application, evidence in support and any Mareva-type injunction made on the respondent as soon as practicable and a duty to provide full notes of the hearing to any party that would be affected by the relief sought is continuation of the duty of full and frank disclosure and non-compliance with these duties, is likely to have the same or similar consequences to non-compliance

137. Ibid, p.12

138. Ibid

139. Regarding the U.S., the author was unable to find any information related to this point.

140. Practice Direction supplementing Civil Procedure Rules Part 25, Schedule B (5)

141. Interoute Telecommunications (UK) Ltd v Fashion Gossip Ltd, The Times, 10 November 1999

with the duty of full and frank disclosure of all matters material to the forum.

Thus, under the author's proposed model, in ex parte applications for European injunctions, the applicant has a duty to serve the application, evidence in support and any European injunction made on the respondent as soon as practicable. Besides, the applicant must provide full notes of the hearing to any party that would be affected by the relief sought. Non-compliance with these duties will have similar consequences to non-compliance with the duty of full and frank disclosure of all matters material to the forum.

§ III. Adverse party's right to apply for modification and/or discharging of Mareva-type injunctions

This subsection is about to analyze whether or not the adverse party can apply for modification and/or discharge of Mareva-type injunctions. In this regard, given that Mareva-type injunctions may cause substantial prejudice to an adverse party, from the first cases creating this kind of injunctions the adverse party's right to apply for modification and discharge of injunctions was recongized.[142]

In this respect, there are two hypotheses. Under the first hypothesis, there is no allegation of error in the grant of the Mareva-type injunction; instead, the adverse party is willing to place at the forum's disposal a security large enough to guarantee plaintiff's claim; this is going to be elaborated under (A). Under the second hypothesis, the very grant of Mareva-type injunction is under attack; this is going to be explained under (B).

A. Providing undertakings (security) in lieu of Mareva-type injunctions

To soften the harsh nature of Mareva-type injunctions, different

142. Jeffrey L. Wilson, Op. Cit., p. 710

mechanisms have been set up. One of the existing safeguards to reduce unfairness to the adverse party is the adverse party's right to provide undertaking or some kind of secrity in lieu of a Mareva-type injunction. In other words, to get rid of being subject to a Mareva- type injunction the adverse party may offer an undertaking in lieu of the injunction.

This undertaking can ensure the execution of the final substantive relief. Contrary to the undertaking given by the plaintiff, the undertaking in lieu of injunction is offered by the adverse party. However, in accepting or refusing the undertaking in lieu of injunction the forum will apply the same principles of undertaking provided by the applicant for Mareva-type injunctions. Whenever the adverse party, in lieu of an injunction, provides an underttaking to the forum pending final determination of the action, once again, the applicant must provide croos-undertaking in damages. In this respect, the disposition of the English legal system and the U.S. Uniform Asset-Preservation Orders Act is noteworthy.

Under the English practice direction, a Mareva injunction will cease to have effect if the Respondent:

(a) Provides security by paying the sum of £ into court, to be held to the order of the court; or

(b) Makes provision for security in that sum by another method agreed with the Applicant's legal representatives.[143]

In Fiona Trust case, at the begining of a longrunning litigation a worldwide Mareva injunction was made in respect of assets up to the value of 225 million USD; to discharge the worldwide Mareva injunction, a similar amount was paid into court 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

143. Practice Direction 25 A, Annex 11 (4) (a) and (b)

permission to the court.[144] Five years later, when 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.[145]

In this regard, according to the U.S. Uniform Asset-Preservation Orders Act, "a party against which an asset-preservation order is issued may apply for relief from the order by posting a bond or other security in the amount of the damages sought or in an amount determined by the court".[146]

In the view of above, the adverse party's entitlement to provide an undertaking in lieu of a Mareva-type injunction is rightly accepted. It is a right, not an obligation. So, by providing an undertaking the adverse party may apply for being freed from the Mareva-type injunction. However, the undertaking should be sufficient; otherwise, the offer of undertaking may be rejected.

Similar to the plaintiff's cross-undertaking, in dealing with the adverse party's undertaking the forum needs to make sure that the adverse party has the means to meet any liability under the undertaking. Based on the adverse party's financial situation, the forum can choose one of the several forms of guarantying the ability of the applicant ranging from payment into court, the provision of bonds and etcetera. If the adverse party's undertaking is sufficient, it should be accepted. Otherwise, insisting on a Mareva-type injunction, despite offering a proper undertaking by the advesrse party, is not acceptable. Because, in such a case, it seems that the plaintiff is about to exert undue pressure on the adverse party.

In view of the foregoing, under author's proposed model, the adverse party

144. Fiona Trust v Privalov [2016] EWHC 2163 (Comm), cited by Filip Saranovic, Op. Cit., p. 69

145. Ibid

146. Uniform Asset-Preservation Orders Act, Section 4 (c)

can provide appropriate undertaking in lieu of a Mareva-type injunction and such an undertaking should be accepted. Because, such a solution provides both of the parties the sufficient and well-balanced protection.

B. Adverse party's right to apply for modification and/or discharging of Mareva-type injunctions

In this hypothesis, the adverse party is questioning the forum's decision in granting Mareva-type injunctions, on the basis of allegedly wrongfully established requirements of the grant of Mareva-type injunction and/or the plaintiff's failure to comply with the duty of full and frank disclosure. In other words, the adverse party argues that the injunction should not have been granted or should be set aside or modified.[147] The adverse party's application for modification or discharge of Mareva-type injunction normally presumes that he/she has been served with or notified of the Mareva-type injunction itself, because, taking into account the surprise effect and secrecy element in efficiency of Mareva-type injunctions, most of the times these measures are sought ex parte. Regarding this issue, the disposition of the English legal system and the U.S. system's Uniform Asset-Preservation Orders Act are also noteworthy.

According to the English standard form for Mareva injunction, the defendant and anyone served with or notified of the Mareva injunction may apply to the court at any time to vary or discharge the injunction (or so much of it as affects that person), but they must first inform the applicant's solicitors; if any evidence is to be relied upon in support of the application, the substance of it must be communicated in writing to the Applicant's solicitors in advance.[148]

In this respect, in Ashtiani and another v Kashi case, the claimants obtained, inter alia, an ex parte Mareva injunction restraining the defendant from removing

147. The party whose request for a Mareva-type injunction was not granted may also appeal to a higher court to seek to overturn the order from the lower court.

148 . Practice Direction supplementing Civil Procedure Rules, Annex 13, Part 25

from the jurisdiction or otherwise disposing of his assets.[149] On an application by the defendant, and subject to his undertaking not to dispose of the leasehold property, as his only substantial asset within the jurisdiction, without advance notice to the plaintiffs, the Mareva injunction was discharged.[150]

In Refco v Eastern Trading, as another example of English cases concerning the adverse party's right to apply for modification and/or discharging of Mareva-type injunctions, the proceedings on the merits were in the Unites States and the claimants sought to restrain the defendants from moving their assets in England.[151] Since, there was insufficient evidence relating to the dissipation of assets, it was held that the injunction which had been granted ex parte should be discharged.[152]

In this regard, based on the U.S. Uniform Asset Preservation Orders Act, if an asset-preservation order is issued ex parte, the party against whom the order is issued and a nonparty served with an asset-preservation order may move to dissolve or modify the order on at least 24 hours' notice to the party that obtained the order.[153] Besides, the appropriate appellate court has jurisdiction of an appeal, including an interlocutory appeal, from an order granting, continuing, modifying, refusing, or dissolving an asset-preservation order.[154]

In the view of above, although the English and U.S. legal systems generally provide for the defendant or any third party served with or notified of Mareva-type injunctions to apply for modification or discharge of such injunctions, both of the above-mentioned legal systems failed to provide a comprehensive reponse to this issue. Especially, they have not sufficiently elaborated the right of the

149. Ashtiani and another v Kashi, CA ([1986] 2 All ER 970)

150. Ibid

151. Refco v Eastern Trading, [1999] 1 Lloyd's Rep. 159

152. Ibid

153. Uniform Asset-Preservation Orders Act, Section 4 (c) (d), Section 5 (d) and Section 6 (e)

154. Ibid, Section 11

defendant and or any third party served with or notified of an inter parte Mareva-type injunctions to apply to modify or discharge such injunctions. From the author's point of view the defendant and or any third party in an inter parte Mareva-type injunction can also apply for the modification or discharge of injunction.

Thus, under the author's proposed model, if the European injunction is granted ex parte, as soon as the defendant and/or any other third party is served with or notified of the Mareva-type injunction, he/she can apply for modification of discharge of such injunction. For the inter parte European injunctions, the defendant and/or any other third party may apply for the modification or discharge of such injunctions, basing their application on the forum's wrongfuly dealing with the requirements of the grant of European injunction.

Conclusion of Chapter II

Taking into account the draconian nature of Mareva-type injunctions, to grant this kind of injunctions, proof of very high standards is necessary; otherwise the grant of these injunctions with low requirements can make proceeding unjustly too claimant-friendly.

To ensure that the Mareva-type injunctions are only used to fulfil their purpose and nothing more, the use of these injunctions is subject to certain safeguards. On one hand, the applicant needs to provide multiple undertakings to the forum and to the adverse party. On the other hand, there are some mechanisms enabling the adverse party or third party to apply for modification and/or discharging of Mareva-type injunctions. What is more, by providing undertaking or some kind of secrity in lieu of a Mareva-type injunction, the advaerse party can get rid of being subject to a Mareva- type injunction.

Thus under the author's proposed model, to have a well balance injunction in protecting the plaintiff and the defendant, on one hand, the standards of granting European injunctions will be high enough to prevent the grant of this kind of injunctions when, pending the execution of final substantive relief, the plaintiff's right can be protected by another provisional measure less severe (oppressive) to the defendant; on the other hand, such standards will not be so high to prevent the rightful applicants from obtaining European injunctions. The undertakings provided by the applicant will be taken seriously and the forum will make sure that the enforcement of these undertaking is ensured. The adverse party or third party's right in application for modification and/or discharge of European injunction as well as the adverse party's right to provide security in lieu of European injunction will also be guaranteed.

Having analyzed the general framework of Mareva-type injunctions in the Title 1, in the next title we are about to analyze the scope of Mareva-type

injunctions and the involvement of third parties.

Title 2. The scope of Mareva-type injunctions and the involvement of third parties

Determining the boundaries of Mareva-type injunction, similar to any other legal phenomenon, is very important. Along with the above-mentioned explanations of the Title 1, elaborating the scope of this kind of injunctions and its effects on third parties are other ways to shed some light to the boundaries of these injunctions. In this respect, the territorial scope, the assets subject to and the assets excluded from the scope of Mareva-type injunctions are going to be analyzed in Chapter I. Then, in Chapter II, the involvement of third parties in different capacities is going to be analyzed.

Chapter I. The scope of Mareva-type injunctions

In the world of laws, determining the scope of every legal concept is necessary. Keeping in mind the complicated and subtle legal structure of Mareva-type injunctions, it is necessary to look from different angles to these almost newly created injunctions.

In this respect, firstly at Section I, we will elaborate the gradual expantion of the scope of Mareva-type injunctions. Then at Section II, the assets subject to Mareva-type injunctions and the assets excluded from the scop of these injunctions will be dealt with.

Section I. Gradual expantion of the scope of Mareva-type injunctions

The issue at hand in this section is very important; because the scope of Mareva-type injunctions is one of the key elements of popularity of these injunctions. However, at first their scope was not that clear. These injunctions did not have such a big scope or at least it was assumed that their scope was limited, from different aspects.

In this section, we are going to shed some light to the issue of the scope of

Mareva-type injunctions. As a result of analysis of this section, we will be able to clarify how far the Mareva-type injunctions can reach, from different aspects.

§ 1. Territorial reach of Mareva-type injunctions

In this subsection, we are about to analyze whether or not the Mareva-type injunctions can pass legally the national borders. Normally based on territoriality principle, a court cannot exercise power beyond its territorial limits; because every nation has the right of sovereignty only within its borders. In other words, the geographic boundaries of a court's authority are usually limited to national borders; otherwise the court exercising authority beyond its national borders may violate international law. Accordingly, regarding the territorial reach of Mareva-type injunctions, in the begging, it was assumed that these injunctions' aim was preventing the removal of assets from jurisdiction of the forum and it was considered to be clear that this injunction was only limited to assets within the jurisdiction. Thus, it was applied, or assumed to apply, territorially. In this respect, analyzing the English and U.S. systems' disposition we will shed some light to the issue.

In English system, for the first thirteen years of the life of Mareva-type injunction consistent with the above-mentioned assumption, it was always assumed that it was a remedy restricted in scope to assets located within the territorial jurisdiction of the court. That is why, "Lawyers on the continent initially reacted with an indulgent smile, which expressed the feeling that it had taken the English until the end of the twentieth century to establish a legal innovation that civil law countries such as France, Germany and others, had maintained as a long standing tradition under various names such as arrest (Germany), saisie conservatoire (France) or sequestro (Italy)".[155] Thus it seemed that this new innovative Mareva injunction had brought the English legal system in line with

155. Peter F. Schlosser, Coordinated transnational interaction in civil litigation and arbitration., p. 150

Civil Law countries.

The decision of the English court in Ashtiani and another v Kashi case is noteworthy in this regard.[156] Where, the Court of Appeal held, inter alia, that the power of the court to grant a Mareva injunction restraining the defendant from disposing of his assets was restricted to those assets which were within the jurisdiction of the court.[157]

Soon, however, it became apparent that the legal nature and the practical usefulness of the Mareva injunction were quite different from the characteristics of the "arrest" or the "saisie conservatoire."[158]

In 1988 when the court of appeal had to consider the territorial scope of the Mareva injunction, the situation was far from clear. In one hand, some scholars believed that section 37(3) of the Supreme Court Act 1981 had been enacted on the apparent understanding that the Mareva injunction was concerned with assets within the jurisdiction and there was a clear authority in the court of appeal that it was limited to assets within the jurisdiction.[159]

156. Ashtiani and another v Kashi, CA ([1986] 2 All ER 970)

157. Ibid.

158. Peter F. Schlosser, Coordinated transnational interaction in civil litigation and arbitration ,p. 151

159. Ibid; the restrictive approach exemplified by Ashtiani v. Kashi has not been adopted in the Commonwealth countries. Indeed, in Australia three decisions of state courts recognized the power to grant Mareva injunctions and ancillary orders in respect of assets located outside the court's territorial jurisdiction. In Ballabil Holdings Pty. Ltd. v. Hospital Products Ltd. -which was rendered before Ashtiani case- the Court of Appeal of New South Wales held that it would grant a Mareva injunction to restrain disposal of assets located outside the jurisdiction where those assets had been removed from the jurisdiction after the commencement of proceedings. The first instance court's judge held that the Mareva injunction should be granted, in the light of the transnational nature of international business and the ease with which the transfer of assets was daily effected, for to restrict the remedy to locally based assets would be to invite an undesirable restraint on the court's power to ensure that its orders were not stultified. In the Court of Appeal, Priestley J.A. agreed with the arguments of the first instance court's judge, but the majority (Street C.J. and Glass J.A.) rested this part of the decision on the much narrower ground that the court had jurisdiction to make orders in personam against a defendant in relation to assets abroad, when those assets were in New South Wales when the action commenced and had since been removed. Thus, accordance with the majority's point of view it was unnecessary to decide the the territorial scope of the Mareva jurisdiction. In Coombs & Barei Construction Pty. Ltd. v. Dynasty Pty. Ltd. the South Australian court- approveing the approach of Rogers J. in Ballabil- granted a Mareva injunction in relation to the defendant's assets outside South Australia, when the evidence was that the bulk of his assets were in other parts of Australia. In Yandil Holdings Pty. Ltd. v. Insurance Co. of North America, the high Court of New South Wales made an order for costs against a plaintiff who had abandoned a fraudulent claim at trial and orderd the disclosure of plaintiff's assets, including assets located outside the jurisdiction, pending taxation of the costs and enforcement. Rogers J. thought that the reference by Dillon L.J. in Ashtiani v. Kashi to "special grounds" in which disclosure of foreign assets might be required was completely inconsistent with the tenor of the rest of Dillon L.J.'s judgment. Though, he accepted the suggestion by Dillon L.J. that the person obtaining the benefit of the order should undertake not to use the information without the consent of the other parties or the leave of the court. In Hong Kong-then another commonwealth member- in Asean Resources Ltd. v. Ka Wah International Merchant Finance Ltd., the High Court- disregarding the Ashtiani case- granted a Mareva injunction, pending trial, restraining the disposal of shares in a Singapore company, and a appointed a receiver. Sears J. treated Dillon L.J.'s judgment in the Ashtiani case as deciding that there was jurisdiction to grant an order relating to foreign assets, but that in practice the order was not to be granted, and went on: I confess I do not understand the learned judge when he says that. He went on saying that if I have jurisdiction over foreign assets there must be instances where that jurisdiction will be exercised. Otherwise, the jurisdiction of the court is rendered completely powerless.

On the other hand, some other scholars, basing their opinion on some statements mentioned in the Ashtiani case, believed that it was just a settled practice, not to grant Mareva injunctions extraterritorially; thus, obstacles to grant worldwide Mareva injunctions were a matter of practice and not as a matter of jurisdiction.[160]

In such a situation, in English legal jurisprudence, first it was accepted that, to preserve assets overseas until the plaintiff could take enforcement proceedings where the assets were located, post-judgment Mareva-type injunctions could be granted.[161] Then, this ruling was extended to cover pre-judgment cases.[162]

In the evolutional phase of Mareva injunctions to the extraterritorial level in England, there were three important cases. These cases were Babanaft International Co. S.A v Bassatne[163], the Republic of Haiti v. Duvalier[164] and Derby & Co. Ltd. v. Weldon.[165]

In Babanaft International Co.S.A v Bassatne (hereinafter Babanaft), at first on the following day after the judgment, when the defendants failed to satisfy the judgment, on an ex parte application, the judge granted, inter alia, a Mareva injunction covering any assets of the defendants in England, because he considered that they would be likely to take any step open to them to frustrate the execution of the judgment; but believing that he was precluded from doing so by the reasoning of the decision of the court in Reilly v. Fryer, he refused to extend this to assets of defendants outside the jurisdiction.[166]

160. Ibid

161. Ibid, p.333

162. Ibid, pp. 333-334

163. Babanaft International Co SA v Bassatne and another [1988] 1 All ER 433 [1989]

164. Republic of Haiti v Duvalier CA ([1990] 1 QB 202, [1989] 2 WLR 261)

165. Derby & Co Ltd v Weldon (No.1) [1989] 2 W.L.R. 276 (CA)

166. Babanaft

After a while and pursuant to some changes of circumstances, the plaintiffs renewed their application to the judge to extend the injunction to assets outside the jurisdiction. The application was heard inter parte. This time, agreeing that Reilly v Fryer case did not stand in the way of extending the Mareva injunction to assets outside the jurisdiction, the judge granted a Mareva injunction precluding the defendants from dealing with any of their assets worldwide without giving five days' notice to the plaintiffs' solicitors in every case. This order was qualified by a proviso in the following terms:

"Nothing in this injunction shall prevent any bank or third party (not being a third party connected or associated in any way with the Defendants or either of them or any relative of the Defendants or either of them or any company or firm united or associated in any way with the Defendants or either of them or any relative of the Defendants or either of them) from exercising any right of set off it may have in respect of facilities given to the defendants or the said companies before the date of this injunction including any interest which has accrued or may hereafter accrue in respect of such facilities."[167]

On the following day the judge gave a further brief judgment in which he refused the defendants' application to restrain the plaintiffs from giving notice of the injunction to the persons such as banks or other institutions that might hold assets of the defendants. The defendants appealed against both of judgments.

The Court of Appeal, allowing the appeal in part, held that although the court had jurisdiction to grant a Mareva injunction over a defendant's foreign assets after judgment, the court should not had made an unqualified Mareva injunction covering assets abroad, because it would involve an exorbitant and extraterritorial assertion of jurisdiction of an in rem nature over third parties outside the jurisdiction. Instead, such an injunction, if made, should be qualified

167. Ibid

by an express proviso making it clear that the injunction was directed to the defendant himself and did not affect the rights of third parties or seek to control their activities. Accordingly, the unconditional injunction made by the judge was replaced by an injunction limited to the defendants personally and to that extent the appeal was allowed, which expressly excluded any effect on any third party.[168]

According to Kerr LJ in the Court of the Appeal, "although at first sight it seems that under subsection (3) of section 37 of the Supreme Court Act1981, the scope of Mareva injunctions is limited to cover assets located within the jurisdiction of High Court, and even in Ashtiani v Kashi judges had attached some importance to this subsection in order to reach the conclusion that Mareva injunctions should be limited to assets located within jurisdiction, it is clear from a reading of that judgment as a whole that the decision was not founded on the construction of s 37[169] but on wider considerations of policy; the purpose of sub-s (3) was not to restrict the territorial ambit of Mareva injunctions but to ensure that there should be no discrimination against persons not domiciled, resident or present within the jurisdiction; Subsection (3) does not restrict the scope, geographical or otherwise, of sub-s (1)".[170]

In this respect according to some scholars, it is necessary to avoid placing too much weight on subsection (3) and insufficient weight on subsection (1) of

168. Ibid

169. According to section 37 of the Supreme court Act 1981:

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

170. Babanaft , p. 440; to reach to such a conclusion, the Court of Appeal took also into consideration some of the relevant material, including two of the relevant decisions of the Court of Justice of the European Communities (de Cavel v de Cavel Case and Denilauler v Snc Couchet Fr• res Case), one case from Hong Kong courts (Asean Resources Ltdv Ka-Wah International Merchant Finance Ltd), the three aforementioned Australian cases and two more recent decisions of English court (Interpool Ltd v Galani [1987]& Maclaine Watson & Co Ltd v International Tin Council), whereas, in Ashtiani v Kashi, none of these jurisprudences were brought to the court's attention.

the1981 Supreme Court Act.[171] The provision on subsection (1) is general and wide-ranging, and especially it is clearly wide enough in its own terms to cover worldwide Mareva injunctions.[172] "Subsection (3) is a more specific provision which deals with a problem in the grant of Mareva injunctions which was troublesome at the time that subsection (3) was enacted- the grant of Mareva injunctions against defendants based within the jurisdiction".[173]

In Republic of Haiti and others v Duvalier, the Government of Haiti and five of its agencies had sued the former president of the country (Baby Doc Duvalier) and some members of his family for around $120m allegedly embezzled while the former president was in office from 1971 to 1986. The proceedings on the substance of the case were pending in France where the defendants were resident. Since the whereabouts of the defendant's assets were unknown, a basis for the French style of attachments (saisie conservatoire) was lacking.

Based on the evidences that the defendants were attempting to hide their assets, the plaintiffs sought in England for interim protective measures under section 25 of the Civil Jurisdiction and Judgments Act 1982 in the form of a Mareva injunction, accompanied by an ancillary disclosure order, covering the defendants' assets wheresoever situated.[174]

The English court's basis of jurisdiction over the defendants was highly tenuous; none of them were resident in the England, and the English court evidently lacked jurisdiction to adjudicate the merits of the underlying claim.[175] Moreover, although the defendants had engaged English solicitors to administer some of their assets, most of those assets were in fact located outside the U.K.

171. David Capper, Worldwide Mareva Injunctions, The Modern Law Review, Vol. 54, 1991, p.332

172. Ibid

173. Ibid

174. Ibid, p. 338; Lowrence Collins, Op. Cit, p. 7

175. George A. Bermann, Provisional Relief in Transnational Litigation, 35 Columbia Journal of Transnational, 553, 1997, p. 589

The sole connection of England with that case was the presence in England of solicitors with access to the foreign assets. The exercise of jurisdiction was justified on the basis that the solicitors could be treated as agents of the defendants, and the relevant information was located in England.[176]

Acknowledging that the plaintiffs' evidence demonstrates a prima facie case, or even a good arguable case, the injunction was granted because of the defendants' plain and admitted intention to move their assets out of the reach of all courts of law (alleging that the litigation was an international conspiracy against them), the skill and resources they had shown in doing that and the vast sums of money involved.[177] The English Commercial Court's ex parte Mareva injunction[178] not only freezed the defendants' (the first to tenth defendants) assets within the U.K. up to the value of $120 million, but also (1) barred them from dealing with assets, wherever located, that represented the proceeds of the alleged embezzlement, and (2) compelled them to disclose the nature, location, and value of all their assets world-wide.[179]

On 6 June 1988 the solicitors of defendants applied to Knox J to vary or discharge his order. He declined to do so. The time limits for compliance with the order and notification of it to the defendants were extended. On 7 June the solicitors appealed to the court of appeal.

On appeal, the defendants argued that the plaintiff should have sought interim relief, if at all, either from a French court (since the action was pending in France) or from a court in the country where the bulk of the assets were located.

176. Lowrence Collins, Op. Cit, p.9

177. David Capper, Op. Cit; Lowrence Collins, Op. Cit, p. 9; Peter Schlosser, Coordinated transnational interaction in civil litigation and arbitration , p. 151.

178. The decision is striking in still another respect: it enabled the government of Haiti to obtain provisional relief far in excess of the scope of relief that the French court hearing the main action would have granted if the request had been addressed to it. Indeed, a French court would not have granted such broad relief even if the action had been pending in the U.K. and ancillary provisional relief had been sought in France. It is also noteworthy that the government of Haiti appears to have obtained this far-reaching relief from the U.K. without the French court in which the main action was pending having made any such request to the U.K. court, and conceivably even without its knowledge.

179. George A. Bermann, Op. Cit.

The Court of Appeal, however, sustained the order in full. Admitting that "[the] cases where it will be appropriate to grant such an injunction will be rare-if not very rare indeed," Staughton, L.J., nevertheless affirmed the courts' jurisdiction, in appropriate circumstances, "to grant a Mareva injunction, pending trial, over assets worldwide".[180]

According to Staughton, L.J., "this case demands international co-operation between all nations .... [I]f ever there was a case for the exercise of the court's powers, this must be it.... If the Duvalier family have a defence to the substantive claim, and feel that they are being persecuted, then their remedy **...** is to co-operate in securing an early trial of the dispute. It is not to secrete their assets where even the most just decision in the world cannot reach them".[181]

"In answer to the argument for the defendants that it was wrong in principle to order persons not resident in England as to what they should or should not do out of the jurisdiction, Staughton L.J. pointed to the fact that there have been many cases where parties out of the jurisdiction have been subjected to an injunction as to their conduct abroad-for example as to commencing or continuing proceedings there".[182]

In this case the Court of Appeal made a worldwide Mareva similar to conditions of Babanaft case, but added a proviso in terms similar to those suggested by Kerr L.J. in Babanaft. [183] That is to say, that the order (injunction and/or subsidiary orders related to it) should not affect third parties unless and to the extent that it was enforced by the courts of the states in which any of the

180. Ibid

181. Ibid, p. 590

182. Lowrence Collins, Op. Cit, p.9

183. The irony of the story cannot be dissimulated here. As has already been mentioned, the French Cour de cassation, seised with the substance of the matter, decided that a claim of a Government against its predecessor based on the embezzlement of funds has a foreign public law nature and, hence, cannot be pursued in France.

defendants' assets were located.[184]

In Derby & Co. Ltd. v. Weldon (No. 1), which was the first case in which the proceedings on the substance of the dispute were pending in England and the restraint on disposal of assets was sought before trial (judgment), on the plaintiffs' ex parte application against the individual defendants, the Chancery Division held, inter alia, that while Mareva injunctions previously had been limited to assets located within the jurisdiction, there was no reason in principle why, in a proper case, such injunctions could not be issued with respect to assets located overseas.[185] The court indicated that in general plaintiffs should undertake, or it should be a condition of the injunction, that the decision as to whether any action should be taken abroad in respect of foreign assets should be left to the English court.[186]

"On appeal, the Court of Appeal ... conceding that the world-wide injunctions were a drastic and potentially oppressive remedy that should only be granted in exceptional circumstances, nevertheless found such circumstances to be present. Essentially, it determined that the defendants' assets in the U.K. were wholly insufficient to satisfy a prospective judgment, and that there was a high risk that the defendants would dispose of their substantial foreign assets in anticipation of an adverse judgment"[187].

In the subsequent phases of Derby saga, in court of appeal Lord Donaldson emphasized that "the normal form of order should indeed be confined to assets within the jurisdiction ... [since] ... most defendants operate nationally rather than internationally. But, once the court is concerned with an international operator,

184. Lowrence Collins, Op. Cit.; Haiti case

185. Derby & Co Ltd v Weldon, cited by George A. Bermann, Op. Cit, p. 568

186. Lowrence Collins, The territorial reach of Mareva injunctions, p. 12

187. Ibid.

the position may well be different."[188] According to him, "the key requirement for any Mareva injunction, whether or not it extends to foreign assets, is that it shall accord with the rationale upon which Mareva relief has been based in the past. That rationale... [is] that no court should permit a defendant to take action designed to frustrate subsequent orders of the court. If for the achievement of this purpose it is necessary to make orders concerning foreign assets, such orders should be made, subject, of course, to ordinary principles of international law".[189]

Lord Donaldson pointed out that "other considerations apart, the fewer the assets within the jurisdiction, the greater the necessity for taking protective measures in relation to those outside it.... The existence of assets within the jurisdiction is not a prerequisite to the grant of a Mareva injunction over foreign assets, although it has always been a prerequisite to the grant of an injunction over assets located within the jurisdiction. Normally a Mareva injunction should be confined to assets within the jurisdiction if there are sufficient of these to meet the plaintiffs claim. It is only if there are insufficient assets within the jurisdiction that an injunction should be granted over foreign assets".[190]

In addition to the abovementioned cases of the English court, nowadays the worldwide Mareva injunctions are expressly recognized in the Mareva injunction's standard form.[191] So, provided that the conditions are met, the English courts can grant the Mareva injunctions covering the assets of the defendant universally.

In this respect, in the U.S. legal system there has been no express rule for application of temporary restraining orders and preliminary injunctions to assets beyond the jurisdiction of U.S. courts. Even the Uniform Asset-Preservation

188. George A. Bermann, Op. Cit., p.570

189. Ibid

190. Ibid

191. Practice Direction 25A – Interim Injunctions, part 25 civil procedural rules, available at https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part25/pd_part25a

Orders Act has no express rule regarding this issue. The majority of the U.S. Circuit Courts of Appeal have embraced, though with variation in the strength and forthrightness thereof, the use of temporary restraining order (TRO) and provisional injunctions to secure a source of assets to satisfy a potential money judgment.[192] However, the U.S. equivalent of the English Mareva injunctions, are mostly granted territorially. Only sometimes, thanks again to in personam characteristic of these injunctions, the U.S. courts have granted extraterritorial Mareva-type injunctions. Some U.S. cases are noteworthy in this regard.

In United States v. First National City Bank, the Supreme Court of the United States held that the United States' court had jurisdiction to enjoin a New York bank from transferring a property of its customer held by the bank at a branch in Uruguay.[193] Since, the bank had actual and practical control over its branches; accordingly "the branch bank's affairs are, therefore, as much within the reach of the in personam order… as are those of the home office. Once personal jurisdiction of a party is obtained, the District Court has authority to order it to 'freeze' property under its control, whether the property is within or without the United States."[194] The lack of service on the Uruguayan corporation was not considered fatal to the issue of the injunction, because the court's order was directed at Citibank over whom jurisdiction of the U.S. court was unchallenged.

192. James R. Theuer Pre-Judgment Restraint of Assets for Claims of Damages: Should the United States Follow England's Lead?, 25 N.C.J. Int'l L. & Com. Reg. 419 1999-2000, p.450; although at first sight and based on the decision of Supreme Court of the United States in Grupo Mexicano, it seemed that a federal court had no authority to grant a pre-judgment injunction to prevent defendants from dissipating their assets in a case where a plaintiff has (or had based on upper explanations) made only legal claims, e.g., claims for money damages ; thus, the classic Mareva scenario was explicitly foreclosed by the Supreme Court of the United States in 1999 in Grupo Mexicano de Desarrollo v.Alliance Bond Fund., but a closer observation makes it clear that almost immediately after that judgment, the federal courts distinguished the Grupo Mexicano decision and limited it to its contextual basis, requests under the federal courts' traditional equitable powers for preliminary injunctions where only legal claims for money damages were asserted. The lower federal courts have developed three broad exceptions to the Grupo Mexicano rule, exceptions which effectively obliterate the rule. Thus, it seems that the plaintiffs in U.S. federal courts may entirely circumvent the Grupo Mexicano and secure a Mareva-style remedy, making Grupo Mexicano an entirely hollow holding, avoidable with the mere assertion of some equitable remedy in a case predominantly founded in money damages.

193. United States v. First National City Bank, 379 U.S. 378 (1965), available at https://supreme.justia.com/cases/federal/us/379/378/

194. Lawrence Collins, Provisional and protective measures in international litigation, p. 110

In Inter-Regional Financial Group, Inc. v. Hashemi (Inter-Regional),[195]a Delaware Corporation, brought law suit in the District Court for the District of Connecticut against Cyrus Hashemi (Hashemi), a foreign citizen with his usual place of residence in Connecticut. The complaint filed in this action was accompanied by, inter alia, an application for a prejudgment remedy calling for the attachment of certain of Hashemi's personal property and an injunction requiring Hashemi to bring certain securities into the United States for the purpose of attachment.

After a hearing, District Court for the District of Connecticut, finding that the traditional threshold requirements for the grant of the injunction had met, directed the defendant to bring his foreign stock certificates into Connecticut to be attached; because, the defendant owned too few assets in Connecticut of only minimal value and attachment under section 8-317 of the U.C.C. was valid only if the securities are actually seized by an officer.[196]

The defendant appealed against this order to the U.S. Court of Appeals for the Second Circuit. The main issue on appeal was whether the district court had the authority to issue an injunction ordering foreign securities to be brought into the state for attachment.

The court of appeals, finding that the district court's injunction had met the requirements of Connecticut law, affirmed the district court's injunction directing defendant to bring his foreign stock certificates into Connecticut to be attached. “To justify the injunction, the Court of Appeals relied on section 8-317 of the Uniform Commercial Code, adopted by Connecticut, which governs the attachment of investment securities. Under the statute, the officer making the attachment must actually seize the security. The section also empowers a court to

195. Inter-regional Financial Group, Inc., Plaintiff-appellee, v. Cyrus Hashemi, Defendant-appellant, 562 F.2d 152 (2d Cir. 1977) available at http://law.justia.com/cases/federal/appellate-courts/F2/562/152/293841/

196. Ibid

issue injunctions enabling creditors to reach debtor's securities. The court of appeals reasoned that these provisions, read in light of the Connecticut case Fleming v. Gray Manufacturing Co.,[197] permitted the district court to order Hashemi to bring his stock certificates into Connecticut from outside the country".[198]

In Republic of the Philippines v. Marcos, as the leading American case having extraterritorial effects, the Republic of the Philippines brought a civil suit against its former president, Ferdinand Marcos, his wife, and others.[199] The suit involved a claim under the Racketeer Influenced and Corrupt Organizations (RICO) Act, and pendent state law claims, arising out of the defendants' investment in the U.S. of fraudulently obtained moneys.[200] The Republic of the Philippines petitioned the District court for a preliminary injunction prohibiting the defendants from disposing of any of their assets, except as needed to pay their attorneys' fees and meet their normal living expenses. The defendants' assets included real property and other assets located not only in the U.S., but also outside the United States including in the U.K. and Switzerland. On June 25, 1986, the allegation of fraud led the District Court to find that the preliminary injunction enjoining the Marcoses from disposing of any of their assets, save for the payment of attorney fees and normal living expenses, was necessary to preserve the possibility of equitable relief.[201]

The Marcoses appealed. A panel of the Court of Appeals vacated the District Court's order issuing the injunction; but the District Court's order was reinstated by the Court of Appeals sitting en banc. The Court of Appeals ruled

197. In the Fleming case, the U.S. District Court for the District of Connecticut construed section 8-317 of the U.C.C. to authorize an injunction directing the defendants to bring certain corporate securities from outside the state into Connecticut where they could be attached before trial.

198. Judith L Ritter, Op. Cit, p. 1018

199. The Republic of the Philippines, Plaintiff-appellee, v. Ferdinand E. Marcos, et al., Defendants-appellants, 862 F.2d 1355 (9th Cir. 1988)

200. Ibid; George A. Bermann, Op. Cit., p. 564

201. Ibid

that the district court had not abused its discretion in granting the injunction. After finding that the plaintiff had shown the traditional tests for the grant of injunctions, the court turned to the extraterritoriality issue.[202] According to the Court of Appeals "the injunction is directed against individuals, not against property; it enjoins the Marcoses and their associates from transferring certain assets wherever they are located. Because the injunction operates in personam, not in rem, there is no reason to be concerned about its territorial reach".[203]

In the view of above, it seems that in general in both of the English and U.S. legal systems, in appropriate circumstances, cross-border Mareva-type injunctions may be issued. However, there is a difference between the two systems. While in English legal system the granting of cross-border Mareva-type injunctions is accepted expressly and definitively, making it a good example to follow in creating a new generation of provisional measures compatible with the needs of 21 century, in the U.S. legal system its acceptance has been sporadic; thus, although based on in personam characteristic of injunctions, we can theoretically argue that the forums in the U.S. may grant extraterritorial Mareva-type injunctions, the practical disposition of the U.S. system is far from clear; besides, some U.S. courts, especially the U.S. Supreme Court with its decision in Grupo Mexicano case, have even tried to deny the very existence of any injunction similar functionally to the English Mareva injunctions. This means that from this point of view, the U.S. system can not be good model for a new generation of provisional measures.

Thus, the author's proposed European injunction will expressly be capable of crossing the national borders, whether it is issued by an international

202. George A. Bermann, Op. Cit.

203. Ibid

commercial arbitral tribunal or by a national court in aid of an international commercial arbitration.

§ II. Evolving application of Mareva-type injunctions against different defendants and proceedings[204]

The issue in this subsection is, on one hand, whether Mareva-type injunctions can be ordered only against foreigners or they can also be ordered against the defendants residing, domiciling or being present within the borders of the country in which the forum is located. On the other hand, we are about to analysis whether the Mareva-type injunctions can also be ordered in aid of foreign proceedings or they are exclusively available in aid of proceedings within national borders.

In this regard, especially in the beginning, none of the above-mentioned issues had a straightforward response. In both of those areas, there were some issues which complicated the situation. In this respect, the issue of availability or otherwie of Mareva-type injunctions against foreigners and the persons residing, domiciling or being present within the borders of the country in which the forum is located, is going to be analyzed under (A), and the issue of the availability of these injunctions in aid of foreign proceedings is going to be dealt with under (B).

A. Evolving application of Mareva-type injunctions against defendants within and beyond the jurisdiction

Here, the issue under consideration is one of the best indices showing the gradual expansion of the scope of application of the Mareva-type injunctions. In this respect, the English legal system and to some extent the U.S. legal system's disposition are helpful in guiding us.

204. Despite the fact that based on our definition of Mareva-type injunctions in this thesis the anti-suit injunctions are out of scope of the thesis, whenever the arguments about the anti-suit injunctions seem useful for our purpose, we will discuss about anti-suit injunctions.

