The Anglo-American Perspective on Freezing Injunctions

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The Anglo-American Perspective on Freezing Injunctions

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Freezing injunctions are pre-trial orders to restrain a defendant from dealing with his assets so as to forestall his attempt to frustrate the potential money judgment against him. They were formerly called *Mareva* injunctions after one of the two landmark cases by the Court of Appeal in 1975 that marked their birth in England.¹ Since then, their scope has been expanded through cases and statute. They are now incorporated in the Civil Procedure Rules (CPR).²

Freezing injunctions have been adopted in most common law jurisdictions as an effective civil remedy to combat attempts by recalcitrant debtors or fraudsters to frustrate potential money judgments by use of ever faster methods of fund transfer. The United States, however, provided a conspicuous exception. In *Grupo Mexicano de Desarrollo SA v Alliance Bond Fund Inc*, the US Supreme Court by a 5:4 judgment declared that the US District Court does not have the equitable jurisdiction to grant such form of injunctive relief.³ The State of New York followed suit.⁴ Why has the English court been able to develop this extraordinary remedy? And why has the American court been unable to adopt the remedy that has become so popular among many common law countries? This article will adopt a comparative approach to answer these questions. Freezing injunctions will also be compared with their American counterparts: pre-judgment attachments. This is an attempt to analyse how different social and historical backgrounds can shape development of legal doctrines.

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² CPR r 25.1(f); PD(25) 6.1–6.2 and annexe.


A draconian procedure and safeguards

Different approaches to similar concerns

Famously called one of the law’s two “nuclear” weapons, freezing injunctions have potentially draconian aspects. The claimant seeking freezing injunction normally proceeds ex parte, without giving the defendant the initial opportunity to present his case. The defendant, taken by surprise, might find himself unable to secure funding to keep the business running, or might suffer irreparable damage to his reputation. The procedure could be used oppressively by creditors to put undue pressure on debtors. Freezing orders could also implicate those who are not parties to the litigation.

To deal with these concerns, the English court has adopted various procedural safeguards. The claimant must make proper inquiries before applying ex parte for freezing injunction. When making the application, he must act in good faith and disclose all relevant matters to the court. Typically, freezing orders include provisions for the respondent’s reasonable living expenses and legal advice fees. The claimants are deemed to give a cross-undertaking to indemnify the respondent against any loss caused if the order turns out to have been wrongly granted. The English court has developed provisos to be included in freezing orders so as not to unduly affect non-parties. These safeguards are incorporated into the standard orders, which are intended to clarify in plain English the respective obligations owed by each party.

The American reaction was, by contrast, outright rejection. Writing for the majority in Grupo Mexicano, Scalia J. gave three reasons for rejecting a remedy equivalent to the English Mareva injunctions. First, the US Federal Court’s equity jurisdiction was confined to the English Chancery practice at the time of the American Independence and no further innovation was to be expected. Secondly, it had long been settled that a general creditor cannot interfere with the debtor’s disposal of property before establishing his claim on the merit by obtaining a judgment. And lastly, whatever the benefit of the proposed remedy, such substantial extension of practice must be left for the Congress to formulate.

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8 They are now found in the annex to CPR Pt 25 PD.
9 S. Gee, Commercial Injunctions, 5th edn (London: Sweet & Maxwell, 2004), para.3.015.
**Difference with any significance?**

It should be noted that the difference in England and the United States is not as significant as appears—at least in the domestic context. In most American states the court has the power to order pre-judgment attachments, which involve seizure of the defendant’s property so as to prevent the defendant from using it during the pendency of a money action. In addition, if the plaintiff has equitable claims or invokes equitable remedies, the court can issue preliminary injunctions to restrain the defendant from transferring relevant assets.\(^\text{14}\) Thus, in many fact situations, the *Grupo Mexicano* restriction could be bypassed by including an equitable claim or remedy along with legal claims.\(^\text{15}\) State fraudulent conveyance statutes provide for provisional remedies that prevent the debtors from further disposing of their property. Some federal statutes grant federal courts the authority to issue injunctive relief that are similar to the English freezing injunctions. The bankruptcy court has, for example, expansive injunctive powers to enjoin activities that could impede the reorganisation process.\(^\text{16}\)

Despite the US Supreme Court’s concern for the domestic implications, there are significant differences in the international context. Pre-judgment attachments are not available for properties located outside the court’s territorial jurisdiction. Thus in the United States, general creditors must identify the whereabouts of all the attachable assets and pursue attachment proceedings in each state where such assets are located. *Grupo Mexicano* itself involved a Mexican debtor whose assets were located in Mexico. For this reason it was conceded by all parties that New York’s attachment statute were unavailable.\(^\text{17}\)

