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THE GRANTING OF MAREVA INJUNCTIONS IN SUPPORT OF FOREIGN COURT PROCEEDINGS

In an increasingly interconnected and borderless world, Mareva injunctions in support of foreign court proceedings can play an important role in preserving assets which the defendant might otherwise dissipate for the purpose of avoiding satisfaction of the foreign judgment. However, there is some uncertainty as to whether the Singapore court has the power to grant such Mareva injunctions. There appears to be some conflict between the judgments given in this area. This article examines the jurisdictional requirements and existence of power for such Mareva injunctions.

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I. Introduction

1 Today, money flows quickly, instantly, across borders. People travel from one end of the globe to another faster and more conveniently than ever before. Legal systems remain national. The substantive jurisdiction of any particular legal system is likely tied to connecting factors of the dispute to that jurisdiction, but where assets are located or remain has no such correlation. Judgments and orders made in one country are toothless in another, unless recognised or enforced by that other country's courts. Legal proceedings are expensive and take time, and while a creditor is seeking judgment in one jurisdiction he may want to preserve the debtor's assets located in a different jurisdiction so that at the end of the process he is able to enforce his judgment, and his expenditure on legal costs will not have been in vain. To this end, he may want to obtain a Mareva injunction, also known as a freezing order, from the court of the jurisdiction where the assets are located. Depending on the applicable law and attitude of the court of the forum in which he is suing, a worldwide Mareva injunction from that court may not be forthcoming. Moreover, the enforceability and utility of a worldwide Mareva injunction against a foreign third party bank which is not subject to the jurisdiction of the

court of the forum issuing the worldwide Mareva injunction may be limited. This is because the order of the issuing court is only enforceable against the foreign bank if declared to be enforceable by the foreign court, and the order so granted is likely to be worded such that it does not interfere with the legal obligations of the foreign bank imposed by the law of the foreign jurisdiction, so as not to offend the principles of international comity.[1]

2 Picture this scenario. A plaintiff is suing a defendant, who is resident in Hong Kong, for breach of contract. The plaintiff is suing the defendant in Hong Kong because Hong Kong is the natural forum due to the various connecting factors to Hong Kong, and the contract which the plaintiff is suing on contains a non-exclusive choice of court agreement specifying the Hong Kong courts as the forum for dispute resolution. However, the defendant's assets are all in Singapore and the value of his assets in Hong Kong is insufficient to satisfy the judgment sum if the plaintiff eventually succeeds in the Hong Kong suit. The plaintiff is worried that in the event that he succeeds in the Hong Kong suit, the judgment would be worthless because the defendant would in all likelihood have dissipated his assets in Singapore, or removed them elsewhere, so as to prevent meaningful enforcement of the plaintiff's prospective judgment from Hong Kong. The question to be answered is whether the plaintiff can obtain a Mareva injunction from the Singapore court over the defendant's assets in Singapore so as to prevent the defendant from dissipating or removing those assets. In other words, can the plaintiff get an interim Mareva injunction in Singapore in respect of assets in Singapore in aid of the Hong Kong proceedings?

3 Simply put, the Mareva injunction prevents the defendant from freely exercising his rights over his assets so as to protect the plaintiff's position by preserving assets which the defendant might otherwise dissipate for the purpose of avoiding satisfaction of the judgment. There are three requirements to obtain such a Mareva injunction in Singapore. First, the Singapore court must have *in personam* jurisdiction over the defendant. Second, the court must have the power to grant the injunction. Third, the court must decide that an injunction is appropriate on the specific facts of the case, namely, there is a good arguable case on the merits of the plaintiff's claim, and there is a real risk that the defendant will dissipate his assets to frustrate the enforcement of an anticipated judgment of the court. Here, the discussion will focus on the first two requirements.

4 It is important to draw a clear distinction between the first two requirements. The first requirement, which is about establishing

1 For instance, see Supreme Court Practice Directions 2010, Form 7.

in personam jurisdiction of the court over the defendant, concerns territorial jurisdiction and is especially relevant when one deals with a foreigner outside the jurisdiction. On the other hand, the second requirement concerns whether the Singapore court has the power to grant the Mareva injunction after the court has properly assumed jurisdiction over the defendant.[2] Some cases use the word "jurisdiction" to mean both *in personam* jurisdiction under the first requirement and the power to grant the Mareva injunction under the second requirement. As a matter of conceptual clarity, separate terminology shall be used in this article.

5 One should also consider whether the first requirement of *in personam* jurisdiction has been established *before* considering the second requirement of whether the court has the power to grant the Mareva injunction. Hence, if *in personam* jurisdiction of the court over the defendant is not established, then there is no need to consider the second requirement.

II. Establishing *in personam* jurisdiction: The need for a pre-existing cause of action

6 If the defendant is resident in Singapore, it is easy to establish *in personam* jurisdiction over the defendant: personal service of the writ on the defendant will suffice.[3]

7 However, in the scenario outlined earlier, the defendant is not resident in Singapore but in Hong Kong and that makes things a little more complicated. Pursuant to s 16(1)(*a*)(ii) of the Supreme Court of Judicature Act,[4] the defendant can be brought within the *in personam* jurisdiction of the Singapore court by serving a writ on the defendant out of jurisdiction with leave of court, in accordance with the Rules of Court.[5] The requirements for obtaining leave of court for service of originating process out of Singapore are clear. First, there must be a good arguable case that at least one of the specified heads of jurisdiction under O 11 r 1 of the Rules of Court is satisfied. Secondly, there must be at least a serious issue to be tried on the merits of the case. Thirdly, it must be shown that Singapore is clearly the appropriate forum for the trial of the dispute. The fundamental consideration for the third requirement is whether Singapore is the natural forum to hear the case,

2 See also *Mercedes Benz AG v Leiduck* [1996] AC 284 at 297.
3 Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) s 16(1)(*a*)(i).
4 Cap 322, 2007 Rev Ed.
5 Cap 322, R 5, 2014 Rev Ed. See O 11 r 2 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed).

and how much weight to be placed on the various connecting factors to Singapore is often open to argument.

8 Regarding the first requirement of having a good arguable case of at least one of the specified heads of jurisdiction under O 11 r 1, can the plaintiff simply rely on the fact that he is seeking a Mareva injunction against the defendant's assets in Singapore to argue that his case falls within the head of jurisdiction under O 11 r 1(*b*)? Order 11 r 1(*b*) provides that service of an originating process out of Singapore is permissible with the leave of the court if in the action, "an injunction is sought ordering the defendant to do or refrain from doing anything in Singapore". So can the plaintiff simply say that since a Mareva injunction is an injunction, it automatically falls within O 11 r 1(*b*)?