In England for a while, there was considerable doubt as to whether Mareva injunction could be obtained against English defendants residing within the borders of England. This can be seen in the judgment of the English court in Rasu Maritima SA v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara (Pertamina) and Government of Indonesia.[205] Where, the plaintiffs had applied for an ex parte Mareva injunction restraining the defendants, who were outside the jurisdiction, from removing assets out of the jurisdiction or transferring property therein**.** In the High Court, Kerr J. granted an interim injunction restraining Pertamina from removing or taking any steps to remove any assets from the West Gladstone Dock at Liverpool. Few weeks later, on the plaintiffs' application to continue the injunction, the judge Kerr J. discharged the injunction, but continued it pending an appeal.

Then, based on the plaintiffs appeal, in the Court of Appeal, dismissing the appeal based on the circumstances of the case, Lord Denning MR and Orr LJ, held "that where a defendant was not within the jurisdiction but had assets in this country, the court had jurisdiction under section 45 of the Supreme Court of Judicature (Consolidation) Act 1925, to grant an interim injunction to restrain the defendant from removing assets from the jurisdiction pending trial of the action".[206] Based on this case, it seemed that a defendant who was within the jurisdiction of the English court was in a favorable position than the one outside the court's jurisdiction. In other words, it sounds that there was an assumption that the English legal system should treat the defendants inside its jurisdiction better than the defendants outside its jurisdiction. It was assumed that Mareva injunction was applicable only against defendants who were outside the jurisdiction of English courts but had assets inside the jurisdiction. In this respect, Bank Leumi (UK) Ltd v Ricky George Sportain (UK) Ltd case is also noteworthy.

205. Rasu Maritima SA v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara (Pertamina) and Government of Indonesia (as interveners), [1978] 3 All E.R. 324 (Eng. C.A.)

206. Ibid

Where, Ormrod L.J. stated that a Mareva injunction could not be obtained against a defendant within the jurisdiction.[207]

Taking into account that treating the defendants inside the court's jurisdiction better than the defendants outside its jurisdiction was a discriminatory judicial act, such an attitude on behalf of the English courts came under criticism. According to the critics, the distinction between English and foreign-based defendants was unjustifiable and contrary to modern notion of justice. That is why, in 1980 in Barclay-Johnson v Yuill case the English court changed its attitude. [208]

In this case, which was one of the early cases that involved a defendant who was domiciled in England, the defendant submitted that the court should not grant a Mareva injunction against an English national domiciled in England, because its jurisdiction to grant such an injunction was restricted to preventing foreign nationals from removing assets out of the jurisdiction.

Arguing that the essence of the court's jurisdiction was the existence of a real risk that a defendant would remove his/her assets from the jurisdiction, the court rejected defendant's argument. Thus, baed on the decision of the court in the Barclay-Johnson v Yuill case, it was established that the court's jurisdiction should not be confined to foreign defendants and that the grant of a Mareva injunction was not barred merely because the defendant was not a foreigner or a foreign-based person. However, the court acknowledged that the defendant's nationality, domicile and place of residence could be material in determining whether there was a real risk of the assets being removed from the jurisdiction.[209]

Finally, any doubt as to the jurisdiction of the English courts to grant a

207. Steven Gee Q.C., Injunctions and Recent Developments in Interim Relief, p. 14

208. Barclay-Johnson v Yuill [1980] 3 All ER 190

209. Ibid

Mareva injunction against defendants domiciled, resident or present within the jurisdiction was set aside by English Supreme Court Act 1981. According to section 37 of the act:

"…

(3) The power of the High Court under subsection (1) to grant an interlocutory injunction restraining a party to any proceedings from removing from the jurisdiction of the High Court, or otherwise dealing with, assets located within that jurisdiction shall be exercisable in cases where that party is, as well as in cases where he is not, domiciled, resident or present within that jurisdiction".[210]

The reference to "assets within that jurisdiction," i.e. in England and Wales, makes it necessary to refer to the object of section 37(3), which was to ensure that a defendant who was within the jurisdiction was not in a more favorable position than a defendant outside the jurisdiction.[211]

In this respect, in the U.S. legal system the courts can proceed and render binding decisions in legal cases only if they have personal jurisdiction over the defendant. Personal jurisdiction is critical in any legal action because a judgment rendered by a court without proper personal jurisdiction will not be enforced if properly challenged.[212] Similar to all other legal proceedings, inter alia all other provisional measures, for temporary restraining orders and preliminary injunctions personal jurisdiction is necessary.[213] Normally, in order for a court of a state to exercise personal jurisdiction over a defendant, not present within the territory of the state, the defendant must have such sufficient minimum contacts

210. Ibid, Section 37

211. Lawrence Collins, The territorial reach of Mareva injunctions, p. 2

212. Panagiota Kelali, Provisional Relief in Transnational Litigation In the Internet Era: What is in the US Best Interest?, 24 J. Marshall J. Computer & Info. L. 263 (2006), p. 272

213. It is going to be explained in part II of this thesis, that the forum's jurisdiction over the subject matter is also sufficient basis for having jurisdiction to deal with applications for provisional measures.

with the state. While the mere fact that the defendant's assets are located within the jursidiction of the forum does not justifies personal jurisdiction on the subject matter, the personal jurisdiction on provisional measures may be based on the mere presence of assets or even a situation of urgency somehow located herein.[214] According to Schlosser, "Location of assets within the jurisdiction justifies general (as opposed to specific) personal jurisdiction for interim relief".[215] This means that the personal jurisdiction on provisional measures is different from the jurisdiction on the subject matter. The U.S. system's approach is totally in line with the disposition of the International law Association saying that "The mere presence of assets within a country should be a sufficient basis [of] the jurisdiction to grant provisional and protective measures in respect of those assets".[216]

In this regard, the Uniform Asset-preservation Orders Act's disposition is noteworthy, where it rightly emphasizes on the fact that a forum's jurisdiction with regard to Asset-preservation Orders can be either by virtue of the forum's personal jurisdiction over the party against which the order is requested or by virtue of the forum's jurisdiction over the subject matter.[217]

Keeping the above in mind, the English and U.S. legal systems' approach in dealing with the issue at hand in this section is well-balanced and up to date. This means that nowadays in dealing with the applications for Mareva-type injunctions, in so far as the forum can establish jurisdiction on the subject matter or personal jurisdiction over the defendant, there is no difference where the defendant is, as well as in cases where he is not, domiciled, resident or present within the national borders of the country in which the forum is located. Treating

214. Peter F Schlosser, Coordinated transnational interaction in civil litigation and arbitration, p. 162

215. Ibid, p. 163; even if the parties have, by mutual agreement, derogated from courts' jurisdiction, such an agreement is not normally thought to have extended to include provisional measures. One can easily refer to the customary practice in the context of arbitration agreement.

216. F. K. Juenger, The ILA Principles on Provisional and Protective Measures, 67th Conference, Helsinki, 1996, principle 11, available at https://www.jstor.org/stable/841029?seq=1#page_scan_tab_contents

217. Uniform Asset-preservation Orders Act, Section 8 (c) (2) and (3)

the defendants domiciled, resident or present within the national borders of the country in which the forum is located, better than the defendants not domiciled, resident or present there, is considered a blunt discriminatory judicial act and outdated practice.

As long as there is a way to enforce Mareva-type injunctions, it seems that even the mere presence of defendant's assets or the risk of denial of justice can justify the forum's jurisdiction over the defendant. Compared to establishing jurisdiction for the purpose of the subject matter, in establishing jurisdiction over the defendant for the purpose of provisional measures, inter alia Mareva-type injunctions, it seems that lower threshold is necessary. Because, on one hand, provisional measures are susceptible of being subject to subsequent changes and on the other hand, they are pending the final determination of the forum dealing with the substantive proceeding.

In the view of the above, under the author's proposed model, provided that the forum can establish jurisdiction on the subject matter or personal jurisdiction over the defendant, it will not discriminate between the defendants who are within jurisdiction with the defendants outside the jurisdiction. In other words, equal treatment of all the defendants will be guaranteed.

B. Evolving application of Mareva-type injunctions in aid of domestic and foreign proceedings

Traditionally, especially under common law system, provisional measures were granted only in aid of domestic legal proceedings. However, such an approach is not compatible with the realities of the modern business world in the globalization era. In this regard, especially in view of the fact that international commercial arbitration generally takes place in a neutral country where neither the defendant nor his property is located, the availability of provisional measures helping domestic and foreign international commercial arbitration has outmost

importance. Since the evolution of these injunctions has begun firstly in English legal system, in this section we will firstly analysis their evolution in England as the main country establishing the general frameworks of Mareva-type injunctions. The analysis of the U.S. system will be relatively small as the U.S. system is less developed regarding Mareva-type injunctions.

In England, the first general rule was established in the judgment of the English court in famous Siskina case.[218] Where, the House of Lords held that "the power of the High Court to order an interlocutory injunction presupposes the existence of an action, actual or potential, claiming substantive relief which the High Court has jurisdiction to grant and to which the interlocutory orders referred to are but ancillary."[219] In this case, the Court had no jurisdiction over the dispute because it could not allow service out on the defendants, so that personal jurisdiction was not established; it followed from Siskina that a court should not allow service ex juris (serve out of the jurisdiction) where a claim for a Mareva injunction was the sole relief sought.[220] In other words, according to the House of Lords, simply because of the presence of the defendant's assets in England the English courts had no substantive jurisdiction and where there was no jurisdiction to commence substantive proceedings in England there could be no Mareva-Type injunction.[221]

The corollary was that a plaintiff could not obtain interim or ancillary relief in aid of foreign proceedings until an action was brought in the forum on the basis of the foreign proceedings, i.e., to register or enforce the resulting foreign judgment or arbitral award.[222]

218. Siskina v Distos Compania Naviera SA (The Siskina) [1979] AC 210

219. Paul Michell, Op. Cit, p. 752

220. Ibid

221. Peter Biscoe, Op. Cit., p. 18

222. Ibid

To the general rule that the jurisdiction of the English Court over persons was territorial and restricted to those upon whom its process ccould be served within the territorial limits of England and Wales, there were some exceptions. These are now to be found in the long-arm jurisdiction of the court under R.S.C. Order 11 rule 1. which permits the High Court to grant leave to a plaintiff to serve its process upon a person outside the territorial limits of England and Wales in those cases, but only in those cases, that are specified in sub-rules (a) to (o) of rule 1(1) or in rule 2.[223]

The Siskina doctrine, which was criticized from the beginning, was followed for some time, but soon it lost its charm. Thus, the abovementioned general rule was found to be not a good rule and was abandoned.

The strict Siskina requirement that there should be a substantive cause of action in the jurisdiction to ground the award of a Mareva injunction has faced its most severe challenge in the context of international arbitration.[224] This happened in Channel Tunnel case.[225] Where, the plaintiffs sought an injunction pending the arbitration in Brussels. The House of Lords held that, under section 37(1) of supreme court act 1981, the injunction sought by the plaintiffs could be granted despite the existence of the mandatory stay of proceedings in favor of arbitration abroad; but since the grant of injunction claimed would largely pre-empt any decision ultimately made by arbitral tribunal under clause 67, it was not appropriate in the circumstances of the case to grant the injunction.[226]

The Channel Tunnel case indicated that, although a substantive cause of action may be a necessary precursor to an interlocutory injunction, the cause of action need not be within the territorial jurisdiction of the court in which

223. Ibid

224. Paul Michell, Op. Cit., p. 757

225. Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd and Others, Gazette 17-Feb-1993, [1993] 2 WLR 262, [1993] 1 All ER 664, [1993] AC 334

226. Ibid

interlocutory relief is sought. Thus, based on this judgment, an English court can order interlocutory injunction in aid of foreign arbitral proceedings. However, the dispute must be potentially justiciable by the domestic court in order for the court to order interim relief, even if, in practical terms, the order of a stay will be virtually automatic.[227] The Channel Tunnel case thus challenged and limited the Siskina's requirement that the plaintiff must rely upon a substantive cause of action in order to ground ancillary relief in the form of a Mareva injunction, at least to the extent that the cause of action must be one located within the territorial jurisdiction of the English court. Similarly, in Phonogram Ltd. v. Def American Inc., the High Court held that an interlocutory injunction was available in England where domestic proceedings had been stayed in favor of California proceedings[228]. Although the case concerned foreign litigation rather than arbitration proceedings, the court followed Channel Tunnel in holding that it possessed the authority to grant interlocutory injunctive relief where the relevant causes of action were within the territorial jurisdiction of the English court, even though the court ordered a stay of proceedings in favor of litigation abroad on forum non convenience grounds[229].

Anti- suit injunctions were another domain that challenged the scope of the Siskina doctrine.[230] Regarding effects of anti- suit injunctions on the Siskina doctrine, the tide began to turn against Siskina in South Carolina Insurance Co. v. Assurantie Maatschappij "De Zeven Provincien" N. V. case, where the plaintiff sought an anti-suit injunction to restrain a party to English proceedings from

227. Ibid

228. Ibid

229. Ibid

230. An Anti-suit injunction is a court or an arbitral tribunal order to a party not to commence or continue a suit against a particular party in respect of a particular cause of action in another specified forum (normally foreign court or arbitral tribunal). It is issued to prevent a concurrent proceeding in a different forum, to prevent enforcement of an award issued by another forum or to avoid re-litigation. Although, anti-suit injunctions are out of scope of the definition of Mareva-type injunctions in this thesis, taking into account that they are in personam injunctions, like Mareva-type injunctions, the reasoning of the court about anti-suit injunctions is helpful in this regard.

commencing parallel litigation against it in the United States[231].

Lord Brandon of Oakbrook, confirming the power of the English courts to grant anti-suit injunctions, limited the scope of the Court's power to grant injunctions to the terms set out in Siskina, while making an exception for anti-suit injunctions;[232] but lord Goff of Chieveley took a different view. Agreeing in the result, the latter declined to accept that anti-suit injunctions should be categorized as an exception to the Siskina doctrine. According to him, the availability of anti-suit injunctions revealed the error of Siskina's dogmatic rule.[233] "The availability of anti-suit injunctions demonstrates that there is no requirement that injunctive relief be ancillary to a substantive cause of action in the jurisdiction: instead, reliance is placed upon a more amorphous conception of justice and fairness to the parties. The applicant need only demonstrate that it would be "unconscionable" to allow the other party to pursue litigation in a foreign forum".[234]

Indeed, an anti-suit injunction may be issued even in the absence of a cause of action in the jurisdiction in which the injunction is being sought. In many cases, an applicant will seek an anti-suit injunction enjoining the commencement or continuation of litigation abroad precisely to enable the applicant to continue litigation in the domestic forum, so that there will be a cause of action in the domestic jurisdiction. There are, however, instances where an anti-suit injunction has been sought to prevent litigation from continuing at all.

The scope of Siskina doctrine was also limited by Civil Jurisdiction and

231. Ibid, P. 755; South Carolina Insurance Co. v. Assurantie Maatschappij "De Zeven Provincien" N. V. [1987] A.C. 24 (H.L.)

232. Paul Michell, Op. Cit, p. 755

233. Ibid

234. Ibid.

Judgments Act 1982 and its subsequent extension in 1997.[235] In its original 1982 form, section 25 of the Civil Jurisdiction and Judgments Act conferred a statutory jurisdiction to grant freestanding interim relief of any nature, including Mareva injunction.[236] Based on section 25, Siskina's bar to the ability of English courts to order Mareva injunctions in aid of foreign legal proceedings was partially removed by the reception of the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters into English law.[237] Section 25 renderes Siskina inapplicable where interim relief is sought in aid of legal proceedings in a Contracting State of Brussels convention 1968 (now Recast brussels I regulation is replaced the Brussels convention and subsequent Brussels I regulation).[238] In awarding interim relief in aid of proceedings in a Contracting State of Brussels convention (now Recast Brussels I regulation), English courts do not exercise substantive jurisdiction over the dispute, they just exercise jurisdiction for the limited purpose of granting provisional measures. Section 25 was extended to Lugano Convention countries by the Civil Jurisdiction and Judgments Act 1991.[239] Now, the Section 25 of the Civil Jurisdiction and Judgments Act 1982, as extended in 1997, empowers the High Court to grant all forms of freestanding interim relief, including Mareva injunctions, in relation to substantive proceedings anywhere in the world.

In all of the three abovementioned hypothesis of section 25 of Civil Jurisdiction and Judgments Act 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

235. The Brussels Convention was incorporated into domestic law in the United Kingdom by the Civil Jurisdiction and JudgmentsAct 1982 (U.K.), 1982. A parallel Convention concluded with the Contracting States to the Brussels Convention and the Member States of the European Free Trade Area, the Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, 16 September 1988, (1989) [hereinafterLugano Convention], was incorporated into U.K. domestic law by the Civil Jurisdiction and Judgments Act 1991 (U.K.), 1991.

236. Section 25 (1) and (2), Civil Jurisdiction and Judgments Act 1982

237. Paul Michell, Op. Cit, pp. 763-764

238. Provided that the proceedings have been brought (or be about to be brought) in a Contracting State, the defendant be domiciled in a Contracting State, and the subject matter of the litigation be within the scope of the Conventions (i.e., civil and commercial matters).

239. Civil Jurisdiction and Judgments Act 1982 (as amended by the Civil Jurisdiction and Judgments Act 1991), Section 25 (1) and (2)

the proceedings in question makes it inexpedient for the court to grant it, the court will not grant the injunction.

The scope of the Siskina doctrine was limited again by extension of the power of the English court to order Mareva injunctions (even) in the absence of actual cause of action. In this respect, although the House of Lords in the Siskina had held that injunctive relief should not be available in the abstract, without a basis in an underlying legal dispute justiciable in the English courts; thus, they made it a condition of granting a Mareva injunction that a cause of action must have arisen at the time that relief was sought; but the requirement that a cause of action must have already arisen before injunctive relief can be granted can deny relief to plaintiffs with deserving cases. That is why, in A. v. B., the English Commercial Court held that a Mareva injunction was available even where no subsisting cause of action had yet arisen.[240]

In this respect, any doubts regarding availability of provisional measures, including Mareva-type injunctions, in aid of international commercial arbitration, within or beyond the borders of England, has faded away under the Arbitration Act 1996. Based on the Arbitration Act 1996, the court can grant provisional measures even if the seat of the arbitrations is outside England and Wales or Northern Ireland or no seat has been designated or determined.[241] The court may refuse to exercise any such power if, in the opinion of the court, the fact that the seat of the arbitration is outside England and Wales or Northern Ireland, or that when designated or determined seat is likely to be outside England and Wales or Northern Ireland, makes it inappropriate to do so.[242] In this regard, the Motorola Credit Corporation v Uzan & Ors case is also noteworthy. Where, the English

240. A. v. B [1989] 2 Q.B. 423, cited by Paul Michell, Op. Cit.

241. Arbitration Act 1996, Sections 2(3) and 44

242. Arbitration Act 1996, Sections 2(3) and 44

court laid dawn considerations which should be born in mind when considering whether it is 'inexpedient' to make such an injunction.[243]

This was a famous case of alleged international fraud which had no substantive connection with England. The substantive proceedings were pending against the four Turkish respondents in the United States. The point of principle was whether a worldwide Mareva injunction should be made under s. 25 of the Civil Jurisdiction and Judgments Act 1982 in support of an action in a foreign jurisdiction.[244]

While the Court of Appeal upheld worldwide Mareva injunction and cross-examination orders against two of the respondents who had assets in England, one of whom was also resident in England, it set them aside against the other two respondents who did not have assets in England on the basis that it was 'inexpedient' to grant such relief when no sanction was available against them in the event of their disobedience.[245] According to the court, there are five considerations which should be borne in mind when considering whether it is 'inexpedient' to make such an order:

"First, whether the making of the order will interfere with the management of the case in the primary court e.g., whether 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. If so, then respect for the territorial

243. Motorola Credit Corporation v Uzan & Ors [2003] EWCA Civ 752 (12 June 2003), available at http://www.bailii.org/ew/cases/EWCA/Civ/2003/752.html

244. Ibid

245. Peter Biscoe, Op. Cit, p. 25; Motorola Credit Corporation v Uzan & Ors

jurisdiction of that state should discourage the English court from using its unusually wide powers against a foreign defendant. Fourth, whether at the time the order is sought there is likely to be 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".[246]

Regarding the availability of provisional measures, including U.S. equivalent of the English Mareva injunctions, in aid of international commercial arbitration, within or beyond the borders of the U.S., interestingly, there is no express provision allowing provisional remedies to be granted by the courts when the parties have agreed to arbitration, neither in the United States Federal Arbitration Act 1925 nor in the U.S. Federal Rules of Civil Procedure. However, arbitration is one of the fields where American law is willing to grant interim protective relief even though neither federal nor state courts have jurisdiction as to the substance of the matter.[247] In this regard, based on the case law and American institutional arbitration rules, the U.S. system's disposition is well-established.[248]

In the view of above, thanks to the fact that in English system the availability of Mareva-type injunctions in aid of domestic and foreign proceedings is expressly determined, the author prefers the English system over the U.S. system. However, in both of the above-mentioned system nowadays it is beyond doubt that the provisional measures, inter alia Mareva-type injunctions, can be garanted even if a foreign forum, inter alia a foreign international commercial arbitral tribunal, is competent in dealing with substantive relief. In other words, to ground the grant of a Mareva-type injunction to the existance of a substantive

246. Peter Biscoe, Op. Cit., p. 26

247. Peter F Schlosser, Coordinated transnational interaction in civil litigation and arbitration, p. 163

248. This point will be elaborated in detail in the Second Part of the thesis.

cause of action within the jurisdiction is not necessary. It seems that it is not only tolerated but also encoraged to aid actual or future foreign substantive proceedings. Any rule or practice limiting the assitance to the foreign proceedings, especially international commercial arbitration, by way of providing provisional measures is considered outdated. In other words, in the golobal village of international commerce, if a legal tool can fight effectively against injunstice, whenever it is appropriate, it is better to lend such a tool in aid of foreign arbitral and legal proceedings, otherwise mala fide defendants, abusing the loopholes in the overal dispute settlement systems of the world, can make themselves judgment-proof.

In this regard, taking into account the characteristics of international commercial arbitration as a dispute settlement system, especially the fact that the seat of arbitration is usually chosen in a neutral country, different from the parties' place of business or domicile and the location of their assets, sometimes the asisstance of foreign forums gets necessary. Such an asisstance can enhance the justice and international commerce in the world. Keeping in mind the intertwined structure of globalized world, this can also be useful for the forum giving the asisstance.

Thus, under the author's proposed model, it will expressly be stated that the courts can grant European injunctions in aid of international commercial arbitrations within the national borders and beyond the national borders.

Section II. Assets subject to Mareva-type injunctions and the assets excluded from the scope of these injunctions

The issue at hand in this section is, on one hand, to determine which assets are subject to the Mareva-type injunctions. This helps the injuncted person to know precisely his/her limitations. On the other hand, the question is which assets, if any, are excluded from the scope of assets subject to Mareva-type injunctions.

This helps the injuncted person to know which assets he/she can deal with freely or at least with less limitations, comparing to the assets subject to Mareva-type injunctions.

In this respect, the subsection I is going to deal with the issue of the assets subject to Mareva-type injunctions and the subsection II is going to analyze the assets excluded from the scop of Mareva-type injunctions. In other words, the first subsection will consider the general rule in this regard and the susequent subsection will consider exclusion/s of such a gereral rule.

§ I. Assets subject to Mareva-type injunctions

Tradidionally, especially in England, whenever a person was subject to a Mareva-type injunction, all of his/her assets were subject to the injunction. But nowadays, a Mareva-type injunction, both in English and U.S. legal systms, may restrain or enjoin a person from dissipating all or a part of his assets.[249] Taking into account all the circumstances of the case, the forum dealing with the applications for Mareva-type injunctions may choose one of the above-mentioned approaches.

If the forum chooses to restrain or enjoin a defendant from dissipating all of his/her assets, such a Mareva-type injunction normally applies to all the respondent's assets whether or not they are in his own name, whether they are solely or jointly owned and whether the respondent is interested in them legally, beneficially or otherwise.[250] In this respect, the judgment of the English court in JSC BTA Bank v Solodchenko & Ors case is worthy of notice. Where, the plaintiff successfully obtained Mareva injunctions against the first defendant, the second defendant (director of two companies involved) and nine corporate

249. Uniform Asset Preservation Orders Act, Section 4 (4) e

250. This issue is explained in more detail in Title 1 of the First Part ; Uniform Asset Preservation Orders Act, Section 4 (4) d

defendants.[251] There was a dispute as to the obligation of the defendant to disclose assets held by him as trustee or nominee for a third party, being assets in which the respondent retains no beneficial interest. In fact, the second defendant contended that he was not required to make disclosure of assets held by him in his capacity as trustee. The second defendant's view can be the result of the idea that the Mareva injunction is intended to cover those assets which are available for enforcement purposes and that assets in which the beneficial interest is held by a third party are not assets which would typically be available for enforcement and so, in principle, should fall outside the terms of a standard Mareva injunction.[252]

In the Court of Appeal, the court held that the duty of disclosure of the defendant extended to assets held on trust whilst at the same time maintaining the clear position that the Mareva injunction was intended to catch only those assets which would be available for enforcement purposes and they are limited to those which are beneficially owned by the defendant.[253] The decision was based on additional wording of the "standard form" adopted in the Admiralty and Commercial Courts Guide.[254] In fact, the Court of Appeal has fashioned a means of meeting the concerns of claimants when dealing with unscrupulous defendants who are well versed in methods of disguising their true beneficial interest behind purported trust structures by placing the disclosure obligation on the respondent, and thereby enabling the claimant to become aware of the asset and address any concerns as to the validity of the relevant trust whilst, at the same time, maintaining that ultimately the only assets which should be caught by a Mareva injunction are those which are beneficially owned by the defendant.[255]

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251. JSC BTA Bank v Solodchenko & Ors [2010] EWCA Civ 1436

252. Paul McGrath, The freezing order: a constantly evolving jurisdiction, Civil Justice Quarterly, v.31, no.1, 2012 Jan, (ISSN: 0261-9261 p. 19

253. Ibid, p. 21

254. Standard form adopted in the Admiralty and Commercial Courts Guide provides as follows: "Paragraph 5 applies to all the Respondent's assets whether or not they are in his own name, whether they are solely or jointly owned [and whether the Respondent is interested in them legally, beneficially or otherwise]. For the purpose of this order the Respondent's assets include any asset which he has the power, directly or indirectly, to dispose of or deal with as if it were his own. The Respondent is to be regarded as having such power if a third party holds or controls the asset in accordance with his direct or indirect instructions."

255. Paul McGrath, Op. Cit., p. 22; the interests of third parties whose assets are being properly held on trust by the defendant are properly protected. Such protection would

It is noteworthy that the effect of a Mareva-type injunction is that the defendant cannot enjoy the full spectrum of rights which can be exercised by an owner in respect of his property;[256] in other words, it takes away some of rights of injuncted person regading his assets, however, the assets still belong to him. This can be justified on the ground that he should not have the freedom to use his rights for a wrongful purpose.[257]

In the view of the above, under the author's proposed model based on the circumstances of case the forum may restrain or enjoin a person from dissipating all or a part of his assets. However, some assets are excluded from the scope of Mareva-type injunctions, which are the subject of our analysis in the next subsection.

§ II. The assets excluded from the scope of Mareva-type injunctions[258]

In this subsection, we are about to determine the areas in which the injuncted defendant is not limited or, at least, is less limited. Because, despite being subject to a Mareva-type injunction, the defendant is not totally detached from his/her assets and can still carry on certain operations regarding his/her assets. In other words, the defendants subject to a Mareva-type injunction are only deprived of their freedom to the extent to which it is necessary to stop them from making themselves intentionally judgment-proof. Otherwise, such an injunction would be too claimant-friendly and therefore would not be able to guarantee the equal treatment of the parties.

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have to be given in the form of a revised cross-undertaking in damages which would need to be expressly extended to include such third parties.

256. Filip Saranovic, Private International Law Aspects of Freezing Injunctions (Dissertation), Hughes Hall, 5th May 2017, p. 59, available at https://www.repository.cam.ac.uk/bitstream/handle/1810/270457/Saranovic-2018-PhD.pdf?sequence=1

257. Ibid

258. Taking into account, on one hand, that the Mareva-type injunction does not confer the claimant any proprietary rights of security over assets which fall within its ambit; on the other hand, the fact that a the defendant subject to such an injunction is free to continue his ordinary business, if a Mareva injunction is expressed to apply to assets only so far as their value does not exceed a stipulated sum, then if the value does exceed that sum, the enjoined party may use freely the exceeding sum for any purpose including commercial purpose. Because, a Mareva injunction, even if it relates to a particularized asset, is a relief in personam; it does not confer any proprietary rights over assets which fall within the scope of Mareva injunction. This rule was established in Cretanor Maritime Co. Ltd. v. Irish Marine Ltd. Case.

In the view of the above, in this subsection we are going to analyze the assets excluded from scope of the assets subject to Mareva-type injunctions. In this respect, first we will analyze the ordinary course of business (A); then, spending toward ordinary living expenses will be clarified (B); finally, legal fees will be dealt with (C).

A. The ordinary course of business

Here, we are going to analysis one of the main situations where a person subject to a Mareva-type injunction can deal with his assets without violating the terms of the injunction, i.e. dealing with assets in ordinary course of business. After a general overview of above-mentioned issue, the disposition of the English and U.S. systems will be elaborated respectively. Finally, taking into account all of the above, the author's point of view will be elaborated.

In this respect, if based on a Mareva-type injunction a person would be forbidden totally from persuing his/her business activities, it would normally put in danger the very existence of his/her business. Such injunctions in smaller businesses with limited borrowing power could prevent payroll from being paid, or allowing the company to pay a supplier that is key to allowing that business to complete a project and earn revenue.[259] Very few businesses, if any, can survive imposition of a Mareva-type injunction forbidding totally the pursuit of business for a while. In other words, the damage done by the grant of such a Mareva-type injunction may be irretrievable. The cross-undertaking in damages is of no consolation to a company which has been ruined. Even secured cross-undertaking cannot normally compensate the damages of a defendant whose business or reputation is unjustly destroyed. When the business is ruined or the the defendant's reputation is damaged, it is usually too late to save the business or

259. Alexander Firsichbaum, The Uniform Asset-preservation Orders Act: Quieting the alarms with lessons from abroad, Rutgers University Law review commentaries January 29, 2018, p. 7

restore the reputation. That is why, the ordinary and proper course of business exception (proviso) was created, which is a safeguard designed to prevent the defendant's business from being ruined or the defendant's reputation being damaged. According to this proviso, Mareva-type injunction does not prohibit the respondent from dealing with his assets in the ordinary and proper course of business.[260] In other words, the defendant subject to a Mareva-type injunction can continue the normal routine in managing a trade or business. In the absence of such a proviso the defendant could be faced with a choice between defaulting on its payments on the one hand and providing security on the other.[261]

Transactions in the ordinary course of business may even empower the defendant to meet the eventual judgment debt. Although these transactions carry the usual business risk of loss, they do not amount to wrongful conduct. The goal of the ordinary and proper course of business proviso is keeping business activities of defendant as normal as possible. These businesses are not intended to prejudice the movant and make the process of litigation futile.

In this respect, in English legal system based on standard form Mareva injunction, a Mareva injunction does not prohibit the respondent from dealing with or disposing of any of his assets in the ordinary and proper course of business.[262] There are also some interesting cases dealing with this subject matter.

In Iraqi Ministry of Defence v. Arcepey Shipping Co. Ltd,[263] the plaintiffs applied and successfully obtained a Mareva injunction over the proceeds of an insurance policy on the defendants' ship, as the only assets of defendants. Subsequently Gillespie Bros, as creditors of the defendant, who was subject to a Mareva injunction, sought leave to intervene in the court proceeding based on the

260. The standard form freezing injunction (adapted for use in the Commercial Court), Paragraph 11(2)

261. Ibid

262. Ibid

263. Iraqi Ministry of Defence v. Arcepey Shipping Co. S.A. [1981] Q.B. 65; [1980] 2 W.L.R. 488; [1980] 1 All E.R. 480

ground that they had, earlier, made a loan to the defendants on the security of a ship's mortgage coupled with an assignment of the insurance policy. They asked the court to authorize the repayment of a loan out of monies otherwise subject to the Mareva injunction.

Mr. Justice Donaldson dealt with the issue between the plaintiffs and the interveners to determine the validity of the interveners' claim, deciding in favor of the interveners. Then, based on an application by the interveners to vary the injunction so as to permit the defendants to pay to the interveners, the case came before Mr. Justice Robert Goff. According to the latter "… it does not follow that, having established the injunction; the court should not thereafter permit a qualification to it to allow a transfer of assets by the defendant if the defendant satisfies the court that he requires the money for a purpose which does not conflict with the policy underlying the Mareva jurisdiction. It does not make commercial sense that a party claiming … damages … prevent the defendant from using his assets to satisfy his debts as they fall due and so put him in the position of having to allow his creditors to proceed to judgment with consequent loss of credit and of commercial standing''.[264]

In Normid Housing Association Ltd v Ralphs and Mansell case,[265] where the claimants had brought a substantial claim against the defendant architects for negligence and breach of contract in the design of certain works; the defendants had professional indemnity cover and insurers had made a comparatively small offer to settle the claims against them by the defendant architects.[266] The plaintiffs wanted to prevent the defendants from compromising the claim with the insurers and had obtained an injunction restraining the defendants from doing so.

264. Ibid

265. Normid Housing Association Ltd v Ralphs and Mansell (A Firm) and Another [1988] EWCA Civ J0728-3

266. Steven Gee Q.C., Injunctions and Recent Developments in Interim Relief, p. 91

Failing to uphold the injunction under Third parties (Rights Against insurers) Act 1930, the plaintiffs then tried to uphold the injunction by reference to the Mareva principles. The case went all the way to the Court of Appeal. The recent court held that the compromise of the claim by the defendants would be allowed as a transaction entered into in the ordinary course of business, not collusive, or putting the defendants' asset beyond the claimants' reach.[267]

In this respect, Emmott v Michael Wilson and Partners case is equally noteworthy. Where the Court of Appeal, overturning the first instance court' decision that two payments had been made in breach of a Mareva injunction, 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.[268]

In this regard, Fiona Trust litigation also merits a closer look.[269]Where a Mareva injunction specifically prohibited the conclusion of newbuilding (shipbuilding) contracts even though it would have been in the ordinary course of business of the defendant.[270] Even when a security was provided by the defendants, 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. This means that, although in English standard Mareva injunction form the ordinary course of business proviso is a defaul assumption and trading in the ordinary course of business is normally excluded from the scope of Mareva injunctions, it is important not to make an assumption that every Mareva

267. Ibid; from the author's point of view, a good citizen and normal businessman, who is subject to a Mareva injunction, should not be allowed to compromise his claim against third parties. In other words, although a businessman may sometimes compromise his claims, the compromisation by a defendant subject to a Mareva injunction, especially for a very lower than maket price, is not a prodent behavior.

268. Emmott v Michael Wilson and Partners, [2015] EWCA Civ 1028; Filip Saranovic, Op. Cit., p. 69

269. Fiona Trust and Holding Corp v Privalov [2016] EWHC 2163 (Comm)

270. Ibid

injunction contains an ordinary course of business proviso.[271]

Similar to the English legal system, the U.S. system has also dealt with the defendant's right to continue the ordinary course of business. Earlier this was elaborated through the case law, but now under the UAPOA, on at least 24 hours' notice to the party that obtained an asset-preservation order, a party against which the order is issued may apply for an order permitting it to pay its business expenses.[272] There are also some U.S. cases clarifying this subject matter.

In United States ex rel Taxpayers Against Fraud v. Singer Company, the plaintiffs, becaming concerned that defendant, which had been successfully targeted for a leveraged buyout, was quickly liquidating its divisions to pay off the acquisition debt incurred in connection with the takeover, sought and obtained a preliminary injunction from the United States District Court for the District of Maryland (fourth Circuit). Accordint to the injunction, Singer had to obtain court review and approval of non-ordinary-course-of-business transactions to prevent Singer, without court awareness, from further liquidating or distributing its assets.[273] In this regard, Hoxworth v. Blinder, Robinson & Company, Inc. case is also worthy of note.

Where, plaintiffs moved, inter alia for a preliminary injunction prohibiting Blinder, Robinson from making transfers out of the ordinary course of business without notice to them and prior court approval. The United States District Court for the Eastern District of Pennsylvania, finding that the usual criteria for obtaining a preliminary injunction had met, prohibited the defendant, inter alia, from transferring any funds outside the ordinary course of business and from

271. Filip Saranovic, Op. Cit., p. 69

272. Uniform Asset-preservation Orders Act, Section 4 (d)

273. United States ex rel. Taxpayers Against Fraud v. Singer Co., 889 F.2d 1327 (4th Cir. 1989)

transferring any funds outside the country without prior approval by the district court.[274]

In the view of above, in general it seems that ordinary course of business proviso is a good procedural tool in establishing the balance between the claiment and defendant. Without this proviso the Mareva-type injunction would result in injustice to the defendant. This proviso balances delicately the interests of the the plaintiff and defendant. In the absence of such a proviso, the Mareva-type injunction would give unfair advantages to the claimant, becoming the claimant's tool of oppression.

While the U.S. default system requiring the defendant's request to pay business expenses puts in danger the very existance of the defendant's business and sounds one-sided in favour of the plaintiff, the English system's default system permitting the defendant to deal with or dispose of any of his assets in the ordinary and proper course of business seems well balanced.

Thus, based on the author's proposed European injunction, the defendant subject to such an injunction is allowed to continue his/her normal business activities, but he/she needs to behave like a good citizen, avoding any extraordinary behavior capable of harming the plaintiff.

B. Spending toward ordinary living expenses

Taking into account the importance of the defendants' personal life, in granting a Mareva-type injunction against individual defendants, it is necessary to adapt measures ensuring the defendants to maintain their own and their family' standard of living. Thus, here, we are going to elaborate the way in which the defendants subject to a Mareva-type injunction and their families' standard of living can be guaranteed. To do this, after a short overview of the subject matter,

274. Hoxworth v. Blinder, Robinson & Co., 903 F.2d 186 (3d Cir. 1990); finally, the Circuit Court, confirming the power of district court to order preliminary injunction, based of special circumstances of the case, vacated the injunction.

we will clarify the disposition of the English and U.S. legal system in this regard. Finally, analyzing the strenghths and weaknesses of the above-mentioned systems and the needs of defendants to maintain their and their families' standard of living, we will elaborate our proposed way to maintain such a standard.

In this regard, in every legal suit, before the issuance of an enforceable relief, normally the defendant is free to deal with his assets as he pleases. Especially, in pre-judgment phase, which the plaintiff's entitlement to the defendant's assets is not still proven, the plaintiff should not be allowed to exercise undue pressure on the defendant. Despite the fact that provisional measures can provisionally limit the defendant's aforementioned freedom, nevertheless there are some areas that even provisional measures, inter alia Mareva-type injunctions, can not limit the defendants' freedom. Spending toward ordinary living expenses is one of those areas. We can not prohibit a person from paying for his living expenses and those of his family simply because he may, in the future, be found to be debtor; otherwise, this can put the defendant under significantly unjust pressure to settle the dispute merely to get out from the provisional measure's tight grip; if the defendants have other resources in which the provisional measure, inter alia the Mareva-type injunction, does not apply and can be available for the personal and family liviving expenses of the defendant, the situation can be different.