Even within the international context, however, the American courts have not been entirely adverse to the English freezing injunctions. In *CIBC Mellon Trust Co v Mora Hotel Corp*, New York’s highest court was willing to enforce an English money judgment issued against the defendants upon their failure to comply with the English freezing injunctions and accompanying disclosure orders.\(^\text{18}\) In dismissing the argument that the English court’s procedures are not “compatible with the requirements of due process of law”,\(^\text{19}\) the court stated that, “the overall fairness of England’s legal system … is beyond dispute”.\(^\text{20}\) Meanwhile, whether the American court will enforce foreign freezing injunctions,\(^\text{21}\) or even permanent injunctions, is unclear.\(^\text{22}\) In any event, the court under the common law tradition has not enforced foreign injunctions or non-final judgments, which is also the English position today unless the relevant foreign judgment falls under the Brussels Regime.\(^\text{23}\)

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\(^\text{16}\) 11 USC s.105(a).

\(^\text{17}\) *Alliance Bond Fund v Grupo Mexicano de Desarrollo*, 543 F.3d 688, 693 (2d Cir. 1998).

\(^\text{18}\) *CIBC Mellon Trust Co v Mora Hotel Corp* 100 NY2d 215 (2003).

\(^\text{19}\) *New York Civil Practice Law and Rules (NY CPLR)* s.5304(a)(1).

\(^\text{20}\) *CIBC Mellon Trust* 100 NY2d 215 (2003) at 222.


\(^\text{22}\) G.B. Born and P.B. Rutledge, *International Civil Litigation in United States Courts*, 4th edn (New York: Aspen/Kluwer, 2007), p.1206. It is suggested that monitoring the compliance of the injunction or deciding whether to modify or lift it would take up judicial resources.

The English court may issue freezing injunctions to support proceedings in foreign countries including the United States. In fact, American trial judges are sometimes quite sanguine about their proceedings being supported by English freezing injunctions. In *Eastern Trading Co v Refco*, Judge Conlon, for the US District Court for the Northern District of Illinois, dismissed the plaintiff’s application to enjoin the defendant from proceeding in England to obtain *Mareva* relief to secure the satisfaction of its counterclaim. She held that such an ancillary proceeding does not constitute a parallel litigation to be enjoined in American law. The reaction from the judge who presided in the English proceeding was more nuanced. In his judgment discharging the freezing injunction previously granted, Rix J. stated that:

“it is clear that the learned Judge was not expressing or intending to express, in my judgment, an informed view as to the appropriateness of the application being made in a foreign country rather than in her own Court.”

In his view, which was approved by the Court of Appeal, there were doubts about the risk of asset dissipation. The case was not a typical *Mareva* case where the defendant is accused of participating in fraud or dishonesty or making use of suspicious financial arrangement. The relevant customer agreement contained a jurisdictional clause that put both the merits and all proceedings for interim relief in the hands of the Illinois Court. Thus, the court possessing a merely ancillary jurisdiction had to proceed with caution and sensitivity to the proceedings in the foreign court possessed with the substantive claim.

English judges’ relative sensitivity to the extraterritorial implication of freezing relief finds its parallel in the review of the *Grupo Mexicano* case by Lord Collins, who was then a practicing solicitor. He pointed out that both the majority and minority opinions in *Grupo Mexicano* ignored the comity implication, even though the relief was sought against a foreign defendant whose whole assets were located outside the court’s jurisdiction. He further suggested that the English court might not have granted relief in like circumstances, given that the defendant was making a bona fide effort to restructure its debt and to deal with other claims in the country where its business was centred.

**Powers of judges and patterns of civil procedure reform**

It may be inferred from the previous section that the striking difference between England and the United States lies not so much in the availability of remedy itself as in the approach to administering the procedure. This section identifies such contrasting aspects and places them in wider contexts. This will reveal the underlying values or assumptions that define the procedural innovation in the respective countries.

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Injunctions in the historical context

The major task that the English court faced in the formative era of *Mareva* injunctions was to establish the jurisdictional foundation by distinguishing the late nineteenth century cases that were said to deny the court’s ability to issue such remedies. Once it was accomplished, the judges were able to develop the jurisdiction as if to draw the design on a clean slate. By contrast, the American judges had to operate on a more contentious background. The American court had been asked to issue injunctions in socially controversial cases since the late nineteenth century. This is reflected in the cases cited in *Grupo Mexicano*, such as antitrust cases, which involved splitting up monopolist corporations, and civil rights cases, in which the court took control of the whole school or school district to de-segregate the white-only schools.