9 The answer is "no" – the fact that the plaintiff is seeking a Mareva injunction does not automatically mean that the plaintiff's claim falls within the specified head of jurisdiction under O 11 r 1(*b*). The Court of Appeal considered this question in the case of *Karaha Bodas Co LLC v Pertamina Energy Trading Ltd*[6] ("*Karaha Bodas*"). In that case, the Court of Appeal followed the English House of Lords case of *Siskina v Distos Compania Naviera SA*[7] ("*The Siskina*") and the Privy Council decision on appeal from Hong Kong of *Mercedes Benz AG v Leiduck*[8] ("*Mercedes Benz*") in holding that there must be a pre-existing cause of action to which the injunction was merely ancillary.[9] The Court of Appeal reasoned that this position was borne out by reference in O 11 r 1 to an injunction being sought in "the action" and the fact that O 11 r 2(1)(*b*) required a plaintiff to state that he believed he had a "good cause of action", hence implying that there must be a pre-existing cause of action to which the injunction was merely ancillary. In this connection, the Court of Appeal also held that in order to apply for a Mareva injunction, the plaintiff must possess a right of action against the defendant that had accrued at the time of the application.[10] Practically speaking, that means that the plaintiff must first commence substantive proceedings against the defendant by asserting a cause of action before or at the time of application for a Mareva injunction.[11] The plaintiff will have to show a *prima facie* cause of action against the

6 [2006] 1 SLR(R) 112.
7 [1979] AC 210.
8 [1996] AC 284.
9 *Karaha Bodas Co LLC v Pertamina Energy Trading Ltd* [2006] 1 SLR(R) 112 at [42]–[43].
10 *Karaha Bodas Co LLC v Pertamina Energy Trading Ltd* [2006] 1 SLR(R) 112 at [44].
11 *Karaha Bodas Co LLC v Pertamina Energy Trading Ltd* [2006] 1 SLR(R) 112 at [44]. See also *Swift-Fortune Ltd v Magnifica Marine SA* [2006] 1 SLR(R) 629 at [9] and [87].

defendant.[12] Therefore, without a good arguable case that at least one of the specified heads of jurisdiction under O 11 r 1 is satisfied, including that there is a *prima facie* accrued cause of action, the plaintiff would not be granted leave of court to serve the originating process out of Singapore.

10 On the facts of *Karaha Bodas*, *in personam* jurisdiction of the Singapore court over the foreign defendant was not established because the foreign defendant was a Hong Kong entity with no presence in Singapore but which simply held assets in Singapore, and the applicant did not make a substantive claim against the defendant.[13] In that case, the plaintiff merely applied for a Mareva injunction and an order granting the plaintiff leave to serve the order and a sealed copy of the originating summons on the defendant in Hong Kong.[14] As for the local defendant, which was a Singapore-incorporated company and thus subject to the ordinary jurisdiction of the Singapore court, the Court of Appeal discharged the Mareva injunction because at the time of applying for the Mareva injunction, the plaintiff had no accrued right of action against the local defendant, and this was tantamount to obtaining a security for a future cause of action, which the law did not permit.[15]

11 The Court of Appeal in *Karaha Bodas* also considered the minority opinion by Lord Nicholls of Birkenhead in *Mercedes Benz*.[16] Lord Nicholls held that the head of jurisdiction under O 11 r 1(1)(*b*) would apply to a claim for a Mareva injunction when it comprised the sole relief sought. His opinion was that there was nothing exorbitant about this jurisdiction provided the anticipated judgment was one which would be recognised and enforceable in the forum. According to Lord Nicholls, the law took a wrong turn in *The Siskina* by wrongly tying Mareva relief to the underlying cause of action rather than the enforcement of the prospective judgment which was the rationale of a Mareva injunction. The court when hearing an application for a Mareva injunction is concerned with the plaintiff's prospects of obtaining the judgment whose efficacy he is seeking to protect; therefore, it is not essential that the cause of action must have accrued. Lord Nicholls further held that where, as in that case, the judgment obtained abroad could be enforced in Hong Kong, the plaintiff should be entitled to bring an action claiming a Mareva injunction as a substantive relief.[17] The Court of Appeal did not accept Lord Nicholls' views because it

12 *Multi-Code Electronics Industries (M) Bhd v Toh Chun Toh Gordon* [2009] 1 SLR(R) 1000 at [98]–[99].
13 *Karaha Bodas Co LLC v Pertamina Energy Trading Ltd* [2006] 1 SLR(R) 112 at [43].
14 *Karaha Bodas Co LLC v Pertamina Energy Trading Ltd* [2006] 1 SLR(R) 112 at [2].
15 *Karaha Bodas Co LLC v Pertamina Energy Trading Ltd* [2006] 1 SLR(R) 112 at [44].
16 *Karaha Bodas Co LLC v Pertamina Energy Trading Ltd* [2006] 1 SLR(R) 112 at [42].
17 See *Swift-Fortune Ltd v Magnifica Marine SA* [2006] 1 SLR(R) 629 at [84].

found the majority's interpretation of O 11 persuasive.[18] Therefore, the Court of Appeal has firmly decided that *in personam* jurisdiction of the Singapore court over the defendant is required before a Mareva injunction can be granted against the defendant, and there is no inherent jurisdiction to allow the granting of free-standing Mareva injunctions.

12 It is worth noting that it was Lord Denning MR sitting in the English Court of Appeal in *The Siskina* who first suggested that the English court had an inherent jurisdiction to attach assets so that they could be available to satisfy a future judgment of a foreign court. Even though the House of Lords rejected his suggestion on appeal, the Australian courts have since 1982 adopted this concept of inherent jurisdiction of the court to form the basis of free-standing Mareva injunctions, hence bypassing the *The Siskina* doctrine.[19] The High Court of Australia has affirmed that interlocutory injunctive relief of the kind historically given by the Court of Chancery cannot be granted unless there is an underlying cause of action. However, it has expressly distinguished Mareva injunctions, the juridical basis of which is the court's inherent power to prevent the frustration of its process. Accordingly, the Australian courts have permitted a more flexible approach for the availability of Mareva injunctions without the need for legislative reform.

13 For completeness, it should be noted that the *The Siskina* doctrine has effectively been reversed by statutory reform in England. First, there is s 25 of the Civil Jurisdiction and Judgments Act 1982[20] which conferred a statutory jurisdiction to grant interim relief, including Mareva relief, in aid of proceedings brought or to be brought in a contracting state to the Brussels Convention 1968[21] ("Brussels Convention"), subsequently widened to include contracting states to the Lugano Convention.[22] Secondly, the Civil Jurisdiction and Judgments Act 1982 (Interim Relief) Order 1997[23] empowers the High Court to grant interim relief under s 25(1) of the Civil Jurisdiction and Judgments Act 1982 in relation to "proceedings" regardless of where they are commenced or whether their "subject-matter" comes within Art 1 of the Brussels Convention. Further, earlier difficulties with regard

18 *Karaha Bodas Co LLC v Pertamina Energy Trading Ltd* [2006] 1 SLR(R) 112 at [42].

19 See generally James J Spigelman AC, "Freezing Orders in International Commercial Litigation" (2010) 22 SAcLJ 490 at 497–502, paras 32–52.

20 c 27 (UK).

21 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (27 September 1968).

22 Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (16 September 1988).

23 SI 1997 No 302 (UK).

to service out of the jurisdiction of the originating process commencing free-standing proceedings for interim relief under s 25 were done away with because of the coming into force of O 11 r 8A of the former Rules of the Supreme Court, now r 6.20(4) of the Civil Procedure Rules, which permits service out of the jurisdiction of a claim made "for an interim remedy under section 25 (1) of the 1982 Act".[24] Now that the Court of Appeal in *Karaha Bodas* has firmly decided that *in personam* jurisdiction of the Singapore court over the defendant is required before a Mareva injunction can be granted against the defendant, it would be difficult to imagine a differently constituted Court of Appeal overruling *Karaha Bodas* and adopting the Australian approach of recognising an inherent extra-territorial jurisdiction so as to dispense with the requirement for *in personam* jurisdiction over the defendant. Hence, any change in the legal position will require legislation.