In this respect, according to the English standard Mareva injunction form, such an injunction does not prohibit the respondent from spending towards his ordinary living expenses.[275] But before spending any money the respondent must tell the applicant's legal representatives where the money comes from.[276]

275. The standard form freezing injunction (adapted for use in the Commercial Court), Paragraph 11(1), available at https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part25/pd_part25a

276. Ibid

In PCW (Underwriting Agencies) Ltd. v. Dixon case, [277] where the defendant subject to a Mareva injunction was the chairman of a very successful underwriting company and known to be wealthy, despite requesting £1,000 per week to support his family, the English court ordered that only £100 per week be released from a Mareva injunction for living expenses.[278] On appeal, the court reversed and released the higher amount, finding the original order totally unrealistic if the defendant was to maintain his standard of living, given his high income.[279] According to the recent court, it would be improper for a defendant to be "compelled to reduce his standard of living in order to secure what is as yet only a claim by the plaintiff.[280] Justice Lloyd found the original, unreasonably small exemption for living expenses to be coercive, explaining that until the matter is tried, the plaintiff is not entitled to exercise undue pressure on the defendant and that if the figure £100 a week was maintained it could only result in the defendant's capitulation.[281]

In this regard, in the U.S. legal system, based on the UAPOA, a defendant subject to an asset-preservation order can apply for an order permitting it to pay its ordinary living expenses.[282] In other words, as a default rule a party against which the order is issued can not pay its ordinary living expenses from the assets subject to the asset-preservation order, but the order can be modified to enable the party to pay ordinary living expenses. Besides, even before the UAPOA, there were examples of cases where the U.S. courts had allowed the defendants subject to temporary restraining orders and preliminary injunctions to pay their living

277. PCW (Underwriting Agencies) Ltd. v. Dixon, [1983] BCLC 105 (Lloyd J.) (Eng.)

278. Cited by Alexander Firsichbaum, Op. Cit., p. 6

279. Ibid

280. Ibid

281. Ibid

282. Uniform Asset-preservation Orders Act, 4 (d)

expenses. In this respect, the aforementioned famous Republic of the Philippines v. Marcos case is noteworthy.

Where, the allegation of fraud led the District Court to find that the preliminary injunction enjoining the Marcoses from disposing of any of their assets, save for the payment of normal living expenses, was necessary to preserve the possibility of equitable relief.[283]

In the view of the above, despite some similarities between the English and U.S. legal systems' approaches in dealing with the issue of ordinary living expenses by the defendant subject to a Mareva-type injunction, there is a big functional difference. While based on the English system, prima facie a defendant can pay ordinary living expenses; according to the U.S. UAPOA a defendant's right to pay the ordinary living expenses is subject to an additional application for an order permitting it to pay the ordinary living expenses. The author submits that this difference makes the approach taken by Englich standard Mareva injunction form more comprehensive and appropriate. Especially in pre-judgment injunctions, if all of the defendant's property is subject to the Mareva-type injunction, it is not acceptable to deprive the defendant from maintaining standards of normal living, simply because of a probable relief agaist him. Whereas the applicant's entitlement to prevail in his/her claim against the defendant is as yet only a claim, according to the common sense every person's entitlement to disposing of any of his/her assets for the payment of normal living expenses is beyond doubt. Keeping in mind the nature of ordinary living expenses, postponding the spending toward such expenses is contrary to common sense and even human rights.

Despite the above, the English legal system's approach is not also free from criticism; becase requirement of prior notice to the claimant's legal representative

283. The Republic of the Philippines, Plaintiff-appellee, v. Ferdinand E. Marcos, et al., Defendants-appellants, 862 F.2d 1355 (9th Cir. 1988)

is an unnecessary burden on a defendant's use of funds for paying his ordinary living expenses and those of his family. It will be better to postpone such a notice to the time after paying such expenceses.

In this regard, it is noteworthy that both of the above-mentioned systems have failed to indicate how such expenceses will be determined. Though, we can infer that in calculating living expenses the forum granting the Mareva-type injunction can use the indices used in other domains such as family law, but it seems that it would be more appropriate to set up in advance standards in calculating living expenses in commercial cases; because, each domain has its own specific characteristics.

Thus, in view of the foregoing, under the author's proposed model, prima facie the person subject to a Mareva-type European injunction can pay his living expenses and those of his family from the assets subject to such an injunction, unless such a person has other resources in which the above-mentioned injunction does not apply and can be availble for paying his living expenses and those of his family. In other words, ordinary living expences of the person subject to a Mareva-type European injunction and his his family is excluded from the scope of assets subject to such an injunction, unless the person has other resources in which the above-mentioned injunction does not apply and can be availble for paying his living expenses and those of his family. The defendant, after paying such expenceses, will inform the claimant's legal representatives about the use of funds for paying his living expenses and those of his family. This proposal is consistent with the European Convention of Human Rights, where it declares that "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general

principles of international law".[284]

C. Legal fees

Insofar as a plaintiff should be empowered to prevent a defendant from becoming judgment-proof by dissipating his assets, a defendant should also be allowed to defend against serious allegations by the plaintiff.[285] To defend properly, the defendant will usually need legal advice and representation, which necessitates spending funds. After a short overview, we will elaborate the disposition of the English and U.S. systems regarding the right of the person subject to a Mareva-type injunction to spend funds for legal advice and representation; finally, we will propose our point of view in this respect.

In this respect, taking into account the importance of the right to defend, normally defendants subject to a Mareva injunction need to be able to spend a reasonable amount of funds on legal advice and representation. Otherwise, the risk is that the defendant may fold its cards without ever presenting its defence, simply because it cannot afford to do so.[286] The defendants may pay legal fees from the assets subject to a Mareva-type injunction, unless they have other resources in which the Mareva-type injunction does not apply and can be available for the their legal fees. In other words, legal fees of the defendant are excluded from the scope of assets subject to such an injunction, unless the person has other resources in which the above-mentioned injunction does not apply and can be availble for paying his legal fees. Similar to the costs of liviving, the costs of legal representation vary significantly from case to case, so the court should take into account all the circumstances in determining its montent.

284. Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms Paris, 20.III.1952, article 1, available at https://www.echr.coe.int/Documents/Convention_ENG.pdf

285. Alexander Firsichbaum, Op. Cit., p. 10

286. Ibid, p. 13

In English legal system, according to the English standard Mareva injunction form, Mareva injunction does not prohibit the respondent from spending on legal advice and representation.[287] But before spending any money the respondent must tell the applicant's legal representatives where the money is to come from.[288] If a party subject to a Mareva injunction is unable to secure funding from other sources, and the party controls assets that it would be able to use to pay for legal representation but for the order, the order must be modified to release funds necessary to the party subject to the order, to pay for legal representation.[289] In this respect some English cases clarifying the disposition of the English courts regarding the power of a defendant subject to a Mareva injunction to spend a reasonable amount of funds on legal representation are noteworthy.

In Southern Cross Commodities Pty Ltd. (In Liquidation) v. Keith Desmond Martin, pursuant to the England's High Court' refusal to unfreeze assets needed to satisfy ongoing legal costs, taking into account the financial situation which was such that the defendants had only enough funds to pay their solicitors up to the day of the appeal, meaning that had the appeal been denied, the solicitors would have immediately ceased work, the Court of Appeal reversed the High Court's decision and allowed the defendants to access assets necessary for their defense, basing its reasoning on that nothing should be done that would prevent justice being done between the parties.[290] Concerning the issu at hand, Fortress Value Recovery Fund I LLC v. Blue Skye Opportunities Fund LP case is also noteworthy.[291]

Where, LP, a group of more than twenty defendants, including a financial

287. The standard form freezing injunction (adapted for use in the Commercial Court), Paragraph 11(1)

288. Ibid

289. Alexander Firsichbaum, Op. Cit., p. 11

290. Southern Cross Commodities Pty Ltd. (In Liquidation) v. Martin [1986] EWCA (Civ) 5219, (Eng.), Cited by Alexander Firsichbaum, Op. Cit., p. 10

291. Fortress Value Recovery Fund I LLC v. Blue Skye Special Opportunities Fund L.P. [2014] EWHC (Comm) 551 [2], [4] (Eng.), Cited by Alexander Firsichbaum, Op. Cit., pp. 10-11

holding company, its subsidiaries, and its individual shareholders were subjected to a Mareva injunction.[292] "The individuals proposed to cause the holding company to declare a dividend that could be used by them and the corporate defendants to pay for their joint defense, a transaction that would require a modification of the injunction. The defendants asserted that the holding company should be permitted to pay for these legal costs, even though doing so would entirely deplete the holding company's assets". Considering that if the variation is refused whether the defendant will in practice have recourse to other funds in order to fund his defence, the court found that the individuals and subsidiaries shared a common interest with the holding company in defending the claim, and would be willing and able to finance the joint defense themselves if their backs were up against a wall. According to the court, although the corporate defendants would not have sufficient unrestrained assets to defend themselves with a dividend from the holding company, a variation of the Mareva injunction to release funds was unnecessary because the rational self-interest of the individual defendants would prevent it from lacking representation due to a lack of funding.[293]

In this respect, equally, the U.S. legal system is also familiar with the notion of the power of a defendant subject to a U.S. equivalent of English Mareva injunctions to spend a reasonable amount of funds on legal advice and representation. Based on the UAPOA, a defendant subject to an asset-preservation order can apply for an order permitting it to pay its legal representation.[294] In other words, an asset-preservation order can be modified to enable a party to pay his/her legal fees. Again, the above-mentioned Republic of the Philippines v. Marcos case is noteworthy. Where, the District Court found that the preliminary injunction

292. Fortress Value Recovery Fund I LLC v. Blue Skye Special Opportunities Fund L.P. [2014] EWHC (Comm) 551 [2], [4] (Eng.), Cited by Alexander Firsichbaum, Op. Cit., pp. 10-11

293. Ibid

294. Uniform Asset-preservation orders Act, 4 (d)

enjoining the Marcoses from disposing of any of their assets, save for the payment of, inter alia, attorney fees, was necessary.[295]

In the view of the above, here again, despite some similarities between the English and U.S. legal systems' approaches in dealing with the issue of paying legal fees by the defendant subject to a Mareva-type injunction, there is a big functional difference. While based on the English system, prima facie a defendant can pay legal fees; according to the U.S. UAPOA a defendant's right to legal fees is subject to an additional application for an order permitting it to pay such fees. From the author's point of view, this difference makes the approach taken by Englich standard Mareva injunction form more comprehensive and appropriate. Especially, if all of the defendant's property is subject to the Mareva-type injunction, it is not acceptable to deprive the defendant from spending fees for legal advice and representation, simply because of a probable relief agaist him. Similar to the arguments in supporting the injuncted person's right in spending toward ordinary living expences, whereas the applicant's entitlement to prevail in his/her claim against the defendant is as yet only a claim, according to the common sense every person's entitlement to pay for legal advice and representation in defending himself is beyond doubt. Keeping in mind the importance of the defendant's access to the legal advice and representation in defending himself, postponding spending fees for such a purpose to the permission of the forum issuing the Mareva-type injunction is contrary to common sense.

The arguments in criticising the U.S. and English systems failur in determining expressly the method of calculating the leagal fees are the same as the arguments presented in explaining spending toward ordinarr living expences; the same can be said also about criticizing the English system's approach in

295. The Republic of the Philippines, Plaintiff-appellee, v. Ferdinand E. Marcos, et al., Defendants-appellants, 862 F.2d 1355 (9th Cir. 1988)

requiring prior notice about spending legal fees to the claimant's legal representative.

In the light of the above, under the author's proposed model, prima facie the person subject to a Mareva-type European injunction can pay legal fees from the assets subject to such an injunction, unless such a person has other resources in which the above-mentioned injunction does not apply and can be availble for paying legal fees. In other words, legal fees are exampted from the scope of assets subject to such an injunction, unless the person has other resources in which the above-mentioned injunction does not apply and can be availble for paying legal fees. The defendant will inform the claimant's legal representatives about the use of funds towards legal fees after paying such fees.

Conclusion of Chapter I

Taking into account the importance of determination of the scope of every legal concept, in this chapter the scope of Mareva-type injunctions was analysed from different angles. Elaborating the subtle structure of these injunctions, this chapter determined the territorial reach of these injunctions, which is worldwide. This means that this kind of injunctions can cross national borders without violating the international law. It was also showed that there should be no difference between the defendants having resident, domicile or being present within the national borders with the defendants not being resident, domicile or being present within the national borders of the country hosting the forum.

Then, it was proved that such injunctions can be granted against both domestic and foreign defendants as well as in aid of domestic or foreign proceedings, especially in aid of international commercial arbitrations within and beyond national borders.

Finally, the assets subject to the Mareva-type injunctions were analysed. Showing that although all or specified assets of the defendant can be subject to such injunctions, there are some assets that are excluded from the scope of Mareva-type injunctions.

In the view of the above, taking into account that this chapter determined the scope of Mareva-type injunctions from different angles, the next chapter will be dealing with the issue of Mareva-type injunctions and incolvement of third parties.

Chapter II. Mareva-type injunctions and involvement of third parties

Normally, someone who is not a parincipal party to an arrangement, contract or lawsuit, should not be bothered. But, to respond to the defendants' complicated tactics in avoiding effects of Mareva-type injunctions, the the scope of these injunctions has been extended beyond the defendants against whom the final substantive relief is claimed. This means that the persons against whom no final substantive relief is claimed may be affected by a Mareva-type injunction; that can happen in two cases: either the injunction is made against the third parties, or although the Mareva-type injunction is not made against the third parties, notice of the injunction is given to the third parties.

In this regard, this chapter, first, will analysis the impact of a Mareva-type injunction, granted against the defendant of the substantive proceeding, on third parties; secondly it will analysis granting the Mareva-type injunctions directly against third parties.

Section I. The impacts of Mareva-type injunctions on third parties

Taking into account that, to transfer or dissipate its assets, a defendant subject to a Mareva-type injunction mostly uses services of third parties, they have established mechanisms preventing the third parties from deliberately assisting in or permitting a breach of the terms of the Mareva-type injunction. In other words, in order to prevent the defendants from using the third parties in disposing their assets contrary to the terms of a Mareva-type injunction, mechanisms enabling us to fight against such a phenomenon were set up. In the absence of above-mentioned mechanisms, by the aid of third parties, the defendant can make himself judgment-proof.

Given that the granting of a Mareva-type injunction is liable to have an impact on third parties who deal with the defendant or are involved in dealing

with assets falling within the scope of the injunction, in this section, we are about to analysis situation in which the injunction is not made against the third party, however the notice of the injunction is given to the third party.[296] In such a circumstance, the third parties should be protected against unjust negative effects of the Mareva-type injunction over them; this can be done, for example, by establishing proper undertakings provided by plaintiffs and subtle drafting of the terms of Mareva injunctions. Regarding the possibility that third parties might be entitled to, or claim, an interest in the assets subject to a Mareva-type injunction, it is said that "If there are … genuine interests vested in third parties beneficially, the first defendant can state the facts in his answer to the interrogatories, and the notice of the injunctions can be served on the parties alleged to be beneficially interested, and their objection can be made to the court and its validity upheld. When there is such massive evidence of nominees, and puppet directors dancing to the first defendant's tune, it is for him to state on oath his belief, if he holds it, that one or more persons implicated in the silken skein of his spider's web has a genuine beneficial interest."[297] The court is not obliged to accept without inquiry an assertion by the defendant, or a third party intervening, that the assets belonges to a third party.[298] In deciding whether to accept such an assertion without further inquiry, the court will be guided by considerations of justice and convenience between all the parties concerned and might thus order either the contentions to be tried as a preliminary issue before the trial of the main action or await the result of the trial.[299] After a short elaboration of the disposition of the English and U.S. legal systems, we will propose the best way in dealing with the the impact of Mareva-type injunctions on third parties.

296. Steven Gee Q.C., Injunctions and Recent Developments in Interim Relief, p. 27

297. Steven Gee Q.C., Injunctions and Recent Developments in Interim Relief, p.10, available at https://www.lsla.co.uk/sites/default/files/lecture_materials/Injunctions%20-%20Steven%20Gee%20QC.pdf

298. S.C.F. Finance Co. LTD. V. Khalil Said Masri and Mrs. Ina'am Masri, [1986] 2 Lloyd's Rep. 366

299. Ibid

In this regard, the disposition of the English legal system is based on the Practice Direction supplementing Civil Procedure Rules and some cases of the English courts. According to the Practice Direction, it is a contempt of court for any person notified of a Mareva injunction knowingly to assist in or permit a breach of the injunction; any person doing so may be imprisoned, fined or have their assets seized.[300] This means that, under the English system, a third party with the knowledge of the Mareva-type injunction should not deliberately aid and abet a breach of the terms of an injunction by the defendant; otherwise, the third party will be subject to contempt of the court punishments.[301] In other words, the third party is not bound directly by the injunction but will be guilty of contempt of court, for which it may be penalised by imprisonment, sequestration or fine, if it does anything to assist Mareva injunction's breach; because it would thereby be interfering with or obstructing the administration of justice.

A third party can also be in contempt of the court for participating in acts which are contrary to the terms of the order, even though the party enjoined has not learned of the granting of the injunction. Because, the court's injunction takes effect as soon as it is pronounced; although the defendant would not be in contempt of court if he acted inconsistently with its terms before he knew the order has been made, nevertheless the third party would be guilty of contempt if he deliberately caused the injunction to be set at naught. In such a situation, although the third party has not aided and abetted the defendant acting in breach of the injunction, the third party can be in contempt, because his conduct is an interference with the administration of justice in that it defeats the purpose of the court in making the injunction.

300. Civil procidure Rules, Practice Direction 25 A, example Freezing injunction form, annex 16

301. If the forum granting the injunction is an arbitral tribunal, it has no power over the third party, so whenever the third party's involvement in the successful functioning of a Mareva-type injunction process is necessary, it is esential to apply for this kind of injunctions before the national courts.

In this respect, there is a difference between a third party who is within the jurisdiction of the English courts and the third party outside the jurisdiction of the English courts. Whereas the third party that is within the jurisdiction of the English court will clearly be in contempt of court if he knowingly undermines a Mareva injunction, the third party outside the jurisdiction of the English court, who is not subject to the jurisdiction of English court, can be affected by the terms of a Mareva injunction only to the extent that this injunction is declared enforceable or is enforced by a court in that country or state.[302] Regarding the disposition of the English courts as to the effects of the Mareva injunctions on third parties, some cases of English courts are noteworthy.

Z Ltd. v. A-Z and AA-LL[303] is one of those cases, where, the English Court of Appeal, dismissing the appeal of the defendants, articulated guidelines for the liability of third parties (especially banks) who violate the Mareva injunctions.[304] The guidelines are as follow:

1) A third party who has been given notice of the injunction, if he/she knowingly assists in a breach of the injunction, will be guilty of contempt of court, irrespective of the defendant's knowledge of the injunction[305].

2) If a third party, for example a bank, is under an obligation to another party to make payments on behalf of the defendant, for instance under a bank guarantee, it may violate the injunction and debit the defendant's account irrespective of notice. The third party must, however, as far as possible, consider withdrawal of such facilities from the defendant;[306]

(3) The plaintiff must indemnify any reasonable expense incurred by a third

302. Civil procidure Rules, Practice Direction 25 A supplementing Civil Procedure Rules, annex 19

303. Z Ltd. v. A-Z, 1982 Q.B. 558, 573-74 (C.A.); although the action was settled but the banks applied for leave to appeal in order to clarify the position of innocent third parties served with a Mareva injunction.

304. Although the action was settled but the banks applied for leave to appeal in order to clarify the position of innocent third parties served with a Mareva injunction.

305. Ibid, p. 27

306. Ibid, p. 32

party in complying with the injunction, and is required to give the court an undertaking to this effect. These costs can, however, be recovered from the defendant at trial, if the plaintiff is successful;[307]

(4) It is the duty of the plaintiff to give the third party such information as is needed to allow it to comply with the injunction. If the plaintiff does not have sufficient information and is unable to identify the assets of the defendant, he may request the third party to conduct a search. The cost for this, however, is to be borne by the plaintiff.[308]

In this respect, Bank Mellat v Kazmi case is also noteworthy. Where, the plaintiff had obtained, inter alia, an ex parte Mareva injunction restraining the first defendant from disposing, pleddging, transferring or otherwise dealing with his assets, particularly the sums of money standing to the credit of some specific bank accounts.[309] In such a circumstance, since the defendant was entitled to receive a substantial sum from the Secretary of State for social services who had thereby become a debtor of the defendant, the plaintiff wanted the sum to be paid into one of the defendant's bank accounts, but the defendant wanted it to be paid to him directly. That is why, the Secretary of State sought to intervene in the proceedings and asked for directions as to what he should do.[310]

Nourse L.J., with whom the other members of the court agreed, after citing from the judgment of Sir John Donaldson M.R. in the Law Society v Shanks, indicated that: "…Mere notice of the existence of a Mareva injunction cannot render it a contempt of court for a third party to make over an asset direct. Otherwise it might be impossible, for example, for a debtor to pay over to the defendant even the most trivial sum without seeking the directions of the court. A

307. Ibid, p. 27

308. Ibid

309. Bank Mellat v Kazmi, [1988] EWCA Civ J1221-16, [1989] QB 541

310. Steven Gee Q.C., Injunctions and Recent Developments in Interim Relief, p. 87

distinction should be drawn between notice of the injunction on the one hand and notice of a probability that the asset will be disposed of or dealt with in breach of the order on the other hand. It is only the latter case that the third party can be in contempt of court".311

Concerning the U.S. legal system's disposition as to the effect of Mareva-type injunctions on third parties with the notice of the injunction, we can devide it in two periods. For the period before the Unifrm Assest-preservation Orders Act, the author was unable to find any specific information in this regard. With regard to the period after the Unifrm Assest-preservation Orders Act, there are some useful rules in this regard.

The UAPOA permits service on a nonparty (third party); this means that the party obtaining the asset-preservation order can require the third party to comply with the order.[312] "A nonparty served with an asset-preservation order shall take all necessary and appropriate actions to preserve assets by preventing any use of the assets of the party against which the order is issued which would violate the order until further order of the court. The nonparty shall comply promptly with this subsection, taking into account the manner, time, and place of service and other factors that reasonably affect the nonparty's ability to comply".[313] Except as otherwise provided for in section 6 (b) of the Uniform Asset-Preservation Orders Act, third party with the notice of an Assset-

311. Ibid; it seems that where a Mareva order is expressed as restraining the defendant from disposing, pledging, transferring or otherwise dealing with any assets, the court will not interpret that as preventing any conduct of the defendant which merely results in the same asset or in the case of a debt the financial proceeds of the debt, being held by the defendant himself. The Mareva injunction in the example order restrains the defendant from disposing of the asset or the financial proceeds of the debt. The defendant remains free to receive assets. If a claimant wishes to prevent the defendant from receiving payment of a debt due or accruing due to him from a third party, the plaintiff should make an application for special wording to be inserted in the injunction, prohibiting the defendant from giving directions for accepting or receiving payment of the relevant debt due or to become due from a third party.

312. Uniform Asset-Preservation Orders Act, Section 6(a)

313. Ibid, section 6 (b); in the Uniform Asset-Preservation Orders Act the U.S. system has used the term non party to refer to the third party.

preservation order shall not knowingly assist or permit a violation of the above-mentioned order, otherwise he can be find in contempt of court.[314]

If the third party believes, in good faith, that complying with the asset-preservation order would violate foreign law, create liability under a foreign legal system or violate an order issued by a foreign sovereign or tribunal, the third party immediately may move the court that issued the asset-preservation order to dissolve or modify the order. If the court finds that the nonparty acted in good faith, it may not find the third party in contempt of court for failing to comply with the order during the pendency of the petition.[315]

In the view of above, while both of the English and U.S. legal systems have tried to prepare the necessary rules as to the effects of Mareva-type injunctions on third parties and to some extent have set up proper rules protecting the rights of the applicants and third parties, from the author's point of view, to serve as a model on the question of the effects of European injunctions on third parties, the English system is preferred. However, the English system needs also some improvements.

In this respect, despite the fact that requiring the third party to comply with the terms of the Mareva-type injunction is a good mechanism making these injunctions a powerful legal tool in the battle against mala fide defendants making themselves judgment-proof, arbitral tribunals are not able to punish the third parties acting contrary to the terms of a Mareva-type injunction. To make international commercial arbitration more efficient, the author submits that it is necessary to change the current practice and let the arbitral tribunals to punish, indirectly through the courts, the third parties deliberately assisting in or permitting a breach of the terms of the Mareva-type injunction.

314. Ibid, section 6 (d)

315. Ibid, section 6 (b)

Thus, under the author's proposed model, a third party who has been given notice of the injunction, if knowingly assists in a breach of the injunction, he/she will be guilty of contempt of court, irrespective of the defendant's knowledge of the injunctionon. In this respect, arbitral tribunals will also be able to punish, indirectly throught the courts, the third parties who knowingly assist in or permit a breach of the injunction. However, the third parties will be protected against unjust negative effects of the Mareva-type injunction over them; whenever there are genuine interests vested in third parties beneficially, the defendant shall state the facts in his answer to the interrogatories, and the notice of the injunctions will be served on the parties alleged to be beneficially interested, and their objection will be made to the court and its validity upheld; besides, third parties affected by a Mareva-type European injunction are entitled to protection through the applicant's undertaking as to damages and as to their costs incurred in complying with injunctions.

Section II. Ordering Mareva-Type injunctions against third parties

In the globalized world of the 21st century, it is not unusual to see defendants using third parties such as individuals, companies and trusts to control or keep custody of their assets. Especially, mala fide businessmen rarely hold their assets in their own name; they may keep their assets in offshore companies, trusts, or in the name of relatives or any other third party letting them to hide or dissipitate their assets and make themselves judgment-proof.

Keeping the above in mind, to limit the scope of the Mareva-type injunctions to assets held in the name of the defendant of substantive claim can amount to a serious lacuna in the ambit of these injunctions. Accordingly, in order to meet these concerns and ensure that such injunctions remain effective, their scope needs to be extended, enbaling them to reach the assets in the hands of third parties. In this regard, the effect of Mareva-type injunctions granted against the

defendants of substantive claim over the third parties was dealt with in the previous section; in this section, firstly, we will consider how the grant of these injunctions were extended directly against third parties; then, we will elaborate our proposed way of dealing with such an extention. Since, according to the information known to the author, so far, the U.S. legal system has not expressly dealt with the issue of granting Mareva-type injunctions directly against third parties, the development the the above-mentioned issue will considered based on the English legal system's disposition.

In this regard, the disposition of the English legal system is mostly based on its rich case law in this field. C INC. PLC v. L was one of the cases in which the English courts' jurisdiction to grant a Mareva injunction directly against third parties was recognized.[316] Where, the plaintiff had obtained judgment against L, only then to find that she claimed that all assets were held by her on trust for or as agent for her husband who was overseas and against whom no substantive claim had yet been brought by the Claimant. So, the plaintiff set out to add him, and to claim a Mareva injunction against him.[317] In other words, the court was asked to grant a Mareva injunction over the assets of a person who was resident out of the jurisdiction and against whom no substantive claim had yet been brought by the Claimant.

In Queen's Bench Division (Commercial Court) Mr. Justice Aikens held, inter alia, that the court has the legal power to grant a Mareva injunction against Mr. L. This is despite the fact that there was no claim for substantive relief against him by the claimant. According to learned justice, the Court has the power to make the order because: (i) the claimant has an existing substantive right against

316. C Inc Plc v Mrs L and Mr L [2001] 2 Lloyd's Rep 459; according to the Practice Direction, similar to defendant in the substantive proceeding against whom a Mareva injunction is ordered, the third party against whom a Mareva injunction is ordered will be in a contempt of court if knowingly breaches the injunction. Besides, if the court later finds that this injunction has caused loss to the third party against whom the injunction has been granted, and decides that the the latter should be compensated for that loss, the applicant will comply with any order the court may make.

317. Ibid

the existing defendant, Mrs. L, in the form of a judgment debt that remains unsatisfied; (ii) the liability of Mrs. L to the claimant which gave rise to that judgment debt meant that Mrs. L (arguably) had a right to claim an indemnity from her husband, Mr. L, in respect of that liability and the judgment debt; (iii) that gave her the right to sue him and to pursue his assets, in respect of that right; (iv) as she was unlikely to exercise that right, the English Court would have to appoint a receiver as an aid to equitable execution to pursue that right; (v) there is a risk of dissipation of the assets of Mr. L; (vi) a freezing order over the assets of Mr. L (in and outside the jurisdiction), would prevent such dissipation; (vii) therefore the freezing order is both incidental to and dependent upon the enforcement of the substantive right that the claimant has against the first defendant, Mrs. L.[318]

In clarifying the disposition of English system regarding the grant of Mareva injunctions against third parties, TSB Private Bank International SA v Chabra case had also played a big role. Where, pursuant to the contract of guarantee, the claimant had brought an action against Mr Chabra, the guarantor and the first defendant.[319] Based on the plaintiff's application, a Mareva injunction was granted against Mr Chabra; since it was inadequate to protect the claimant; the claimant applied for a similar Mareva injunction against a company, in which Mr Chabra was a director and majority shareholder, despite the fact that the second defendant was a third party in that there was no cause of action against it.

Relying, on one hand, on some passage from the claimant's solicitors' affidavit that the assets of the company are the assets of Mr. Chabra and that with 100 percent control in him or his wife, he can procure the transfer of assets and, on the other hand, based on the fact that although there was no cause of action against the company, there was credible evidence, not contradicted by evidence

318. Ibid, p.479

319. TSB Private Bank International SA v Chabra [1992] 1 W.L.R. 231

from Mr. Chabra, that the assets that appear to belong to the company may in fact be Mr. Chabra's assets and therefore available to satisfy a judgment obtained against him, the court granted the Mareva injunction.[320]

Taking into account the circumstances of the case, if an injunction against Mr. Chabra was inadequate to protect the claimant from the risk that assets vested in the company may become unavailable to satisfy the judgment obtained against Mr. Chabra, an injunction should be made against the company to prevent it from dissipating assets; otherwise an injunction against Mr. Chabra alone, either in relation to his own assets or the company's assets, was inadequate. Because, Mr. Chabra was out of the jurisdiction and the court did not know what personal assets he had. Accordingly, it was no safeguard to the claimant to have an injunction against Mr. Chabra restraining him from directing or procuring the company from disposing of its assets when it may turn out that the claimant had no means of enforcing such an injunction against Mr Chabra.[321]

Thus, the ambit of assets caught by the Mareva injunction was extended to those held by a third party for and on behalf of the defendant.[322] Such an extension was entirely in line with the underlying purpose of the Mareva injunction, namely to catch those assets against which any subsequent judgment may be enforced.[323] However for such an injunction against a third party, it was necessary to establish a good arguable case that the assets held by the third party were beneficially owned by the defendant and therefore available for enforcement purposes. In the event that the third party disputed it was holding such assets, a procedure was devised to have the issue resolved.[324] In this respect Mr. Justice Flaux's statements

320. George Keightley and Nicholas Dixey, Mourant Ozannes, Injunctive relief against third parties: the Chabra jurisdiction, available at https://uk.practicallaw.thomsonreuters.com/6-521-2980?__lrTS=20170424122811179&transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1

321. Ibid

322. Paul McGrath, Op.Cit., p.14

323. Ibid

324. Ibid

in Linsen International Limited v Humpuss Sea Transport & Ors case are also helpful.[325]

Where, he insisted on a strict application of the concept of lifting the corporate veil and in particular on the need to establish abuse of the corporate structure in pursuit of the fraud. According to him, control of a company in itself and in the absence of misuse or abuse of its structure, did not suffice for the purposes of lifting the corporate veil; if there is no abuse of the corporate structure there is no basis for lifting the corporate veil even if there does exist fraud.[326] Piercing the corporate veil is a course which the court should take if no other remedy is possible and if certain requirements are satisfied.[327]

In Yukos v Rosneft case[328], the English court extended the scope of Mareva-type injunctions against third parties to a new level far beyond the above-mentioned Chabra case. Supported by the reasoning of Deputy High Court Judge Bartley-Jones QC in Dadourian Group International Inc v Azury Ltd, David Steel J rejected the submission that the Court of Appeal in Yukong Line Ltd v Rendsburg Investments Corporation had expressly limited Chabra to where the third party was holding as nominee for the defendant or the defendant otherwise had a beneficial interest in the relevant asset.[329] Steel J referred to the decision of the Australian High Court in Paul Cardille v LED Building Proprietary Ltd in which the High Court had held that it sufficed if it could be established that there existed some legal process by which the third party could be compelled to make the assets available for enforcement purposes.[330]

325. Linsen International Limited & Ors v Humpuss Seatransport Pte Ltd & Ors, [2011] EWHC 2339 (Comm), aff'd on appeal [2011] EWCA Civ 1042, available at http://www.lawcareers.net/Information/BurningQuestion/Ince-Co-LLP-Drawing-a-veil-over-corporate-behaviour

326. Ibid

327. Ibid

328. Yukos Capital Sarl v OJSC Rosnaft Oil Co (2011) [2011] EWHC 1461 (Comm)

329. Ibid

330. Ibid

It is suggested that this represents a sensible and pragmatic extension of the Chabra jurisdiction, by recognizing the fact that the monies sitting in the London bank accounts, although in the name of a RT company (third party), and not formally in Rosneft's (defndant'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 mareva injunction jurisdiction.

In the view of above, to block the way for defendants to make themselves judgment-proof, it was rightly seen necessary to extend the scope of Mareva-type injunctions directly against third parties. It was a suitable response to defendants who were creative in avoiding the effects of Mareva-type injunctions by increasingly using third parties to dispose their assets. The grant of Mareva-type injunctions against third parties may broadly be justified on the basis of updating the Mareva-type injunctions in line with the latest methods of judgment evasion.

While granting Mareva-type injunctions against third parties has made such a legal tool stronger, in this respect it is noteworthy to emphasise that, here, the expression "third parties" is used in the sense of persons against whom no final substantive relief is claimed, otherwise, from the autho's point of view, whenever a Mareva-type injunction is ordered directly against third parties, in fact such third parties are defendants in the proceeding leading to the grant of the injunction and are entitled to the normal protection of the normal defendants subject to such injunctions.[331] In this respect, the absence of any rule under the Uniform Asset-preservation Orders Act of the United States regarding the grant of Mareva-type injunction against third parties can be a clue that from the abobe-mentioned Act's point of view when these injunctions are granted against someone, the person subject to such injunctions should be called defendant.

331. Third party can also be defined as a person who is not a party to a lawsuit, agreement or any other transection but who is usually somehow implicated in it.

The author submits that the granting Mareva-type injunctions against third parties, against whom no cause of action is asserted, is an unusual practice within another unusual legal remedy; therefore, in granting such relief, the extreme discretion needs to be exercised and it should be made sure that principles of natural justice are not violated. On one hand, in order to block all the avenues for the defendants to make themselves immune to the final relief in the merits, dealing with all the assets held or controled by third parties, whether the respondent of final substantive relief is interested in them legally, beneficially or otherwise, should be restrained; on the other hand, the rights of innocent third parties should be protected and the granting of such injunctions should not be used to put pressure to extract a settlement on terms unfavourable to the defendant. In other words, Mareva-type injunctions may be granted only where there is good reason to suppose that assets held in the name of a the third party would be amenable to some process, ultimately enforceable by the courts, by which the assets would be available to satisfy a judgment against a defendant whom the claimant asserts to be liable upon his substantive claim.

Thus, under the author's proposed model, all the assets held or controled by third parties, whether the respondent of substantive relief is interested in them legally, beneficially or otherwise, are within the scope of European injunctions against third parties. Under certain circumstances, when the doing of justice so requires, the corporate veil may be pierced and Mareva-type injunctions may be granted against third party companies and other entities such trusts; however, the rights of innocent third parties will be protected and the granting of such injunctions will not be used to put pressure to extract a settlement on terms unfavourable to the defendant.

Conclusion of Chapter II

In order to make Mareva-type injunctions more efficient, the scope of these injunctions can be extended to the persons against whom no final substantive relief is claimed (third parties). In other words, nowadays, thanks to enlargement of the scope of Mareva-type injunctions, the effects of these injunctions are not confined to the parties but can be extended to a third parties.

The third parties may be affected by a Mareva-type injunction in two ways; either the injunction is made against the third party, or although the Mareva-type injunction is not made against the third party, notice of the injunction is given to the third party. In other words, on one hand, the injunction granted against the defendant of the final substantive relief may have effects on the third parties; in such a hypothesis, although the third parties are not directly the addressee of the injunction, however, since the notice of injunction is given to the third parties, they may be affected by the injunction; on the other hand, the Mareva-type injunction may be granted against third parties directly; in such a hypothesis, the addressee of the injunction is a person other than the defendant of the actual or potential legal proceeding.

In extention of Mareva-type injunctions against third parties, it is necessary to creat a well-balaced mechanism protecting on one hand the applicant of a Mareva-type injunction and on the other hand the third parties; otherwise, such a mechanism, which is created to make justice, can lead to substantial injustice.

Conclusion of First Part

Taking into account, on one hand, the fact that the European Union is a regional organization with different member states with more or less different legal systems (mostly civil law systems), and on the other hand, the common law origin of Mareva-type in personam injunctions, in elaborating the general framework of active in personam injunctions, despite using the English and U.S. legal systems' experience, the author has tried to adapt the existing framework with the European Union framework. Besides, to propose a comprehensive model, analyzing the existing definition, preconditions, requirements and legal safeguards for the adverse party, finding some aspects of them unacceptable, the author has tried to use the positive points of them and to get rid of negative points.This means that finding some flaws in the existing requirements and safeguards, the proposed model has tried to be well-balanced, protecting the interests of both of the applicant and adverse party. Especially, the author's proposals are about to make the requirements of granting Mareva-type injunctions neither too high nor too low and the legal safeguards for the adverse party real and sure. In other words, we have tried to establish a balance between what the plaintiff or adverse party may obtain with what he may lose. Adverse party's right to apply for modification and/or discharging of Mareva-type injunctions was fund to be one of the aspects which requires special attention, making the level of protection of the adverse party as important as that of the applicant.

Regarding the scope of Mareva-type injunctions, finding the existing framework especially that of the English system mostly up to date and efficient, the author tried to propose some small changes, making the existing framework even more efficient. Especially, finding the grant of Mareva-type injunctions directly against third parties or the effect of Mareva-type injunctions over a third party with notice of the injunction necessary, the author emphasized on a well-

balanced mechanism protecting on one hand the applicant of a Mareva-type injunction and on the other hand the third parties.

Based on the analysis conducted in the First Part of this thesis, the issue of active Mareva-type active cross-border injunctions was elaborated, mostly finding the English legal system's disposition as a good model to follow. In the Second Part of this thesis, looking from the second angle, where a forum may lend its support to Mareva-type injunctions ordered by foreign forums, we will elaborate the conflict of laws in the area of provisional measures.

Second Part. Conflict of laws in the area of provisional measures

Taking into account the analysis of the first part, this part is complementary to that part; because, on one hand, it will determine the competent forum and the applicable law or rule which can have effects in availability or otherwise of direct Mareva-type cross-border injunctions; on the other hand, it will elaborate indirect acceptance of Mareva-type injunctions in some other legal systems.