Having experienced fewer such controversies, the English court since the late nineteenth century had nurtured a wide range of powers to regulate its own procedure. Some of those powers did not have basis on any statute or rule of law. Among them was the inherent jurisdiction, which was said to be derived from “the very nature of the court as a superior court of law”. This was the basis of Practice Directions, through which procedural improvements including *Mareva* injunctions were brought about. *Mareva* injunctions were based on the statutory power to grant an injunction when it appears “just and convenient”, but they represented a drastic departure from the previous self-restraint. Once such departure was sanctioned by Lord Denning in 1975, there were only limited external checks that would constrain the course of innovation.

The House of Lords did impose restraint on Lord Denning’s ambitions of reform. In *The Siskina v Distos Compania Naviera*, where Lord Hailsham accused him of usurping the legislative power, the House of Lords held that *Mareva* injunctions cannot be issued unless there is a pre-existing cause of action which falls within the jurisdiction of the English court. This proposition continued to cast a shadow...
on the *Mareva* jurisprudence for almost two decades. Nonetheless, successive challenges were waged against *The Siskina* principle, and whatever was perceived as its unfortunate legacy was largely removed by legislation.

In the United States, since the late nineteenth century, the extent to which the federal courts could legitimately exercise its equitable jurisdiction has been hotly debated between enthusiastic supporters and detractors. This broad issue was the focus of the US Supreme Court’s decision in *Grupo Mexico*no. The heat of the debate was such that both the majority and the dissent quickly distinguished away the cases involving analogous facts of preliminary injunctions. Scalia J. then asserted that in the federal system “the flexibility [of equity] is confined within the broad boundaries of traditional equitable relief.” Dissenting on behalf of the four liberal justices, Ginsburg J. countered this by criticising his “unjustifiably static conception of equity jurisdiction.” The commentators were quick to point out that *Grupo Mexico* was just one of a series of recent cases where Scalia J. and other conservative justices were pursuing the grand aims of constricting the equitable powers of the federal courts.

For Americans, *Grupo Mexicano* was essentially a case involving an “ordinary creditor-debtor problem” that was conflated with a controversy over the federal courts’ remedial power. This was not an attractive area for the Congress to intervene. It has yet to legislate on the matter, despite the call from commentators and the suggestion from Scalia J. himself to do so.

**Specialised court**

Freezing injunctions in England were developed through the accumulation of cases in the Commercial Court. This specialised court is held in high esteem in England for its role in elucidating both substantive and procedural law. A markedly different view of such specialised courts can be observed in the United States.

In England, *Mareva* injunctions were popular among practitioners immediately after Lord Denning approved them for the first time, and even before the case was reported. They were constantly issued by the Commercial Court judges, who liaise
closely with the barristers who practise before them and the solicitors who instruct them. Freezing injunctions were nurtured in this close-knit specialist community that is sensitive to the needs of the commercial community. When the matter of principles arose, the Court of Appeal ruled on the issue and sometimes set out guidelines, but the Commercial Court judges’ exercise of discretion was mostly respected.

The Commercial Court judges and the advocates before them during the formative era of Mareva relief continued to shape the expanding jurisdiction. They knew well that the availability of the robust freezing injunctions affected the international reputation of the Commercial Court and the flow of international legal business to London. The freezing relief was developed with an eye to equivalent practices in other jurisdictions. Today, freezing injunctions not only equal with French saisie conservatoire or American attachments in material respects but go far beyond them in terms of the territorial extension. The English disclosure orders that developed alongside them are perhaps even more effective than the main injunctions in countering international fraud.

The Commercial Court judges’ experience is no less valuable in the daily disposal of applications for freezing injunctions. Ascertaining whether there is the risk of asset dissipation by the defendant is a fact-intensive exercise. This key requirement must be analysed with reference to numerous facts including the nature of the relevant assets, the nature and financial standing of the defendant’s business, the defendant company’s country of registration, and the connection between the defendant and other suspicious companies. In Third Chandris Corp v Unimarine SA, Lawton L.J. said that the Commercial Court judges, “have special experience of commercial cases and they can be expected to identify likely debt dodgers as well, probably better than, most businessmen.”