14 An interesting situation arises where the Singapore court grants a Mareva injunction, but the defendant then successfully argues for a stay of the Singapore proceedings, perhaps on the ground that Hong Kong is the natural forum, or on the ground of *lis alibi pendens*, that is, that there is already a claim pending in the Hong Kong courts in which the plaintiff is claiming substantially the same remedy. The question is whether the defendant is still within the *in personam* jurisdiction of the Singapore court upon the grant of the stay of the Singapore proceedings.

15 The answer is "yes". In *Multi-Code Electronics Industries (M) Bhd v Toh Chun Toh Gordon*[25] ("*Multi-Code*"), the High Court held that where the Singapore proceedings were stayed, the Singapore court retained a residual jurisdiction over the underlying cause of action and that *per se* was sufficient to ground the Singapore court's jurisdiction to allow the continuation of the Mareva injunction that was granted, provided that there was all along a substantive justiciable claim that would have been tried in the Singapore court and would have ended with a Singapore judgment had the action not been stayed.[26] The High Court elaborated that the residual jurisdiction would allow the stayed Singapore action to be revived and carried forward to judgment in the Singapore court if, for some reason, the stay was subsequently lifted by the Singapore court. Such a stay could potentially be lifted, for example, where the foreign judgment could not be registered and enforced in Singapore because of the restrictions on registration of judgment under

24 See Stephen Gee, *Commercial Injunctions* (London: Sweet & Maxwell, 5th Ed, 2004) at para 1.027.

25 [2009] 1 SLR(R) 1000.

26 *Multi-Code Electronics Industries (M) Bhd v Toh Chun Toh Gordon* [2009] 1 SLR(R) 1000 at [79].

the Reciprocal Enforcement of Commonwealth Judgments Act.[27] The situation might be different if the stayed action in Singapore had been struck out completely, in which case the whole action in Singapore was extinguished.[28]

16 The lesson for the defendant is that where Hong Kong and not Singapore is the natural forum for the dispute, the defendant should not apply for a stay of the Singapore proceedings in favour of the Hong Kong proceedings, for the Singapore court still has residual jurisdiction to allow the continuation of the Mareva injunction that was granted. Instead, the defendant should seek to set aside the service of the process out of jurisdiction on the basis that leave for service out of Singapore should not have been given as Singapore was not the appropriate forum to try the case. If the service of the process has been set aside, the Singapore court no longer has jurisdiction over the main action; hence, the Mareva injunction granted would lapse due to the lack of jurisdiction by the Singapore court. This shows the difficulty of requiring *in personam* jurisdiction of the Singapore court over a foreign defendant where the various connecting factors point to another jurisdiction instead of Singapore being the natural forum to resolve the dispute. Where the defendant applies pursuant to O 12 r 7(1) to set aside service of the process out of Singapore, the burden is on the plaintiff to prove a proper case for service out, and the plaintiff will have to establish that Singapore is a better *prima facie* forum than Hong Kong for the adjudication of the dispute (stage one of the *Spiliada* test). Where the plaintiff fails to show that Singapore is a better *prima facie* forum, that should not be the end of the plaintiff's case. It is conceivable that the plaintiff can then go on to argue that he will be denied substantial justice if service of the process out of Singapore is set aside (stage two of the *Spiliada* test). Perhaps the plaintiff can show that if service of the process is set aside such that he is unable to obtain the Mareva injunction from the Singapore court, that in itself will constitute denial of substantial justice because he is able to demonstrate that there is a real risk of the defendant dissipating his assets. Therefore, even though there is a requirement for the court to establish *in personam* jurisdiction over the defendant before a Mareva injunction can be granted, and that requirement may not be fulfilled if the service of process out of jurisdiction is set aside, there is some latitude for the courts in deciding whether service of process should be set aside when the court considers that this would mean denying the plaintiff substantial justice if the service process is set aside. If the courts are amenable to such arguments

27 Cap 264, 1985 Rev Ed. *Multi-Code Electronics Industries (M) Bhd v Toh Chun Toh Gordon* [2009] 1 SLR(R) 1000 at [79] and [112].

28 *Multi-Code Electronics Industries (M) Bhd v Toh Chun Toh Gordon* [2009] 1 SLR(R) 1000 at [104].

of denial of substantial justice, this may serve to ameliorate the arguably rigid requirement for *in personam* jurisdiction of the Singapore court over the defendant before a Mareva injunction can be granted against the defendant.

17 If the defendant does not succeed in its setting aside application, whether on the basis that Singapore is not the natural forum or that the plaintiff does not have a *prima facie* cause of action, it will be open to the defendant to make an application to strike out the plaintiff's action entirely on the basis that the plaintiff's claim discloses no reasonable cause of action.[29] A striking out application would allow the court to examine all the pleadings and facts in some detail to satisfy itself that the plaintiff has a reasonable cause of action and not merely a *prima facie* cause of action. Where the plaintiff's action has been struck out and hence is extinguished, the Singapore court would cease to retain any form of jurisdiction to ground the Mareva injunction.[30]

III. The existence and exercise of power to grant Mareva injunctions in aid of foreign court proceedings

18 In Singapore, it is clear that a Mareva injunction can be obtained from the Singapore court in support of foreign arbitrations.[31] However, it remains unclear whether the Singapore court has the power to grant such Mareva injunctions in aid of foreign *court* proceedings. In this regard, there appears to be a conflict of authorities.

A. Evaluation of Petroval v Stainsby

19 In the first High Court case of *Petroval SA v Stainby Overseas Ltd*[32] ("*Petroval*"), the plaintiff, which had its address in France, commenced an action in Singapore against the defendants who had their addresses in either the British Virgin Islands ("BVI") or Switzerland. The sole ground upon which the plaintiff based its jurisdiction for the Singapore action was O 11 r 1 of the Rules of Court, namely, that the defendants had assets in Singapore which included private apartments and bank accounts. The plaintiff then took out an application for a Mareva injunction against disposal of assets by all the defendants, receivership orders against the corporate defendants and, upon the grant of such relief, a stay of the Singapore action until the final disposal of the

29 *Multi-Code Electronics Industries (M) Bhd v Toh Chun Toh Gordon* [2009] 1 SLR(R) 1000 at [99].

30 *Multi-Code Electronics Industries (M) Bhd v Toh Chun Toh Gordon* [2009] 1 SLR(R) 1000 at [90], [99] and [103].

31 See s 12A(2) of the International Arbitration Act (Cap 143A, 2002 Rev Ed).

32 [2008] 3 SLR(R) 856.

action commenced in the High Court in the BVI. Hence, it was clear that the merits of the claim would not be determined in Singapore but in the BVI, and the plaintiff's sole purpose for commencing the Singapore action was to obtain the Mareva injunction and receivership order. Essentially, the plaintiff was seeking to enforce the injunctive relief (freezing and receivership orders) granted by the BVI court.