In this respect these days, on the one hand globalization and the emergence of new technologies and new communication systems such as internet are eroding the borders, one of the consequences being that commercial transactions are often not confined to a single country; on the other hand, taking into account that each country has its own specific values and that the legal system of every country reflects those values, the structure and contents of national judicial systems usually vary, more or less, from one country to another.

In such circumstances, different forums may claim jurisdiction over a specific legal matter, and different national laws or rules may be applicable under certain circumstances. To resolve such conflicts, or differences, each coherent legal system needs to put in place procedures. Conflict of laws, also called private international law, is such a set of rules of procedural law that is designed to resolve problems arising from the differences between legal systems. In other words, it is body of law concerning the resolution of problems resulting from such diversity of jurisdictions, laws and rules.

Conflict of laws addresses three principal questions. First, when a legal problem touches upon more than one country, it must be determined which forum has jurisdiction to adjudicate the matter.[332] Second, once the forum has taken jurisdiction, it must decide what law or rule it should apply to the question before

332. Ulrich M. Drobnig, Max Rheinstein, Peter Hay, Conflict of laws, Encyclopedia Britanica, available at https://www.britannica.com/topic/conflict-of-laws

it.[333] Third, assuming that the forum ultimately renders a decision in favour of the plaintiff, conflict of laws must address the enforcement of the decision (relief).[334] Thus, in this part of the thesis, first, the disposition of some legal systems about the competent forum to seek provisional measures and the applicable laws and/or rules will be analyzed. Then, in title II, the recognition and enforcement of judicial and arbitral interim measures will be analyzed.

Title 1. Jurisdiction and choince of law

In deciding to apply for a cross-border injunction in aid of an actual or a future international commercial arbitration the applicant needs to know where can or should the application be initiated (jurisdiction) and which law and/or rule will the forum apply (choice of law). Thus, in Title 1 of the Second Part , clarifying and analyzing the disposition of some legal systems about the competent forum to seek provisional measures, including Mareva-type cross-border injunctions, firstly in Chapter I we will propose the most competent forum to seek the author's proposed European injunction. Then, in Chapter II, analyzing the approaches of those legal systems about the applicable laws and/or rules, the author will propose the most suitable applicable laws and/or rules.

Chapter I. Forum to seek provisional measures, including cross-border injunctions (jurisdiction)[335]

Determining the competent jurisdiction to adjudicate the case is one of the first questions in any international case involving a conflict of laws. With regard

333. Ibid

334. Ibid

335. In France, provisional measures, which are designed to freeze the defendant's assets while awaiting final relief, operate in rem and are considered to be manifestations of enforcement jurisdiction, as such strictly territorial in scope. Thus, taking into account that this thesis is about to explain Mareva-type in personam injunctions, which can cross the national borders; in previous chapters we did not analyzed the French legal system. But taking into account that based on applicable law on provisional measures, sometimes international arbitral tribunals seated in France may grant provisional measures, including cross-border injunction, from this chapter on we will explain the French legal system's disposion too.

to interim measures in aid of an international commercial, taking into account that the seat of such arbitration is usually chosen in a neutral country which has no connection with the parties or their assets, determination of the right forum gets even more important. A wrong forum will refuse to grant the interim measure.

Thus, determining the competent forum to seek provisional measures is essential, because it has a profound effect over the outcome of the application for a provisional measure. Although, it is good to have a unique result irrespective of the forum deciding the dispute, in practice it is rare, if not impossible, to have such a result. On the contrary, based on the forum we choose, the outcome may change. With regard to provisional measures in international commercial arbitration, we can think of different possible forums. The forum can be a national court in a specific country, an arbitral tribunal or any other person or authority determined by the parties.

Section I. Availability of provisional measures from arbitral tribunals and national courts

Given the nature of arbitral tribunals and national courts, it is possible that the remedies provided by one of them may not be available in the other; it is also possible that the sources of their jurisdiction in granting provisional measures, if any, may be different.

The section is about, on one hand, to analyze whether or not arbitral tribunals and national courts can grant provisional measures, especially Mareva-type injunctions; on the other hand, in the event that one or both of them are competent to grant such measures, it will determine the basis of their jurisdiction.

§ I. Arbitral provisional measures

In this subsection, the question is, on one hand, whether or not an international commercial arbitral tribunal with prima facie jurisdiction to rule on

the merits of the case is also competent to order provisional measures in favor of such an arbitration proceeding; on the other hand, if such a competence to grant provisional measures exists, whether or not it extends also in granting Mareva-type injunctions, as a specific and very powerful kind of provisional measures. Besides, this subsection will determine the basis of such a probable jurisdiction.

In this respect, taking into account that the arguments supporting the grant of provisional measures by the courts having jurisdiction on the merits may, by analogy, be applicable on the granting of provisional measures by arbitral tribunals, we begin by explaining the approach taken by the courts.

According to traditional way of approaching interim measures, these measures are normally sought before the court (forum) that is hearing, or is about to hear, the case on the merits.[336] In other words, jurisdiction in relation to the substantive claim usually provides also jurisdiction to grant the provisional measures. The forum deciding on the merits has a broad power to grant provisional measures; this is even a general principle of law that the judge of merits is also judge of the incidental jurisdiction.

In this regard, the approach of the courts internationally competent as to the merits of the case is especially noteworthy; where, courts having competence in international sphere over the merits of the case are also competent for granting interim measures of protection in the relevant proceedings and there is general consensus as to the broad powers of such forums to order provisional measures; they can adopt whichever kind of provisional and protective measure they see fit, regardless of the location of the assets or of the persons to whom the measures refer.[337]

336. Veronica Ruiz Abu Negim, Ancillary Jurisdiction for Interim measures of protection in support of Cross-border Litigation, 10 Unif. L. Rev. n.s. 759 2005, p. 763, avaiable at http://heinonline.org; in some areas like real estate this general rule is not applied.

337. Ibid, pp. 763-764.

The broad power of the courts having jurisdiction as to the substance of the matter in granting interim measures has also been recognized under Brussels I regulations (recast). According to these regulations, "Where provisional, including protective, measures are ordered by a court having jurisdiction as to the substance of the matter, their free circulation should be ensured under this Regulation".[338]

Taking into account that under this study the forum having jurisdiction over the merits of the case is necessarily an international commercial arbitral tribunal, the power of such tribunals to grant provisional measures, inter alia Mareva-type injunctions, is going to be analysed. In this regard, the English, U.S. and French legal systems as well as the UNCITRAL Model Law' disposition may help us.

Although from the first quarter of 20th century there were some examples of laws and rules allowing the arbitral tribunals to grant provisional measures, the universal and widespread acceptance of the power of arbitral tribunals to grant the provisional measures took place at the last quarter of 20th century.[339] Nowadays, in general, the availability of provisional measures from arbitral tribunals is accepted by vast majority of legal systems. Only very few legal systems refrain from empowering the arbitral tribunal to grant interim relief. Almost all of important institutional arbitration rules and laws, including in the English, U.S. and French legal systems, have accepted the power of arbitral tribunal to order provisional measures.

In England, the parties are free to agree that the arbitral tribunal shall have power to order on a provisional basis any relief which it would have power to grant in a final award.[340] Thus, the power of the arbitral tribunal to grant

338. Recast Brussels I regulations, Recital 33

339. Ali Yesilirmak, Op. Cit., p. 36

340. Arbitration Act 1996, Section 39 (1)

provisional measures, inter alia Mareva-type injunctions, depends on the parties' agreement. If they have not agreed so, prima facie, the tribunal lacks such a power. There is, however, no unanimity regarding this issue.

While Mustill & Boyd consider that section 39 (1) of Arbitration Act confers no power on arbitrators to make a provisional measure, inter alia Mareva-type injunction, even with the parties' agreement; because (a) there is no power to do so under section 48 and (b) section 39 (1) only relates to power to order on a provisional basis any relief which it would have power to grant in a final award.[341] Russell would seem to allow that the parties could agree under section 39 (1) to give arbitrators the power to make a provisional measure, inter alia Mareva-type injunction. Besides, Gee argues that the better view is that such a right exists under section 38 (1) rather than section 39 (1).[342]

In this respect under the London Court of International Arbitration rules, to conduct emergency proceedings pending the formation of arbitral tribunal the Emergency Arbitrator may make any order or award which the arbitral tribunal could make under the Arbitration Agreement (excepting Arbitration and Legal Costs).[343] An order of the Emergency Arbitrator shall be made in writing, with reasons.[344] An award of the Emergency Arbitrator shall, when made, take effect as an award.[345] With respect to the attitude of English legal system regarding Mareva-type injunctions, the Kastner v Jason case is interesting.[346] Where, the High Court held that under the applicable Jewish procedural law, the arbitral tribunal had jurisdiction to grant a Mareva injunction, but the tribunal's injunction did not confer on Mr. Kastner any proprietary interest in the defendant's property

341. Kastner v Jason and others Sherman and another v Kastner [2004] EWHC 592 (Ch), paragraph 16

342. Ibid

343. LCIA Arbitration Rules (2014), article 9.8

344. Ibid, article 9.9

345. Ibid

346. Kastner v Jason and others Sherman and another v Kastner [2004] EWHC 592 (Ch)

(home).[347] According to the court, Mareva injunction granted by the arbitral tribunal, like its counterpart granted by English courts, operates in personam only and not by way of security or proprietary interest.[348]

Under the U.S. legal system, the Federal Arbitration Act, which governs international arbitrations in the United States, does not expressly authorize provisional measures in aid of non-maritime arbitrations.[349] Especially, the Federal Arbitration Act does not address the power of the arbitral tribunal to grant provisional measures; however, it is generally accepted that arbitrators have inherent authority to order interim or preliminary relief pending a final award. Besides, terms of the arbitration agreement and/or the terms of the chosen arbitral rules may also authorize the arbitral tribunal to grant provisional measures.

According to the International Centre for Dispute Resolution (ICDR) rules and Commercial Arbitration Rules of the American Arbitration Association, at the request of any party, the arbitral tribunal may order or award any interim or conservatory measures it deems necessary, including injunctive relief and measures for the protection or conservation of property.[350] Regarding Mareva-type injunctions, it sounds that if the tribunal finds it necessary, it can order such injunctions capable of crossing borders, provided that such measures are allowed by the law applicable to the arbitration proceedings.

Under both of the above-mentioned institutional rules, before the constitution of the arbitral tribunal a single emergency arbitrator will decide on applications for provisional measures. The emergency arbitrator will have almost the same power of arbitral tribunal regarding interim measures and any interim award or order granted by such an emergency arbitrator shall have the same effect

347. Ibid, paragraphs 13-23

348. Ibid, paragraphs 13-23

349. The Federal Arbitration Act (USA), Section 8

350. ICDR rules 2014, Article 6 and Article 24; AAA Commercial Arbitration Rules and Mediation Procedure 2013, R-37 and R-38

as an interim measure made by arbitral tribunal, and shall be binding on the parties when rendered.[351]

Besides, based on the Uniform Asset-preservation Orders Act, which introduces a kind of new generation of American counterpart of English Mareva injunctions, asset-preservation orders can be ordered by arbitral tribunals.[352] Taking into account that the latter orders are in personam orders preserving an asset by restraining or enjoining a person from dissipating an asset, it seems that they are capable of crossing borders; in other words, they have worldwide scope of application.

In this regard, under the French legal system, generally the arbitral tribunal is vested with the power to order any provisional or conservatory measure it deems fit; however, only courts may order conservatory attachments or judicial security.[353] The arbitral can amend or add to any provisional or conservatory measure it has granted; it can even attach penalties to such orders.[354]

Similar to the U.S. system, it seems that in an international arbitration seated in France, the tribunal is capable of ordering Mareva-type cross-border injunctions, provided that such measures are allowed by the law applicable to the arbitration proceedings. Under the ICC Arbitration rules, if the parties have not agreed to another pre-arbitral procedure that provides for the granting of conservatory, interim or similar measures, a party that needs urgent interim or conservatory measures that cannot await the constitution of an arbitral tribunal may make an application for such measures pursuant to the Emergency Arbitrator

351. ICDR rules 2014, Article 6

352. National Conference of Commissioners on Uniform State laws, Prefactory note and comments on Uniform Asset-preservation Act, 2014, p. 14

353. Decree No. 2011-48 of 13 January 2011(hereinafter Code de procédure civile), Article 1468; under the UNCITRAL Model Law, unless otherwise agreed by the parties, the tribunal has a vast power to grant provisional measures. Thus, it seems that it can also grant cross-border injunctions.

354. Ibid

Rules in Appendix V.[355] "The emergency arbitrator's decision shall take the form of an order. The parties undertake to comply with any order made by the emergency arbitrator ".[356]

With regard to the disposition of the UNCITRAL Model Law concerning the availability of arbitral provisional measures, based on the Model Law "Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, grant interim measures".[357] It seems that such a rule gives the arbitral tribunals a broad power in granting provisional measures.

Since, the article 17 of the is not among those provisions of the Model law not limited territorially, some may infer that based on this article the arbitral tribunals' provisional measures are not capable of crossing the borders; however based on the fact that according to article 17 H(1) "An interim measure issued by an arbitral tribunal shall be recognized as binding and, unless otherwise provided by the arbitral tribunal, enforced upon application to the competent court, irrespective of the country in which it was issued…"[358], it sounds that the provisional measures granted by the arbitral tribunals are capable of crossing the borders.

In light of the issues raised above, arbitral tribunal as the forum hearing, or is about to hear, the case on the merits has a broad power to grant provisional measures. The jurisdiction over substantive claim provides usually the arbitral tribunal jurisdiction to grant the provisional measures and such a tribunal should be considered as the first and natural authority to deal with provisional measures. The types of interim measures available are not limited to those which could be

355. Rules of Arbitration of the International Chamber of Commerce In force as from 1 March 2017, article 29.1 and article 29.6

356. Ibid, article 29.2

357. UNCITRAL Model Law on International Commercial Arbitration 1985 With amendments as adopted in 2006 (hereinafter UNCITRAL Model Law on International Commercial Arbitration,) article 17

358. Ibid, 17 H (1)

granted by the state courts at the place of arbitration; an arbitration tribunal with its seat in country X, for example, may be empowered to order an English type Mareva injunction blocking (indirectly) the assets of one of the parties while a X's court cannot make such an order.[359] Since the arbitral tribunal can deal with applications for provisional measures only when it is formed, when the parties have entrusted a third party or an emergency arbitrator with the authority to deal with the provisional measures, before the formation the tribunal the latter persons should be considered as the first and natural authority to deal with provisional measures. Despite the ICC arbitration rules and some opinion that contrary to the arbitral tribunal provisional decisions, the emergency arbitrator's decisions can not be qualified an award, the author believes that the provisional measure granted by an emergency arbitrator or any other third party appointed by the the parties of arbitration agreement may be qualified as award, provided that some requirements have met.

From the author's point of view, the arbitral tribunal should be considered as the first and natural authority in charge of dealing with provisional measures. The reasons are as follows:

Firstly, to request interim measures before the arbitral tribunal that is hearing, or is about to hear, the case in the merits is realization of traditional way of approaching interim measures. Taking into account, on one hand the fact that provisional measures have first been developed in the courts, where, as a general rule, the courts having jurisdiction over the case on the merits are also competent for granting provisional measures and on the other hand, the fact that this rule is capable of being generalized to other forums having jurisdiction over the case on the merits, inter alia international commercial arbitration, whenever an international commercial arbitral tribunal is hearing, or is about to hear, the case

359. Julian D.M. Lew, Loukas A. Mistelis and Stefan M. Kröll, Comparative International Commercial Arbitration, Kluwer International, 2003, pp. 662-663

in the merits, it can also grant provisional measures in aid of an actual or future substantive proceedings.[360]

Secondly, normally, if the parties have chosen international commercial arbitration as their dispute settlement mechanism, this means that, as far as possible, they want to resolve whatever disputes they may have through arbitration, avoiding resort to any other forum, including national court. So, by requesting any provisional measures before the forum in which the parties have designated, the sanctity of contract and party autonomy principles are respected utmost. The resort to a forum other than arbitral tribunal may undermine the arbitration agreement to refer the dispute to arbitration.

Thirdly, if the final resolution of a case in the merits is entrusted to a forum, the same trust should logically be shown to that forum in granting a provisional measure concerning the same dispute. Otherwise, it would be a big paradox that a forum can have the ability to resolve a dispute definitively, without having the ability to decide about that problem provisionally. If the parties have chosen an international commercial arbitral tribunal as their system of dispute settlement in the substance of the dispute, it is assumed that the parties have entrusted the arbitral tribunal with the authority to deal with the provisional measures, unless the parties have stipulated otherwise.

Fourthly, taking into account, on one hand the fact that dealing with applications for provisional measures is time-consuming and sometimes it can be a tactic by the applicant to delay the proceedings in the substantive proceedings, on the other hand, the fact that the arbitral tribunal is usually aware of the facts in the substance of the dispute, the arbitral tribunal is usually in a better position than courts to identify whether a request for a provisional measures is a genuine need or it is an abusive application, used as a dilatory tactic or oppressive weapon (this

360. The arbitral tribunal can deal with applications for provisional measures only when it is formed. When the parties have entrusted a third party or an emergency arbitrator with the authority to deal with the provisional measures, the latter persons should be considered as the first and natural authority to deal with provisional measures.

can only happen where the application for interim measure is made after the formation of arbitral tribunal). This means that, based on familiarity of arbitral tribunal with the facts of the case, it can minimize negative effects of abusive applications.

Fifthly, generally resort to an expert can be the safest and the best way to deal with problems in all areas. Since the member or members of arbitral tribunals have usually some expertise with regard to given dispute in which they are entrusted, the arbitral tribunal is usually a more suitable forum in dealing with the requests for interim protection of rights than judges at national courts, who are not necessarily experts in the field of that given dispute.

Sixthly, bearing in mind that resolving disputes through international commercial arbitration system has usually less disruptive effects than through national courts on the parties' overall commercial relationship, especially in long term contracts, requesting provisional measures from arbitral tribunal will equally have less disruptive effects. On the contrary, application for provisional measures before a national court may deteriorate the commercial relationship between the parties.

Seventhly, since the arbitration process, including the provisional measures before the arbitral tribunals, is confidential, by applying for provisional measures before arbitral tribunals, the parties can keep their dispute, their arguments, mere existence of the arbitration proceeding and/or provisional measures between them confidential. But in applications for provisional measures before national courts, the confidentiality cannot be guaranteed; because most of the time the proceedings and decisions (including applications and decisions for provisional measures) before national courts are public.

Eighthly, while regarding the type and form of provisional measures the hands of national courts are tied, the type and form of arbitral provisional

measures are rarely fixed; consequently, arbitral tribunals, unlike national courts, under certain circumstances may issue the most suitable type and form of the interim measure among vast types and forms of measures in the world.

Finally, like international commercial arbitration proceedings in general, applying for provisional measures before an arbitral tribunal is generally less expensive than applying before national courts.

With regard to the power of arbitral tribunal to grant cross-border Mareva-type injunctions, along with the above-mentioned arguments in the English, U.S. and French legal systems[361] as well as the UNCITRAL Model supporting the grant of this kind of injunctions, the approaches of courts internationally competent on the merits and the Brussels I regulation (recast) can be a solid basis; where the forums having international competence as to subject matter have also broad powers to grant whichever kind of provisional measure they see fit, regardless of the location of the assets or of the persons to whom the measures refer. The same is true about the courts within the European Union under the Brussels I regulations (recast), where within the European Union, the free circulation of provisional measures ordered by a court of a member state having jurisdiction as to the substance of the matter is guaranteed.

In both of the abovementioned hypothesis, if we can zoom out and see the bigger picture (a Helicopter view), we see a forum deciding on the merits has broad power to adopt provisional measures in which are not limited to national borders. In today's borderless world that international commercial arbitration is considered the main system of resolving international commercial disputes, it sounds that the forum deciding on the merits with broad power to adopt boederless provisional measures can also be an international commercial arbitral tribunal. Especially, taking into account that international commercial arbitration is

361. Regarding Mareva-type cross-border injunctions, whereas in England the power of arbitral tribunal in granting this kind of injunctions is proven practically, under the U.S. and French legal system, so far, it is only theoretically shown that the arbitral tribunals have the power to grant such injunctions.

recognized all over the world as a dispute settlement mechanism, we can avail ourselves of the reasons of courts internationally competent and the courts under recast Brussels I regulation's broad power to justify the international arbitral tribunal's power to grant cross-border injunctions. In particular, taking into account the fact that the international commercial arbitration having an autonomous jurisdiction based on its jurisdiction over the substantive dispute is a supranational competent forum, analogous to the courts internationally competent, it seems that arbitral tribunals can inherently grant whichever kind of provisional and protective measure they see fit (inter alia cross-border Mareva-type injunctions), regardless of the location of the assets or of the persons to whom the measures refer.

Thus, in the view of the above, from the author's point of view the arbitral tribunal having jurisdiction over the substantive matter is the first and natural forum to grant author's proposed European injunction. It has a very broad power to grant European injunctions, regardless of the location of the assets or of the persons to whom the injunction refers. This means that the injunction granted by the arbitral tribunal can freely circulate worldwide.

A. Arbitral tribunal's source of competence to grant provisional measures

It is generally accepted that the jurisdiction in relation to the substantive claim also provides jurisdiction to grant the provisional measures. In international commercial arbitration, since resolving the disputes on the merits is entrusted with an arbitral tribunal, consequently, based on its jurisdiction over the substantive dispute, the latter tribunal has an autonomous jurisdiction in dealing with applications for provisional measures. We are about to analyze and clarify the sources of the jurisdiction of arbitral tribunal.

In this regard, the sources of arbitral tribunal's competence to issue

provisional measures may vary from a legal system to another. In other words, to justify the arbitral tribunals' competence in granting provisional measures, every legal system may rely on a different basis.

Sometimes, the party autonomy is considered as the source of arbitral tribunal's competence in dealing with applications for provisional measures. This can happen, where the parties expressly or impliedly provide for such a competence in their arbitration clause or agreement. It has rarely happened that the parties expressly stipulated this in their arbitration clause or agreement. Normally the parties confer such a competence to the arbitral tribunal by reference to specific arbitration rules. English legal system can be as an example of legal systems adopting such a basis in granting provisional measures. However, all the legal systems don't necessarily consider party autonomy as the source of arbitral tribunal competence.

For some others, the lex arbitri is considered as the source of the arbitral tribunal's copetence in dealing with applications for provisional measures. This means that when the parties choose an especial country as the seat of arbitration, if the laws of that country empower the arbitral tribunal to deal with the applications for provisional measures, the tribunal can grant provisional measures. The French legal system is a good example of legal systems adopting such a basis for granting provisional measures.

Finally, it is submitted that interim measures may be granted on the basis of inherent or implicit power of arbitral tribunals, or of their power to conduct the arbitral proceedings. The source of an inherent power is neither the arbitration agreement nor a statute but the status of the arbitral tribunal as an organ entrusted with the resolution of a dispute.[362] The implied powers are based on the argument that parties, by submitting to arbitrate a dispute, implicitly empower arbitrators to

362. Ali Yesilirmak, Op. Cit., p. 98

issue provisional measures.[363] These powers are considered to be an implicit extension of the power to adjudicate the parties' dispute as envisaged in the arbitration agreement; such extension is justified by the broad interpretation of the arbitration agreement; the broad interpretation may be made where it is permitted under the applicable law.[364] The U.S. legal system can be a good example of legal systems adopting such a basis for granting provisional measures.

Keeping the above in mind, although in all of the English, U.S. and French systems arbitral tribunals may grant provisional measures, but the methods of these countries are different. While the arbitral tribunals seated in the England will have jurisdiction to grant provisional measures only by virtue of the parties' agreement, in the French system, the arbitral tribunal has, prima facie, the competence to grant provisional measures and in the U.S. the arbitral tribunal's authority to grant provisional measures stems from the tribunals' inherent power or from parties' agreement, especially through designation of arbitration rules.

In this regard, the necessity of the parties' prior agreement in granting the arbitral tribunal the competence to order provisional measures creates more problems, especially in ad hoc arbitrations. Because on one hand, at the time of drafting their contract and arbitration clause, the parties rarely may have thought to decide about the power of arbitral tribunal to grant provisional measures; on the other hand, after the occurrence of the dispute, it is normally difficult, if not impossible, that the parties agree on such an issue. That is why, the author submits that the approaches taken by the U.S. and French legal systems are more in line with the needs and realities of international commercial dispute settlement system of the 21st century.

In the view of above under the author's proposed model, the arbitral

363. Ibid, p. 99

364. Ibid

tribunals may grant provisional measures, inter alia the Mareva-type European injunctions, on the basis of their inherent or implicit power to conduct the arbitral proceedings. It is also recommended that the different countries adopt the laws expressly authorising the arbitral tribunals to grant provisional measures.

B. Defects and shortcomings of the arbitral tribunal in granting provisional measures

All good things may have some flaws. Thus, neddless to say that internation commercial arbitration can have also its own flaws. Hence, we are about to analyze the flaws of international commercial arbitration in dealing with applications for provisional measures.

In this respect, despite all of above-mentioned arguments supporting the power of arbitral tribunal as the natural and first venue in dealing with applications for provisional measures in international commercial arbitration, bearing in mind the characteristics of arbitration, sometimes arbitral tribunal can face with some defects and shortcomings in granting provisional measures.

As the law currently stands, it is believed that in such circumstances the parties need to seek provisional measures from another venue. The type of defect and shortcoming may force the applicant to choose a specific venue over another one. First, we will explain the defects and shortcomings of international commercial arbitration in dealing with applications for provisional measures, then, we will analyze if these defects and these deficiencies are indispensable or not.

In this respect, the defects and shortcomings of international commercial arbitration system are as follow:

a. Inability of the arbitral tribunal to grant interim measures before formation of the tribunal

Taking into account, on one hand, the fact that the arbitral tribunal needs to be constituted before it can deal with any request for provisional measures and, in the other hand, the fact that requests for provisional measures usually precede the constitution of arbitral tribunal, sometimes it is not useful to request provisional measures from arbitral tribunal.

b. Lack of coercive power by arbitral tribunal

In case, a party against whom the provisional measures are issued does not voluntarily enforce these measures, since the arbitral tribunal lacks coercive power, so it cannot enforce them against recalcitrant defendants. In other words, the arbitral tribunal cannot grant those interim measures which intrinsically require the use of imperium.

c. Inability of the arbitral tribunal to grant ex parte interim measures

Based on adversarial nature of arbitration, the arbitral tribunal cannot grant ex parte provisional measures. But, sometimes, in order to profit from surprise effect of provisional measures, it is necessary to seek ex parte provisional measures. In such a time, it is necessary to ask the measure before the forum in which is capable of granting ex parte interim measures.

d. Inability of the arbitral tribunal to grant interim measures against third parties

Based on the contractual nature of international commercial arbitration and principle of privity of contracts, the arbitral tribunal cannot order provisional measures against third parties. According to the principle of privity of contracts, contracts can only bind the parties who entered into it, and cannot favor or prejudice a third person, even if he is aware of such contract and has acted with knowledge thereof. So, when the provisional measures are going to be asked against third parties, it is necessary to ask them before a forum other than arbitral tribunal. In the view of above regarding dispensability or indispensable of defects

and shortcomings of the international commercial arbitration system in granting provisional measures, it seems that most of them are, to some extent, dispensable.

The inability of the arbitral tribunal in granting interim measures before formation of the tribunal is one of those defects that can be overcomed. The parties can overcome this hurdle by specifying an especific person or institution as an authority to decide about provisional measures before constitution of arbitral tribunal. Although, third party appointed by the parties is not exactly the same as arbitral tribunal deciding on the merits of the matter, such a third party can order provisional measures before the formation of or even after the formation of arbitral tribunal, if the parties have agreed so. In this regarde, the author even submits that, such a third party, regardless of its name, because of what it does, is a kind of arbitrator, under certain circumstance.[365]

Inability of arbitral tribunal to grant those interim measures which intrinsically require the use of imperium sounds also dispensable. Based on the fact that in some countries of the world, including in England, if the coercive execution of an arbitral provisional measure is needed, arbitral tribunal or the party in whose favour the measure is ordered can ask for court assistance in the coercive execution of provisional measure, the legislator can stablish such a mechanism in coercive execution of the provisional measures granted by arbitral tribunal or any other party appointed third party.

With regard to the inability of the arbitral tribunal to grant ex parte interim measures, although at the moment it is an internationaly accepted rule that the arbitral tribunal cannot order ex parte provisional measures, taking into account, on one hand, the widespread acceptance of international commercial arbitration as the main dispute settelement mechanism in international transactions and, on

365 . Contrary to the jurisdiction of the arbitral tribunal having substantive jurisdiction over the merits of the dispute, the third party's jurisdiction in granting provisional measures, which stems still from the parties' agreement, is an ancillary jurisdiction. If such a third party is entrusted with enough competence to grant binding and enforceable provisional measure, the author sees no reason to make difference between such measures with that of arbitral tribunal.

the other hand, the broad power of mala fide defendants in making themselves judgment-proof, it seems that when there is a need to keep surprise effect of provisional measures or there is an emergency, we must change this rule and give the arbitral tribunal or any other third party appointed by the parties, the necessary power to grant ex pare provisional measures. Especially in applications for some provisional measures such as Mareva-type injunctions, where the defendant needs usually to be caught by surprise, if every aspect of international commercial arbitration process is kept adversarial, it will give an apportunity to mala fide defendants, knowing about applicationan, to hide and/or dissipate their assets. Besides, if the judges at state courts can order ex parte provisional measures without being considered against due process, why shouldn't the arbitrators or any other third party appointed by the parties, who are kind of private judges between the parties, be allowed to order ex parte provisional measures.

In this regard, the inability of the arbitral tribunal to grant interim measures against third parties seems the only hurdle that can not be overcomed easily in the near future. With some bold pro-arbitration attitude, we can hope that one day this rule will also change.

Keeping in mind all the above mentioned, based on the author’s proposed model, before the formation of the arbitral tribunal, an emergency arbitrator or any other third party appointed by the parties can order provisional measures, iter alia European injunctions. After the formation, the arbitral tribunal is the naturally and first forum in seeking the provisional measures. In both of the above-mentioned hypothesis, the arbitrator/s or any other third party appointed by the parties can grant ex parte provisional measures and/or provisional measures which intrinsically require the use of imperium. However, for the time being, neither the arbitrator/s nor any other third party appointed by the parties may order provisional measures against third parties.

§ II. Judicial provisional measures in aid of international commercial arbitration

Taking into account the fact that in international commercial arbitration, sometimes, arbitral tribunals and/or third party appointed by the parties cannot grant timely or efficient provisional measures, in such circumstances the availability or otherwise of these measures from national courts can have big consequences. In other words, bearing in mind, on one hand, the defects and shortcomings of arbitral tribunal in ordering provisional measures, and on the other hand, some advantages of requesting these measures from national courts, sometimes applicants may apply for provisional measures before national courts. This subsection is about to analyze the availability or otherwise of provisional measures from national courts in aid of international commercial arbitration.

In his regard, while in the first decades of the twenty century only the national courts could grant provisional measures regarding arbitration, nowadays this rule is abolished in most of the countries of the world. [366] Despite the fact that for a while they tried to eliminate national courts from arbitration process, it was finally accepted that national courts can play a positive role in arbitration process. Thus, nowadays, the national court's jurisdiction in dealing with the applications for provisional measures in aid of international commercial arbitration in most of the countries of the world, including in the England, U.S. and Frence, is beyond doubt. [367]

In the view of above, exclusive jurisdiction of courts in granting provisional measures in aid of arbitration is an outdated practice; it is against party autonomy principle and globalization era's policy of letting the parties to regulate their

366. Only few countries such as Italy and China prevent arbitral tribunals from granting provisional measures. This means that in these countries the national courts have the exclusive jurisdiction to grant provisional reliefs.

367. In this regard, the disposition of the English, U.S. and French leags systems will be explained under national courts' source of competence to grant provisional measures in aid of arbitration.

affairs and giving the states a supervisory role. Besides, it is also generally accepted that the involvement of courts can only be supportive; this means that if the arbitral tribunal or any other third party appointed by the parties is able to grant timely and efficient provisional measures, the courts should refrain from intervening in this regard.

In this respect, the author believes that in choosing the national court, based on the degree of court's control over the arbitration proceeding and the defendant, there should be some kind of hierarchy. Otherwise, letting the movant to choose arbitrarily his/her favorite court can lead to forum shopping and other unpleasant consequences.

From the author's point of view, the first court can be the court in the seat of arbitration. Since, such a court has supervisory role in the arbitration proceeding, it can be the closest court to the parties intend to settle their dispute in a given territory; only if this court is unable to grant efficient Mareva-type injunction, the applicant can apply before the other courts.

The second court in the hierarchy can be the court in the defendant's domicile; because it has jurisdiction over the defendant and can usually guarantee the enforcement of Mareva-type injunction.

Taking into account the ties of every person, inter alia defendant, with his/her place of residence, the third court can be the court in the defendants' place of residence, if it is different from his/her domicile.

The fourth court can be the national court of the relevant defendant; because, the defendant has usually an acceptable level of connection with his/her national court.

The fifth court can be the court of the place of business of the defendant; since, the defendant has normally strong links with his/her place of business, so the due process can usually be guaranteed for the defendant.

Finally, if all of the above-mentioned courts are unable to grant efficient Mareva-type injunction, the movant should be allowed to apply before any court with the ability to grant enforceable Mareva-type injunction, even if it is the applicant's own national court or it is a court where the defendant's only connection with it is the presence of his/her assets overthere. The latter hypothesis can only happen, when there is a risk of denial of justice.

In all of the above-mentioned hypotheses, the author believes that the movant should be allowed to apply before subsequent court only if the arbitral tribunal and any other third party appointed by the parties as well as the court in higher hierarchy, if any, is unable to grant efficient Mareva-type injunction.

Thus in the view of the above and keeping in mind the aboved-mentioned hiorachy, under the author's proposed European injunction, unless the parties have agreed otherwise, prima facie the courts will be competent to grant provisional measures in aid of arbitration; however they will do so only when the arbitral tribunal or any other third party appointed by the parties is unable to grant timely and efficient European injunction.

A. National courts' source of competence to grant provisional measures in aid of international commercial arbitration

Given that the arbitral tribunals' competence to grant provisional measures in aid of a future or actual substantive dispute falling within their jurisdiction is an autonomous competence, determination of the national courts' source of competence to grant provisional measures in aid of arbitration will give a clearer picture of the situation. After a general overview of the latter issue, we will elaborate the English, U.S. and French legal systems disposition regarding the above-mentioned issue. Finally, based on analysis of the issue, the author will elaborate his proposals about the issue at hand.

In this regard, similar to the jurisdiction of the third party appointed by the parties, the national courts' jurisdiction to grant provisional measures in aid of arbitration has its roots in recognition of principle of ancillary jurisdiction.[368]

Ancillary jurisdiction in this context could be defined as the jurisdictional basis on which interim relief is granted to support proceedings on the merits sought in another forum.[369] The forum exercising ancillary jurisdiction is not in the same position as the forum hearing the merits; it has been submitted that the former forum's function is a limited one, and is intended to be supportive only; this position seems to reflect what in procedural law theory has been called delegated jurisdiction.[370]

In ancillary jurisdiction, jurisdiction on the merits is detached from the jurisdiction for the purpose of provisional measures and a forum other than the competent forum as to merits is allowed to adopt provisional measures in support of actual or future proceedings before the competent forum as to merits. The forum exercising ancillary jurisdiction is not competent as to the merits, instead, it is a forum either in the country where the provisional measure should become effective or in the country that, because of the kinds of measure available there, is best equipped to provide appropriate /provisional measures.[371]

Theoretically speaking, such a detachment is not very difficult to conceive; the autonomy of provisional measures has very deep roots in the general theory of procedural law so that it is permissible to consider autonomous basis of jurisdiction in this regard, even though interim measures will always be

368. Although, similar to other jurisdictions, the French court's jurisdiction in granting provisional measures in aid of an international commercial arbitration is an ancillary jurisdiction, however, they may only grant such provisional meaures only regarding the assets located within the French borders. Contrary to the injunctions subject to this study, which require the in personam jurisdiction of the issuing courts over the injuncted person, in granting procisional measures in aid of an international arbitration, the Frech courts exercise in rem jrisdiction.

369. Veronica Ruiz Abu Negim, Op. Cit., p. 761

370. Ibid.

371. Ibid, p. 765

supportive to the merits.[372] At the international level, two options may emerge with this model.

The first possibility is to disassociate jurisdiction on interim measures of protection from jurisdiction on the merits, but not to provide for any jurisdictional basis in this regard, leaving the jurisdictional issue (and hence, the possibility of recognition and enforcement) to the lex fori; this seems to be the international standard at present.[373]

The alternative would be to envisage internationally accepted bases for ancillary jurisdiction. Although it has been difficult to achieve international consensus on this topic so far, emerging international standards suggest that there are already solid roots, at least with regard to certain jurisdictional bases.

In different levels ancillary forums' jurisdiction in granting provisional measures in support of actual or future proceedings before the competent forum as to merits has been confirmed.

In this respect in transnational level the ALI/UNIDROIT Principles of Transnational Civil Procedure, the UNCITRAL Model Law for International Commercial Arbitration and the Hague Convention on Choice of Court Agreements are noteworthy.