In the United States, the specialised courts have had a rather troubled history. In 1910, the Commerce Court was established to hear appeals from the Interstate Commerce Commission, a federal railroad regulation agency. Immediately after

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establishment, however, the court was mired in a political controversy. Heavily criticised for its apparent bias in favour of the railroad interest, the court was abolished only three years later.56

The Court of Appeals for the Federal Circuit is a specialised court with appellate jurisdiction over cases involving patent and trade mark and other specific categories of cases involving the federal government. It has survived the doubt about its bias toward patent protection.57 However, establishing a similar specialised court at the trial level has never been a realistic reform agenda. This is so even though some empirical research has cast doubt on trial judges’ ability to handle patent cases.58 The Federal Circuit must defer to the fact finding by the judge or the jury of the regional general trial courts.59

The State of Delaware has specialised Chancery courts at the trial level. Delaware Chancery judges are known for their expertise in business matters, and the court has developed a reputation for sophistication in corporate law. Delaware is one of the only three states that retain Chancery courts as distinct from the courts of common law that sit with the jury. Delaware is also one of the 12 states where judges are appointed on their merits rather than by election. These features ensure that the court is insulated from excessive political or popular influence, but they also make Delaware rather anomalous among the American states that insist on judges’ political accountability.60

Thus in the United States, there is persistent scepticism against the specialised courts. According to this view, specialised judges are overly sympathetic to the policies furthered by the law that they administer and are susceptible to capture by the bar that regularly practices before them.61 No wonder, the plaintiff-creditor’s plea in *Grupo Mexicano* for adopting *Mareva* so as to maintain the United States as an attractive centre for financial transaction was quickly brushed aside by the majority of the US Supreme Court.62

**Vanishing trials and managerial judges**

In England, the right to jury trial has been abolished by statute and case law except in certain areas.63 In the area of commercial law, where freezing injunctions are most frequently sought, the jury has been virtually eliminated. It would be inconceivable for English lawyers to consider why the jury should be relevant in this context. In the United States, the right to jury trial is enshrined in federal and state constitutions. Writing for the court in *Grupo Mexicano*, Scalia J. appealed to this venerable right:

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The requirement that the creditor obtain a prior judgment is a fundamental protection in debtor-creditor law—rendered all the more important in our federal system by the debtor’s right to a jury trial on the legal claim.”

He then went on to warn that unbounded equity jurisdiction could, “place the whole rights and property of the community under the arbitrary will of the Judge.”

It has long been recognised both in England and the United States that most civil cases settle and few cases actually reach trial. As the trial declined, the pre-trial stage gained prominence and attracted increasing attention. The need to cope with court congestions and delay encouraged this trend.

In 1990s England, the Commercial Court and other specialised courts led the way to promoting ADR, encouraging settlement and strengthening the trial judge’s case-management role. These practices were accepted by Lord Woolf in his Access to Justice inquiry, and were expanded in the resulting Civil Procedure Rules 1998.

Individualised case-management confers significant discretionary powers on trial judges. Concerns may well be raised that such power be exercised capriciously, inconsistently or unpredictably. However, the statutes and rules of court in England have traditionally conferred wide discretion in the area of civil procedure, and it has been suggested that the apparent discretion “is quickly confined between banks of practice and authority”. It was against this background that Lord Woolf said in Biguzzi v Rank Leisure Plc, “judges have to be trusted to exercise the wide discretions which they have fairly and justly in all the circumstances”. The academic assessment post-CPR has been that the case management appears to be working effectively, or even that it should be pursued more vigorously.

In the United States, from which Lord Woolf drew inspiration for expansion of ADR and case management, things have been more tumultuous. The vanishing trial was lamented and a prominent law professor wrote a famous article against settlement. Managerial judges were also greeted with scepticism. Trial judges’ managerial power was passionately debated not only among legal professionals but also among legislators. Practical concerns were raised that the power could be exercised to the detriment of plaintiffs who fight against corporations and government bodies. Even though the trend was irreversible, the commentators

continued to warn against the decline of transparency in the legal process. In such culture of secrecy, it was contended, those who possess stronger bargaining power would inevitably prevail, and the resulting distributive effect would work in favour of large corporations. 76

**Domestic response to international problems**

In England, freezing injunctions developed through case law, independently of the pre-existing law of judgment enforcement. As the extraterritorial reach of the orders expanded, both the court and Parliament avoided constraining them by rigid jurisdictional rules. 77 The American attachment is one of the statutory pre-judgment remedies that have existed since the colonial period. Since the 1970s, they have become increasingly subject to the constitutional scrutiny by the US Supreme Court.

Since the formative period, English freezing injunctions have been deployed in international settings to counter the global operation of debt-evaders and fraudsters. 78 The extraterritorial jurisdiction of freezing injunctions was extended pragmatically in accordance with the fairness and necessity of the case.