20 The High Court granted the plaintiff's *ex parte* application for those interim orders and also ordered a stay of the Singapore action until final disposal of the BVI action, but later allowed the defendants' application to set aside those interim orders. The High Court gave essentially two reasons for setting aside the Mareva injunction. The first reason was that the plaintiff 's substantive claim must not only be justiciable in the Singapore court but should also terminate in a Singapore judgment; and the second was that the High Court had no power under s 4(10) of the Civil Law Act[33] to grant an injunction in aid of foreign proceedings. Each of these two reasons shall be analysed.

21 The first reason given by the High Court was that it was of the view that the Court of Appeal in *Swift-Fortune Ltd v Magnifica Marine SA*[34] ("*Swift-Fortune*") re-affirmed and applied the principles in *The Siskina*, one of which was that "the substantive claim must not only be justiciable in an English Court but should also terminate in an English judgment",[35] and that the Court of Appeal had declined to adopt the restatement of the relevant principle in *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd*[36] ("*Channel Tunnel*").[37] In other words, the High Court was of the view that it was bound by what it thought was the Court of Appeal's decision in *Swift-Fortune* that the court only had power (or should only exercise its power, if any) to grant a Mareva injunction if the substantive claim would terminate in a Singaporean judgment. Accordingly, since the merits of the claim would not be determined in Singapore but in the BVI, the High Court in *Petroval* held that the plaintiff's cause of action was not justiciable within the doctrine of *The Siskina*.[38]

22 With respect, it is submitted that the High Court was wrong to state that the Court of Appeal in *Swift-Fortune* affirmed the principle in *The Siskina* that "the substantive claim must not only be justiciable in an English Court but should also terminate in an English judgment". To

33 Cap 43, 1999 Rev Ed.
34 [2007] 1 SLR(R) 629.
35 *Swift-Fortune Ltd v Magnifica Marine SA* [2007] 1 SLR(R) 629 at [62].
36 [1993] AC 334.
37 *Petroval SA v Stainby Overseas Ltd* [2008] 3 SLR(R) 856 at [13].
38 *Petroval SA v Stainby Overseas Ltd* [2008] 3 SLR(R) 856 at [17].

proceed further, it is necessary to elaborate on what the Court of Appeal stated to be the law in *Karaha Bodas*, which *Swift-Fortune* referred to.

23 In *Karaha Bodas*, the Court of Appeal recognised that three legal principles arose out of *The Siskina*:[39]

> (a) First, O 11 r 1(1) of the English Rules of Court did not allow the English court to assume jurisdiction against a foreign defendant on the merits of a claim just because the defendant had assets in England and the plaintiff had asked for a Mareva injunction against these assets.
>
> (b) Second, there was no jurisdiction to grant a Mareva injunction unless and until the plaintiff had an accrued right of action. These two principles were mentioned above in the discussion on the requirement of the Singapore court establishing *in personam* jurisdiction over the defendant.
>
> (c) Third, there was no power to preserve assets within the jurisdiction of the court which would be needed to satisfy a claim against a defendant if it eventually succeeded, regardless of where the merits of a substantive claim were to be decided. In other words, the statutory power to grant injunctions did not empower the court to grant free-standing interlocutory relief brought in proceedings claiming only that type of relief within England in order to support the plaintiff in a claim he was making in a foreign jurisdiction.

24 The Court of Appeal in *Karaha Bodas* affirmed and applied the first and second principles of *The Siskina*, but made it clear that since the application of the first and second principles were sufficient to dispose of the appeal, the third principle did not arise for decision in that appeal.[40] As stated earlier, the first and second principles relate to the establishment of *in personam* jurisdiction of the court over the defendant, while the third principle relates to the existence (or exercise) of power of the court to grant the Mareva injunction. It may be recalled that on the facts of *Karaha Bodas*, *in personam* jurisdiction of the Singapore court over the foreign defendant was not established because the foreign defendant was a Hong Kong entity with no presence in Singapore but which simply held assets in Singapore, and the applicant did not make a substantive claim against the defendant.[41] In that case, the plaintiff merely obtained a Mareva injunction and an order granting the plaintiff leave to serve the order and a sealed copy of the originating

39 *Karaha Bodas Co LLC v Pertamina Energy Trading Ltd* [2006] 1 SLR(R) 112 at [35] and [45].

40 *Karaha Bodas Co LLC v Pertamina Energy Trading Ltd* [2006] 1 SLR(R) 112 at [45].

41 *Karaha Bodas Co LLC v Pertamina Energy Trading Ltd* [2006] 1 SLR(R) 112 at [43].

summons on the defendant in Hong Kong.[42] Hence, the Court of Appeal did not have to consider the issue of whether it had the power to grant a Mareva injunction. Nevertheless, the Court of Appeal noted that there had been considerable debate on the extent to which the third principle was still in force,[43] probably because of *Channel Tunnel*, the significance of which will be elaborated upon below.[44] It was also the view of the Court of Appeal in *Swift-Fortune* that the Court of Appeal in *Karaha Bodas* did not endorse the third principle.[45]

25 As stated earlier, the first reason given by the High Court in *Petroval* was based on the High Court's view that this third principle in *The Siskina* was affirmed and applied in *Swift-Fortune*:[46]

> In my view, the Court of Appeal was re-affirming and applying the principles in *Siskina v Distos Compania Naviera SA* [1979] AC 210 ('*The Siskina*'), one of which is that '*The Siskina* doctrine contemplated that the substantive claim must not only be justiciable in an English court but should also terminate in an English judgment' (at [62] of the Court of Appeal's judgment).

26 However, with respect, that is not correct. It is clear that the paragraph in *Swift-Fortune* cited by the High Court in *Petroval* merely stated what the general understanding of third principle was in the *The Siskina* doctrine without endorsing it:[47]

> We should add that this conclusion is also consistent with the general understanding in 1994, *ie*, the decision of the House of Lords in *Channel Tunnel* ([47] *supra*) that the *The Siskina* doctrine contemplated that the substantive claim must not only be justiciable in an English court but should also terminate in an English judgment: see *Karaha Bodas* ([4] *supra*) at [38].

27 The above quotation which was relied on by the High Court in turn cited *Karaha Bodas*, which also merely stated the English law position after *The Siskina* without endorsing it:[48]

> As the respondents submitted, after *The Siskina*, it was settled English law that a plaintiff could never get a Mareva order which was essentially ancillary to proceedings that were pending in a foreign court where the defendant was not within the *in personam* jurisdiction of the English court. An English court would only grant a Mareva injunction in respect of a dispute which was being substantially

42 *Karaha Bodas Co LLC v Pertamina Energy Trading Ltd* [2006] 1 SLR(R) 112 at [2].
43 *Karaha Bodas Co LLC v Pertamina Energy Trading Ltd* [2006] 1 SLR(R) 112 at [45].
44 See para 30 below.
45 *Swift-Fortune Ltd v Magnifica Marine SA* [2007] 1 SLR(R) 629 at [68].
46 *Petroval SA v Stainby Overseas Ltd* [2008] 3 SLR(R) 856 at [13].
47 *Swift-Fortune Ltd v Magnifica Marine SA* [2007] 1 SLR(R) 629 at [62].
48 *Karaha Bodas Co LLC v Pertamina Energy Trading Ltd* [2006] 1 SLR(R) 112 at [38].