According to ALI/UNIDROIT Principles of Transnational Civil Procedure, "A court may grant provisional measures with respect to a person or to property in the territory of the forum state, even if the court does not have jurisdiction over the controversy."[374] Based on principle 31 of aforementioned principles, "The courts of a state that has adopted these Principles should provide assistance to the

372. Ibid

373. Ibid

374. Ibid, p. 766; ALI / UNIDROIT Principles of Transnational Civil Procedure, available at http://www.unidroit.org/english/principles/civilprocedure/ali-unidroitprinciples-e.pdf

courts of any other state that is conducting a proceeding consistent with these Principles, including the grant of protective or provisional relief …."[375] In this regard, "it has been submitted that this general frame is very broad, broad enough to stand for worldwide freezing injunctions, which enable a court to grant in personam relief affecting assets located anywhere, both within and outside that court's territorial boundaries. It has been suggested that to allow worldwide freezing injunctions is a potential effect not foreseen by the drafters and that the Principles are in fact intended to permit orders with territorial effects only. The reference to the territory of the forum state points in that direction. Conversely, it could be argued that the drafters did have freezing injunctions in mind and so decided to draft the text in such a far-reaching fashion, i.e. not limiting the provision to measures of a territorial nature".[376]

Under the UNCITRAL Model Law on International Commercial Arbitration, which is another transnational source confirming ancillary forums' jurisdiction to grant provisional measures in support of actual or future proceedings before the competent forum as to merits, "A court shall have the same power of issuing an interim measure in relation to arbitration proceedings, irrespective of whether their place is in the territory of this State, as it has in relation to proceedings in courts."[377]

The third transnational source confirming the ancillary forums' jurisdiction in granting provisional measures in support of actual or future proceedings before the competent forum as to merits is the Hague Convention on Choice of Court Agreements (approved on 30 June 2005). Although it does not actually itself regulate the topic of interim measures of protection, yet the Hague Convention appears to espouse detachment of jurisdiction for interim relief from jurisdiction

375. Ibid

376. Veronica Ruiz Abu Negim, Op. Cit.

377. Model Law on International Commercial Arbitration, Article 17 J

on the merits, by letting the parties to remain free to seize any court provided it has jurisdiction under its national law; therefore, while the Convention does not establish autonomous basis for ancillary jurisdiction itself, it promotes reliance on national law.[378]

In this respect, in the regional level, ancillary forums' jurisdiction in granting provisional measures in support of actual or future proceedings before the competent forum as to merits has been best confirmed in article 35 of the Regulation (EU) No 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 (recast) by stating that: "Application may be made to the courts of a Member State for such provisional, including protective, measures as may be available under the law of that Member State, even if the courts of another Member State have jurisdiction as to the substance of the matter".[379]

With regard the question whether, on a basis of this article, ancillary jurisdiction is imposed on Member States, or the provision merely constitutes permission for Member States to exercise such ancillary jurisdiction in accordance with their own national laws, as far as legal doctrine is concerned, the most widely accepted opinion is that this provision leaves the question to national law and that it is not by itself a basis of ancillary jurisdiction.[380] In this situation, if the national law doesn't provide for ancillary jurisdiction in support of foreign proceedings in the field of interim measures of protection, there are no bases on which to grant it.[381]However, a minority believes that aforementioned article 35 itself provides a direct jurisdictional rule enabling Member States' courts to order

378. Veronica Ruiz Abu Negim, Op. Cit., p. 768

379. Ibid, p. 769

380. Ibid, p. 770

381. Ibid

interim measures of protection in support of foreign proceedings, regardless of their national procedural laws in this regard; Spanish authors in particular - and this probably relates to the fact that under Spanish law such bases do not exist - have sustained this position.[382] In this respect, the decision of the European Court of Justice in Van Uden case is also noteworthy.[383]

Where the European Court of Justice held that ancillary jurisdiction was conditional upon the existence of a real connecting link between the subject-matter of the measures sought and the territorial jurisdiction of the requested court.[384] Based on this decision, the separation between jurisdiction on the merits and jurisdiction for the purposes of interim measures of protection is confirmed by the the European Court of Justice.[385]

In national level, national laws of vast majority of the countries of the world, including the England, U.S. and France, have recognized the principle of ancillary jurisdiction of the courts in granting provisional measures in support of actual or future proceedings before the competent forum as to merits. One of the best examples on national sources of ancillary forum's jurisdiction to grant provisional measures can be found in England.

Where, the basis for ancillary jurisdiction for interim measures of protection in support of cross-border litigation are provided for in Section 25 of the Civil jurisdiction and Judgments Act 1982 which was originally enacted to give effect to Article 24 of the Brussels and Lugano Conventions; this section was extended to cover proceedings in jurisdictions outside the European Union by the Interim Relief Order 1997; nowadays, application for interim relief may be made

382. Ibid

383. Case C-391/95, Van Uden Maritime BV v. Kommanditgeselschaft (Deco-Line)

384 . Veronica Ruiz Abu Negim, Op. Cit, pp. 770-771; Van Uden Maritime BV v. Kommanditgeselschaft (Deco-Line)

385. Although, there are other regional sources for confirmation of ancillary jurisdiction with regard to provisional measures, such as Inter-American Convention on Execution of Preventive Measures (CIDIP II, Montevideo 1979), they are out of sphere of this study.

in England regardless of where the substantial proceedings are taking place.[386] Besides, according to the English Arbitration Act, "unless otherwise agreed by the parties, the court has for the purposes of and in relation to arbitral proceedings the same power of making orders about the matters … as it has for the purposes of and in relation to legal proceedings".[387] In this regard, taking into account that according to some interpretations of English Arbitration Act, arbitral tribunal can grant provisional measures only if the parties have agreed so, the power of English court as an ancillary forum in granting provisional measures, inter alia Mareva-type injunctions, is well beyond that of arbitral tribunals.

Regarding this subject in the United States, interestingly, there is no provision in the United States Federal Arbitration Act 1925 allowing provisional remedies to be granted by the courts when the parties have agreed to arbitration. However, it is accepted that the courts have inherent power to order interim relief. The rules of the leading arbitral institutions also provide that seeking interim relief from the court does not waive the jurisdiction of the tribunal.[388]

With respect to the French legal system's disposition regarding the issue at hand, insofar as the arbitral tribunal has not yet been constituted, the existence of an arbitration agreement shall not preclude a party from applying to a court for provisional or conservatory measures.[389] After the arbitral tribunal is constituted, provisional measures should be requested from the tribunal, except conservatory attachments and judicial security which are always within exclusive jurisdiction of the courts.[390]

386. Veronica Ruiz Abu Negim, Op. Cit., p. 776

387. English Arbitration Act 1996, S. 44 (1); the English court may refuse to grant such provisional measures 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.

388. AAA ICDR rules 2014, Article 6(7) and article Article 24(3); AAA Commercial Arbitration Rules and Mediation procedures 2013, R-38(h)

389. Code procédure civile, Article 1449

390. Ibid

In the light of the above and taking into account that separation (detachment) of jurisdiction for the purpose of merits and provisional measures is common legal principle to a large number of legal systems of the world, the author submits that, nowadays, it is a general principle of law. Although the competent forum as to the merits is natural venue to grant provisional measures, in aid of a future or actual substantive dispute falling within their jurisdiction, it is not necessarily the sole venue in granting provisional measures. Relying on ancillary jurisdiction, provisional measures can be granted by a forum other than the competent forum as to the merits. Such a jurisdiction can be defined as the jurisdictional basis on which interim relief is granted to support proceedings on the merits sought in another forum. The main reasons for justifying the availability of provisional measures from a forum other than the forum having substantive jurisdiction are timing, maximum efficiency and costs, among other reasons. In other words, sometimes the provisional measures of the forum having substantive jurisdiction may be inefficient, time consuming and/or costly; in such circumstances, the plaintiff is be able to apply for provisional measures before the forum exercising anciallary jurisdiction.

The absence of ancillary jurisdiction mechanism may put the plaintiff in danger of denial of justice. Especially, if the competent forum as to merits is unable to grant timely and/or efficient provisional measure, to request interim measures the movant needs to have access to ancillary forum, otherwise, he/she can be at risk of irreparable harm.

In this regard, the applicant has the option to request provisional measures from the competent forum as to merits or request it directly at the place where the measures should become effective, or request the measures at any other forum that, because of the kinds of provisional measures available there, is best equipped to provide provisional measures. However, from the author's point of view, in application for judicial provisional measures in aid of an international commercial

arbitration the applicant shold not be free to choose one of the above-mentioned forums. He/she may choose the court only if the arbitral tribunal or any other third party appointed by the parties is unable to grant efficient, timely and proper interim measure.

Under the author's proposed model, the first forum in granting European injunction in aid of an international commercial arbitration will be the arbitral tribunal. If it is not still formed or if the parties provided so, the third party appointed by the parties will deal with the application for such provisional measures. In both of the above-mentioned hypothesis, if the arbitral tribunals and/or third parties are unable to grant timely and efficient provisional measure, inter alia Mareva-type European injunctions, the national court will be competent to order provisional measure, unless the parties agreed otherwise. In this regard from author's point of view, to grant European injunction a European Union-wide basis for the ancillary jurisdiction should be envisaged, giving the national courts of the member states an autonomous competence to grant such injunctions, irrespective of the availability or otherwise of such measures in a given member State.[391]

1. The basis of the jurisdiction of incillary jurisdiction of national courts in granting Mareva-type injunctions

Taking into account that the jurisdiction of national courts in granting provisional measures in aid of arbitration is an ancillary jurisdiction, we are about to analyze and elaborate the basis of the incillary jurisdiction of national courts in granting Mareva-type injunctions. This will help us to determine the competent court in granting provisional measures in aid of arbitration. After an overview of

391. The author supports the idea of achieving an international consensus on this topic, but taking into account the difficulty in achieve such a consensus, until we achieve this goal, the European Union can at least manage this matter in European level.

the issue at hand and also elaboration of the English and U.S. legal systems' disposition, the author will put forward his proposed model as the basis of ancillary jurisdiction of national courts.

In this regard, in order to grant interim measures, the court must necessarily establish jurisdiction. However, contrary to the jurisdiction of national court in granting the traditional provisional measures such as attachments, which is in rem jurisdiction, with regard to in personam provisional measure, the court needs to establish in personam jurisdiction over the defendant or third party (as the case may be).[392]

The in personam jurisdiction can be established if the defendant or third party can be lawfully served either within or outside the jurisdiction; it is the authority of the court over the person, an individual or entity, which allows the court to order that person to appear and to comply with an order or remedy.[393] In this regard, the in personam jurisdiction may be based upon physical presence in a jurisdiction, a legal presence in the jurisdiction such as domicile or legal residence, or a commercial presence of such contacts that are at least minimal and that do not offend the traditional notion of fair play and substantial justice to hale a party with such contacts into court in the forum.[394]

Relying on sovereign power of the country, courts of each country have personal jurisdiction over persons within their borders; on the contrary, courts of no country can exercise personal jurisdiction and authority over persons outside its territorial jurisdiction, unless the persons have manifested some contact with

392. In rem jurisdiction is a court's power to adjudicate the rights to a given piece of property located within the court's national borders.

393. Stephen Michael Sheppared, The wolters Kluwer bouvier law dictionary, Published by Wolters Kluwer law & Business in New York, 2011, pp.587-587

394. Ibid; the 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, is the basis of the arguments of proponents of Mareva-type worldwide cross-border injunctions.

the country.[395]

The in personam jurisdiction is based on vertical and unilateral approach to jurisdiction. It is focused only on the relationship between the domestic court and the defendant, without paying any attention on relations between countries.

Social contract theory can serve as the basis of personal jurisdiction. "The defendant (or third party), representing the "governed", either actually or impliedly consents to the power of the court, representing the "governor". By obtaining benefits or creating risks within the forum in which the court sits, the defendant (or third party) impliedly consents that court's jurisdiction."[396]

In this regard nowadays in England, whenever the defendant can be summoned before the English court, the court exercising ancillary jurisdiction will have personal jurisdiction over the defendant and even in the absence of substantive proceedings within the territorial jurisdiction of English courts, it can grant interim measures, inter alia worldwide Mareva-type injunctions, in aid of actual or future substantive proceedings in all over the world. In other words, when the defendant is validly served out, the court have personal jurisdiction over the defendants and shall have power to grant interim relief in aid of actual or future substantive proceedings in all over the world.[397] In granting interim relief in the absence of substantive proceedings, the English court may refuse to grant that 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.[398] In this respect, the Motorola Credit Corporation v Uzan & Ors case is noteworthy. Where, the Court of Appeal set

395. Ibid; defendants and/or third parties outside the jurisdiction may be summoned through Long-arm jurisdiction, which is the ability of local courts to exercise jurisdiction over such persons.

396. Filip Saranovic, Op. Cit, p. 90

397. The defendant can validly be served out only if there is at least minimal connection between the English court and the defendant, enabling the court to exercise personal jurisdiction.

398. Civil Jurisdiction and Judgments Act 1982, Article 25 (2)

aside worldwide Mareva injunction against the two of respondents, who did not have assets in England and had no other connection with that jurisdiction, on the basis that it was 'inexpedient' to grant such relief when no sanction was available against them in the event of their disobedience.[399]

In the U.S. system, similar to the English system, to grant ancillary provisional measures the courts need to establish personal jurisdiction over the defendant. In this regard, based on the decision of the U.S. Supreme Court in International Shoe Co. v. Washington case,[400] in order for a court of a State to exercise personal jurisdiction over a defendant, not present within the territory of the State, the defendant must have such sufficient minimum contacts with the state so that exercising jurisdiction over the defendant would not offend traditional notions of fair play and substantial justice.[401] In other words, the U.S. courts can exercise jurisdiction over a nonresident defendant only if the defendant has sufficient contacts with the state such that forcing the person to litigate in that forum is not unfair.

In the light of the above, with regard to sufficiency of personal jurisdiction over the defendant as a necessary and sufficient jurisdictional precondition in granting Mareva-type cross-border injunctions, it seems that it is not only sufficient but also consistent with international law norms. Since an injunction is addressed to a person, it does not affect directly the assets, whether inside or beyond the territorial jurisdiction of the forum ordering it; thus, consistent with the international law, under certain circumstances a forum in a country can order a person subject to its jurisdiction to do or refrain from doing certain act beyond the territorial jurisdiction of the forum. Since the goal is to ensure the fair play and substantial justice (due process), the unconditional appearance of a defendant

399. In this regard the above-mentioned Van uden case of the ECJ is noteworthy.

400. International Shoe Co. v. Washington

401. Lawrence Collins, Provisional and protective measures in international litigation, p.36; International shoe v. Washington

or third party before the court can also be sufficient in establishing the personal jurisdiction over the defendant or third party; however, the defendant or third party resorting to the court for rejecting the court's personal jurisdiction should not be sufficient in establishing personal jurisdiction.

Concerning the necessity of existence of some contact, between the forum and a nonresident defendant, in establishing personal jurisdiction of the ancillary forum, it seems, as a general rule, that courts should exercise jurisdiction over a nonresident defendant only if the defendant has sufficient contacts with the state such that forcing the person to litigate in that forum is not unfair. In this regard, it is noteworthy to emphasize that while the mere fact that the defendant's assets are located within the jursidiction of the forum does not justifies personal jurisdiction on the subject matter, the personal jurisdiction on provisional measures may be based on the mere presence of assets or even a situation of urgency somehow located herein.[402]

Under exceptional circumstances letting some applicants to request provisional measures from a specific forum without having sufficient contacts with the forum sounds to be fair. For example, when there is no connection between the forum and the defendant, but, by secreting or dissipating his assets, the defendant is manifestly making himself judgment-proof and there is no other forum capable of ordering efficient or timely provisional measure preventing the defendant from such a manifestly mala fide behavior, to prevent the movant from being exposed to a risk of a denial of justice, it seems that the ancillary forum should be able to grant injunctions, provided that the enforcement of the injunction granted by such an ancillary forum is possible somewhere in the world. Taking into account that denial of justice is so contrary to human conscience, fighting with such a phenomenon can be a real basis of filing the gaps of legal

402. Peter F Schlosser, Coordinated transnational interaction in civil litigation and arbitration, p. 162

systems and precluding the mala fide defendants from using legal loopholes in escaping the justice.

In the view of above, for author's proposed European injunction, in so far as there is some connecting factor between the court exercising ancillary jurisdiction and the defendant, the court will have personal jurisdiction over the defendant and grant these injunctions; in exceptional circumstances, when there is the risk of denial of justice, the forum can even order the European injunctions in the absence of any connecting factor, provided that recognition and/or enforcement of injunction is possible somewhere in the world.

B. Judicial provisional measures in aid of arbitration in foreign countries

Keeping in mind that, nowadays, the availability of judicial provisional measures in aid of an actual or future arbitration within the national borders is generally beyond doubt, this part is about to investigate whether or not the state courts can grant provisional measures in aid of an actual or future foreign commercial arbitration.

In this regard, although convenience and efficiency require the availability of provisional measures in aid of arbitration whose seat is or is deemed to be in a foreign country, most national laws are silent on this issue. Regarding the countries not silent about this this, , under laws of some countries, court assistance to foreign arbitration seems to be unavailable; on the contrary, under laws of some other countries, court assistance to foreign arbitration, in recognition of the need for such assistance, seems to be permitted.[403] The disposition of UNCITRAL Model Law on International Commercial Arbitration, Brussels I regulations

403. Ibid

(recast) and the legal systems of the English, U.S. and French are noteworthy in this respect.

Based on the fact that the article 17 J of the UNCITRAL Model Law on International Commercial Arbitration is excluded from the principle of territorial application of laws, the courts of the countries in which has enacted their laws based on the aforementioned Model Law, without changing this exemption, will grant provisional measures to a party to an international arbitration agreement, notwithstanding the fact that the arbitration has, or may heve, its seat elsewhere.[404]

In this respect although the arbitration is excluded from the scope of Brussels regulations, based on the article 35 of the recast Brussels I regulations and the decision of the ECJ in Van Uden case the courts can grant provisional measures in aid of an actual or future arbitration proceeding in other member states of the Brussels I regulation. In other words, the exclusion of arbitration from the scope of the recast Brussels I regulation and its predecessors concerns issues other than provisional measures in aid of arbitration.

In English legal system based on Sections 2(3) and 44 of the Arbitration Act 1996, the court can grant provisional measures, inter alia Mareva-type injunctions, even if the seat of the arbitrations is outside England and Wales or Northern Ireland or no seat has been designated or determined.[405] The court may refuse to exercise any such power if, in the opinion of the court, the fact that the seat of the arbitration is outside England and Wales or Northern Ireland, or that when designated or determined seat is likely to be outside England and Wales or Northern Ireland, makes it inappropriate to do so.[406]

404. UNCITRAL Model Law on International Commercial Arbitration, Article 1 (2) and article 17 J

405. Arbitration Act 1996, Sections 2(3) and 44

406. Arbitration Act 1996, Sections 2(3) and 44; in this regard, the above-mentioned Motorola Credit Corporation v Uzan & Ors case is noteworthy.

In the United States, despite some cases decided on the contrary, nowadays the availability of court-ordered protective measures in aid of arbitration is accepted. The court can grant provisional measures, inter alia Mareva-type injunctions, in aid of a future or an actual arbitration proceeding within the United States or beyond the borders of the United States.

In France, before the formation of arbitral tribunal the court can grant provisional measures in aid of arbitration seated in a foreign country; because the article 1449 of the French Decree No. 2011-48 of 13 January 2011, which is now the source of the power of the French court in granting provisional measures, is applicable in international commercial arbitrations which may take place within the borders of France or beyond its borders. Besides, conservatory attachments and judicial security are always within exclusive jurisdiction of the courts.[407]However, the provisional measures of the French courts are usually strictly territorial, so they cannot grant Mareva-type injunctions in aid of international commercial arbitrations. Thus, as the law stands now, French courts are able to grant provisional measures in aid of foreign arbitration proceeding; however, hese measures concerns only the assets within the borders of France.

In view of above, the author submits that the availability of judicial provisional measures in aid of an actual or future arbitration within the national borders or beyond the borders of the country is beyond doubt. Probably this is one of the reasons helping international commercial arbitration to get widespread acceptance as a dispute settlement system in international commercial transactions. Taking into account the important role of interim measures in protecting the parties' right and inefficiency of some of interim measures of arbitral tribunals, the national courts' inability to grant provisional measures in aid of an actual or future arbitration, can lead to the risk of denial of justice.

407. Code procédure civile, Article 1449

In the absence of a mechanism enabeling the parties of an international commercial arbitration to request provisional measures from national courts, inter alia foreign courts, the parties may hesitate to choose arbitration as their proper dispute settlement system, because one of the reasons in choosing international commercial arbitration as their proper dispute is the availability of supportive roles, including provisional measures, from national courts in appropriate circumstances. As the law stands now, an international commercial arbitration cannot do well without the assurance of the parties about the availability of courts' helping hands. In this respect the theory of delocalization of international commercial arbitration was failed.

To the extent that the national court has a solid ground of jurisdiction, it should be able to grant provisional measures even in aid of an international commercial arbitration whose seat is or is deemed to be in a foreign country. International commercial arbitration as a supranational dispute settlement mechanism merits universal support and the grant of provisional measures in aid of foreign arbitral proceeding is in line with such a supportive approach. Besides, from the author's point of view, judicial provisional measures in aid of foreign commercial arbitration may cross national borders; otherwise, taking into account the technological development and abolition of borders, the provisional measures will not be able to protect the rights of the applicants.

Thus, for the author's proposed model, in proper circumstances the national courts can grant provisional measures, inter alia Mareva-type cross-border European injunctions, whether or not the place of an actual or a future arbitration is within or beyond the court's national borders. Taking into account the widespread acceptance of international commercial arbitration as the main despute settlement in international commerce, the author submits that the judicial provisional measures may be granted in aid of an international commercial arbitration whether or not the place of an actual or a future arbitration is within or

beyond the territorial scope of European Union. In other words, from the author's point of view, provisional measures granted by a comtetent court having jurisdiction to grant these measures need to have universal scope, otherwise in the 21th century territorialy limited provisional measures may not be able to protect the applicants.

C. Compatibility of request for judicial provisional measure with agreement to arbitrate

By submitting an actual or a future dispute to the international commercial arbitration, the parties demonstrate their willingness to avoid state courts; however, the parties may apply for provisional measures before national courts. Hence, we will analysis whether or not such applications are compatible with the agreement of the parties to submit their dispute to the international commercial arbitration.

Generally, most national laws, international documents, arbitration rules and scholars, directly or impliedly, accept that an agreement to arbitrate does not and should not hinder the grant of the interim measures by courts, because such a court intervention does not hinder but assists the effectiveness of arbitration.[408]

In this respect, the European Convention on International Commercial Arbitration, Geneva, 1961[409] and the UNCITRAL Model Law on International Commercial Arbitration, with a more or less similar express language, have accepted compatibility of request for judicial provisional measures with the agreement to arbitrate.

408. Ibid, p. 122

409. European Convention on International Commercial Arbitration, Geneva, 21 April 1961

According to the European Convention on International Commercial Arbitration,"A request for interim measures or measures of conservation addressed to a judicial authority shall not be deemed incompatible with the arbitration agreement, or regarded as a submission of the substance of the case to the court".[410] Equally based on article 9 of the UNCITRAL Model Law on International Commercial Arbitration, "it is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for the court to grant such a measure".[411]

Based on above-mentioned Article 35 of the recast Brussels I regulations and the Van Uden case, the compatibility of request for judicial provisional measures with the agreement to arbitrate is also beyond boubt.

Concerning this issue, under the English legal system, it is a lonstanding position that, absent an expression of intent to the contrary, a forum selection clause should not be construed as automatically precluding a party from seeking a provisional measure in a different court. We can also infer this point from section 44 of Arbitration Act 1996, where the list of court powers exercisable in support of arbitral proceedings is provided. In this respect Mike Trading & Transport Ltd. v. R. Pagnan & Fratelli (The Lisboa)[412] and the Channel Tunnel Group Ltd and Another v. Balfour Beatty Construction Ltd and Others[413] cases are also noteworthy.

In the Lisboa case a vessel called The Lisboa, which had broken down en route from Argentina to Italy with a large cargo of wheat, was towed to Tunisia

410. Ibid, article VI (4)

411. UNCITRAL Model Law on International Commercial Arbitration, article 9

412. Mike Trading & Transport Ltd v. R. Pagnan & Fratelli [1980] 2 Lloyd's Rep 546 (CA)

413. Channel Tunnel Group Ltd and Another v. Balfour Beatty Construction Ltd and Others, Gazette 17-Feb-1993, [1993] 2 WLR 262

and from there to its destination in Italy.[414] The owners of the cargo, liable for large towage expenses, brought an action in Venice against the vessel's owners and secured its arrest, disregarding the requirement in the bill of lading that all legal proceedings be brought in London. On the other side, the vessel's owners responded with a law suit in London for damages for the unlawful arrest of The Lisboa in breach of the choice of forum clause, and for a declaration of non-liability for the towage expenses; they also sought an injunction restraining the cargo owners from maintaining the ship's arrest.[415] Sunsequently, the cargo owners began their own proceedings in London on the merits by bringing an unseaworthiness claim. The Court of Appeal refused the injunction sought by the shipowners; where, Lord Denning stated that the choice of forum clause encompassed only actions to establish liability and not proceedings brought for security purposes.[416]

In this respect, in the Channel Tunnel Group Ltd and Another v. Balfour Beatty Construction Ltd and Others case, the Channel Tunnel Group made a request in England for an interim injunction.[417] The case went all the way to the House of Lords; in the latter House, on the issue of whether or not a national court could grant an interim measure when the case fell within the domain of arbitration and of the New York Convention, Lord Mustill, with whom all the other Lords were in agreement, stated that:

"The purpose of interim measures of protection [by courts] ... is not to encroach on the procedural powers of the arbitrators but to reinforce them, and to render more effective decision at which the arbitrators will ultimately arrive on the substance of the dispute. Provided that this and no more is what such measures

414. Mike Trading & Transport Ltd v. R. Pagnan & Fratelli [1980] 2 Lloyd's Rep 546 (CA)

415. Ibid

416. Ibid

417. Channel Tunnel Group Ltd and Another v. Balfour Beatty Construction Ltd and Others, Gazette 17-Feb-1993, [1993] 2 WLR 262; Ali Yesilirmak, Op. Cit., p. 126

aim to do, there is nothing in them contrary to the spirit of international arbitration".[418]

In this regard, the French system has also accepted the compatibility of request for judicial provisional measures with the agreement to arbitrate the merits. Its acceptance in the French system is demonstrated expressly as follow:

"The existence of an arbitration agreement, insofar as the arbitral tribunal has not yet been constituted, shall not preclude a party from applying to a court for measures relating to the taking of evidence or provisional or conservatory measures".[419]

The U.S. system's disposition is very instructive. On one hand, some U.S. courts take the view that the courts' duty to refer the parties to arbitration under Article II of the New York Convention prevents the assistance of the courts to grant provisional measures in aid of international commercial arbitration.[420] On the other hand, there are some other U.S. courts believing in the court's competence to grant provisional measures in aid of an international commercial arbitration.

In this regard, in McCreary Tire and Rubber Co. v. CEAT, S. p. A,[421] as an example of group of the U.S. court's cases believing in unavailability of provisional measures in aid of international commercial arbitration, the dispute related to alleged breach of agreement entered into between McCreary and CEAT. Although the agreement between the parties had referred the disputes to arbitration under the ICC Arbitration Rules in Brussels, Belgium, McCreary, in an attempt to frustrate the arbitration agreement, attached certain debts owed to CEAT and initiated a lawsuit. Subsequently CEAT removed the case to a federal

418. Ali Yesilirmak, Op. Cit., pp. 126-127

419. Code de procédure civile, Article 1449

420. Ali Yesilirmak, Op. Cit, pp. 122-123

421. McCreary Tire and Rubber Co. v. CEAT, S. p. A., 501 F. 2d 1032 (3 Cir. 1974)

court.

The Third Circuit referred the parties to arbitration in accordance with Article 11 of the New York Convention and further held that the request for a provisional measure (attachment) seeks to bypass the agreed upon method of dispute resolution.[422] The disposition of the courts believing in unavailability of provisional measures in aid of international commercial arbitration has been criticized a lot. According to Van den Berg, "It is submitted that the McCreary decision is based on the wrong presumption that Article II (3) of the Convention completely divests the courts of the Contracting States of their jurisdiction. The effect of Article 11(3) is merely that the courts have no jurisdiction to hear the merits of a dispute […] No contrary inference can be drawn from the use of the word 'refer' in Article II (3) of the New York Convention rather than 'stay the court action'. The word 'refer' is used for historical reasons and its technical procedural sense must be deemed as a court directive staying the court proceedings on the merits".[423]

In Carolina Power and Light Co. v. Uranex case,[424] as an example of group of the U.S. courts' cases believing in availability of provisional measures in aid of international commercial arbitrations, the dispute arose from the contract between a North Carolina public utility company, Carolina Power, and a French company, Uranex, for sale of uranium concentrates. After a dramatic increase in the price of the uranium, Uranex ceased the delivery on the contract price and requested renegotiation; the parties agreed to submit their disputes to arbitration.[425]

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422. Ali Yesilirmak, Op. Cit, p. 124

423. Kate Brown, The Availability of Court-Ordered Interim and Conservatory Measures in Aid of International Arbitration in the United States of America and France - A Comparative Essay [2003] IntTBLawRw 5; (2003) 8 International Trade and Business Law Review 135, available at http://classic.austlii.edu.au/au/journals/IntTBLawRw/2003/5.html

424. Carolina Power and Light Co. v. Uranex, 451 F. Supp. 1044 (N. D. Cal. 1977)

425. Ali Yesilirmak, Op. Cit, p. 125

Then, the Carolina Power attached a debt owed to Uranex for satisfaction of a future arbitral award in its favor; Uranex moved to lift the attachment and the court expressly refrained from following the reasoning and the outcome of the McCreary court by stating, inter alia, that the availability of provisional remedies encourages rather than obstructs the use of agreements to arbitrate.[426]

In the view of above, nowadays, it is generally accepted that whenever there is an arbitration agreement between the parties, even if a request is made to the courts for provisional measures, substantive proceedings remain in the jurisdiction of arbitration and such a request is not incompatible with the decision of the parties to choose arbitration as their dispute settlement mechanism. In other words, absent an expression of intent to the contrary, requesting provisional measures from state court should not be considered as a waiver of the right to arbitrate. The existence of an arbitration agreement between the parties will not also prevent a state court from granting provisional measures. This is demonstration of the principle of separability of jurisdiction for the purpose of provisional measures from the jurisdiction for the purpose of substantive proceedings. However, the courts' competence to decide on the protective measures in aid of arbitration does not mean, in any way, that they are themselves competent on the merits.

Regarding the disposition of some courts, especially some U.S. courts, in interpreting the New York convention as an absolute prohibition against judicial involvement in international commercial arbitration, even for the limited purpose of granting preliminary reliefs, it seems that such a disposition is totally wrong. Because, these decisions were on the basis of the false presumption that Article II (3) of the New York Convention completely exempts the courts of the Contracting States from their jurisdiction. But this kind of interpretation is wrong and contrary

426. Ibid

to the spirit of the New York Convention by helping international commercial arbitration. The article II of the New York Convention, which was the basis of the decisions of the courts in those cases, does not deal with provisional measures. The article II (3) the New York Convention only means that whenever the merits of a dispute is referred to an international commercial arbitration, as the parties preferred dispute settlement mechanism, if one of the parties, disregarding the agreement of the parties, initiates a substantive proceeding in the state courts, if the arbitration agreement is not null and void or incapable of being performed, the courts must refer the parties to their agreed method of dispute resolution, i.e. international commercial arbitration. Nowadays, this view, which is compatible with the view taken by vast majority of the contraction countries of the New York convention, seems to be the prevailing one even in U.S. courts. The author submits that the courts should try to prevent the abusive applications to bypass arbitration as agreed dispute settlement mechanism. In other words, the court should distinguish between a litigant turning its back on the chosen forum, on the one hand, and a litigant going outside that forum for a provisional measure on the other hand.

Thus, in the author's proposed model, despite the parties' agreement to refer their dispute to an international commercial arbitration, national courts are allowed to grant provisional measures in aid of such an arbitration proceeding, unless the partys' agreement provides otherwise.

Keeping in mind the compatibility of request for judicial provisional measures with the agreement to refer the merits of dispute to an international commercial arbitration, in the next section we will elaborate the realization of concurrent jurisdiction of national courts and international arbitral tribunals in granting provisional measures.

Section II. Realization of concurrent jurisdiction of national courts and arbitral tribunals in granting provisional measures

On one hand, because of aforementioned shortcoming and inherent problems of arbitration, and on the other hand, because of some necessities and advantages of resorting to national courts, nowadays the concurrent jurisdiction of the national courts and arbitral tribunals are accepted by most of the legal systems, arbitration rules and doctrine. It is accepted that court's involvement is also vital to the survival and effectiveness of international commercial arbitration as a dispute settlement system. Contrary the theory of delocalization, for the time being, international commercial arbitration cannot entirely ignore national courts.

The effectiveness and good administration of justice are the balancing factors for reconciling the tension between involvement of courts into arbitral process and parties' will to keep courts out from involving in resolution of their disputes by opting for arbitration.[427] This reconciliation requires collaboration or co-operation between arbitrators and the courts.

Based on the acceptance of the principle of concurrent jurisdiction of arbitral tribunals and national courts with regard to provisional measures, a need to regulate the co-existence of jurisdictions of the judicial authorities and the arbitral tribunals arises. Since, both jurisdictions are generally similar or identical; sometimes, they overlap and may even be in conflict.[428]

Despite the importance of collaborating and regulating the co-existence of jurisdictions of the judicial authorities and the arbitral tribunals, international conventions, most arbitration rules, most national arbitration laws including the Model Law are silent about it. This section is about to analyze the approaches of realization the concurrent jurisdiction, positive and negative conflict of jurisdictions, exclusion of jurisdiction and damages as compensation for application for provisional measures in the wrong forum.

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427. Ibid, p. 132

428. Ibid, p. 133

§ I. Different approaches of the realization of the concurrent jurisdiction

In realization of the concurrent jurisdiction of national courts and arbitral tribunals, there are different approaches. The national laws and arbitration rules regulating the concurrent jurisdiction of national courts and arbitral tribunals in granting provisional measures may choose either the freedom-of-choice approach or the restricted-access approach. In this respect, the silence of a legal system may also be interpreted as freedom of choice approach.

In the light of the above, first we are going to analysis the freedom of choice approach and, then, the restricted-access approach will be elaborated.

A. Freedom-of-choice approach

To request provisional measures, based on some of national laws and arbitration rules accepting the concurrent jurisdiction, the parties are free to choose either arbitral tribunal or national courts. In other words on the basis of this approach, in the absence of an agreement on the contrary, the parties are free to request interim measures either from courts or from any person vested by the parties with power in that regard (before the formation of arbitral tribunal such a person can be emergency arbitrator or any other person appointed by the parties; after the formation of arbitral tribunal this person is normally the arbitral tribunal). The U.S. system and UNCITRAL Model Law seem in line with this approach.

According to ICDR rules, to request an interim measure, before the formation of arbitral tribunal the movant can choose between national court and emergency arbitrator; after the formation of arbitral tribunal the movant can choose between national court and arbitral tribunal.[429]

429. Article 6 and article 24, ICDR INTERNATIONAL DISPUTE RESOLUTION PROCEDURES (Including Mediation and Arbitration Rules) Rules Amended and Effective June 1, 2014

On the basis of UNCITRAL Model Law, for his/her application for interim measures, the movant can choose between national courts and arbitral tribunals.[430] Since there is no emergency arbitrator under the UNCITRAL Model Law, if there is no third party appointed by the parties to decide about applications for provisional measures before the formation of arbitral tribunal, the court will be the sole jurisdiction having competence to such applications. Whenever there is such a third party appointed by the parties, the agreement of the parties will be important in determining whether or not the movant is free to choose between national court and third party. The freedom of choice approach is critisied for not being suitable solution.

According to Professor Yesilirmak, the freedom of choice approach is against the principle of party autonomy and parties' choice of arbitration over litigation, and is a free invitation for abuse; thus, such an approach hinders the effectiveness of arbitration.[431] In this respect it is noteworthy that even under the freedom of choice approach, parties should follow a common sense approach in choosing the forum to make their interim relief applications; they should not abuse the freedom of choice approach; otherwise they might be held liable for damages arising from such abuse.[432]

In the view of the above, the author’s proposed model does not follow the freedom-of-choice approach.

B. Restricted-access approach

To make arbitration more effective and to avoid any abuse in requesting provisional measures from national courts, some other laws and rules envisage for

430. UNCITRAL Model Law on International Commercial Arbitration, Article 9 and article 17 J

431. Ali Yesilirmak, Op. Cit., pp.133-134

432. Ibid

the restricted access to courts. Under this approach, access to courts for interim measures of protection in aid of arbitration is allowed only under appropriate circumstances.[433] Upon these laws and rules, varying degree of equilibrium between party autonomy and court involvement is maintained.[434]

"The national laws and arbitration rules generally accept that courts' role prior to constitution of arbitral tribunals is complementary; where no party-appointed authority is in existence, courts step in and assist arbitration proceedings. After appointment of arbitrators, courts' role is subsidiary. Arbitrators have priority to deal with provisional measure requests and where circumstances are not appropriate for them to grant these measures, then, only then, national courts step in and provide for their assistance. The role of courts also remains subsidiary if arbitrating parties previously agreed for one of the emergency measure mechanisms. In such a case, since a request for a measure could be made to a party-determined authority, there is generally no need for courts' complement".[435]

The approach of national laws in relation to the coordination of jurisdiction of national courts and arbitral tribunals varies considerably. While based on some national laws accepting concurrent jurisdiction, measures are initially to be sought from arbitral tribunals; in some other national laws those measures are sought from national courts until constitution of an arbitral tribunal and generally from the tribunal once it is constituted or seized of the matter in question.[436]

Section 44 of the English Arbitration Act (1996) contains one of the most elaborate rules on the restricted-access approach model of regulating the

433. Ibid, p. 134; to be more precise, we can say that just small number of national laws and arbitration rules regulate the concurrent jurisdiction of national courts and arbitral tribunal in granting provisional measures.

434. Ibid, p. 137

435. Ibid

436. Ibid, p. 138

concurrent jurisdiction of national courts and arbitral tribunal in granting provisional measures.

According to article 44 "(3) If the case is one of urgency, the court may, on the application of a party or proposed party to the arbitral proceedings, make such orders as it thinks necessary for the purpose of preserving evidence or assets. (4) If the case is not one of urgency, the court shall act only on the application of a party to the arbitral proceedings (upon notice to the other parties and to the tribunal) made with the permission of the tribunal or the agreement in writing of the other parties. (5) In any case the court shall act only if or to the extent that the arbitral tribunal, and any arbitral or other institution or person vested by the parties with power in that regard, has no power or is unable for the time being to act effectively".[437] This means that in England, generally, the courts do not intervene in arbitral proceedings, except within the relatively narrow confines of the 1996 Act, where it is both necessary and appropriate for them to do so; the court will not grant interim relief unless the tribunal or arbitral institution has no power to act or is unable for the time being to act effectively.

According to Professor Yesilirmak, "The philosophy behind Section 44 is: if a given power could possibly be exercised by a tribunal, then it should be, and parties should not be allowed to make unilateral applications to ... [a court]. If, however, a given power could be exercised by the tribunal, but not as effectively, in circumstances where, for example, speed is necessary, the ... [court] should be able to step in".[438]

Regarding this issue, the French legal system has also a good solution. In this system, so long as the arbitral tribunal has not yet been constituted, a party can apply to a court for measures relating to the taking of evidence or provisional

437. English Arbitration Act 1996, articel 44 (3), (4) and (5)

438. Ali Yesilirmak, Op. Cit, p. 140

or conservatory measures.[439] In this phase, the court will grant provisional or conservatory measures, only where the matter is urgent. If circumstances so require, these measures may even be ordered by way of an ex parte procedure.[440] After the arbitral tribunal is constituted, "the arbitral tribunal may order upon the parties any conservatory or provisional measures that it deems appropriate, set conditions for such measures and, if necessary, attach penalties to such order".[441] This means that after the formation of arbitral tribunal, the French courts can not order provisional measures other than conservatory attachments and judicial security. With regard to conservatory attachments and judicial security, it is noteworthy to emphasis that applications to these measures should necessarily be before the court, both before the formation of arbitral tribunal and after its formation.