In a series of cases decided in 1988, the Court of Appeal authorised worldwide freezing orders, which restrain the defendant from dealing with his assets whether such assets are located within the jurisdiction or not. 79 In *Babanaft International Co SA v Bassatne*, Kerr L.J. said:

> “some situations, which are nowadays by no means uncommon, cry out—as a matter of justice to plaintiffs—for disclosure orders and *Mareva*-type injunctions covering foreign assets of defendants even before judgment.” 80

In *Republic of Haiti v Duvalier*, 81 for example, the only link between England and the case was the presence of defendant’s solicitors in England. The case was commented as having gone to “the very edge of what is permissible”. Nevertheless, the exercise of the jurisdiction was justified because the defendant had manifested intention to defraud the plaintiff, the solicitor could be treated as agents of the defendants, and the relevant information was located in England. 82 The extensive extra-jurisdictional effect of the freezing injunctions and the accompanying discovery orders has made the English court a popular forum of choice for international litigants.

Turning to the domestic context, the *Mareva* relief was extended to English defendants in 1979, 83 and became available to restrain the defendant from dissipating his assets within the jurisdiction in 1982. 84 However, freezing injunctions are not

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84 *CBS United Kingdom Ltd v Lambert* [1983] Ch. 37; [1982] 3 W.L.R. 746 CA (Civ Div).
readily available for claims of a modest sum. Although the High Court has the jurisdiction to issue freezing orders with regard to typical county court matters, such orders are strongly discouraged.

In most American states, pre-judgment attachments provide remedies similar to the English freezing injunctions. The history of pre-judgment attachments, however, has been a process of domesticating the jurisdictional tool derived from England.

Foreign attachments, as adopted by the New England colonists from the customs of London, were a jurisdictional tool to attach debtor’s property in the hands of a third party so as to compel the defendant’s appearance to the court. They were originally restricted to cases against absent or absconding debtors but later were made available generally against debtor-defendants by colonial statutes. Common attachment, another form of pre-judgment attachment with its roots in common law, enabled the plaintiffs to attach tangible property in the defendant’s own possession so as to compel defendant’s appearance to the court. However, this measure was transformed by colonial statutes into a method of assuring the satisfaction of the plaintiff’s judgment. Under such statutes, the goods attached remain seized for a certain period after judgment in favour of plaintiff so that he can execute upon them to satisfy the judgment.

Thus, by the time of the American independence, these early forms of pre-judgment attachment procedures had transformed themselves from a sharp jurisdictional tool to a rather heavy-handed means of debt collection that are broadly available to ordinary creditors. However, creditors’ easy access to such measures had to be counter-balanced with additional protection for the debtors. In a series of cases since the late 1960s, the US Supreme Court placed state pre-judgment remedies under constitutional scrutiny to ensure sufficient due-process protection for debtor-defendants.

One strand of cases required state courts exercising the attachment jurisdiction to ensure that the forum has a minimum contact with the defendant and the underlying cause of action. In the leading case of Shaffer v Heitner, the US Supreme Court held that a Delaware statute authorising sequestration of defendant’s property within the state to found the court’s jurisdiction (characterised as the equity counterpart of the process of foreign attachment in suits at law) violated the due-process clause of the Fourteenth Amendment of the US Constitution. It was held that the need to prevent a wrongdoer from removing his assets beyond the reach of an in personam suit was not in itself a sufficient justification for recognising the jurisdiction unless the property is the subject matter of the litigation or in some way related to the underlying cause of action.

85 Sions v Ruscoe-Price Unreported November 30, 1988 CA (Civ Div). This was a case before Woolf L.J. which resulted in denying an application for a freezing injunction for a claim involving £2,000.
Another strand of cases broadened the constitutional protection to the debtor defendant by affording notice and opportunity to be heard before pre-judgment remedies are granted against him. In *Connecticut v Doehr*, for example, the US Supreme Court held that the Connecticut pre-judgment attachment statute violated the defendant’s due-process right because it allowed ex parte hearing based merely on the fact that the defendant owned real property in the state, without requiring the plaintiff to show any exigent circumstances.

Ironically, these developments took place just when *Mareva* injunctions were solidifying their foundation and extending their extra-jurisdictional reach. In *Rasu v Perusahaan (“Pertamina”)*, Lord Denning quoted at length from *Ownbey v Morgan*, a US Supreme Court decision upholding the constitutionality of the Delaware foreign attachment statute. He did so to indicate that the relief sought was authorised in the United States and that its origin could be traced back to the English practices. However, in *Shaffer v Heitner*, decided in the same year, the US Supreme Court suggested that its due-process jurisprudence had already departed from the *Ownbey* decision.