> litigated in England in which some legal or equitable right of the plaintiff was being invaded and which could be protected and enforced within England by a final judgment in England.

28 It is clear that the Court of Appeal in *Swift-Fortune* did not approve the third principle in *The Siskina* as it stated that given the facts of that appeal, its decision would not "take the law beyond the *The Siskina* doctrine as applied in *Karaha Bodas*, and confirmed in *Mercedes Benz*".[49] As stated above, the Court of Appeal in *Karaha Bodas* affirmed and applied the first and second principles of *The Siskina* but made clear that the third principle did not arise for decision in that appeal.[50] On the facts of *Swift-Fortune*, the Court of Appeal held that the applicant did not have a justiciable right against the respondent when it obtained the *ex parte* Mareva injunction and would never have it at any time.[51] Therefore, *Swift-Fortune* was decided on the basis that the applicant in that case did not establish the Singapore court's *in personam* jurisdiction over the respondent;[52] hence, the third principle, which relates to the existence of the court's power to grant a Mareva injunction, also did not arise for consideration and the issue of whether the third principle is applicable is still open. This is further supported by the precision in which the Court of Appeal in *Karaha Bodas* approved *Mercedes Benz*:[53]

> In the context of Petral, we were satisfied that the principle established by *The Siskina* and reiterated by *Mercedes Benz* regarding the lack of *in personam* jurisdiction over a foreign defendant where no substantive claim was made against him was a sound one and that it should be adopted by us. … In the result, we found that the Singapore court had no *in personam* jurisdiction over Petral, a Hong Kong entity with no presence here, simply because it had assets in Singapore.

29 The High Court in *Petroval* also stated that the Court of Appeal in *Swift-Fortune* affirmed the principles in *The Siskina* and decided not to adopt the interpretation of the *The Siskina* doctrine in the case of *Channel Tunnel*, which was a House of Lords decision after *The Siskina*. In the evocative words of the High Court, the Court of Appeal was "sailing with *The Siskina* … and decided not to travel the *Channel Tunnel* route".[54] The High Court further stated:[55]

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49 *Swift-Fortune Ltd v Magnifica Marine SA* [2007] 1 SLR(R) 629 at [92].
50 *Karaha Bodas Co LLC v Pertamina Energy Trading Ltd* [2006] 1 SLR(R) 112 at [45].
51 *Swift-Fortune Ltd v Magnifica Marine SA* [2007] 1 SLR(R) 629 at [87].
52 *Swift-Fortune Ltd v Magnifica Marine SA* [2007] 1 SLR(R) 629 at [87].
53 *Karaha Bodas Co LLC v Pertamina Energy Trading Ltd* [2006] 1 SLR(R) 112 at [43].
54 *Petroval SA v Stainby Overseas Ltd* [2008] 3 SLR(R) 856 at [16].
55 *Petroval SA v Stainby Overseas Ltd* [2008] 3 SLR(R) 856 at [16].

> Following the Court of Appeal, I similarly and respectfully decline to 'take the law beyond *The Siskina* doctrine' (see [92] of the Court of Appeal's judgment).

30 In *Channel Tunnel*, Lord Browne-Wilkinson accepted that the *The Siskina* doctrine required the plaintiff to have a substantive claim before the court and that the defendant must be amenable to its jurisdiction before the court could grant a Mareva injunction. However, his Lordship did not agree that *The Siskina* had decided that the substantive claim must be decided by an English court, that is, the third principle in *The Siskina*. In his view, it did not matter if the final order was made by the English court or some other court or arbitral tribunal, so long as there was a pre-existing cause of action subject to English jurisdiction.[56]

31 With respect, the authors are unable to agree with the High Court in *Petroval* that the Court of Appeal in *Swift-Fortune* had declined to adopt *Channel Tunnel*'s interpretation of the *The Siskina* doctrine. Instead, as elaborated above, the Court of Appeal had left the issue open. Similarly, the High Court in *Multi-Code* came to this conclusion.[57]

32 Since the basis of the High Court's decision in *Petroval* could not be found from the Court of Appeal's decision in *Swift-Fortune*, the significance is that *Petroval* has decided to adopt the third principle in *The Siskina* and reject the *Channel Tunnel*'s interpretation of the *The Siskina* doctrine which excludes the third principle in *The Siskina*. It appears that Judith Prakash J in the High Court decision of *Swift-Fortune* also endorsed the third principle in *The Siskina*.[58] As will be elaborated below,[59] the second High Court case of *Multi-Code* adopted the contrary position and accepted *Channel Tunnel*'s interpretation of *The Siskina* that the third principle in *The Siskina* did not exist.

33 The second reason given by the High Court in *Petroval* was that it was of the view that the Court of Appeal in *Swift-Fortune* felt that there was no power under s 4(10) of the Civil Law Act to grant the injunction in aid of foreign court proceedings and hence no power to do the same in aid of foreign arbitral proceedings:[60]

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56 *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] AC 334 at 342–343.

57 *Multi-Code Electronics Industries (M) Bhd v Toh Chun Toh Gordon* [2009] 1 SLR(R) 1000 at [88].

58 *Swift-Fortune Ltd v Magnifica Marine SA* [2006] 2 SLR(R) 323 (HC) at [32]; *Swift-Fortune v Magnifica Marine SA* [2007] 1 SLR(R) 629 (CA) at [4] and [68].

59 See para 38 below.

60 *Petroval SA v Stainby Overseas Ltd* [2008] 3 SLR(R) 856 at [13].

> The Court of Appeal, in dismissing the appeal against Prakash J's decision to set aside the injunction, obviously felt that there was no power under s 4(10) of the Civil Law Act (Cap 43, 1999 Rev Ed) to grant the injunction in aid of foreign court proceedings and hence no power to do the same in aid of foreign arbitral proceedings. This flows logically from the judgment at [62] quoted above that '[i]f the court has such power with respect to foreign court proceedings, then it has similar power with respect to arbitral proceedings governed by the IAA'.

34 With respect, the High Court's reliance on *Swift-Fortune* is misplaced. As stated above, the Court of Appeal in *Swift-Fortune* held that the applicant did not have a justiciable right against the respondent when it obtained the *ex parte* Mareva injunction and would never have it at any time. Accordingly, *Swift-Fortune* was decided on the basis that the applicant in that case did not ever establish the Singapore court's *in personam* jurisdiction over the respondent;[61] hence, the issue of whether the Singapore court had power to grant the Mareva injunction did not arise for consideration. On the contrary, the Court of Appeal noted that there were arguments for and against construing s 4(10) of the Civil Law Act to allow the court to grant Mareva injunctions to assist foreign court proceedings or foreign arbitral proceedings.[62] The Court of Appeal also noted that where the plaintiff has a justiciable cause of action in a Singapore court against a defendant who is subject to the *in personam* jurisdiction of the Singapore court, the High Court case of *Front Carriers Ltd v Atlantic & Orient Shipping Corp*[63] ("*Front Carriers*") had decided that the court had the power under s 4(10) of the Civil Law Act to grant a Mareva injunction in aid of the foreign arbitration to which the substantive claim had been referred in accordance with the agreement of the parties and, by implication, where the substantive claim was tried in a foreign court.[64] Yet, the Court of Appeal stated in no uncertain terms that since the appeal was not against the decision in *Front Carriers*, where a separate appeal had been filed (but later withdrawn), it would not be prudent for the court to say anything that might be interpreted as either approving or disapproving *Front Carriers* as a s 4(10) decision. Seen in this context, even though the Court of Appeal did go on to make some observations regarding s 4(10), these were not only *obiter* but indeed tentative.