In the light of the analysis conducted above, in the absence of a well-regulated mechanism dealing with the concurrent jurisdiction of national courts and arbitral tribunals in granting provisional measures the parties, the courts and arbitral tribunals may confront with the problem in dealing with the application for interim measures. In this respect, neither keeping silent about the realization approach of concurrent jurisdiction nor the freedom-of-choice approaches seem a good solution. The author submits that they are two sides of a coin. In both of them, an applicant may apply in an inappropriate forum as a procedural and abusive strategy aiming at gaining tactical advantages over a respondent. Besides, the freedom of choice approach sounds against the principle of party autonomy and parties' choice of arbitration over litigation in national courts. Because, when the parties choose international commercial arbitration as their proper dispute settlement mechanism, unless the parties agreed otherwise, generally this means

439. Code Procédure Civile), article 1449

440. Ibid, article 812 and article 874

441. Ibid, article 1468

that, as far as possible, they want their entire dispute be resolved by arbitral tribunal. In other words, letting the hands of movant open to apply for interim measures in national courts, while the arbitral tribunal can deal with such applications, is against parties' wish to avoid national court system and hinders the effectiveness of international commercial arbitration.

Thus, to make international commercial arbitration more effective, to respect parties' agreement to resolve their dispute through arbitration and to avoid any abuse in requesting provisional measures from national courts, restricted-access approach seems much better. Where, the access to courts for interim measures of protection will be allowed only under certain circumstances and the court's role will be assisting international commercial arbitration. The courts will avoid any unnecessary intervention in arbitration proceeding. The court will be able to grant interim relief only when and to extent that the arbitral tribunal or any other person vested by the parties with power in that regard has no power to act or is unable for the time being to act effectively. This approach can eliminate, or at least minimize, the risk of procedural and abusive applications for interim measures before the national courts, aiming at gaining tactical advantages over a respondent. Besides, this approach is totally in line with the principle of party autonomy and parties' choice of arbitration over litigation in national courts. In this respect, the degree of equilibrium between party autonomy and court involvement should be on the side of the former and the outside intervention should only be accepted where the exercise of arbitral power to grant provisional measures is, in general, ineffective or such power is not available at all.[442]

Regarding the methods of realization of restricted-access approach of concurrent jurisdiction of national courts and arbitral tribunals, it seems that the above-mentioned approach supported by English courts is more in line with the

442. Ibid

realities of international commercial arbitration in these days. Because, under this approach the court will not grant interim relief unless the tribunal or any other person vested by the parties with power in that regard (such as emergency arbitrator or arbitral institution) has no power to act or is unable for the time being to act effectively. This means that the court's involvement in international commercial arbitration is for the purpose of filling the gaps of international commercial arbitration, not for unnecessary interventions. Although the approach supported by the French legal system has some very good points and can one day, when the international commercial arbitration is free from its actual defects, be the best approach, the fact that the French reformed law governing arbitration' silence is taken as meaning that after the formation of arbitral tribunal the court cannot order provisional measures, apart from conservatory attachments and judicial security, is not consistence with the realities of international commercial arbitration in these days. However, we may claim that despite reforming the law governing arbitration, the well-established French case law saying that the existence of an arbitration agreement cannot prevent French courts from granting interim relief where the claimant has demonstrated the need for urgent relief is still applicable. At the moment, the recent claim is in line with arbitration friendly attitude in French legal system.

Thus, under the author's proposed model, as long as the arbitral tribunal or any other person vested by the parties with power in that regard is able to grant timely and efficient provisional measures, the movant cannot ask provisional measures from national courts. But, if the arbitral tribunal or any other person vested by the parties with power in that regard has no power to act or is unable for the time being to grant provisional measures effectively, the movant can resort to national courts.

§ II. Positive and negative conflict of jurisdictions

Taking into account that the concurrent jurisdiction of the arbitral tribunals and national courts in dealing with applications for provisional measures in international commercial arbitration is accepted, the conflict of jurisdictions between courts and tribunals may occur. We are about to analyze such conflicts, which can be a negative conflict of jurisdiction or a positive conflict of jurisdiction.

Where both of the arbitral tribunals and national courts deny the jurisdiction in regard of provisional measures by asserting that the jurisdiction belongs to the other forum, there is a negative conflict of jurisdictions. This can happen, for example, where, on one hand, the parties exclude the jurisdiction of arbitral tribunal in dealing with applications for provisional measures, and on the other hand, the court denies the jurisdiction to deal with applications for provisional measures in aid of arbitration. The best example of this kind of negative conflict of jurisdictions occurred in U.S., where arbitrators had no jurisdiction to grant an interim measure and some courts, believing that they don't have jurisdiction, refused to grant provisional measures in a case subject to the New York Convention.[443] Another form of negative conflict of jurisdictions may happen where, on one hand, based on national laws of the seat of arbitration, the arbitral tribunal is not allowed to grant provisional measures and, on the other hand, the parties exclude the jurisdiction of national courts in regard of provisional measures.

Where both of the arbitral tribunals and national courts assert jurisdiction, there is a positive conflict of jurisdictions. This kind of conflict can lead the courts and arbitral tribunals to issue different and even conflicting provisional measures.

In this regard, neither international conventions and rules nor the most of the national laws and rules regulate such conflict of jurisdictions. Whereas the

443. Ali Yesilirmak, Op. Cit., p. 157

issue of the negative conflict of jurisdictions in dealing with provisional measures in international commercial arbitration has not even received properly scholars' attention, with regard to positive conflict of jurisdictions it may be argued that perhaps as a matter of convenience and speed, the forum first seized of has in principle priority to decide a provisional measure request.[444] But on the contrary, it can be said that "The court should play its complementary and subsidiary role and; consequently, it should give priority to arbitration, agreed method of settlement…. Thus, any potential conflict should in principle be resolved in favor of arbitrators, and arbitration. The exception to this principle is circumstances where the tribunal is incompetent to act or unable to act effectively".[445] In this regard, where the court plays a complementary or subsidiary role no or little conflict would arise.[446]

With regard to the modification, termination or suspension of interm measures, where the provisional measures are granted by the arbitral tribunal, in so far as the tribunal is able to act in time and effectively, the national court should refrain from any intervention for the modification, termination or suspension of the measures.

In the view of the above, sometimes the conflict of jurisdictions may occur. Thus, every developed legal system should set up the necessary rules resolving such conflicts, whether positive or negative.

With regard to the negative conflict of jurisdictions, one point is noteworthy. If on the basis of normal procedures, the court is incompetent with regard to provisional measures, where there is a risk of denial of justice, it seems

444. Ibid, p. 158

445. Ibid

446. Ibid

that the national court should exceptionally step in and claim jurisdiction with respect to provisional measures.

Regarding positive conflict of jurisdictions, since the international commercial arbitration is parties' agreed method to resolve the dispute, it have priority in dealing with the whole dispute settlement process, inter alia provisional measures. In other words, in so far as the arbitral tribunal is able to grant efficient and/or timely provisional measure, the court should not be allowed to intervine in dispute settlement process, inter alia in provisional measures. Only when arbitral tribunal is unable to grant efficient and/or timely provisional measure, the court should step in.

Concerning modification, termination or suspension of interim measures, although these measures can be modified, terminated or suspended and the issuing forum can order that an order made by it under certain circumstances shall cease to have effect in whole or in part on the order of the other forum or other institution or person having power to act in relation to the subject-matter of the order, but there should be mutual trust between the courts and arbitral tribunals with regard to these measures. Where the court or arbitral tribunal grants a provisional measure, the other forum should refrain from modification, termination or suspension of the measure, unless based on the change of circumstances or new reasons. Equally, where the court or arbitral tribunal refrains from granting a provisional measure, the other forum should refrain from granting similar or an identical measure, unless a change in circumstances or new reasons justifies it. Because, it seems that in both of the aforementioned circumstances, with regard to interim measures, these two forums complement each other and this is also in line with the principle of comity.

In the view of above, for the author's proposed European injunction, the concurrent jurisdiction between the courts and arbitral tribunal in having jurisdiction will be expressly regulated. Aritral tribunal or any other person vested

by the parties with power in that regard is the first and natural forum having jurisdiction to grant interim measures. However, if arbitral tribunal or any other person vested by the parties with power in that regard is powerless to act efficiently or is unable for the time being to deal with provisional measures, the court will step in.

§ III. Excluding the jurisdiction of arbitral tribunals and/or national courts

In this part the issue is whether or not the jurisdiction of arbitral tribunal or national courts in granting interim measures can be exclude by the parties' agreement. The arbitration laws and rules rarely deal with the issue of exclusion agreements in express terms. It is a very delicate matter and we can find especially arguments both against, and in favor of excluding the jurisdiction of national courts.

Taking into account the contractual basis of arbitration, excluding the jurisdiction of arbitral tribunal concerning interim measures is generaaly accepted or at least it is less problematic. But excluding the jurisdiction of national courts is not that straightforward.[447]

The arguments in favor of upholding the possibility of exclusion of the jurisdiction of national courts concerning interim measures are mainly based on the party autonomy principle, which is one of the most important principles in international commercial arbitration; it is believed that "contracting parties should be able to freely take the risk of empowering their arbitral tribunal to solely deal with interim relief. The parties, in international commerce, are in a position to weigh the risks they are taking and are able to take counter measures for minimizing the risk of unavailability of interim protection.... In addition, like agreements excluding appeals (setting aside) from awards are valid, exclusion

447. ICSID Convention is the only convention expressly excluding the jurisdiction of the national courts regarding interim measures, though the parties can agree otherwise.

agreements concerning interim protection of rights should, by analogy, be held valid".[448] The English system is an example of legal systems allowing the exclusion of courts' jurisdiction in granting provisional measures in aid of international commercial arbitration. Since, based on Section 107 of the English Arbitration Act (1996), Section 44 on courts' jurisdiction in regard of interim relief is not part of mandatory principles of the English Arbitration Act, this means that it is valid to exclude courts' jurisdiction by an agreement. Such exclusion agreements should be in express terms and a general exclusion of courts' jurisdiction in favor of arbitration is not sufficient to exclude courts jurisdictions to grant provisional measures.[449]

However, despite omnipresence of party autonomy principle in international commercial arbitration process, the validity of exclusion agreements regarding the jurisdiction of national courts in granting interim measures is under question in some legal systems. They argue that such agreements should not be held valid due to the fact that the provisional remedies may be necessary to secure a party's legal position and that they are applied in situations the importance of which cannot be assessed in advance.[450] There is also a further argument that effective and quick interim relief as provided for by a court could not be derogated; because the derogation may cause denial of justice for a party.[451] For example, where the effective judicial interim relief is eliminated completely and interim proceedings before an arbitrator is not timely, efficient or enforceable, excluding the jurisdiction of national courts may cause denial of justice for a party.

448. Ali Yesilirmak, Op. Cit., p. 156

449. In this regard, the above-mentioned Lisboa case is noteworthy.

450. Ali Yesilirmak, Op. Cit., p. 155

451. Ibid

In this respect, the French legal system, as an example of legal systems not allowing the exclusion of courts' jurisdiction in granting provisional measures, is noteworthy. Although the French decree reforming the law governing arbitration (2011) is silent about this issue, but based on established case law dating back to the time before the enactment of the above-mentioned decree, which seems still applicable, a court's jurisdiction could not be completely excluded in regard of interim protection of rights, as the complete exclusion disregards conflictual situation that has been irremediably jeopardized culminating in a genuine 'denial of justice', provided there is a sufficient link giving it [a French court] jurisdiction to take measures justified by urgency or risk.[452] The National Iranian Oil Company (NIOC) v the State of Israel case is noteworthy in this regard. Where¸ the issu was whether a French court can appoint an arbitrator on behalf of an obstructing party at the request of the other party in an arbitration that is not taking place in France or subject to French procedural law. The Cour de Cassation affirmed the French courts' right to appoint an arbitrator on behalf of one of the parties where not doing so would have effectively blocked the other party from exercising its right to arbitration (denial of justice), notwithstanding the weak link of the arbitration with France.[453]

It should be emphasized that it is the total exclusion of the courts' jurisdiction in regard of interim measures that may be considered a breach of the principle of due process (denial of justice) and thus held invalid; otherwise the partial exclusion agreements are usually accepted. Restrictions in the aforementioned restricted-access approach of regulating the concurrent jurisdiction of national courts and arbitral tribunal in granting provisional measures are kind of legislative partial exclusion and, as already explained, are accepted in different laws and rules.

452. Ibid

453. Decision 01-13.742, 02-15.237 Arrêt n° 404 du 1er février 2005 Cour de cassation - Première Chambre Civile

"Where the parties also exclude court assistance for enforcement of arbitral provisional measures, such exclusion, in fact, waives the effect of any interim protection of rights; consequently, it may constitute an excessive self-restriction of a legal right. Such a self-restriction may be denial of justice."[454]

Keeping in mind the above, nowadays, the jurisdiction of arbitral tribunal in granting interim measures can undoubtedly be excluded by the parties' agreement. Because, international commercial arbitration is based on party autonomy principle and under the latter principle if the parties decide to opt out of arbitration system for the purpose of provisional measures, such a decision should be respected. Any kind of restriction of the parties' power to exclude the jurisdiction of arbitral tribunal concerning interim measures is against fundamental principle of party autonomy in international commercial arbitration.

But, regarding exclusion of the jurisdiction of national courts, it seems that the better view is differentiating between the partial exclusion and total exclusion of the jurisdiction of national courts. While, the partial exclusion of national courts' power in granting interim measures is in line with above-mentioned party autonomy principle and such exclusion seems beyond doubt; the total exclusion can sometimes cause problems. Thus, if the total exclusion does not lead to denial of justice, it sounds that it can also be accepted; otherwise, such exclusion may be considered a breach of the principle of due process (denial of justice) and thus held invalid. For example, when the jurisdiction of national court is excluded but the arbitral tribunal or any other person vested by the parties with power in that regard is able to grant efficient and timely provisional measure, it seems that the validity of such exclusion is beyond doubt. But, when the the jurisdiction of national court is excluded but the arbitral tribunal or any other person vested by the parties with power in that regard is powerless to act efficiently or is unable for

454. Ali Yesilirmak, Op. Cit., p. 154

the time being to deal with provisional measures, such an exclusion seems to be invalid.

In the view of above, in the author's proposed model the exclusion of jurisdiction of arbitral tribunal is allowed, whether partial or total. Regarding exclusion of jurisdiction of national courts, its partial exclusion is allowed, but the total exclusion can only be accepted if it does not lead to the denial of justice.

§ IV. Damages as compensation for applications for provisional measures in a wrong forum

This part is firstly about to elaborate whether the damages out of application for interim measures in wrong forum are recoverable or not. Secondly, if recoverable, where to look for such damage?

In this regard, although the national laws and rules are gererally silent about this issue, but it is generally accepted that where the interim measures are asked from a wrong forum, whether arbitral tribunals or national courts, the damages arising out of such a decision can be recovered; because, these damages have arisen out of the breach of terms of the parties' agreement.[455]

The damages arising from arbitral provisional measures should normally be sought from the arbitral tribunal and the damages arising from judicial provisional measures, where the substance of the case is subject to arbitration, should also be recoverable from arbitral tribunal and, alternatively, from the courts.[456] In this respect, it seems that the damage arising out of applications for provisional measures in the wrong forum should equally be treated like the

455. Regarding the damages arising from provisional measures compatible with arbitration agreement, based on general principle of law, they should also be recoverable, upon a party request, provided that the measure is the result of abusing the right to apply for interim protection and/or is eventually proved to be wrong.

456. Ali Yesilirmak, Op. Cit., p. 148

damages arising from provisional measures in right forums.

In the view of above, the author submits that the damages out of application for interim measures in wrong forum are rightly recoverable. Dealing with the issue of such damages by the arbitral tribunal seems more advantageous, because it helps to adjudicate all the issues, whether provisional or final, in a single forum and enhances effectiveness of arbitration. What is more, it is more compatible with the principle of party autonomy and the parties' aim to solve all of their disputes before a sole forum determined by the parties. In other words, rather than making a fresh request to the national courts for damages, the arbitral tribunals can determine once and for all issues relating to the underlying dispute including the damages, inter alia damages out of applications in the wrong forums; thus the arbitral tribunals are better equipped to deal with such issue and it is more convenient forum than the courts.[457]

In this regard, since the issue of damages is very closely connected to jurisdiction of the national courts, arbitral tribunal may be hesitant to grant such damages; however, an arbitration agreement or clause covering all disputes connected to the underlying relationship sounds wide enough to cover any claim on damages arising out of unjustified interim measures relating to such relationship.

Thus, in the author's proposed model, any damge, inter alia the damage arising out of application in a wrong forum for provisional measures, is recoverable. The competent forum to deal with such an issue is the arbitral tribunal having jurisdiction over the substantive proceeding. Alternatively, where the arbitral tribunal is not formed yet, the applicants may apply for damages before national courts.

457. Ibid, p. 149

Conclusion of chapter I

In the light of the analysis conducted above, identifying the competent forum to seek the provisional measures is essential, because it may have profound effects over the outcome of applications for provisional measures. In this regard, the arbitral tribunal as the forum hearing, or is about to hear, the case on the merits has a broad power to grant provisional measures. The jurisdiction over substantive claim provides usually the arbitral tribunal the jurisdiction to grant the provisional measures. The author submits that, since the international commercial arbitration is an internationally competent forum to resolve international commercial disputes, it should be considered as the first and natural authority with a very broad power to grant provisional measures, inter alia Mareva-type European injunctions, regardless of the location of the assets or of the persons to whom the provisional measures refers.

Taking into account that the arbitral tribunal can deal with applications for provisional measures only when it is formed, if the parties have entrusted a third party with the authority to grant binding and enforceable provisional measures, before the formation of the arbitral tribunal the latter person should be considered as the first and natural authority to deal with provisional measures and its decisions regarding interim measures should be treated the same as arbitral tribunal's decisions. However, the arbitral tribunal or the aforementioned third party is not the sole authority to grant provisional measures in international commercial arbitration. On one hand, because of some shortcoming and inherent problems of international commercial arbitration system, and on the other hand, because of some necessities and advantages of resorting to national courts, nowadays the concurrent jurisdiction of the national courts and arbitral tribunals are accepted by the majority of the legal systems, arbitration rules and doctrine. The national courts can also grant provisional measures both in aid of international commercial arbitration taking place within the national borders and

beyond the national borders. If on the basis of normal procedures, the court is incompetent with regard to provisional measures, where there is a risk of denial of justice, it seems that the national court should exceptionally step in and claim jurisdiction with respect to provisional measures.

In realization of the concurrent jurisdiction of national courts and arbitral tribunals, the author submits that in so far as the arbitral tribunal or the third party appointed by the parties is able to grant efficient provisional measure, the court should not be allowed to intervene in dispute settlement process, inter alia in provisional measures. Only when arbitral tribunal is unable to grant efficient and/or timely provisional measure, the court should step in. Thus, any potential conflict should in principle be resolved in favor of arbitral tribunal or the third party appointed by the parties.

In choosing the forum to request provisional measures in aid of an international commercial arbitration, the party autonomy principle and above-mentioned hierarchy of arbitral tribunals, third parties and national courts should be respected. Otherwise, letting the applicant to choose his/her favorite forum can lead to forum shopping and other unpleasant consequences.

In view of the foregoing this Chapter identified the competent forum to seek the provisional measures. Having this in mind, the Chapter II is about to analysis the applicable law to interim measures.

Chapter II. Applicable law to interim measures

In the view of the above, determination of the competent forum to seek the provisional measures will take us half way, unless we determine the applicable law on these measures. The forum dealing with the applications for provisional measure will make its decision based on the law applicable to provisional measures. The outcome of the request can be different based on different laws. This chapter is about to elaborate this point.

International commercial arbitration proceedings can give rise to a variety of conflict of law issues. Although, we will only discuss the law applicable to provisional measures, which is the law governing the arbitration proceedings, it is still a hard task.

Generally, the issue of conflict of laws in international commercial arbitration is different from the approaches followed in normal litigation by courts. Because, in international commercial arbitration, the presence of the principle of party autonomy is generally stronger than its presence in ordinary judicial proceedings. As an example, while normally in normal litigation at courts of some countires the parties can only choose the application of the law of a country, in international commercial arbitration parties, and in their absence the arbitrators, are usually allowed to determine the application of a national law or non-national law such as the UNIDROIT Principles, general principles of law and etc. In other words, comparing to normal litigation at courts, in international commercial arbitration party autonomy plays a more important role. The parties are normally free to choose the details of their dispute settlement mechanism, subject to only few limitations.

International commercial arbitration can involve more than one system of law or legal rules, including laws of the seat of arbitration, laws or rules chosen by the parties, applicable law of arbitration agreement and etc. The law governing

the arbitral proceedings is variously referred to as the procedural law of the arbitration, the curial law, the lex arbitri, or the loi de l'arbitrage.[458] The principle of the autonomy of the arbitral procedure has long been recognized, but its application methods are different. Usually, the parties and, in the absence of agreement between them, the arbitrators have a great deal of freedom in choosing the law or rule of law governing the arbitral procedure. The law governing the arbitral procedure will not necessarily be the same as law or rule of law governing the merits of the dispute, or that of the seat of the arbitration.

The rules governing arbitral procedure are autonomous of those governing arbitration agreements and the rules and/or laws governing the merits of the case. Thus, the parties may choose different rules to govern the main contract, arbitration agreement and the arbitral procedure. In the absence of the parties' agreement, the arbitral tribunal is not obliged to apply the laws applicable to the merits of the contract or the arbitration agreement to the arbitral procedure. The law governing the arbitration proceedings comprises the rules governing interim measures.

In this regard, subjecting an arbitration in one state to the procedural law of another country is also accepted; provided that the law and public policy of the place of arbitration so permits. In the modern legal systems such as Frace, England and U.S., the parties and the arbitrators are by no means obliged to have a particular national law governing any procedural issues which may arise in the course of the arbitration.[459] They may simply refer to private rules of arbitral procedure, prepared by an arbitral institution or used in ad hoc arbitration, or can refer to transnational rules derived from an analysis of comparative law or arbitral case law.[460] They can also combine provisions of a number of different laws and

458. Gary Born, International Commercial Arbitration, second edition, (Kluwer Law International 2011), p. 34

459. Fochard Gaillard Goldman on International Commercial Arbitration, Kluwer Law International, 1999, p. 633

460. Ibid

rules, or even refrain from choosing any procedural rules or law at all, leaving the arbitrators to resolve any procedural difficulties as and when they arise.[461]

To determine the applicable law, there is difference between instances where the parties have expressly agreed on the choice of law governing the grant of interim measures and instances where there is no choice of procedural law by the parties.

Section I. Express or implied choice of applicable procedural law

This section is about to analyze the circumstances that the parties, expressly or impliedly, have chosen the law applicable to provisional measures. In this regard, in international commercial arbitration the parties rarely choose expressly the applicable law to govern the issue of interim measures or even the arbitral proceedings in general. They normally choose a substantive law to govern their contract and then the place of arbitration.[462] Where they expressly or impliedly choose the applicable law to govern the grant of provisional measures, it should be applied by the arbitral tribunal. If the parties choose, directly or indirectly, the applicable procedural law, the latitude given to the arbitrator to apply a different law is greatly limited and acting contrary to the parties' choice, may be a ground for challenging the arbitrator or even the interim measures that were granted.[463]

For example, in England § 4(5) of Arbitration Act 1996 is confirmation of the parties' freedom to choose a foreign procedural law in respect of arbitrations seated in England. According to this section "the choice of a law other than the law of England and Wales or Northern Ireland as the law applicable in respect of a matter provided for by a non-mandatory provision of this part is equivalent to

461. Ibid

462. Stephen Nwoye Ikemefuna, Applicable laws and standards for interim measures in international arbitration, p. 9, available at: http://ssrn.com/abstract=2596747

463. Ibid, p. 10

an agreement making provision about that matter".[464]

Nevertheless, sometimes, the forum may find national policies of the place of arbitration on the particular matters sufficiently important to override the law chosen by the parties. Because, a decision to grant an interim measure that conflicts with the applicable mandatory provision or law may be set aside in a country where it is rendered or the eventual enforcement of such decision may be resisted at the time/place of enforcement.[465] This means that irrespective of the law or the rules of law chosen by the parties to govern the arbitral procedure, the mandatory provisions of laws of the place of arbitration or the eventual place of the execution of arbitral decision cannot be ignored.[466] Those mandatory provisions, which result from the public policy considerations, are intended to guarantee compliance with the requirements of due process and equal treatment of the parties, and are, in fact, the only laws which limit the autonomy of the parties in the conduct of the arbitral proceedings. In other words, the freedom of the parties to dictate the procedure to be followed in arbitration is not totally unrestricted. The procedure they establish must comply with any mandatory rules and public policy requirements of the law of the place of arbitration, and those provisions of the international conventions on arbitration that aim to ensure that arbitral proceedings are conducted fairly.[467] The freedom to derogate from the lex arbitri is only achievable to the extent that the lex arbitri itself permits such derogation.[468] "An international arbitration is governed not only by the rules adopted by the parties and the arbitral tribunal, but also by the lex arbitri. It may well be that the lex arbitri will govern with a very free rein, but it will govern

464. Arbitration Act 1996, § 4(5); Alastair Henderson, Op. Cit., p. 904

465. Ibid

466. Fochard Gaillard Goldman, Op. Cit, p. 601

467. Ibid, p.359

468. Alastair Henderson, Lex arbitri, procedural law and the seat of arbitration, Singapore Academy of Law Journal, 2014, p. 898

nonetheless".[469]

In this regard, although the parties can technically specify a national law other than that of the seat of the arbitration as the law governing the arbitration proceedings, provided that the law and public policy of the place of arbitration so permits, it does not seem to be a good solution; because it complicates the international commercial arbitration overly and unnecessarily.

Although theoretically most of countries have accepted the freedom of the parties to choose applicable procedural law of arbitration, in practice it seems that national courts will refrain from granting provisional measures beyond those available in the court's normal proceeding, even if under the rules of law chosen by the parties there exist provisional measures beyond that of the provisional measures of the court of the seat of arbitration. In this respect, it seems that the French court will refrain from granting a Mareva-Type cross-border injunction, even if the law applicable to arbitral procedure is the English procedure law, for example, which permits such a cross-border injunction.

Thus, in the view of the above, under the author's proposed model the parties of international commercial arbitration are encouraged to choose, expressly or impliedly, the applicable procedural law of arbitration. However, irrespective of the law or the rules of law chosen by the parties to govern the arbitral procedure, the mandatory provisions of laws of the place of arbitration or the eventual place of the execution of arbitral decision cannot be ignored.

Section II. Absence of choice of applicable procedural law

This section is about to analyze the circumstances in which the law applicable to provisional measures, expressly or impliedly, is not chosen by the

469. Alan Redfern and Martin Hunter, Law and Practice of International Commercial Arbitration, Sweet & Maxwell, 2013, p. 110; in this regard, the only exception is the particular case of arbitration between investors and states under the ICSID Convention, which is almost entirely insulated from the place of arbitration. In ICSID arbitrations, interim measures may only be sought from the tribunal itself (unless there is an express agreement otherwise) and any review of the award is the exclusive domain of an ad hoc committee appointed by the institution itself rather than the courts of the place of arbitration.

parties.

In this regard in the absence of a choice by the parties, the applicable procedural law or rules on arbitration procedure should be chosen based on circumstances of the case and various connecting factors. This means that the rules of law applicable to the interim measures will be chosen by the forum dealing with such measures based on circumstances surrounding the case. Where there is no agreed procedural law by the parties, the arbitral tribunal is not obliged to apply the law which the parties, or the arbitrators themselves, choose to govern the substantive proceeding. In other words, there is not necessarily a link between the law governing the merits and the law governing the arbitral procedure. Because the considerations to guide the parties or the arbitrators in the choice of the applicable law on the merits and arbitral procedure are not necessarily the same.[470]

Although in the past in the absence of choice of applicable procedural law by the parties, it was assumed that the arbitral procedure is governed by the law of the seat of the arbitration, as indicating the parties' implied intention as to the procedural law, nowadays, it is widely accepted that the seat of the arbitration, often is chosen for reasons of convenience or because of the neutrality of the country in question, and does not necessarily cause the procedure to be governed by the law of that jurisdiction.[471] In other words, since the choice of the seat of arbitration by the parties, the arbitral institution or the arbitrators themselves is often made on grounds entirely unrelated to the arbitral procedure, that choice will not automatically have an impact upon the conduct of the arbitral proceedings.[472] Such a development gives the arbitrators a great deal of freedom in choosing the applicable procedure, or in simply resolving procedural issues as and when they

470. Fouchard Gaillard Goldman, Op. Cit, p. 595

471. Ibid

472. Ibid

arise.[473] In clarification of this issue the disposition of the UNCITRAL model law and that of the French, English and U.S. systems are noteworthy.

In this respect, the French reform of the law governing the arbitration makes no reference to the law of the seat in its provisions concerning the determination of the law governing the procedure. In the absence of the parties' agreement concerning the applicable procedure law or rule in the arbitral proceedings the arbitral tribunal shall define the procedure as required, either directly or by reference to arbitration rules or to procedural rules.[474]

The 1996 English Arbitration Act also recognizes the freedom of the parties (and the arbitrators, in the absence of a choice by the parties) to choose the law applicable to the arbitral procedure, subject to a limited number of mandatory provisions.[475]

Equally, in the United States the parties have broad freedom to determine the procedural rules under which the arbitration will be conducted, even if those rules differ from those in the FAA. Arbitrators generally must follow the procedural rules agreed upon by the parties. However, in practice, the parties typically agree to arbitrate under the rules of an established arbitral institution and these rules give arbitrators discretion to manage the arbitration in the manner they deem appropriate, subject to minimum due process requirements.

In line with the above-mentioned legal systems, the UNCITRAL Model Law has also opted for a considerably reduced role of the seat in determining the law applicable to arbitral procedure. According to article 19 of the Model Law, failing the agreement of the parties, the arbitral tribunal may, subject to those provisions of the Model Law considered to be mandatory, conduct the arbitration

473. Fouchard Gaillard Goldman, Op. Cit, p. 600

474. Code Procédure Civile, article 1509

475. Fouchard Gaillard Goldman, Op. Cit., p. 596

in such manner as it considers appropriate.[476]

In the view of above, in the absence of choice of applicable procedural law by the parties, nowadays, it is widely accepted that the arbitrators have a great deal of freedom in choosing the law applicable to the arbitral procedure. This means that the arbitral tribunal is not obliged to apply the law of the seat of arbitration or the law which the parties, or the arbitrators themselves, may choose to govern the substantive proceeding or arbitration agreement.

Thus, under the author's proposed model, in the absence of choice of applicable procedural law by the parties, the arbitrators have a great deal of freedom in choosing the law or rules of law applicable to the arbitral procedure. They are not obliged to apply the law of the seat of arbitration or the law which the parties, or the arbitrators themselves, may choose to govern the substantive proceeding or arbitration agreement.

476. UNCITRAL Model Law on International Commercial Arbitration, article 19 (2)

Conclusion of Chapter II

The analysys conducted in the above leads us to the conclusion that the determination of the law governing the arbitration proceedings, which is the law applicable to provisional measures, is an important task with considerable consequences in the outcome of arbitral proceeding, especially application for provisional measures. The principle of the autonomy of the arbitral procedure has long been recognized. Since the considerations likely to guide the parties or the arbitrators in choosing the applicable law are not necessarily the same in the case of arbitration agreement, the merits and the arbitral procedure, the comtemporary international commercial arbitration system has rightly accepted that the law and/or the rules of law governing arbitral procedure is autonomous of those governing arbitration agreement and the rules and/or laws governing the merits of the case.

Although all of the above-mentioned systems in choosing the applicable law or rule, by the parties or in the absence of a choice of the parties by arbitral tribunal, governing the arbitration proceedings, may have their own benefits, from the author's point of view, choice of applicable procedural law, whether expressly or impliedly, is preferred approach. Because, it prevents from spending too much time and costs in determine the applicable procedural law governing the arbitration. This point can especially be very helpful in the area of provisional measures, particularly Mareva-type cross-border injunctions, where the time is usually a matter of life or death. Refraining from choosing any procedural rules or law at all or leaving the arbitrators to resolve any procedural difficulties as and when they arise can cause delays, sometimes irreparably.

Regarding the freedom of the parties (and the arbitrators, in the absence of the agreement by the parties) in choosing the applicable law, one point is noteworthy. Such a freedom is not a total freedom for the parties. Despite such a

freedom, they still need to respect some minimum standards. In other words, the procedure they establish must comply with any mandatory rules and public policy requirements of the law of the place of arbitration, and those provisions of the international conventions on arbitration that aim to ensure that arbitral proceedings are conducted fairly. However, the limitations imposed on the autonomy of the parties in the conduct of the arbitral proceedings should not go beyond the laws and rules guaranteeing compliance with the requirements of due process and equal treatment of the parties.

With regard the freedom of the parties or the arbitral tribunal in combining provisions of a number of different laws and rules as applicable law or rule, it seems that, to the extent that it is not necessary, avoiding such a combination is preferred; otherwise it can make international commercial arbitration more costly, time consuming and complicated. Such a combination can be limited to very professionals who know exactly what consequences may cause such a combination.

Concerning reducing the role of the seat in determining the law applicable to arbitral procedure, it seems that since the choice of the seat of arbitration is often made on grounds entirely unrelated to the arbitral procedure, such as convenience or the neutrality of the country in question, applying the law of the seat of the arbitration in the absence of a contrary intention of the parties, as indicating the parties' implied intention as to the procedural law, is baseless, outdated and contrary to the parties' intention as well as the current international commercial practice. So, nowadays the absence of choice of applicable procedural law by the parties will not automatically lead to the application of the law of seat of arbitration as the law applicable on arbitration proceedings, on the contrary in such a circumstances the arbitral tribunal will have a great deal of freedom in choosing the applicable procedure laws and/or rules.

Thus, the author's proposed European injunction will be governed by the laws or rules governing arbitration proceeding, which is not necessarily the same law or rule applicable to the arbitration agreement or the merits. The parties will be encouraged to determine the applicable procedural law and/or rule. They will also be advised to avoid complicating the arbitration proceeding with combination of different laws and rules governing arbitration proceeding. However, in choosing the applicable law or rule the parties (and in the absence of the agreement by the parties, the arbitrators) need to respect the mandatory rules of the pace of arbitration.

In view of the foregoing this chapter confirms that identifying the law and/or rules applicable to interim measures is essential, because it has profound effects over the outcome of applications for provisional measures. Having this in mind, the Title 2 is about to analyze the issue of recognition and enforcement of provisional measures, including Mareva-Type injunctions. Taking into account the fact the recognition and enforcement of these measures are indirect acceptance of extraterritoriality of these provisional measures; the importance of the next title is evident.

Title 2. Recognition and enforcement of provisional measures

Sometimes the legal systems' acceptance of extraterritorial provisional measures is not direct and express. Instead, the way they treat the provisional measures granted by the foreign forums implies that the extraterritorial provisional measures are accepted by them, at least to some extent. This usually happens when the courts of a country recognize and/or enforce the provisional measures ordered by the foreign courts and/or arbitral tribunals.

Generally, in international commercial arbitration system provisional measures are often voluntarily complied with by the defendants. Because, by voluntary enforcement of provisional measure the parties against whom the measure is ordered show the competent arbitral tribunal on the merits that they are good citizens who are victim of plaintiff's wrong claims. In addition, through the voluntary compliance with the provisional measures, defendants can avoid further damages to commercial relations with the plaintiff, particularly in long-term commercial transactions. Finally, the defendants usually comply voluntarily with the provisional measures, because the court or the arbitral tribunal ordering these measures has other persuasive powers such as holding the recalcitrant party liable for damages and costs, and attaching continuing fines (astreinte) which put pressure on the defendants to enforce these measures.

In this respect, Mareva-type cross-border injunctions are even enforced more voluntarily, because the forum ordering this kind of injunctions has normally enough control over the person subject to the injunction enabling it to manage properly any disobedience to the injunctions. Where, the person subject to such cross-border injunction chooses not to obey the order, he/she will be subject to the punishment by the forum ordering the injunctions. For judicial provisional measures, such a punishment can even be imprisonment.

Where, defendants, disregarding all of above-mentioned facts, refuse to

comply with provisional measures, the coercive enforcement of provisional measures may become necessity for effective protection of rights or in other words, effective resolution of the dispute.[477] This means that if the failure to comply with the provisional measure has a severe and irreparable consequence, it might be regarded as being in the interest of an orderly administration of justice to enforce coercively interim measures.

The need for coercive enforcement of provisional measures differs depending upon the weight and effectiveness of the sanctions for disobedience.[478]While, drawing adverse inferences concerning preservation of evidence against the recalcitrant party could provide full protection, the threat of holding such party liable for damages or costs may not always be sufficient for measures related to conduct of arbitration and of relations between the parties during arbitration proceedings.[479] Where there is an immenent threat of transferring or dissipation of assets by the party against whom the measure is ordered, and the aforementioned persuasive powers are not able to provide full protection for the applicant, a coercive mechanism for enforcement of provisional measures becomes necessary.

The force and the enforceability of provisional measures differ also depending upon the issuing forum and the place in which they have been granted. The recognition and enforcement of judicial provisional measures granted in aid of arbitration are normally straightforward within the national borders of the court granting the measures. The recognition and enforcement of arbitral provisional measures at the seat of arbitration, despite usually not being self executing, are also normally easy. But, the transnational recognition and enforcement of interim measures are relatively new issue; that is why, they are more complicated. Title

477. Ali Yesilirmak, Op. Cit., p. 314

478. Ibid, p. 304

479. Ibid

II of the part II is about to elaborate these issues. In Chapter I, we will analysis the recognition and enforcement of judicial provisional measures ordered in aid of arbitration and in the Chapter II, we will analysis recognition and enforcement of arbitral provisional measures.

Chapter I. Recognition and enforcement of judicial provisional measures ordered in aid of arbitration

Whenever, despite all of the above-mentioned incentives and persuasive power of forums issuing provisional measures, the defendants refrain from complying with the judicial provisional measures, the defendants' disobedience may have such severe and irreparable consequences that it is regarded as being in the interest of an orderly administration of justice to enforce coercively the judicial interim measures. In this regard, there are normally mechanisms enabling the recognition and enforcement of judicial provisional measures. Judicial provisional measures are either ordered by the courts at the same country where their recognition and enforcement are asked or by the courts in a foreign country. The mechanism of the recognition and enforcement of domestic judicial provisional measures differs from that of the foreign judicial provisional measures.

Section I. Recognition and enforcement of domestic judicial provisional measures ordered in aid of arbitration

Normally, domestic judicial provisional measures granted in aid of arbitration are directly or through execution offices enforceable.[480] It sounds that there is no difference between recognition and enforcement of provisional measures ordered by the courts in aid of arbitration and those measures in aid of

480. Ibid, p. 303.

court proceedings. Thus, to recognize and/or to enforce provisional measures ordered by the courts in aid of arbitration, the party asking for their recognition and/or enforcement should start the normal proceeding of the courts. Even if this kind of provisional measures are granted ex parte, they are still normally enforceable. Because, the recognition and enforcement of domestic ex parte judicial provisional measures are normally allowed.

Section II. Recognition and enforcement of foreign judicial provisional measures ordered in aid of arbitration

Regarding recognition and enforcement of foreign judicial provisional measures, traditionally, the doctrine of finality was considered an absolute obstacle to such recognition and enforcement.[481] In other words, taking into account the importance of finality requirement for the purpose of recognition and enforcement, there was traditionally little room, if any, for the recognition and enforcement of forign provisional measures in national laws. In this respect, analyzing the legal disposition of the English, U.S. and French legal systems, as well as the UNCITRAL Model law and European Union, we will try to shed some light to the issue of recognition and/or enforcement of foreign judicial provisional measures in aid of an international commercial arbitration in today's world.