### Democratic forms of civil procedure reform

The conspicuous pattern of the English procedural reforms is that the initiatives of the leading members of the judiciary are followed by legislative endorsement and public support. By contrast, the recent American procedural reforms have been subject to extensive legislative and public debate.

In England, Parliament has often followed the judicial initiative of procedural innovations. The expansion of *Mareva* jurisdiction led by the specialised courts has been approved by a series of legislation. At the same time, the statutes left much discretion in the hands of the court. Similarly, the specialised court’s innovative effort in the area of case management and encouragement of alternative dispute resolutions was influential on Lord Woolf’s *Access to Justice* reform. The legislation and the CPR not only incorporated such practice, but still left the specialised courts with flexibility to develop the practice even further.

The Woolf reforms achieved what the sole dissentient Michael Zander described as,

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96. Supreme Court Act 1981 s.37(1) (the court may grant an injunction “in all cases in which it appears to the court to be just and convenient to do so”); Civil Jurisdiction and Judgments Act 1982 s.25(2) (the court may refuse to grant an interim relief, “if, in the opinion of the court, the fact that the court has no jurisdiction apart from this section … makes it inexpedient for the court to grant it”).
97. The CPR apply generally to the courts in England (CPR r.58.3) but the Admiralty and Commercial Court Guide provides for a markedly different procedural regime: Colman, *The Practice and Procedure of the Commercial Court*, 2000, p.27.
“almost universal support including that of the senior judiciary, the Bar Council and the Law Society as well as both the lay and the legal press.”

To some extent, such a wide consensus may be attributed to the broadly shared interest in promoting the international reputation of the court in London. Many reformers of court procedures have referred to the need to maintain the judiciary’s contribution to attracting international litigants and to the commercial life of London and England.

All this has made it possible for the English procedure to evolve informally. Practice Directions, which now have a legislative foundation, can be amended by the Rule Committee without formal legislation by Parliament. Informal procedural rules can be adjusted relatively easily when particular problems arise. With a view to such flexible changes in the future, the English reformers have been willing to embark on procedural innovation even though the empirical basis is admittedly limited.

In the United States, commentators have complained for decades about the politicisation of the civil procedure reform. Just as in Grupo Mexicano, the US Supreme Court justices have been split between the liberals and the conservatives even on procedural issues. Since the 1970s, the Congress has intervened in the procedural reform on a number of occasions. The reform proposed by the Advisory Committee of the Federal Judicial Conference was often disrupted, and was replaced by a series of legislative modification.

With the expansion of legislative role came the call for greater public participation and growing emphasis on the empirical basis for justifying procedural reform. In the Civil Justice Reform Act of 1990, for example, the Congress required each US District Court to implement a local program to reduce expense and delay in civil litigation. The Act also called for a large scale empirical study. However, this was, according to a long-time federal court administrator, a venerable research project mired in political hyperbole, destined to generate “a goodly dollop of hype and exaggeration”. For him, Lord Woolf’s leadership was to be congratulated for achieving in a few years what it took the United States almost a whole century to achieve.
The fact that the American reform has stalled in Washington DC does not mean that no reform is possible. Reform initiatives often originate from local district courts or state courts and develop in an incremental fashion. An American commentator captured such a pattern in the context of case management:

“The innovation came at the local level; judges in San Francisco, Chicago, New York and other places thought up and tried out new ways of handling litigation. Satisfied that these were superior, they then embarked on a course of gentle persuasion to get other judges to do the same. Only well into the development did national rules begin to address case management issues.”

After *Gropo Mexicano*, it has been suggested that the battlefield shifts to the individual states. Though no significant legislative change has been observed at the time of writing, the lower courts of diverse American localities have experimented with innovative use of pre-existing jurisdiction.

**Overall contrast**

From the comparative analysis thus far, several underlying themes can be identified. First, the procedural reform in England has focused on specific needs that have arisen in civil practice. Particularly remarkable is the sensitivity to the needs arising from cross-border litigation. On the other hand, the American approach is to ensure that the civil justice is open and available to a wide range of the public. Correspondingly, emphasis has been placed on the protection of those adversely affected by court orders. Secondly, the English trial judges, especially those sitting for the specialised court, are trusted in their daily administration of procedural law. The American trial judges are perceived as possessing powers that could have significant societal impact, and the concentration of such powers has been viewed with caution.