35 While it is the authors' view that the interpretation of *Swift-Fortune* by the High Court in *Petroval* should not be accepted, it should be noted that the High Court's decision in *Petroval* was rendered by

61 *Swift-Fortune v Magnifica Marine SA* [2007] 1 SLR(R) 629 at [87].
62 *Swift-Fortune v Magnifica Marine SA* [2007] 1 SLR(R) 629 at [93].
63 [2006] 3 SLR(R) 854.
64 *Swift-Fortune v Magnifica Marine SA* [2007] 1 SLR(R) 629 at [96].

Tay Yong Kwang J, who was also a member of the Court of Appeal which delivered the judgment in *Swift-Fortune*.

36 The editorial note of the law report stated that the plaintiff's appeal to the Court of Appeal was allowed, which suggests that the plaintiff managed to maintain its Mareva injunction in aid of foreign court proceedings. Unfortunately, no written grounds of decision were rendered by the Court of Appeal and what there is, is the grounds of decision of the High Court. From an anecdotal account from counsel involved in the case, the Court of Appeal reversed the High Court's decision on a point of fact as the plaintiff decided that it wished to prosecute the merits of the claim in Singapore; hence, the Court of Appeal did not have to decide on the question of granting a Mareva injunction in aid of foreign court proceedings. Therefore, the High Court decision on this issue of the granting of a Mareva injunction in aid of foreign court proceedings has not been overruled by the Court of Appeal.

B. *Evaluation of* Multi-Code Electronics Industries (M) Bhd v Toh Chun Toh Gordon

37 In the second High Court case of *Multi-Code*, the plaintiffs commenced an action in Malaysia against the five defendants for a sum of money arising out of a dispute concerning several escrow and share agreements. The plaintiffs obtained a Mareva injunction in Malaysia against some of the defendants. Soon after, the plaintiff commenced an action in Singapore against some of the defendants for almost identical relief as that pursued in the Malaysian action and also obtained a Mareva injunction against the defendants. The defendants applied for the Singapore proceedings to be stayed and for the Mareva injunction to be discharged.

38 There was no issue about establishing *in personam* jurisdiction over the defendants, who were all resident in Singapore, as service was effected on them within Singapore.[65] The High Court granted the stay of the Singapore proceedings on the ground of *lis alibi pendens* and on the alternative ground of *forum non conveniens*. There was also a justiciable claim against the defendants who were alleged to be involved in a conspiracy to defraud the foreign plaintiffs.[66] Regarding the application to discharge the Mareva injunction, the High Court made two important holdings. First, as opposed to *Petroval*, the High Court in

65 *Multi-Code Electronics Industries (M) Bhd v Toh Chun Toh Gordon* [2009] 1 SLR(R) 1000 at [98].

66 *Multi-Code Electronics Industries (M) Bhd v Toh Chun Toh Gordon* [2009] 1 SLR(R) 1000 at [98].

Multi-Code accepted *Channel Tunnel*'s interpretation of *The Siskina* that the third principle in *The Siskina* did not exist, and held that the court had the power to grant a Mareva injunction even if the substantive proceedings did not in fact end in a Singapore judgment.[67] Second, it held that s 4(10) of the Civil Law Act empowered the court to grant or allow the continuation of a local Mareva injunction despite an order staying local proceedings in favour of a foreign jurisdiction.[68] The High Court also held that the court's powers to grant Mareva injunctions were not affected when the Singapore proceedings were stayed on account of *lis alibi pendens* or *forum non conveniens*.[69]

39 The High Court in *Multi-Code* accepted *Channel Tunnel*'s interpretation of *The Siskina* that the third principle in *The Siskina* did not exist, and accepted *Channel Tunnel*'s position that it did not matter if the final order was made by the English court or some other court or arbitral tribunal, so long as there was a pre-existing cause of action subject to English jurisdiction. The reasoning and rationale for such an interpretation and position are as follows:[70]

> … I can see nothing in the language employed by Lord Diplock (or in later cases in this House commenting on the *Siskina*) which suggest that a court has to be satisfied, at the time it grants interlocutory relief, that the final order, if any, will be made by an English court … the relevant question is whether the English court has power to grant the substantive relief not whether it will in fact do so. Indeed, in many cases it will be impossible, at the time interlocutory relief is sought, to say whether or not the substantive proceedings and the grant of the final relief will or will not take place before the English court. … [I]n the context of arbitration proceedings whether it is the court or the arbitrators which make such final determination will depend upon whether the defendant applies for a stay. The same is true of ordinary litigation based on a contract having an exclusive jurisdiction clause: the defendant may not choose to assert his contractual right to have the matter tried elsewhere. Even more uncertain are cases where there is a real doubt whether the English court or some foreign court is the *forum conveniens* for the litigation: is the English court not to grant interlocutory relief against a defendant duly served and based on a good cause of action just because the English proceedings may subsequently be stayed on the grounds of *forum non conveniens*?

67 *Multi-Code Electronics Industries (M) Bhd v Toh Chun Toh Gordon* [2009] 1 SLR(R) 1000 at [75].

68 *Multi-Code Electronics Industries (M) Bhd v Toh Chun Toh Gordon* [2009] 1 SLR(R) 1000 at [85].

69 *Multi-Code Electronics Industries (M) Bhd v Toh Chun Toh Gordon* [2009] 1 SLR(R) 1000 at [81].

70 *Multi-Code Electronics Industries (M) Bhd v Toh Chun Toh Gordon* [2009] 1 SLR(R) 1000 at [76] and [77], citing *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] AC 334 at 342–343.

> I therefore reach the conclusion that the *Siskina* does not impose the third limit on the power to grant interlocutory injunctions which the respondents contend for. Even applying the test laid down by the *Siskina* the court has power to grant interlocutory relief based on a cause of action recognised by English law against a defendant duly served where such relief is ancillary to a final order whether to be granted by the English court or by some other court or arbitral body.

40 There is no doubt that the two holdings of the High Court in *Multi-Code* alluded to above have the effect of increasing the availability of a Mareva injunction in aid of foreign court proceedings so as to preserve assets in the event that enforcement of a foreign judgment becomes necessary, and to that extent, it should be a welcome development in the law. As recognised by the High Court in *Multi-Code*, the ruling is good policy because there is increasing need for mutual assistance between courts of various jurisdictions, and that is particularly significant in the light of today's:[71]

> … interconnected and 'borderless' world, where trade, banking, finance, investments and other dealings, including disputes that occasionally arise out of such interactions, are no longer confined within separate jurisdictions but are increasingly international or transnational in nature.