In English legal system, the traditional principle is that a foreign decision, in order to be recognized or enforced, must be final, in the sense that it should have brought an end to the dispute between the parties.[482] Taking into account that provisional measures are susceptible of changes, it sounds that, beyond the scope of the Brussels 1 regulation and Lugano convention, there is as yet no way of recognizing or enforcing a foreign protective measure on English territory.[483]

481. Peter F Schlosser, Jurisdiction and International Judicial and Administrative Co-operation, p. 189; Catherine Kessedjian, Op. Cit., No.34

482. Catherine Kessedjian, Op. Cit.

483. Ibid

According to Schlosser, in England the recognition and enforcement is based on the vested rights doctrine, rather than on international comity. It is clear that this doctrine suggests the inference that only final judgments may create rights".[484]

However, the doctrine of international comity to which English courts sometimes take recourse would enable them to enforce a foreign measure of interim protection.[485] In this respect, the decision of the Court of Appeal in the case of Credit Suisse Fides Trust v. Cuoghi sounds promising.[486]

Where, Lord Millett stated that "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, but that this should not 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."[487]

Where because of the lack of the requirement of finality the recognition and enforcement of a foreign judicial provisional measure gets impossible in England, an interim measure duplicating the foreign interim measure seems to be not just the only but also a very proper means of recognition and enforcement.[488] Although, this cannot be based on the vested rights doctrine, the doctrinal figure of a vested interim right would certainly not be repugnant for schooled legal minds.[489]

In the United States the recognition and enforcement of judicial provisional measures have not received unique and comprehensive response. On one hand,

484. Peter F Schlosser, Jurisdiction and International Judicial and Administrative Co-operation, p. 189

485. Ibid

486. Credit Suisse Fides Trust v. Cuoghi, [1997] 3 All ER 74

487. Ibid

488. Peter F Schlosser, Jurisdiction and International Judicial and Administrative Co-operation, p. 190

489. Ibid

based on the traditional principle in common law system of the U.S., only a final foreign judgment is suitable for domestic enforcement.[490] On the other hand, according the Restatement (Second) of Conflict of Laws, which explains the position in American law on the question of the recognition and enforcement of foreign injunctions, "It can … be assumed that a decree rendered in a foreign nation which orders or enjoins the doing of an act will be enforced in this country provided that such enforcement is necessary to effectuate the decree and will not impose an undue burden upon the American court and provided further in the view of the American court the decree is consistent with fundamental principles of justice and good morals".[491] There are some decisions by American courts agreeing to enforce protective measures ordered by foreign courts which might lead us to believe that certain protective measures may find favor in the eyes of American courts.[492]

In this regard, one of the most famous cases is Pilkington Brothers plc v. AFG Industries Inc.[493] This decision was a refusal to order a provisional measure similar in every respect to one granted in Britain, without however being based on a general principle which would prevent it from recognizing or enforcing a provisional measure ordered abroad.[494] Refusing to order the measure, the U.S. court stated that "A generally recognized rule of international comity states that an American court will only recognize a final and valid judgment. This rule, however, has not been strictly applied to cases involving enforcement of modifiable judgments. Modifiable foreign orders can be granted extraterritorial effect even though they might not be 'final' for purposes of res judicata".[495]

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490. Ibid, p. 189

491. Catherine Kessedjian, op. cit., No. 66

492. Ibid, No. 68; Peter F Schlosser, Jurisdiction and International Judicial and Administrative Co-operation, p. 189

493. Pilkington Brothers plc v. AFG Industries Inc., 581 F. Supp. 1039 (D. Del. 1984), available at http://law.justia.com/cases/federal/district-courts/FSupp/581/1039/1596582/

494. Catherine Kessedjian, op. cit.

495. Ibid

Probably the court could not act otherwise, because the application was not for recognition and enforcement of English provisional measure, but rather to duplicate that decision by an identical injunction.[496] If it would be an application for recognition and enforcement, it sounds that the court would order its recognition and enforcement.

Another case showing a kind of willingness of the U.S. courts to enforce the foreign provisional measures is CIBC Mellon Trust Co. v. Mora Hotel Corp case.[497]

Where, the Court of Appeals (New York's highest court), despite their concern over Mareva injunctions, nonetheless enforced an English judgment granted as a contempt sanction against two defendants who refused to comply with the requirements of a Mareva injunction and accompanying disclosure orders**.** By converting the $330 million contempt judgment into a New York judgment, the Court of Appeals created the largest ever award for contempt of court in the history of American law[498].

In France under the traditional approach, only final judgments of foreign courts were considered to be suitable for trans-border recognition and enforcement.[499] Based on this principle, there are some doubts about the possibility of recognition and enforcement of foreign judicial provisional measures in France (except under Brussels I regulation and Lugano Convention). Their main argument against doing so turns upon the nature of the provisional or protective measures, which is directly linked with the means of enforcement.[500] However, there is now a tendency in French legal theory to admit the recognition

496. Ibid., No. 68

497. CIBC Mellon Trust Co. v. Mora Hotel Corp., NV, [2003] 1 All E.R. 564, available at https://www.law.cornell.edu/nyctap/I03_0059.htm

498. Ibid, p.753

499. Peter F Schlosser, Jurisdiction and International Judicial and Administrative Co-operation, p. 189; to be enforceable, the foreign judgment must also be enforceable abroad.

500. Ibid, no.108

or enforcement in France of certain foreign provisional measures.[501] In this regrd, there are some interesting cases.

In the famous English case of Stolzenberg,[502] since Stolzenberg had some assets in Paris, the plaintiffs initiated the enforcement proceedings in France.[503] In a landmark judgment of 30 June 2004,[504] the French Supreme Court (Cour de cassation) confirmed the enforceability in France of both the Mareva injunction and the English default judgment.[505] "Although Stolzenberg's lawyers raised the issue of the compatibility of the judgment with French public policy, they did not insist on the fact that the default judgment was obtained as a consequence of the unwillingness of the defendants to comply with the Mareva injunction.The judgment of the Cour de cassation is thus silent on the issue".[506]

In M. R... X... v M. C... Y..., the French Cour de Cassation, confirming a declaration of enforceability of a U.S. financial penalty, held that the financial penalty which was the sanction for non complying with a foreign injunction was civil in nature, and could thus be declared enforceable.[507] In response to allegations that the recognition of the U.S. order was a disproportionate penalty, the Court answered that trial judges could not be criticized for finding that it was a perfectly proportionate sanction given that the fraud was for US $ 200 million.[508]

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501. Ibid

502. Canada Trust Company (acting in its capacity as trusts of the Chraysler Canada Limited's benefit plan, the Chraysler Canada Limited Master Trust Fund, The Chrysler Canada Limited non-Canadian Master Trust Fund and the Holme Foundry Division Master Trust Fund) and others (Respondants) v. Stolzenberg and Gambazzi and others (Applents), House of Lords, on 12 October 2000

503. Cuniberti Gilles, Daimler Chrysler v Stolzenberg, November 12, 2008, available at http://conflictoflaws.net/2008/daimler-chrysler-v-stolzenberg-part-9-luxembourg/

504. X. [Wolfgang Otto Stolzenberg] v CIBC Mellon Trust Company and Others, Cour de cassation, chambre civile 1, 30.06.2004

505. Ibid

506. Ibid

507. Arrêt n°65 du 28 janvier 2009 (07-11.729) - Cour de cassation – Première Chambre Civil available at https://www.courdecassation.fr/jurisprudence_2/premiere_chambre_civile_568/28_janvier_12071.html; Gilles Cuniberti, French Court agrees with U.S. Anti-suit injunction, Otober 19 2009, available at http://conflictoflaws.net/2009/french-court-agrees-with-u-s-anti-suit-injunction/; in this regard, French scholars agree that as soon as a threat of financial sanction ceases to be a mere threat and is turned into an actual order to pay, the problem is not anymore one of exercising state authority

508. Arrêt n°65 du 28 janvier 2009 (07-11.729) - Cour de cassation – Première Chambre Civil available at https://www.courdecassation.fr/jurisprudence_2/premiere_chambre_civile_568/28_janvier_12071.html; Cuniberti Gilles, Op. Cit.

Referring to the proportionality principle, both in the French Constitution and the European Convention on Human Rights, however, the Court implicitly accepted that foreign civil penalties could only be recognized if proportionate.[509]

In another important case regarding enforcement of foreign provisional measure, on 14 October 2009, where, an American Corporation (In Zone Brands Inc) sought a declaration of enforceability of the American judgment, both of the anti-suit injunction and the summary judgment it seems, but the French parties (In Zone Brands Europe), believing that the anti-suit injunction infringed French sovereignty and their right of access to court as recognized by Article 6 ECHR, opposed the declaration of enforceability, the French Cour de cassation delivered an important judgment regarding enforceability of anti-suit injunctions.[510]

The Cour de Cassation, confirming the declaration of enforceability of the American judgment, held that:

"1. As the parties had agreed to the jurisdiction of the American court, the decision of the American party to sue before that court could not be considered strategic behavior. 2. There was no issue of being denied access to court, as the American court was ruling on its own jurisdiction and only enforcing a choice of court which had been agreed by the parties. 3. Anti-suit injunctions are not contrary to public policy as long as they only aim at enforcing a preexisting contractual obligation, and no treaty or European regulation applies".[511]

It is noteworthy to emphasis that because of the judgment of the ECJ in West tankers case, the French courts will refuse anti suit injunctions ordered by member states of Brussels I regulations (recast) and Lugano convention. But the

509. Ibid

510. Cour de cassation, civile, Chambre civile 1, 14 octobre 2009, 08-16.369 08-16.549; Gilles Cuniberti, French Court agrees with U.S. Anti-suit injunction, Otober 19 2009, available at http://conflictoflaws.net/2009/french-court-agrees-with-u-s-anti-suit-injunction/

511. Ibid

enforcement of anti suit injunction of arbitral tribunals and countries which are not contracting states of recast Brussels I regulation and Lugano Convention sounds accepted.

With respect to the disposition of the UNCITRAL Model Law regarding the recognition and enforcement of judicial provisional measures granted in aid of arbitration, while the courts can grant interim measures in aid of arbitration proceedings seated inside or beyond the national borders, the Model Law has not provided any solution for the recognition and enforcement of judicial provisional measures. In other words, it is silent about the recognition and enforcement of judicial provisional measures granted in aid of arbitration.

With regard to the recognition and enforcement of judicial provisional measures granted in aid of arbitration under the European Union framework, on one hand, in the light of the fact that in the Schlosser Report[512] these measures were not among ancillary proceedings excluded from the scope of the Brussels convention, and in the other hand based on the decisions of ECJ in Marc Rich and Van Uden cases, these Provisional measures do not fall within the arbitration exclusion. Consequently, judicial provisional measures granted in aid of arbitration are capable of recognition and enforcement under recast Brussels I regulations. In this regard the article 2 of recast Brussels I regulations is noteworthy. According to this article "For the purposes of this Regulation: (a) judgment means any judgment given by a court or tribunal of a Member State, whatever the judgment may be called, including a decree, order, decision or writ of execution, as well as a decision on the determination of costs or expenses by an officer of the court. … 'judgment' includes provisional, including protective, measures ordered by a court or tribunal which by virtue of this Regulation has

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512. Burkhard Hess, Thomas Pfeiffer and Peter Schlosser, Report on the Application of the Regulation Brussels I in the Member States, September 2007

jurisdiction as to the substance of the matter. It does not include a provisional, including protective, measure which is ordered by such a court or tribunal without the defendant being summoned to appear, unless the judgment containing the measure is served on the defendant prior to enforcement".[513]

In the view of above, some points are noteworthy: firstly, from the author's view, the doctrine of finality as an absolute obstacle to recognition and enforcement of judicial provisional measures is an outdated doctrine, incompatible with the realities and necessities of the today's world. However, despite the trend towards the recognition and enforcement of foreign judicial provisional measures granted in aid of arbitration, the legal basis of such a trend is far from coherence and unification. There is a need to set up a comprehensive and universal basis for recognition and enforcement of judicial provisional measures granted in aid of an international commercial arbitration. On the basis of such a universal mechanism, the court granting the measures needs to have a genuine and reasonable competence to order such a measure. In other words, such a court should be in the highest rank in the hierarchy of courts explained in Title I of the Second Part of this thesis. A provisional measure obtained opportunistically, for example, before the applicant's national court should not be allowed to be recognized and/or enforced. To establish above-mentioned universal mechanism, the author's proposed European Model can be good model. Alternatively, until we can establish a universal mechanism, as a moderate suggestion of the author, the international comity can be the basis of the recognition and enforcement of judicial provisional measures granted in aid of international commercial arbitration. Because, despite being subject to changes,

513. Recast Brussels I regulation, Article 2 (a); in this respect, Louise de Cavel v Jacques de Cavel (No.1) and Bernard Denilauler v S.N.c. Couchet Fréres, 1980 cases of the Court of Justice of the European Union are noteworthy, despite not being directly related to arbitration. In both of the these cases, the European Court of Justice held that the French order was not enforceable in Germany, on grounds wholly unconnected with the fact that the French orders purported to reach assets in Germany and likewise this cases is more important for what the court did not decide than for what it did decide. Some interpreted these cases as impliedly accepting the extraterritorial provisional measures within the Brussels Convention. According to Lawrence Collins the effect of the decisions of ECJ in two above mentioned case is that the measures of this kind affecting assets outside the territory of the court ordering them can be entitled to recognition and enforcement in other Contracting States provided that the orders are notified to the defendant and provided the defendant is given the opportunity inter partes to resist them.

provisional measures put an end to some issue between the parties and based on international comity, as a well-recognized principle of international law, one jurisdiction can extend certain courtesies to other nations, this can especially be done by recognizing the validity and enforcement of their judicial acts, inter alia provisional measures.

Secondly, the absence of proper mechanism under the UNCITRAL Model Law on International Commercial Arbitration for the recognition and enforcement of judicial provisional measures sounds a strategic deficient in the Model Law. Since judicial interim measures may be ordered in a country other than the place of their recognition and/or enforcement, taking into account the importance of Model Law in establishing a universal mechanism, setting up the rules for the recognition and enforcement of judicial provisional measures in the Model Law is necessary. Otherwise, keeping in mind that these measures are granted by national courts and cannot be called arbitral awards, the recognition and enforcement of judicial provisional measures gets even more difficult and more complicated.

Thirdly, with regard to recognition and enforcement of ex parte foreign judicial provisional measures, although it seems that nowadays such a recognition and/or enforcement is not possible (except under the Brussels regulation under certain circumstances), their necessity is out of question. Especially, in the borderless world of globalization era, sometimes the surprise effect of provisional measures is indispensable, otherwise the defendants may make themselves judgment-proof.

In the view of the above, under the author's proposed model, provided that the foreign court has established a proper personal jurisdiction over the person subject to the European injunction, foreign judicial injunctions granted in aid of international commercial arbitration will be recognized and/or enforced, even if they are granted ex parte.

Conclusion of Chapter I

Thanks to the persuasive power of the courts issuing provisional measures in aid of international commercial arbitrations, these measures are often voluntarily complied with by the defendants. However, if the defendant subject to these judicial provisional measures, inter alia Mareva-type injunctions, chooses not to obey, the forum has normally sufficient control over the person subject to the injunction enabling it to manage properly any disobedience. Whenever the persuasive powers are not able to provide full protection for the applicant, a coercive mechanism for enforcement of provisional measures may become necessary.

The recognition and enforcement of domestic judicial provisional measures granted in aid of arbitration are normally straightforward within the national borders of the court granting the measures. There is normally no difference between recognition and enforcement of domestic judicial provisional measures ordered by the courts in aid of arbitration and those measures in aid of court proceedings.

Regarding the recognition and enforcement of foreign judicial provisional measures, there was traditionally little room, if any, for the recognition and enforcement of these provisional measures in national laws; however, nowadays the doctrine of finality as an absolute obstacle to the recognition and enforcement of provisional measures is considered an outdated doctrine, incompatible with the realities and necessities of today's world. So, there is now a tendency to admit the recognition and/or enforcement of certain foreign provisional measures. However, the legal basis of such a trend is far from coherence and unification. That is why there is a real need to set up a comprehensive and universal basis for recognition and enforcement of foreign provisional measures, inter alia the provisional measures granted in aid of an international arbitration.

In the view of the above, having dealt with the issue of recognition and enforcement of judicial provisional measures in aid of international commercial arbitrations in this chapter, the next chapter is going to deal with the issue of recognition and enforcement of arbitral provisional measures.

Chapter II. Recognition and enforcement of arbitral provisional measures

Taking into account the importance of interim measures in international commercial arbitration process, the recognition and enforcement of arbitral interim measures is a crucial issue. So, in this chapter we are about to analyze this matter.

Similar to judicial provisional measures in aid of arbitration, the recognition and enforcement of arbitral interim measures within the seat of arbitration are relatively straightforward; because they generally involve the same processes required for the recognition and enforcement of an award in domestic arbitration.[514]

But taking into account that in international commercial arbitration, the seat of arbitration is usually chosen in neutral third country, the territorial recognition and enforcement of provisional measures are usually useless or at least very insufficient. To be effective these measures usually need to be recognized and/or enforced beyond the borders of the place of arbitration. In other words, there is a real and practical need to make arbitral interim measures effective through a clear recognition and enforcement framework outside the seat of arbitration.[515] Where, their recognition and/or enforcement get necessary in a country outside the seat of arbitration, it gets more complicated. On one hand, national arbitral laws and rules have been largely deficient in the recognition and/or enforcement of foreign arbitral interim measures; on the other hand, there is no universal system specifically designed for the cross-border recognition and/or enforcement of these interim measures.[516]

514. Robert Hickie Kieran, the Enforceability of Interim Measures of protection Granted by Arbitral Tribunals outside the Seat of Arbitration: A New Approach, Vindobona Journal of International Commercial Law & Arbitration 2008 (12 VJ 221), p. 11

515. Ibid, p. 3

516. Ibid

Section I. Recognition and enforcement of arbitral provisional measures at the seat of arbitration

Taking into account that the arbitral provisional measures are not self-executing, in order to compensate the arbitral tribunal's lack of coercive power and foster international commercial arbitration by making it more effective, the legal systems of different countries have adopted different approaches regarding coercive enforcement of arbitral provisional measures. There are generally four main approaches for enforcement of the arbitral decisions on provisional measures at the seat of abitration.[517]

According to the first approach, which reflects utmost trust to arbitral tribunal by equating an arbitral tribunal's decision to a judgment, an arbitral provisional measure is directly enforceable as if it were a court decision.[518] Although it is a bold solution, it is not adopted neither by the legal systems of countries subject to this study nor by any other big legal system.

Based on the second approach, national courts give executory assistance in regard of the enforcement of provisional measures ordered by arbitral tribunal.[519] The UNCITRAL model Law and a lot of countries, including England, U.S. and France, have taken, more or less, this approach. "Under this approach, the judicial authorities give executory assistance for enforcement of arbitral decisions on provisional measures. In other words, the arbitral decisions (usually awards) are enforced through judicial authorities at the seat without any further (or at least with limited) examination. Alternatively, the decisions are enforced as if they were arbitral awards. This is to say that orders are effectively equated to

517. Ali Yesilirmak, Op. Cit., p. 318

518. Ibid, pp. 317-318

519. Ibid

awards".[520]

The third approach is recasting the decision of arbitral tribunal, as the case may be, to transpose the arbitral decision into the legal system of the state in question; in other words, it requires transposition of the arbitral tribunal's interim measure into a measure that could have been issued by a court and treating accordingly by the state court system.[521]

Finally based on the fourth approach, by taking into consideration the arbitral provisional measure, court orders an interim measure of protection of its own; in other words, based on this approach a court issues its own separate interim measure which is inspired from, or which takes as conclusive the measure granted by arbitral tribunal.[522]

The form in which the provisional measures are granted is very important. The measures granted in the form of an award is usually recognized and enforced easier than the measures granted in the form of an order. Sometimes, the decisions of arbitral tribunal in the form of an order are not enforceable by the courts.

Regarding enforcement of provisional awards in England, in so far as, these measures dispose finally of some of the issues in dispute, they are enforceable. By leave of the court, arbitral provisional measures, inter alia cross border injunctions, granted in the form of awards will be enforced in the same manner as a judgment or order of the court to the same effect.[523] In other words, where a tribunal can make a provisional award, it can be enforced in the same way as an equivalent judgment or order of the court, provided that the leave of the court is obtained. Where the leave is so given, judgment may be entered in terms of the

520. Ibid, p. 319

521. Ibid

522. Ibid

523. Arbitration Act 1996, Section 66(1)

award.[524] In this respect Sucafina SA v. Rotenberg case is noteworthy.[525]

Where, upholding the Commercial Court' decision in a dispute surrounding the status of interim arbitration awards issued under the rules of the Coffee Trade Federation, the Court of Appeal held that the label given to the award by the tribunal (for example, interim) is not determinative of whether an award made by the arbitrators is final and binding for the purposes of enforcement. This means that, regardless of the name given to them, in so far as these measures dispose finally of some of the issues in dispute, they are enforceable.

Regarding the recognition and enforcement of arbitral provisional measures in U.S., although, the U. S. Federal Arbitration Act 1925 (see 9 USC 1) is silent on the issue, the case laws of several U.S. courts show that they have enforced arbitral provisional measures just like any other arbitral award.[526] In other words, the regime for enforcement of arbitral awards extends to the enforcement of arbitral decisions on provisional measures. The Sperry International Trade v Government of Israel ('Sperry') case is an example of U.S. courts' attitude towards recognition and enforcement of arbitral provisional measures)[527].

In this case, the applicant entered into an agreement with the defendant to design and construct a communications system for the Israeli Air Force.[528] According to a clause of the agreement, the applicant needed to draw an irrevocable letter of credit in favour of the respondent to guarantee performance (specified amount of money). Sperry initiated arbitration proceedings claiming breach of the contract and eventually requested from the arbitral tribunal to enjoin

524. Arbitration Act 1996, Section 66(2)

525. Sucafina SA v. Rotenberg [2012] EWCA Civ 637

526. Ali Yesilirmak, Op. Cit., p. 326

527. Sperry International Trade, Inc v Government of Israel 532 F.Sup 901 (S.D.N.Y., 1982)

528. Robert Hickie Kieran, Op. Cit., p.32

Israel from calling the letter of credit.[529] The arbitral tribunal granted interim measure in the form of an award, requiring money under the letter of credit to be deposited into a joint escrow account pending a decision on the merits.[530]

Sperry sought enforcement of the award under the U.S. Code, but Israel argued that the award could not be enforced; because was not final. The court held that "the award was enforceable on the basis that it severed the issue of the letter of credit from other issues before the arbitral tribunal. The award was enforceable to the extent that it put to rest the issues between the parties; namely, the issue of what to do with the letter of credit for the purpose of safeguarding the arbitral process. While the form of the decision was not conclusive, the fact that the form of the decision was an award was treated as indicative of the intention of the arbitral tribunal to treat the decision as final and binding".[531]

In this regard, under the French legal system, similar to the U.S. system, the regime for enforcement of arbitral awards extends to the enforcement of arbitral decisions on provisional measures.[532] It sounds that this approach has a good attitude towards the enforcement of arbitral provisional measures. Since the enforcement is permitted with the assistance of a court with certain safeguards, there is a real possibility that the court can remedy any probable irregularity or violation of due process.[533] It seems that this method is in line with the enforcement regime of the New York convention, where, to ensure that the arbitral tribunal has observed the due process, the enforcement of arbitral provisional measures, similar to the enforcement of final arbitral awards, is done through the courts. The pitfall of this approach is the time spent for courts for

529. Ali Yesilirmak, Op. Cit., p. 334

530. Robert Hickie Kieran, Op. Cit.

531. Sperry International Trade, Inc v Government of Israel

532. Ali Yesilirmak, Op. Cit., p. 325-326

533. Ibid, p. 326

giving permission for enforcement of an arbitral decision.[534] In this regard, in the French legal system, the S.A. Otor Participations v. S.A.R.L. Carlyle (Luxembourg)[535] and Société Braspetro Oil Services (Brasoil) v GMRA[536] cases are noteworthy.

In the first case, in response to the defendant's request to set aside the provisional measure (interim award) ordered by the arbitral tribunal and the financial penalty (astreinte) attached to it, the Paris Court of Appeal held that since the arbitral tribunal's decision finally resolved the parties' dispute regarding the issuance of provisional measures, the decision was properly an award, which could be immediately set aside or enforced pursuant to the provisions of French law governing the enforceability of international arbitration awards.[537] Thus, the application to set aside the award was accepted; however, the court rejected the application on its merits.

In Société Braspetro Oil Services (Brasoil) v GMRA[538] case, an international arbitral tribunal's procedural order was challenged by Brasoil before the Paris Court of Appeal (arbitration's seat was In Paris). Since the French law provided that only arbitral awards could be challenged before the French courts, the issue arose as to whether a tribunal order may also be challenged.

The Paris Court of Appeal held that the nature of an arbitral decision does not depend on the wording used by the parties or the arbitrators. Thus, the fact that the arbitrators had called their decision an order did not make it unchallengeable before the French courts. According to the court, in order to

534. Ibid

535. S.A. Otor Participations, "Emballage", Yves Bacques and Michèle Bouvier [together "the founders"] v. S.A.R.L. Carlyle (Luxembourg) Holdings 1 and S.A.R.L. Carlyle (Luxembourg) Holdings 2 [together, "Carlyle"], CA Paris, 1e ch. C, October 7, 2004

536. Braspetro Oil Services Company (Brasoil) v ... GMRA (Cour d'appel de Paris, 1er juillet 1999)

537. Ibid

538. Ibid

determine whether the decision could be regarded as an award and consequently challenged, the content of the decision must be examined.[539]

"The court stressed that the parties had exchanged written pleadings and had been heard with their experts by the arbitrators on the issue. It pointed out that the order had been made after a five-month deliberation and after an extensive discussion of both arguments. It also underlined that the dispute as to whether the first award could be reviewed had been decided by that 'order'. On that basis, the court concluded that the order was an award for the purpose of French law, and could therefore be challenged".[540]

With regard to the recognition and enforcement of arbitral provisional measures under the UNCITRAL Model Law, it is noteworthy that they have established an almost comprehensive framework. Accordingly, under the Model law an interim measure issued by an arbitral tribunal shall be recognized as binding and, unless otherwise provided by the arbitral tribunal, enforced upon application to the competent court, irrespective of the country in which it was issued.[541] The Model Law is silent on the form of interim measures applicable under the provision, which is significant as, by implication, under the Model law the the form of interim measure is not limited to arbitral awards; therefore awards, orders, directions and recommendations may all qualify for recognition and enforcement under this provision.[542]

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539. Denis Bensaude, Op. Cit, P361; Gilles Cuniberti and Charles Kaplan, Étendue du contrôle du juge sur la procédure suivie par les arbitres lors d'un arbitrage international, available at https://www-lexis360-fr-s.biblio-dist.ut capitole.fr/Document/arbitrage_etendue_du_controle_du_juge_sur_la_procedure_suivie_par_les_arbitres_lors/2PqrxTwlJyG4bmhmfQwNx-iGZHtypPPvwv9NfpAxiwo1?data=c0luZGV4PTEmckNvdW50PTIm&rndNum=630228924&tsid=search2_

540. Braspetro Oil Services Company (Brasoil) v ... GMRA, Op. Cit.

541. UNCITRAL Model Law on International Commercial Arbitration, Article 17 H

542. Robert Hickie Kieran, Op. Cit., p.19; nuumerous safeguards are taken. These include imposition of a positive obligation on the party seeking recognition and enforcement to notify the Court of any termination, suspension or modification of the interim measure granted by the tribunal at the time enforcement is sought, and a vested discretionary power in the Court to require the party seeking recognition and enforcement to provide appropriate security if it has not already been required to do so, or where it is necessary to protect the rights of third parties are taken. In Article 17 I, the Model Law introduces grounds for refusing recognition or enforcement of interim measures. There are two groups of grounds of refusing recognition and enforcement; these are an application by the party seeking refusal of recognition and enforcement or on the Court's satisfaction that the award is not to be imposed and thus refused. Based on the first group, there are three grounds under which the party seeking refusal of recognition and enforcement can make application for refusal. Enforcement may be refused if the opposing party can prove to the court that any one of the grounds under Articles 36(1) (a)(i), (ii), (iii) or (iv) of the Model Law apply. Taking into account the characteristics of interim measures, these reflect just some of the grounds under Article V (1) (a) to (d) of the New York

Despite providing an elaborate provision on provisional measures, including the rules on their recognition and enforcement, the revised Model Law is short of a good and satisfactory provision with regard to ex parte interim measures. According to the Model law, "a preliminary order shall be binding on the parties but shall not be subject to enforcement by a court. Such a preliminary order does not constitute an award".[543] This means that the Model law expressly prohibits the enforcement of preliminary orders, which are ex parte interim measures, either inside or outside the seat of arbitration. Given that these preliminary orders are not capable of enforcement, Articles 17C may be seen to be undermined and having no effective practical value.[544]

Keeping in mind the above, for the recognition and enfoncement of arbitral interim measures within the seat of arbitration, from the author's point view, the above-mentioned fourth approach is totally incompatible with the nature of provisional measures. Because, the time is usually the essence for efficiency of interim measures, especially for Mareva-type injunctions, but this approache delays the time for obtaining and the recognition and enforcement of these measures. For obtaining an interim measure, this approache requires one proceeding before arbitral tribunal and then another proceeding before national court. Thus, it doubles the proceeding, increases the costs and necessary time for obtaining, recognition and/or enforcement of provisional measures. This approach also reflects the least trust and respect for international commercial arbitration as

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Convention that allow for the refusal of recognition and enforcement of arbitral awards. Secondly, the recognition and enforcement may be refused if the arbitral tribunal's decision with respect to the provision of security in connection with the interim measure issued by the arbitral tribunal has not been complied with. Thirdly, the recognition and enforcement may be refused if the interim measure has been terminated or suspended by the arbitral tribunal or, where so empowered, by the court of the State in which the arbitration takes place or under the law of which that interim measure was granted. The other group of reasons for refusing recognition and enforcement of provisional measures allows for the Court to find, in itself, that the interim measure is not capable of recognition and enforcement. According to this group, refusal is permitted, if the Court finds that, firstly, the interim measure is incompatible with the powers conferred upon the court unless the court decides to reformulate the interim measure to the extent necessary to adapt it to its own powers and procedures for the purposes of recognizing and enforcing that interim measure and without modifying its substance ; or secondly, the subject-matter of the dispute is not capable of settlement by arbitration under the law of the State where the recognition and enforcement are sought; or the award is in conflict with the public policy of the State where the recognition and enforcement are sought.

543. UNCITRAL Model Law on International Commercial Arbitration, Article 17C (5)

544. Robert Hickie Kieran Op. Cit., p. 21

a dispute settlement system. Finally, this approach opens the door for the courts' excessive intervention.

Contrary to the fourth approach, the first approach seems the ideal solution. Because, based on this approach the arbitral tribunals' decision on interim measures equates to the judgment of national court. It has been the ultimate goal of arbitration to be recognized as a dispute settlement system equal to courts. This is reflection of utmost respect and trust to arbitration as a dispute resolution system. On practical terms, since the court is not involved in the proceedings for the recognition and enforcement of arbitral interim measure, it is the fastest approach, consistent with the nature of provisional measures which necessitates normally the speedy procedure. To make sure that the due process and interest of state and public is respected, it seems that we can set up a procedure enabling the defendant and/or the authority in charge of execution to ask the court to oppose the arbitral provisional measures' recognition and/or enforcement. In other words, based on this approach, which is the author's proposed model, prima facie the arbitral provisional measures are directly enforceable without the court intervention, however if the defendant or the authority in charge of recognition and enforcement of arbitral provisional measure claims that the due process and interest of state or defendant are not observed, he/she can ask the court's intervention.

Alternatively, it seems that the second approach, which is considered practically the most acceptable solution nowadays, is the second best approach in recognition and enforcement of arbitral interim measures. Because, based on this approach the recognition and enforcement of arbitral provisional measures are permitted with the assistance of the national court, enabling the latter to safeguard due process and interest of state or defendant. However, in this approach the time spent for requesting the court's permission to the recognition and/or enforcement

of arbitral provisional measures makes this approach slow and inconsistence with the essence of interim measures, which normally necessitates speed.

Regarding the third approach, which requires transposition of arbitral provisional measures into a provisional measure that could be ordered by the court, it seems that it can be applied parallel to the first (based on the movant's request) and second approaches. That is to say, when the provisional measure granted by arbitral tribunal does not exists within the legal system of the court, to make it enforceable, the court may recast arbitral provisional measure into judicial provisional measure equivalent or close to arbitral provisional measure. However, the court should intervene only to the extent that its intervention is necessary for recognition and enforcement of arbitral provisional measure.

It is also noteworthy that in recognition and enforcement of arbitral interim measures, the nature of these measures should always be kept in mind. In other words, since these measures are susceptible to changes, the recognition and/or enforcement of these measures can be subject to changes. For example, the recognition and enforcement will be refused if the interim measure has been terminated or suspended by the arbitral tribunal or, where so empowered, by the court of the State in which the arbitration takes place or under the law of which that interim measure was granted.

In the view of the above based on the author's proposed model, prima facie, the arbitral provisional measures will be directly enforceable within the seat of arbitration without the need for court's intervention or even assistance. However, if the defendant or the authority in charge of recognition and enforcement of arbitral provisional measure claims that the due process and interest of state or defendant are not observed, he/she can ask the court to oppose the recognition and enforcement of such arbitral provisional measures.

Section II. Recognition and enforcement of foreign arbitral provisional measures[545]

Since the seat of arbitration in international commercial arbitration often has nothing to do with the parties or the dispute in question, it is vitally important and necessary that an arbitral provisional measure be enforceable in a place other than the seat of arbitration.[546] In other words, taking into account that international commercial arbitrations are generally held in, albeit carefully considered and chosen by arbitrating parties, a convenient place that is often neutral to the parties and subject matter of underlying legal relationship; to be effective, an arbitral provisional measure needs to be enforceable outside the seat of arbitration. However, the cross-border recognition and enforcement of arbitral provisional measures have not received sufficiently the attention of national legislators or international and regional organizations. While the arbitration laws of the some of the countries insist on courts imposing arbitral interim measures within the seat of arbitration, very few, if any,[547]provide for the enforcement of foreign arbitral interim measures.[548]

The recognition and enforcement of arbitral provisional measures outside the seat of arbitration can be sought either through national laws or under the New York convention.

545. Foreign arbitral provisional measure means an arbitral provisional measure which is granted by an arbitral tribunal having its seat in a foreign country. Since the arbitral tribunal is not a court of tribunal of a member state, thus arbitral tribunals decisions are not capable of recognition and enforcement under recast Brussels 1 regulations. In this regard, the decision of the Court of Justice of the European Union in Gazprom OAO v Lietuvos Respublika case is noteworthy.Where the ECJ ruled that Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters must be interpreted as not precluding a court of a Member State from recognizing and enforcing, or from refusing to recognize and enforce, an arbitral award prohibiting a party from bringing certain claims before a court of that Member State, since that regulation does not govern the recognition and enforcement, in a Member State, of an arbitral award issued by an arbitral tribunal in another Member State.

546. Ali Yesilirmak, Op. Cit., p. 330

547. Only a handful of countries incorporate a progressive policy approach to this issue of enforcement out of which only Hong Kong and Germany offer this progressive framework.

548. Robert Hickie Kieran, Op. Cit., p.12

§ I. Recognition and enforcement of forign arbitral provisional measures under national laws

Taking into account the above-mentioned fact that international commercial arbitration is usually held in a neutral country; the recognition and enforcement or otherwise of foreign arbitral provisional measures by national courts can play a big role in success or failure of an international commercial arbitration. That is why, this subsection is about to analyze such an issue.

In this regard under national laws, the foreign arbitral provisional measures can be enforced, if the national law of the court allows their recognition and enforcement.[549] Based on this approach, the enforcing courts lend their assistance to arbitrations seated in a foreign country. Although this approach is based on utmost respect for arbitration, but unfortunately it is accepted just by few countries. Neither U.S. nor France and England are among those countries.[550]

Regarding this issue, the disposition of UNCITRAL Model Law is noteworthy. According to the Model Law, which is about to play a role model for national laws in international commercial arbitration, "An interim measure issued by an arbitral tribunal shall be recognized as binding and, unless otherwise provided by the arbitral tribunal, enforced upon application to the competent court, irrespective of the country in which it was issued."[551] This means that under the Model Law there is no difference between arbitral provisional measures granted within the national borders of seat of arbitration and the measures granted beyond the national borders of the seat of arbitration.

549. Ibid, p. 331

550. In England based on Section 2 of Arbitration Act 1996, the enforcement of arbitral peremptory orders, which are the devices of enforcement of arbitral tribunal's orders or directions, are only possible where the seat of arbitration is inside the jurisdictions of England, Wales or Northern Ireland. This means that the recognition and enforcement of the foreign arbitral provisional measures, not qualified as arbitral award, is not possible. It seems that the recognition and enforcement of foreign arbitral provisional measures qualifying as as arbitral award is governed by New York Convention.

551. UNCITRAL Model Law on International Commercial Arbitration, Article 17 H (1); The provisions and conditions set forth in article 17 I are intended to limit the number of circumstances in which the court may refuse to enforce an interim measure. They are tailor made for enforcement of provisional measures, thus are less strict comparing to the conditions of recognition of Final awards. Based on the condition, in order to be enforceable, they don't need to be final.

Keeping the above in mind, it seems that recognition and enforcement of foreign interim measures have not recieved enouph attention under national laws. The fact that international commercial arbitration is a supranational dispute settlement system has not still been appreciated; otherwise, from the author's point of view, national systems should lend their helping hands to the recognition and enforcement of arbitral provisional measures in international commercial arbitration system, irrespective of the country in which those measures are issued. While, we live in the globalisation era, the national systems' response regarding the issue of the recognition and enforcement of foreign arbitral interim measures is not in line with this era. It sounds that the UNCITRAL Model Law, which provides an up to date solution the the problem of recognition and enforcement of foreign arbitral interim measures, can be a good model for national laws in this respect.

Thus, under the author's proposed model, irrespective of the country in which the arbitral provisional measures are issued, the national systems will lend their helping hands to the recognition and enforcement of those measures.

§ II. Recognition and enforcement of foreign arbitral interim measures under the New York Convention[552]

Although the New York Convention is expressly applicable only to the recognition and enforcement of foreign arbitral awards and it is silent on the recognition and enforcement of interim measures, the courts in some countries apply its provisions to the recognition and enforcement of foreign arbitral interim measures. Apparently, this is a useful attempt to overcome/ bypass the lack of an international treaty, expressly applicable on the recognition and enforcement of

552. Under the UNCITRAL Model Law, an interim measure issued by an arbitral tribunal shall be recognized as binding and, unless otherwise provided by the arbitral tribunal, enforced upon application to the competent court, irrespective of the country in which it was issued. This means that, our previous explanations regarding the recognition and enforcement of arbitral provisional measures within the seat of an international commercial arbitration is equally applicable to the recognition and enforcement of arbitral interm measures beyond the national borders of the country hosting the seat of arbitration.

foreign arbitral provisional measures. However, the application of such an approach is not that straightforward.