Thirdly, in England, the few core members of the judiciary and the bar keep a firm grip on the reform of civil procedure. In the United States, procedural reforms are driven by diverse participants from various localities. People from different branches of the government, varied professions and occupations, and many kinds of interest groups vie for their influence. Fourthly, the procedures are regulated informally in England, while both the civil procedure rules and their reform process have been formalised in the United States. And lastly, the politics does not appear to play a significant role in England. The American procedure is overtly political not only in the sense that the politicians are actively involved but also in the sense that the debates on procedures concern the distribution of power among different decision-makers or different groups of people in the society.

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109 J.L. Wilson, “Three if by Equity: Mareva Orders & the New British Invasion” (2005) 19 St. John’s Journal of Legal Commentary 673, 726. Under Federal Rules of Civil Procedure r.64(a), the Federal District Court can order pre-judgment attachment available under the local state law.

110 See, e.g. *MS Distributing Co v Web Records Inc* No.00 C1436, 2003 U.S. Dist. LEXIS 9092 District Court for the Northern District of Illinois (May 29, 2003) (preliminary injunction prohibiting the defendants from withdrawing from an out-of-state bank account).
Making sense of the difference

The contrasting approaches identified above have affected many aspects of freezing injunctions in England and pre-judgment attachment in the United States. The understanding of such contrast will assist in explaining where the US Supreme Court parted from the English lead and why English commentators found it so difficult to understand the departure.

Freezing injunctions and pre-judgment attachment compared

Nature and objectives

Freezing injunctions in England are orders in personam to restrain the defendant from dissipating his assets. They cannot be ordered for the purpose of providing security. Applications for freezing injunctions where there is no danger of asset dissipation are regarded as an abuse.

The American pre-judgment attachments are in rem remedies that seize the defendant’s property to secure the payment of eventual money judgment. Attachment orders confer on the plaintiff security interests in the property and he obtains priority over subsequent creditors in satisfying his debt. The original purpose of obtaining jurisdiction has lost its significance as it became increasingly easy for plaintiffs to utilise far-reaching long-arm statutes to establish a personal jurisdiction. The emphasis of the attachment remedy has shifted to providing ordinary creditors with measures to secure a fund from which a potential judgment can be satisfied.

Procedural requirements

In England, the claimant must clear high procedural threshold, which corresponds to the relief’s extensive effect. The remedy is available only for those whose claims involve sufficiently high stakes. The hearings are almost invariably held ex parte, where the claimant and his representatives must disclose all the material facts to the court. The claimant must show that he has a good arguable case on the merits of the underlying cause of action and that the refusal of a Mareva injunction would involve a real risk of asset dissipation by the defendant. The relief cannot be granted for the purpose of interfering with ordinary business transactions.
In the United States, the formal requirement of minimum jurisdictional amount is either non-existent or very low. Many state attachment statutes provide for inter partes, as well as ex parte hearing. In order to proceed ex parte, the plaintiff must show some exigent circumstances. The plaintiff is generally required to show the likelihood of success on the underlying cause of action. Additional statutory grounds for attachment in some states are largely analogous to the requirements for the English freezing injunction. In New York, for example, the plaintiff is required to show that:

“The defendant, with the intent to defraud his creditors or frustrate the enforcement of a judgment that might be rendered in the plaintiff’s favour, has assigned, disposed of, encumbered or secreted property, or removed from the state or is about to do any of these acts.”

However, in other states, notably in California, the requirements are easier to satisfy, where once the plaintiff establishes the claim on which to recover, he need not show the defendant’s avoidance efforts.

**Extra-territorial reach**

The inability of English freezing injunctions to confer security interests on the claimant is more than compensated by the extensive extraterritorial effect of the in personam remedy. Statute has removed the formal restraints imposed by the House of Lords in *The Siskina*, allowing the court to exercise extra-territorial jurisdiction in a pragmatic fashion. Concerns for the impact on non-parties and foreign jurisdiction are now dealt with by a series of judicially mandated undertakings and the flexible guidelines set forth by the Court of Appeal.

The American attachment orders operate in rem and can affect only the property located within the jurisdiction. Many state statutes retain the original feature of jurisdictional device, as where the plaintiff can attach the defendant’s property on the ground that the defendant is not available within the jurisdiction or cannot be served, or a plaintiff proceeding against a non-resident defendant is allowed broader scope of attachment. However, the US Supreme Court’s due-process jurisprudence has placed formal constraints on this feature. State courts exercising the attachment jurisdiction are now required to have sufficient connection with the defendant and the underlying cause of action, as well as the property to be attached.