The judicial philosophy of promoting mutual assistance to ensure that justice is done appears to have influenced the House of Lords in *Channel Tunnel*'s decision that the *The Siskina* doctrine did not require that the substantive claim be decided by an English court:[72]

> I add a few words of my own on the submission that the decision of this House in [*The Siskina*] would preclude the grant of any injunction under section 37(1) of the Supreme Court Act 1981, even if such injunction were otherwise appropriate. If correct, this submission would have the effect of severely curtailing the powers of the English courts to act in aid, not only of foreign arbitrations, but also of foreign courts. Given the international character of much contemporary litigation and the need to promote mutual assistance between the courts of the various jurisdictions which such litigation straddles, it would be a serious matter if the English courts were unable to grant interlocutory relief in cases where the substantive trial and the ultimate decision of the case might ultimately take place in a court outside England.

41 Some tangential support for the High Court's approach in interpreting s 4(10) of the Civil Law Act can be found in Canada and the

71 *Multi-Code Electronics Industries (M) Bhd v Toh Chun Toh Gordon* [2009] 1 SLR(R) 1000 at [117].

72 *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] AC 334 at 341.

Bahamas. In Canada, s 39(1) of the British Columbia Law and Equity Act,[73] which appears to be similarly widely worded to s 4(10) of the Civil Law Act, sets out the power of the British Columbian court to grant an injunction in all cases in which it appears to the court to be just or convenient that the order should be made. In several cases by the British Columbian court, it has been held that an interim injunction may be granted in aid of foreign proceedings or the enforcement of foreign judgments.[74] In the Bahamas, s 21(1) of the Supreme Court Act 1996,[75] which is also similarly widely worded to s 4(10) of the Civil Law Act, sets out the power of the Bahamas court to grant a final or interlocutory injunction in all cases where it appears to the court to be just and convenient to do so. In the case of *Walsh v Deloitte & Touche Inc (Bahamas)*,[76] the Bahamas court granted a Mareva injunction in aid of proceedings in Ontario, Canada. The court decided that it had the jurisdiction to grant the Mareva injunction in respect of assets within or without the jurisdiction, and against residents or foreigners, based on s 21(1) of the Supreme Court Act 1996.

42 Determining whether s 4(10) of the Civil Law Act provides for the power to grant a Mareva injunction in aid of foreign court proceedings is a matter of statutory interpretation. However, when faced with a very broadly worded s 4(10) which on its face gives the court a wide discretion to grant an injunction "in all cases in which it appears to the court to be just or convenient that such order should be made", this brief survey of other courts interpreting similarly worded provisions in Canada and the Bahamas shows that the High Court's approach in *Multi-Code* is not unreasonable. It should also be noted that *Channel Tunnel* was concerned with the construction of s 37(1) of the Supreme Court Act 1981[77] ("the English 1981 Act") in England, which was materially similar to s 4(10) of the Civil Law Act and hence ought to be considered persuasive authority on the interpretation of the scope of s 4(10) of the Civil Law Act.[78]

43 An obstacle to the High Court's pro-mutual assistance stance is the tentative observations made by the Court of Appeal in *Swift-Fortune* on whether s 4(10) of the Civil Law Act empowered the court to grant

73 RSBC 1996, c 253.

74 See *RACP Pharmaceutical Holdings v Li Xiaobo* [2007] BCJ 2512; *Mishkin v Roddy Diprima Ltd* [1996] BCJ 2660; and *United States of America v Friedland* [1996] BCJ 2845.

75 Cap 53 (Bahamas).

76 [2001] UKPC 58.

77 c 54 (UK).

78 *Multi-Code Electronics Industries (M) Bhd v Toh Chun Toh Gordon* [2009] 1 SLR(R) 1000 at [67] and [77].

Mareva injunctions in aid of foreign court proceedings.[79] Although the Court of Appeal's views are inconclusive, its philosophy of judicial restraint is evident. The Court of Appeal observed that s 4(10) of the Civil Law Act had remained unchanged since it was enacted in 1878, and correspondingly, the legislative intent of s 4(10) had not changed. It opined that the correct approach was that the meaning of s 4(10) could not change even though social or political conditions had changed. The Court of Appeal then went on to note that it was open to argument in a future case:[80]

> … whether in the context of the political and commercial conditions existing in Singapore in 1878, the legislature of the Straits Settlements had intended s 4(10) to give power to the court to grant interlocutory injunctions in aid of foreign court proceedings, or even less likely in aid of foreign arbitral proceedings.

Taking this to be the approach, it seems difficult to argue that the Legislature in 1878 intended s 4(10) of the Civil Law Act to extend to aiding foreign court proceedings. The Court of Appeal also declined to consider policy considerations relating to adverse consequences canvassed by counsel, such as the adverse effects to Singapore's reputation if Singapore was seen as a jurisdiction in which parties could place funds beyond the reach of legitimate attachment, which in its view were within the purview of Parliament.[81] Any future court faced with this issue will have to consider these views of the Court of Appeal. Perhaps the choice of how widely to interpret the empowering provision of s 4(10) of the Civil Law Act will ultimately be resolved by the future court's conception of its judicial role, specifically, the permissible extent to which policy considerations may play a part in the development of the law.

44 Moreover, it is suggested that the inquiry should not be on whether:

> … in the context of the political and commercial conditions existing in Singapore in 1878, the legislature of the Straits Settlements had intended s 4(10) to give power to the court to grant interlocutory injunctions in aid of foreign court proceedings.

Rather, the inquiry should be on whether a Mareva injunction is a "Mandatory Order or an injunction" within the meaning of s 4(10). This is because s 4(10) provides that the court may grant a "Mandatory Order or an injunction … in all cases in which it appears to the court to be just or convenient that such order should be made". Therefore, if one acknowledges that a Mareva injunction is a "Mandatory Order or an

79 *Swift-Fortune v Magnifica Marine SA* [2007] 1 SLR(R) 629 at [93]–[95].
80 *Swift-Fortune v Magnifica Marine SA* [2007] 1 SLR(R) 629 at [94].
81 *Swift-Fortune v Magnifica Marine SA* [2007] 1 SLR(R) 629 at [15]–[16].

injunction", then the decision as to whether to grant one in aid of foreign proceedings is one for the court to make if it finds it just or convenient to grant the Mareva injunction for that purpose. Seen in this light, whether the Legislature which enacted s 4(10) intended s 4(10) to extend to aiding foreign court proceedings becomes less relevant. Further, as noted by the High Court in *Multi-Code*, the following guidelines are instructive in interpreting the scope of s 4(10):[82]

> In construing an ongoing Act, the interpreter is to presume that Parliament intended the Act to be applied at any future time in such a way as to give effect to the true original intention. Accordingly, the interpreter is to make allowances for any relevant changes that have occurred, since the Act's passing, in law, social conditions, technology, the meaning of words, and other matters.