From one point of view, decisions on provisional measures cannot be ordered in the form of arbitral awards and are not enforceable under the New York convention; because, unlike an award, they are subject to review or revocation and thus are not final. However, based of another point of view, the arbitral tribunals generally have discretion to grant interim measures in various forms and their decisions on these measures are enforceable under the New York Convention, provided that they are enforceable awards in the jurisdiction in which they are granted.[553] In this regard, courts in different countries have adapted various approaches. In general, we can put these approaches into one of the two broad categories.

According to the first approach which is based on conservative interpretation of the New York convention, in a narrow sense, the inherent procedural nature of interim measures is relied on to refuse to consider these measures as an arbitral award for the purposes of recognition and enforcement under the New York Convention.[554] This approach was taken in Resort Condominiums International Inc v Bowell and another (Resort) case.[555] Where, in the course of arbitration proceedings, based on application of the claiment, the arbitral tribunal granted interim measures in the form of an interim arbitration award and Order, precluding the respondent from, inter alia, entering into agreements with any other exchange entity within Australia and using confidential information obtained through the licensing agreement for the duration of the arbitral proceedings.[556] Besides, the respondent was required to make available

553. Ali Yesilirmak. Op. Cit., p. 336

554. Robert Hickie Kieran, Op. Cit., pp. 14-15

555. Resort Condominiums International Inc. v. Ray Bolwell and Resort Condominiums, Pty. Ltd., Supreme Court of Queensland, Australia, 29 October 1993, XX Y.B. COM. ARB. 628 (1995); Robert Hickie Kieran, Op. Cit., p. 14

556. Robert Hickie Kieran, Op. Cit.

financial information and other documentation, open a joint escrow account in the name of both parties and deposit all business revenue under that agreement into that account.[557] Then, based on application of the claimant to enforce the interim award and order in the respondent's country of residence, the Supreme Court of Queensland refused to treat the interim award and order as an arbitral award for the purposes of enforcement under the New York Convention.[558]

Lee J, who presided the Court, stated that "these orders [...] are clearly of an interlocutory and procedural nature and in no way purport to finally resolve the disputes or any of them referred by [the applicant] for decision or to finally resolve the legal rights of the parties. They are provisional only and liable to be rescinded, suspended, varied, or reopened by the tribunal which pronounced them".[559] To reach such a conclusion, Lee J interpreted Article I (1) of the New York convention narrowly, and considered the term differences only refer only to those substantive legal disputes that arose between the parties subject to the arbitration.[560] Relying on Article V (1) (c) of the New York Convention to support this view, Lee J argued that it is clear that the award referred to contemplates only an award which deals with a difference referred or to a difference not referred and beyond the scope of the reference, and not to an order which merely deals with procedural or interlocutory matters.[561]

Fortunately, the courts in other jurisdictions have adopted a different approach in the interpretation of the New York Convention, enabling them to overcome the problems surrounding the recognition and enforcement of interim measures based on above-mentioned first approach. According to the second

557. Ibid

558. Ibid

559. Ibid, p. 15

560. Ibid

561. Ibid

approach which is based on pro-arbitration and modern interpretation of the New York convention, in a wider sense, for the purposes of recognition and enforcement under the New York Convention the effect of interim measures on the arbitral proceedings can be considered final. This means that uner the New York Convention the recognition and enforcement of foreign arbitral interim measures are possible. Such a liberal and purposive approach focuses on the effect of procedural and interlocutory decisions on arbitral proceedings and provides more favorable outcomes in Court proceedings for the recognition and enforcement of foreign arbitral interim measures under the New York Convention.[562] In this respect, the U.S. courts are one of the bigest supporters of the second approach.

According to the U.S. Courts, the absence of an express finality requirement in the New York Convention justifies the application of this convention on the recognition and enforcement of foreign arbitral interim measures. From the latter courts' point of view, "If a procedural determination finally disposes of a severable issue in the arbitral proceedings then it can be treated as an arbitral award (or at least a partial award) for the purposes of enforcement under the Convention".[563] Thus, interim measures are capable of enforcement notwithstanding their provisional or interim nature, their form, or the fact they are not intended finally to resolve all or any of the issues in a dispute.[564] In this respect, the Publicis Communication v True North Communications Inc (Publicis)[565] and Southern Seas Navigation Limited of Monrovia v Petroleos Mexicanos of Mexico City[566] cases of the U.S. courts are noteworthy.

562. Ibid, p.16

563. Ibid

564. Ibid

565. Publicis Communication and Publicis S.A. v True North Communications Inc 206 F. 3d 725 (7th Cir. 2000)

566. Southern Seas Navigation Limited of Monrovia v Petroleos Mexicanos of Mexico City 606 F.Supp. 692 (1985), available at http://law.justia.com/cases/federal/district-courts/FSupp/606/692/2157886/

The Publicis was a case in which a dispute arose between the parties in relation to a joint venture agreement. The defendant sought an interim measure from the arbitral tribunal directing the applicant to provide tax documents in order to satisfy government regulations.[567] The arbitral tribunal granted the measures in the form of an order; its enforcement was sought under the New York Convention. Looking beyond the mere form of the interim measure, the United States Seventh Circuit Court of Appeals held that the order, notwithstanding its procedural nature and form, was enforceable on the basis that it finally put to rest an issue between the parties.[568] To reach such a conclusion, in considering finality of the provisional measure for the purpose of enforcement, the court took the liberal and purposive approach. Based on this approach, in considering whether a measure is final for the purpose of enforcement, it is necessary to look at the substance and impact of the interim measure. This liberal and purposive approach was followed by other cases supporting it.

Southern Seas Navigation Limited of Monrovia v Petroleos Mexicanos of Mexico City was a case in which the US District Court for the Southern District of New York took a similar approach to the above-mentioned Publicis case. In this case various disputes arose between the parties, all of which were submitted to arbitration pursuant to the charter party entered into in 1981.

Southern sought an order removing the notice of claim of lien on grounds it was preventing it from consummating a transfer of Floga and three other vessels in a transaction vital to its continued financial viability. Concluding that they had the power to grant equitable relief, the arbitral tribunal ordered an interim award granting Southern at least partial relief, which required the respondent to remove a notice of lien preventing it from carrying on its business. Then, the Plaintiff, Southern, sought from the United States District Court, S.D. New York, the

567. Robert Hickie Kieran, Op. Cit.

568. Ibid; the New York Convention is incorporated into United States law by the Federal Arbitration Act

confirmation of the interim award.

Relying inter alia, on one hand upon a decision of the Court of Appeals holding that, in the absence of a final award, a district court is without power to review the validity of arbitrators' rulings in ongoing proceedings, and that in order to be final, an arbitration award must be intended by the arbitrators to be their complete determination of all claims submitted to them and, on the other hand, upon the arbitrators' own statement that the award was interim and was not intended to be a final disposition of the merits, the defendant urged the Court not to confirm the award.[569]

Rejecting the arguments of the defendant, the court held that the fact "that the arbitrators labeled their decision an interim award cannot overcome the fact that if an arbitral award of equitable relief based upon a finding of irreparable harm is to have any meaning at all, the parties must be capable of enforcing or vacating it at the time it is made".[570] According to the court, such an award is not interim in the sense of being an intermediate step toward a further end; rather, it is an end in itself, for its very purpose is to clarify the parties' rights in the "interim" period pending a final decision on the merits; the only meaningful point at which such an award may be enforced is when it is made, rather than after the arbitrators have completely concluded consideration of all the parties' claims".[571] In order to preserve the integrity of the arbitration process, this decision of the court offers a practical and purposive approach to the issue of finality with respect to the recognition and enforcement under the New York Convention.[572] This approach enables us to bypass many of the problems surrounding the enforcement of procedural decisions under the New York Convention so long as the decision

569. Ibid

570. Ibid

571. Ibid; Robert Hickie Kieran, Op. Cit., p. 17

572. Ibid

of the arbitral tribunal which it is sought to enforce can be considered to conclude one or more of the severable issues in the arbitration.[573] According to this approach, the court focuses on the particular effect the individual interim measure has on the arbitral proceedings, rather than on the mere label, or the form of the interim measure, or on its inherent nature as a procedural or temporary measure.[574] Based on this method, despite being temporary in nature, interim measures are nevertheless regarded as ultimate and binding for that particular period of time as to the matters determined therein and hence should be subject to enforcement.[575]

Regarding the recognition and enforcement of foreign arbitral provisional measures in England and France under the New York convention, although the disposition of the English and French legal systems are not as clear and rich as as that of the U.S. legal system, it seems that if the measures can qualify as an arbitral award, which finally put to rest an issue between the parties, they can be enforced in these countries. In this regard, in France, if an arbitral award is made abroad, it may only be enforced by virtue of an enforcement order (exequatur) issued by the Tribunal de Grande instance of Paris.[576] The President of the Paris Court of First Instance has jurisdiction over an application for recognition and enforcement of arbitral awards. The party who has a foreign arbitral award in his favor can apply for the recognition and enforcement of the award. In England, an application for leave to enforce an award may be made to the High Court or any County Court. In practice, however, the application should usually be made to the High Court (Commercial Court Registry).

From the above-mentioned cases and observations, we can infer that Article I of the New York Convention expressly provides for the recognition and

573. Ibid

574. Ibid

575. Ibid

576. Code de Procédure Civile, article 1516

enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement is sought, without excluding some types of awards. Thus, it sounds that the awards cover both partial and final awards. Although interim awards, orders and similar procedural directions are by their nature not final; as they are not intended to operate as a res judicata in any respect and are instead open for review, modification, rescission or termination by the arbitral tribunal; taking into account that the New York convention just emphasizes the binding nature of the awards (and not the finality of awards), the provisional measures ordered in the form of partial awards (or ordered in another form, where they contain any final determination of a separate issue) can be enforced based on the New York convention.

In other words, in the absence of an express finality requirement in the New York Convention, if a procedural determination finally disposes of a severable issue in the arbitral proceedings, then it can be treated as an arbitral award (at least a partial award) for the purposes of enforcement under the New York Convention. As a result, foreign arbitral interim measures are capable of enforcement notwithstanding their provisional or interim nature, their form, or the fact they are not intended finally to resolve all or any of the issues in a dispute.[577]

Restraining the ability of the parties to enforce foreign arbitral interim measures under the New York Convention is the result of a strict, conservative and non-purposive reading of the language of the Convention. Although rationale of this approach may have strong legal foundations, it has an unfavorable outcome for the purposes of recognition and enforcement and is against the overall object and purpose of the Convention to enhance the effectiveness of arbitration through facilitating international enforcement of arbitral decisions.

577. Robert Hickie Kieran, Op. Cit., p. 16

Despite the fact that the New York convention, as it is nowadays, can be relied upon for the purpose of recognition and enforcement of foreign arbitral awards, it seems more appropriate if we could design a new express universal mechanism for the recognition and enforcement of foreign arbitral awards. This can be either through amendments to the New York convention, establishing an express rule under this convention for the above-mentioned purpose, or through another international mechanism, such as Hague Convention.

Thus, under the author's proposed model, the foreign arbitral provisional measures, irrespective of their form, in so fas as they contain any final determination of a separate issue, can be recognized and enforced under the New York convention.

Conclusion of Chapter II

Similar to judicial provisional measures in aid of an international commercial arbitration, voluntary compliance with arbitral provisional measurs is not uncommon in international commercial arbitration. If, despite the persuasive power of arbitral tribunal to persuade the defendant to voluntarily comply with arbitral provisional measures, the defendant subject to such measures chooses not to obey the interim measures, he/she can be subject to a fine (financial penalty).

As the law stands now, the recognition and enforcement of arbitral provisional measures granted by arbitral tribunals seated within the national borders are normally straightforward. In so far as they dispose finally of some of the issues in dispute, the recognition and enforcement of arbitral provisional measures generally involve the same processes required for the recognition and enforcement of an award in domestic arbitration; however, from the author's point of view, the approach providing that an arbitral provisional measure is directly enforceable as if it were a court decision reflects utmost trust to arbitral tribunal by equating an arbitral tribunal's decision to a judgment. Because, on practical terms, based on the fact that in this approach the court is not involved in the proceedings for the recognition and enforcement of arbitral interim measure, it is the fastest approach, consistent with the nature of provisional measures which necessitates normally the speedy procedure. To ensure that the due process and interest of state and public is respected, we can set up a procedure enabling the defendant and/or the authority in charge of execution to ask the court to oppose the arbitral provisional measures' recognition and/or enforcement.

Based on the fact that the recognition and enforcement of foreign arbitral interim measures are relatively new issues, they have not received enough attention under national laws; besides, there is no universal system specifically designed for such a cross-border recognition and/or enforcement of interim

measures. In this regard, taking into account that international arbitrations are generally held in, albeit carefully considered and chosen by arbitrating parties, a convenient place that is often neutral to the parties and subject matter of underlying legal relationship, to be effective, an arbitral provisional measure should be enforceable outside the seat of arbitration. The recognition and enforcement of arbitral provisional measures outside the seat of arbitration can be sought either through national laws or under international arrangements such the New York convention.

The UNCITRAL Model Law provides an up to date solution the problem of recognition and enforcement of foreign arbitral interim measures and can be a good model for national laws in this respect. According to the Model Law an interim measure issued by an arbitral tribunal shall be recognized as binding and, unless otherwise provided by the arbitral tribunal, enforced upon application to the competent court, irrespective of the country in which it was issued. However, this rule of UNCITRAL Model Law has not yet received enough attention of the national legislators.

With regard to the New York convention, despite the fact that based on conservative interpretation of the New York convention, in a narrow sense, the inherent procedural nature of interim measures is relied on to refuse to consider these measures as an arbitral award for the purposes of recognition and enforcement under the New York Convention, nowadays based on pro-arbitration and modern interpretation of the New York convention, in a wider sense, the effect of interim measures on the arbitral proceedings can be considered final for the purposes of recognition and enforcement under the New York Convention. Although the New York Convention only is expressly applicable to the recognition and enforcement of foreign arbitral awards and it is silent on the enforcement of interim measures, however, the courts in some countries have tried to apply its provisions to the recognition and enforcement of foreign interim

measures. Apparently, this is a useful attempt to overcome/ bypass the lack of express provisions regarding enforcement of provisional measures. In the absence of an express finality requirement in the New York Convention if a procedural determination finally disposes of a severable issue in the arbitral proceedings then it can be treated as an arbitral award (at least a partial award) for the purposes of enforcement under the New York Convention. As a result, interim measures of protection are capable of enforceable notwithstanding their provisional or interim nature, their form, or the fact they are not intended finally to resolve all or any of the issues in a dispute.

Conclusion of Second Part

In the light of the analysis conducted in the Second Part, in international commercial arbitration the arbitral tribunal as an internationally competent forum hearing, or is about to hear, the case on the merits has a broad power to grant provisional measures, regardless of the location of the assets or of the persons to whom the provisional measures refers. Before the formation of the arbitral tribunal, if the parties have entrusted a third party with the authority to grant binding and enforceable provisional measures, the latter person should be considered as the first and natural authority to deal with provisional measures and its decisions regarding interim measures should be treated the same as arbitral tribunal's decisions. However, the arbitral tribunal and the aforementioned third party are not the sole authorities to grant provisional measures in international commercial arbitration.

Nowadays the concurrent jurisdiction of the national courts and arbitral tribunals are accepted by most of the legal systems, arbitration rules and doctrine. The national courts can also grant provisional measures both in aid of international commercial arbitration taking place within the national borders and beyond the national borders. In so far as the arbitral tribunal or the third party appointed by the parties is able to grant efficient provisional measure, the court should not be allowed to intervene in dispute settlement process, inter alia in provisional measures. Only when arbitral tribunal is unable to grant efficient and/or timely provisional measure, the court should step in. Thus, any potential conflict should in principle be resolved in favor of arbitral tribunal or the third party appointed by the parties.

With regard to determination of the law governing the arbitration proceedings, which is the law applicable to provisional measures, since the considerations likely to guide the parties or the arbitrators in choosing the

applicable laws and/or rules of law are not necessarily the same in the case of arbitration agreement, the merits and the arbitral procedure, the contemporary international commercial arbitration system has rightly accepted that the laws and/or rules governing arbitral procedure is autonomous of those governing arbitration agreement and the rules and/or laws governing the merits of the case. The absence of choice of applicable procedural law by the parties will not automatically lead to the application of the law of seat of arbitration as the law applicable on arbitration proceedings, on the contrary in such circumstances the arbitral tribunal will have a great deal of freedom in choosing the applicable procedure laws and/or rules.

Concerning the recognition and enforcement of arbitral provisional measures and judicial provisional measures in aid of arbitration, thanks to the persuasive power of the forums issuing provisional measures in international commercial arbitrations, judicial and arbitral provisional measures are often voluntarily complied with by the defendants. However, if the defendant subject to these provisional measures, inter alia Mareva-type injunctions, chooses not to obey the interim measure, the forum issuing the provisional measures has normally sufficient control over the person subject to the provisional measure enabling it to manage properly any disobedience. Besides, if the person subject to these provisional measures chooses not to obey, there measures are also capable of being enforced by judicial authorities.

The recognition and enforcement of judicial provisional measures granted in aid of arbitration are normally straightforward within the national borders of the court granting the measures. Equally the recognition and enforcement of arbitral provisional measures within the seat of arbitration are normally straightforward.

Regarding the recognition and enforcement of foreign judicial provisional measures, there is now a tendency to admit the recognition and/or enforcement of

certain foreign provisional measures. With regard to the recognition and enforcement of foreign arbitral interim measures, although they are relatively new issues; nowadays, they can be sought either through national laws or under international arrangements such New York convention.

In the absence of an express finality requirement in the New York Convention, if a procedural determination finally disposes of a severable issue in the arbitral proceedings then it can be treated as an arbitral award (at least a partial award) for the purposes of enforcement under the New York Convention. As a result, under the New York Convention interim measures of protection are capable of enforceable notwithstanding their provisional or interim nature, their form, or the fact they are not intended finally to resolve all or any of the issues in a dispute.

Final Conclusion

In order to enhance the effectiveness of international commercial arbitration to meet the expectations of the parties in today's borderless European Union, we need to provide effective provisional measures consistent with the needs of the era. Otherwise, relying on only the traditional territorial provisional measures will enable mala fide defendants to escape the justice and render themselves judgment-proof. While within the European Union, nowadays day by day, the defendants and their property can pass national borders easily, limiting the scope of provisional measures is not logical. To be efficient, in passing national borders, provisional measures must be as free as the defendants and their property.

In this respect, recurrent inadequacies to be found in provisions of the European Union regarding provisional measures led me to propose new provisions to be adapted. The proposals are designed to assist European Union and member states to equip their regulations/laws with a modern legal framework to more effectively address provisional measures, especially cross-border injunction proceedings in international commercial arbitration.

Taking into account, on one hand, the fact that the European Union is a regional organization with different member states with more or less different legal systems (mostly civil law systems), and on the other hand, the common law origin of Mareva-type in personam injunctions, in elaborating the active in personam European injunctions, despite using the English and U.S. legal systems' disposition as a model, the author has tried to adapt the existing framework with that of the European Union.

With regard to the general framework of active Mareva-type cross-border European injunctions, not convinced by the existing framework under the English and U.S. legal systems, the proposed model has tried to create a well-balanced

mechanism, protecting the interests of both the applicant and the adverse party. In other words, to propose a comprehensive model, analyzing the existing definition, preconditions, requirements and legal safeguards for the adverse party, finding some aspects of them unacceptable, the author has tried to use the positive points of them and to get rid of negative points. Accordingly, in this thesis, the proposed Mareva-type cross-border injunction is called European injunction.

Based on the research conducted in this thesis, a European injunction can be defined as a remedy, in any form, whereby, at any time prior to the execution of the relief by which the substantive international commercial dispute is finally decided by an arbitral tribunal, a court, an arbitral tribunal or any other third party appointed by the parties restrains defendant or third parties from dealing with or disposing of the whole or part of defendant's assets.

In this respect, if the damages in the final relief are not able to protect the plaintiffs sufficiently and the forum has prima facie jurisdiction, to help the plaintiffs to ensure that international commercial arbitration proceedings are not frustrated or undermined, the forum can grant Mareva-type European injunctions with the above-mentioned requirements and characteristics. Especially in the fight against mala fide defendants making the final relief a pyrrhic victory for the plaintiffs, these injunctions are very efficient tools.

Since, these kinds of injunctions are remedies directed against individuals, not directly against property, there is no reason to be concerned about their territorial reach; because it is permissible under international law to order persons otherwise subject to personal jurisdiction of the forum to maintain activities abroad or not to commit acts abroad. The in personam character of these injunctions enables them to bypass the principle of territoriality of traditional interim measures, without being against considerations of comity. Taking into account that the territoriality is not an absolute principle of international law, the seemingly paradox of territoriality of traditional provisional measures and

extraterritoriality of Mareva-type injunctions can be justified. In other words, although the laws of a nation have no direct binding force or effect, except upon persons within its own territories, every nation has a right to bind its own subjects by its own laws in every other place. Based on one of the famous rules in international law, absent a permissive rule to the contrary, whereas states cannot enforce their laws in another state's territory, international law would pose no limits on a state's jurisdiction to prescribe its rules for persons and events outside its borders without a prohibitive rule to the contrary.

Regarding the scope of Mareva-type European injunctions as the main characteristic making these injunctions as one of the nuclear weapons of world of justice, finding the existing framework of Mareva-type injunctions, especially that of the English system mostly up to date and efficient, the author has tried to propose only some small changes, making the existing framework even more efficient.

In this respect, the granting of Mareva-type injunctions directly against third parties and the effect of Mareva-type injunctions over a third party with notice of the injunction, as other aspects of expansion of the scope of provisional measures, are also welcomed by the author. Though the author emphasizes on the establishment of a well-balanced mechanism protecting on one hand the applicant of a Mareva-type European injunction and on the other hand the third parties.

In view of the above, the issue of active Mareva-type cross-border European injunctions was elaborated, by mostly finding the English legal system's disposition as a good model to follow. Whereas the English legal system has provided an almost comprehensive framework for Mareva-Type injunctions and is using these legal tools increasingly day by day, their adoption in the United States' legal system is a little slow. However, the fact that the majority of the courts of the Unites States try to find a way to adopt the Mareva-type injunctions

is a sign showing that the necessity of their existence in the U.S. legal system has been recognized.

With regard to the competent forum to seek provisional measures in international commercial arbitration, in the light of the analysis conducted in this thesis, the arbitral tribunal as an internationally competent forum hearing, or being competent to hear, the case on the merits is the natural forum to seek these measures and it has a broad power to grant provisional measures, regardless of the location of the assets or of the persons to whom the provisional measures refers. In other words, since the international commercial arbitral tribunal is a supranational forum recognized by almost all of the countries of the world, we must assume them the power to grant Mareva-type cross-border European injunctions. In this regard, if the parties entrust a third party with the authority to grant binding and enforceable provisional measures, the latter person should also be considered as the natural authority to deal with provisional measures and its decisions regarding interim measures should be treated the same as arbitral tribunal's decisions.[578] However, the arbitral tribunal and the aforementioned third party are not the sole authorities in dealing with the applications for provisional measures in international commercial arbitration.

Nowadays, the concurrent jurisdiction of national courts is also recognized in the majority of the countries of the world and different international and/or regional conventions and rules. The national courts can grant provisional measures both in aid of international commercial arbitration taking place within the national borders and beyond the national borders. In so far as the arbitral tribunal or the third party appointed by the parties is able to grant efficient and timely provisional measure, the court should not be allowed to intervene. Only when arbitral tribunal or the third party appointed by the parties is unable to grant

578 . Appointment of a third party, for granting provisional measures, is usually done for the period before the 1 formation of the arbitral tribunal.

efficient and/or timely provisional measure, the court should step in. Thus, any potential conflict should in principle be resolved in favor of arbitral tribunal or the third party appointed by the parties.

The parties are usually free to exclude the availability of provisional measures from arbitral tribunals. Taking into account that the parties in international commercial arbitration are usually well aware of the consequences of their contractual determinations, this exclusion is well recognized. With regard to exclusion of jurisdiction of national courts to grant provisional measures, it seems that, despite its acceptance in the majority of the countries, some countries rightly believe that the parties cannot exclude the courts' jurisdiction, at least not totally.

If one of the parties chooses to apply for provisional measures in the wrong forum or the measures are granted wrongly, the damages are recoverable. The arbitral tribunal will be the natural forum to determine the damages.

With respect to the applicable law on provisional measures, it is accepted that the law applicable to these measures are the laws or rules of law applicable to arbitral procedure. The latter laws or rules may be determined by the parties. In the absence of the parties' agreement, the arbitral tribunal will usually determine the applicable laws or rules of law. Since the considerations likely to guide the parties or the arbitrators in choosing the applicable laws or rules of law are not necessarily the same in the case of arbitration agreement, the merits and the arbitral procedure, the contemporary international commercial arbitration system has rightly accepted that the laws or rules governing arbitral procedure is autonomous of those governing arbitration agreements and those governing the merits of the case. So, nowadays, the absence of choice of applicable procedural laws or rules of law by the parties will not necessarily lead to the application of the laws or rules of law of seat of arbitration as the law applicable on arbitration proceedings; on the contrary in such circumstances the arbitral tribunal will have

a great deal of freedom in choosing the applicable procedure laws and/or rules of law. However, in spite of the broad power of the parties or the arbitral tribunals in determining the applicable procedural laws or rules, they cannot exclude all of the laws and rules of the seat of arbitration. The mandatory rules and laws of lex arbitri cannot be excluded. Principles such as equal treatment of the parties and due process cannot be excluded. These principles are very important to the lex arbitri, thus not capable of being excluded by the parties' agreement.

Concerning the recognition and enforcement of judicial and arbitral provisional measures, inter alia Mareva-type European injunctions, thanks to the persuasive power of the forums issuing these measures, voluntarily complying with these measures will not be unusual. However, if the person subject to these provisional measures chooses not to obey, there measures are also capable of being enforced by judicial authorities.

The coercive execution of provisional measures differs based on the forum granting the measures, the form of the measure and the place of forum granting the measure. While, judicial provisional measures granted in aid of arbitration are directly, or through execution offices enforceable at the state where they are ordered, based on the traditional principle that a foreign decision, in order to be recognized or enforced, must be final, the cross-border recognition and enforcement of judicial provisional measures in aid of arbitration is to some extent difficult (except the recognition and enforcement under Recast Brussels I regulation). However, there is now a tendency in legal theory to admit the recognition or enforcement of certain foreign judicial provisional measures.

Regarding the recognition and enforcement of arbitral interim measures at the seat of arbitration, it seems that in most of the countries of the world, including in the U.S., France and England the judicial authorities give executory assistance for enforcement of arbitral decisions on provisional measures. So, the author submits that arbitral provisional awards, in so far as they dispose finally of some

of the issues in dispute, are enforceable. With respect to cross-border recognition and enforcement of foreign arbitral provisional measures, it seems that at the moment their recognition and enforcement under the New York convention is the best existing option. Taking into account that the New York convention just emphasizes the binding nature of the awards (and not the finality of awards), the provisional measures ordered in the form of partial awards (or ordered in another form, where they contain any final determination of a separate issue) can be enforced based on the New York convention.

Concerning the enforcement of Mareva-type injunctions, whereas the enforcement of judicial Mareva-type injunctions normally derive their effectiveness from the personal jurisdiction of the ordering court over the injuncted person and the latter person's fear to be subject to the contempt of court punishment, i.e., a fine, the sequestration of assets or even imprisonment, along with the above-mentioned normal coercive enforcement process available for all the provisional measures, which can also be used for the purpose of the enforcement of judicial and arbitral Mareva-type injunctions, the enforcement of arbitral Mareva-type injunctions can be guaranteed only by monetary fines.

In this regard, it should be noted that the fact that some countries refraining from issuing Mareva-type cross-border injunctions recognize and enforce such injunctions ordered by foreign forums is another sign of progressive acceptance of the necessity of Mareva-type cross-border injunctions in different jurisdictions.

In view of the above, it seems that the laws, rules, regulations, judgments, awards and doctrine form together a trend showing the increasing necessity and acceptance of Mareva-type cross-border injunctions. Therefore, the hypothesis of the thesis is approved. This means that *in the borderless European Union of the 21st century, the adoption of Mareva-type in personam cross-border injunctions, as it exists under the English legal system, is one of the best and most efficient*

ways in protecting the plaintiffs in international commercial arbitrations within the European Union.

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Annexes:

Anex 1

Forms of Freezing Injunction and Search Order

Adapted for use in the Commercial Court

** FREEZING INJUNCTION **

IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

COMMERCIAL COURT

Before The Honourable Mr Justice [ ]

Claim No.

BETWEEN

Claimant(s)

- and –

Defendant(s)

_____

Applicant(s)

Respondent(s)

PENAL NOTICE

If you [ ][579] disobey this order you may be held to be in contempt of court and may be imprisoned, fined or have your assets seized.

Any other person who knows of this order and does anything which helps

579. Insert name of Respondent(s).

or permits the Respondent to breach the terms of this order may also be held to be in contempt of court and may be imprisoned, fined or have their assets seized.

THIS ORDER

1. This is a Freezing Injunction made against [ ] ("the Respondent") on [ ] by Mr Justice [ ] on the application of [ ] ("the Applicant"). The Judge read the Affidavits listed in Schedule A and accepted the undertakings set out in Schedule B at the end of this Order.

2. This order was made at a hearing without notice to the Respondent. The Respondent has a right to apply to the court to vary or discharge the order – see paragraph 13 below.

3. There will be a further hearing in respect of this order on [ ] ("the return date").

4. If there is more than one Respondent-

(a) unless otherwise stated, references in this order to "the Respondent" mean both or all of them; and

(b) this order is effective against any Respondent on whom it is served or who is given notice of it.

FREEZING INJUNCTION

[For injunction limited to assets in England and Wales]

5. Until the return date or further order of the court, the Respondent must not

remove from England and Wales or in any way dispose of, deal with or diminish the value of any of his assets which are in England and Wales up to the value of £ .

[For worldwide injunction]

5. Until the return date or further order of the court, the Respondent must not-

(1) remove from England and Wales any of his assets which are in England and Wales up to the value of £ ; or

(2) in any way dispose of, deal with or diminish the value of any of his assets whether they are in or outside England and Wales up to the same value.

[For either form of injunction]

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

7. This prohibition includes the following assets in particular-

(a) the property known as [title/address] or the net sale money after payment of any mortgages if it has been sold;

(b) the property and assets of the Respondent's business [known as [name]] [carried on at [address]] or the sale money if any of them have been sold; and

(c) any money in the account numbered [account number] at [title/address].

[For injunction limited to assets in England and Wales]

8. If the total value free of charges or other securities ("unencumbered value") of the Respondent's assets in England and Wales exceeds £ , the

Respondent may remove any of those assets from England and Wales or may dispose of or deal with them so long as the total unencumbered value of his assets still in England and Wales remains above £ .

[For worldwide injunction]

8. (1) If the total value free of charges or other securities ("unencumbered value") of the Respondent's assets in England and Wales exceeds £ , the Respondent may remove any of those assets from England and Wales or may dispose of or deal with them so long as the total unencumbered value of the Respondent's assets still in England and Wales remains above £ .

(2) If the total unencumbered value of the Respondent's assets in England and Wales does not exceed £ , the Respondent must not remove any of those assets from England and Wales and must not dispose of or deal with any of them. If the Respondent has other assets outside England and Wales, he may dispose of or deal with those assets outside England and Wales so long as the total unencumbered value of all his assets whether in or outside England and Wales remains above £ .

PROVISION OF INFORMATION

9. (1) Unless paragraph (2) applies, the Respondent must [immediately] [within hours of service of this order] and to the best of his ability inform the Applicant's solicitors of all his assets [in England and Wales] [worldwide] [exceeding £ in value] whether in his own name or not and whether solely or jointly owned, giving the value, location and details of all such assets.

(2) If the provision of any of this information is likely to incriminate the Respondent, he may be entitled to refuse to provide it, but is recommended to take legal advice before refusing to provide the information. Wrongful refusal to provide the information is contempt of court and may render the Respondent liable to be imprisoned, fined or have his assets seized.

10. Within [ ] working days after being served with this order, the Respondent must swear and serve on the Applicant's solicitors an affidavit

setting out the above information.

EXCEPTIONS TO THIS ORDER

11.(1) This order does not prohibit the Respondent from spending £ a week towards his ordinary living expenses and also £ [or a reasonable sum] on legal advice and representation. [But before spending any money the Respondent must tell the Applicant's legal representatives where the money is to come from.]

[(2) This order does not prohibit the Respondent from dealing with or disposing of any of his assets in the ordinary and proper course of business.]

(3) The Respondent may agree with the Applicant's legal representatives that the above spending limits should be increased or that this order should be varied in any other respect, but any agreement must be in writing.

(4) The order will cease to have effect if the Respondent-

(a) provides security by paying the sum of £ into court, to be held to the order of the court; or

(b) makes provision for security in that sum by another method agreed with the Applicant's legal representatives.

COSTS

12. The costs of this application are reserved to the judge hearing the application on the return date.

VARIATION OR DISCHARGE OF THIS ORDER

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

INTERPRETATION OF THIS ORDER

14. A Respondent who is an individual who is ordered not to do something must not do it himself or in any other way. He must not do it through others acting on his behalf or on his instructions or with his encouragement.

15. A Respondent which is not an individual which is ordered not to do something must not do it itself or by its directors, officers, partners, employees or agents or in any other way.

PARTIES OTHER THAN THE APPLICANT AND RESPONDENT

16. **Effect of this order**

It is a contempt of court for any person notified of this order knowingly to assist in or permit a breach of this order. Any person doing so may be imprisoned, fined or have their assets seized.

17. **Set off by banks**

This injunction does not prevent any bank from exercising any right of set off it may have in respect of any facility which it gave to the respondent before it was notified of this order.

18. **Withdrawals by the Respondent**

No bank need enquire as to the application or proposed application of any money withdrawn by the Respondent if the withdrawal appears to be permitted by this order.

[For worldwide injunction]

19. **Persons outside England and Wales**

(1) Except as provided in paragraph (2) below, the terms of this order do not affect or concern anyone outside the jurisdiction of this court.

(2) The terms of this order will affect the following persons in a country or state outside the jurisdiction of this court -

(a) The Respondent or his officer or agent appointed by power of attorney;

(b) Any person who-

(i) is subject to the jurisdiction of this court;

(ii) has been given written notice of this order at his residence or place of business within the jurisdiction of this court; and

(iii) is able to prevent acts or omissions outside the jurisdiction of this court which constitute or assist in a breach of the terms of this order; and

(c) any other person, only to the extent that this order is declared enforceable by or is enforced by a court in that country or state.

[For worldwide injunction]

20. **Assets located outside England and Wales**

Nothing in this order shall, in respect of assets located outside England and Wales, prevent any third party from complying with-

(1) what it reasonably believes to be its obligations, contractual or otherwise, under the laws and obligations of the country or state in which those assets are situated or under the proper law of any contract between itself and the Respondent; and

(2) any orders of the courts of that country or state, provided that reasonable notice of any application for such an order is given to the Applicant's solicitors.

COMMUNICATIONS WITH THE COURT

All communications to the court about this order should be sent to Room EB09, Royal Courts of Justice, Strand, London WC2A 2LL quoting the case number. The telephone number is 020 7947 6826.

The offices are open between 10 a.m. and 4.30 p.m. Monday to Friday.

SCHEDULE A

AFFIDAVITS

The Applicant relied on the following affidavits-

[name] [number of affidavit] [date sworn][filed on behalf of]

(1)

(2)

SCHEDULE B

UNDERTAKINGS GIVEN TO THE COURT BY THE APPLICANT

(1) 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 Applicant will comply with any order the court may make.

[(2) The Applicant will-

(a) on or before [date] cause a written guarantee in the sum of £ to be issued from a bank with a place of business within England or Wales, in respect of any order the court may make pursuant to paragraph (1) above; and

(b) immediately upon issue of the guarantee, cause a copy of it to be served on the Respondent.]

(3) As soon as practicable the Applicant will issue and serve a claim form [in the form of the draft produced to the court] [claiming the appropriate relief].

(4) The Applicant will [swear and file an affidavit] [cause an affidavit to be sworn and filed] [substantially in the terms of the draft affidavit produced to the court] [confirming the substance of what was said to the court by the Applicant's counsel/solicitors].

(5) The Applicant will serve upon the Respondent [together with this order] [as soon as practicable]-

(i) copies of the affidavits and exhibits containing the evidence relied upon by the Applicant, and any other documents provided to the court on the making of the application;

(ii) the claim form; and

(iii) an application notice for continuation of the order.

[(6) Anyone notified of this order will be given a copy of it by the Applicant's legal representatives.]

(7) The Applicant will pay the reasonable costs of anyone other than the Respondent which have been incurred as a result of this order including the costs of finding out whether that person holds any of the Respondent's assets and if the court later finds that this order has caused such person loss, and decides that such person should be compensated for that loss, the Applicant will comply with any order the court may make.

(8) If this order ceases to have effect (for example, if the Respondent provides security or the Applicant does not provide a bank guarantee as provided for above) the Applicant will immediately take all reasonable steps to inform in writing anyone to whom he has given notice of this order, or who he has reasonable grounds for supposing may act upon this order, that it has ceased to have effect.

[(9) The Applicant will not without the permission of the court use any information obtained as a result of this order for the purpose of any civil or criminal proceedings, either in England and Wales or in any other jurisdiction, other than this claim.]

[(10) The Applicant will not without the permission of the court seek to enforce this order in any country outside England and Wales [or seek an order of a

similar nature including orders conferring a charge or other security against the Respondent or the Respondent's assets].]

NAME AND ADDRESS OF APPLICANT'S LEGAL REPRESENTATIVES

The Applicant's legal representatives are-

[Name, address, reference, fax and telephone numbers both in and out of office hours and e-mail]

Anex 2

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No._____

,

Plantiff,

v.

,

Defendant

BOND FOR [TEMPORARY RESTRAINING ORDER] [PRELIMINARY INJUNCTION]

[Counsel or a pro se party shall modify this form as necessary and complete and file it as a bond

instrument in circumstances involving a surety.]

Plaintiff and principal has commenced an action against defendant(s)

and has applied for a [temporary restraining order] [preliminary injunction] against

defendant(s), enjoining and restraining them from the commission of certain acts, as in the complaint more

particularly described.

Now, the undersigned, a corporation as surety, in consideration of the

premises, and of the issuing of a [temporary restraining order] [preliminary injunction], does undertake in

the sum of dollars, and promise that if a [temporary restraining order] [preliminary

injunction] order shall issue the plaintiff will pay to the parties enjoined such damages, not exceeding the

sum of dollars, as they may incur or suffer if found to have been wrongfully enjoined

or restrained.

has caused this undertaking to be signed and its corporate seal affixed

by its duly authorized attorney-in-fact at this day of .

by:

Plaintiff-Principal's Name Attorney-in-fact's Signature for Surety

Attorney-in-fact's Name

Attorney-in-fact's Address