45 A future court interpreting s 4(10) of the Civil Law Act may draw inspiration from how the Mareva injunction *simpliciter* is based on s 4(10) even though s 4(10) was enacted at a time when the Mareva injunction did not exist. It is well known that it was Lord Denning MR in the English Court of Appeal who fashioned the Mareva injunction against foreign parties out of the words of s 45(1) of the Supreme Court of Judicature (Consolidation) Act 1925[83] ("the English 1925 Act") in *Mareva Compania Naviera SA v International Bulkcarriers SA*.[84] In that case, Lord Denning asserted that s 45 of the English 1925 Act gave the court a wide general power to grant protective injunctions. However, later decisions held that the predecessor of s 45 did not confer any additional jurisdiction on the court, and that that section dealt only with procedure and had nothing to do with jurisdiction.[85] Doubts were also expressed as to the power of the English court to grant Mareva injunctions against non-residents, and this led to the enactment of s 37(3) of the English 1981 Act to give the court express authority in this regard.[86] On the other hand, s 4(10) of the Singapore Civil Law Act has been materially unchanged since its enactment as s 4(8) of the Civil Law Ordinance of 1926,[87] and is materially the same as s 45(1) of the English 1925 Act, with no equivalent to s 37(3) of the English 1981 Act. Yet, that did not stop the Singapore courts from invoking s 4(10) in the 1980s as

82 *Multi-Code Electronics Industries (M) Bhd v Toh Chun Toh Gordon* [2009] 1 SLR(R) 1000 at [117], citing Francis Bennion, *Statutory Interpretation* (LexisNexis Butterworths, 4th Ed, 2002).

83 c 49 (UK).

84 [1975] 2 Lloyd's Rep 509. See generally *Swift-Fortune v Magnifica Marine SA* [2007] 1 SLR(R) 629 at [72].

85 *Swift-Fortune v Magnifica Marine SA* [2007] 1 SLR(R) 629 at [72], citing *Gouriet v Union of Post Office Workers* [1978] AC 435 at 516.

86 *Swift-Fortune v Magnifica Marine SA* [2007] 1 SLR(R) 629 at [72].

87 SS Ord No 111, vol 3, 1926 Ed. *Swift-Fortune v Magnifica Marine SA* [2007] 1 SLR(R) 629 at [64].

the statutory source of power to grant Mareva injunctions, which only first emerged in 1975, in court proceedings.[88]

46 Further, any discussion on the power of the court to grant a Mareva injunction should not focus on s 4(10) to the exclusion of s 18(2) read with para 5(*c*) of the Supreme Court of Judicature Act. In 1993, para 5(*c*) of the Supreme Court of Judicature Act was introduced to empower the High Court to "provide for the preservation of assets for the satisfaction of any judgment which has been or may be made" before or after "any proceedings are commenced". In other words, it empowers the High Court to grant Mareva injunctions. This provision is widely worded and does not discriminate against foreign court proceedings. Given that this provision was enacted in 1993, it is at least arguable that it came into operation at a time when the scenario of the need to assist foreign proceedings was contemplated.[89]

47 The legislative reaction to *Swift-Fortune* and the availability of Mareva injunctions in aid of international arbitration are relevant to the discussion. Any doubt as to whether the Singapore courts have the power to issue Mareva injunctions in aid of a foreign-seated arbitration was cleared up by a swift legislative amendment to the International Arbitration Act[90] ("IAA") in 2009. The newly enacted s 12A confers powers on the Singapore High Court to grant interim measures, including Mareva injunctions, in aid of an international arbitration irrespective of whether the arbitration is based in Singapore. This amendment is a clear reaction to the finding in *Swift-Fortune* that the IAA did not empower the Singapore court to grant a Mareva injunction in aid of foreign arbitral proceedings which had no other connection with Singapore.[91] Besides being in line with Singapore's pro-arbitration stance so as to ensure that "our arbitration laws are progressive and will boost our efforts to promote Singapore as a leading venue for arbitration",[92] this signifies a step towards mutual assistance and reciprocity in the international arena so as to achieve the ends of justice. Given this development, there is even less reason to find that the Singapore court has no power to grant Mareva injunctions in aid of foreign court proceedings.

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88 *Swift-Fortune v Magnifica Marine SA* [2007] 1 SLR(R) 629 at [65], citing *Art Trend Ltd v Blue Dolphin (Pte) Ltd* [1981–1982] SLR(R) 633.

89 See also Jeffrey Pinsler SC, *Principles of Civil Procedure* (Academy Publishing, 2013) at para 13.010.

90 Cap 143A, 2002 Rev Ed.

91 *Singapore Parliamentary Debates, Official Report* (19 October 2009) vol 86 at cols 1627–1630 (K Shanmugam, Minister for Law).

92 *Singapore Parliamentary Debates, Official Report* (19 October 2009) vol 86 at cols 1627–1630 (K Shanmugam, Minister for Law).

48 Lastly, it should be noted that the decision of *Multi-Code* seems to have been approved, albeit in passing, by the Court of Appeal in the recent case of *Virsagi Management (S) Pte Ltd v Welltech Construction Pte Ltd*.[93] The case concerned the doctrine of forum election (also known as the doctrine of *lis alibi pendens*). The Court of Appeal explained that where a plaintiff has commenced proceedings both in Singapore and abroad, and then elected to pursue its claim in the overseas forum instead of Singapore, the court could either discontinue the local proceedings or, in the appropriate circumstances, grant a stay of proceedings instead. The Court of Appeal mentioned in passing that a stay of proceedings may be appropriate where the action in Singapore is brought to obtain security by way of a Mareva injunction or attachment of assets, and cited *Multi-Code* as an example.[94] This may be seen as a passing approval of *Multi-Code*'s position that a Mareva injunction may be granted even if the Singapore proceedings are stayed in favour of foreign proceedings. However, as this is merely a passing reference without any discussion of the authorities of *Petroval* and *Swift-Fortune*, the position can hardly be said to be settled.

IV. Conclusion

49 Speaking extra-judicially in Singapore in 2010, J J Spigelman AC, Chief Justice of New South Wales, expressed Australia's interest in ensuring that its court orders would be rendered effective by an overseas court by reason of reciprocity in the international law of nations:[95]

> To look at this from my perspective, a superior court in Australia has, in the exercise of its own jurisdiction, a clear interest in ensuring that its own orders will be rendered effective by an overseas court in the exercise of the jurisdiction of that overseas court. Where the other court will, in fact, act in support of the Australian court, then the Australian court should itself reciprocate, in my opinion, even if it can point to no express statutory power. To put the matter more precisely, this manifestation of the inherent jurisdiction should be recognised as a common law principle by reason of the significance of reciprocity in the international law of nations. It is a manifestation of the way the common law can develop to accord with principles of international law.

50 While Singapore courts may not go so far as to recognise an inherent jurisdiction to attach assets so that they could be available to

93 [2013] 4 SLR 1097.

94 *Virsagi Management (S) Pte Ltd v Welltech Construction Pte Ltd* [2013] 4 SLR 1097 at [35].

95 James J Spigelman AC, "Freezing Orders in International Commercial Litigation" (2010) 22 SAcLJ 490 at 510, para 78.

satisfy a future judgment of a foreign court, but instead have chosen to require *in personam* jurisdiction over the defendant to be established, with a pre-existing cause of action to which the Mareva injunction was merely ancillary, it has been suggested above that there is room to temper the rigidity of such an approach.

51 There is some uncertainty regarding the legal position of whether the Singapore courts have the power to grant Mareva injunctions in aid of foreign court proceedings. Given the recent support for increased harmonisation and integration of laws in the regional and international arena, perhaps the time is right for the Court of Appeal to come to a different landing from the views tentatively alighted upon by the Court of Appeal in *Swift-Fortune*.