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116 e.g. California Code of Civil Procedure (Cal CCP) s.483.010(a) (US $500); 735 Illinois Compiled Statute (ILCS) 5/4-101 (US $20); Delaware Code ss.3506, 3507 (US $50). It is non-existent in Connecticut.
117 Cal CCP ss.484.040(a) (notice), 485.010 (ex parte hearing), 486.010 (temporary protective order); Connecticut General Statutes (Conn Gen Stat) ss.52–278d(a)(the defendant’s right to be heard), 52-278e(a) (without hearing); New York Civil Practice Law and Rules (NY CPLR) ss.6210 (on notice), 6211 (without notice).
119 NY CPLR s.6201. For similar provisions, 735 ILCS 5/4-101.
120 Cal CCP ss.484.020(a), 484.090. See also Maine Rules of Civil Procedure r.4A(c); Northeast Investment Co v Leisure Living Communities Inc 351 A.2d 845 (Maine 1976). This has been criticised as losing sight of an attachment law: Eisenberg (ed.), Debtor-Creditor Law, 2004, para.30.13(3).
123 e.g. 735 ILCS 5/4-101(1); NY CPLR s.6201(1).
124 e.g. Cal CPP s.492.010.
The judge’s discretion

In England, the trial judge’s discretion has had the dual function of administrating the daily operation of freezing relief and developing the governing principles. In exercising discretion, the trial judge takes into account a complex set of factors, ranging from the hardship suffered by the defendant and the impact on the third parties, to the comity implications of the worldwide order. Therefore freezing orders can normally be granted only by puisne judges in the High Court.

In the United States, some state statutes provide that the court “shall” issue attachment orders when the statutory requirements are satisfied, though other states use discretionary language. Even in the states where the discretionary nature is recognised, judges, apprehensive of the harsh nature of the remedy, have insisted on strict compliance with the statutory requirements. In many states the issue of a writ of attachment used to be the act of the court clerk, although following the US Supreme Court’s due-process jurisprudence, the involvement of judicial officers is invariably required today.

Statutory and constitutional constraint

In England, the statutes provide the court’s jurisdictional basis for issuing freezing injunctions. Nevertheless, they have generally approved of judicial innovation and left the actual operation to the trial judge’s discretion. The European Court of Justice, however, has emerged as an institution that exercises an external check upon the English procedure.

In the United States, pre-judgement attachments have developed through state legislation. Attachment orders must satisfy specific requirements proscribed by state statutes, which are, in turn, subject to the Constitutional constraints. Many states have amended their attachment statutes to comply with the US Supreme Court’s evolving due-process jurisprudence.

Grupo Mexicano deciphered

The US Supreme Court’s Grupo Mexicano decision perplexed some English commentators. The understanding of the contrasting approach will illuminate the underlying force that drove the debate among the US Supreme Court justices, which will in turn explain why English observers found it so difficult to understand.

126 CPR PD 25 para.1.1.
127 e.g. Cal CCP s.484.090(b); 735 ILCS 5/4-104.
128 e.g. NY CPLR s.6211. See Eisenberg (ed.), Debtor-Creditor Law, 2004, para.30.01(2)(b)(i) (stating that the attachment is a discretionary remedy).
129 e.g. Kornblum v Kornblum 34 AD3d 748, 749 NY Appellate Division, 2d Department 2006.
Safeguards and domestic implications

For English commentators, the justices in Grupo Mexicano appeared to neglect the layers of procedural protection that the English judge had developed.

Passages from the opinions reveal that the justices had understood the Mareva injunction according to the general principles governing ordinary preliminary injunctions. Such understanding, however, caused the justices to overlook the English Mareva injunction’s sharp focus on prevention of asset dissipation. The factual basis of the Grupo Mexicano case was that the plaintiff would not be able to collect the debt if the defendant disbursed its assets to pay out other creditors. However, this does not of itself mean that the asset is being dissipated in the context of English Mareva relief. An English judge could characterise it as “a bona-fide effort to restructure its debt”. Under such circumstances, the English court would have declined to grant freezing relief. Thus, US Supreme Court could have disposed of the case without deciding on the general issue of whether freezing relief should be available.

Nevertheless, the predominant issue in Grupo Mexicano was the remedy’s potential social impact, and not the consideration of procedural technicalities. The decision of Scalia J. warned of the proposed remedy’s potential to alter the power balance among debtors and creditors. Much less attention was paid to the particular circumstances affecting the debtor and creditor in the instant case.

International dimensions

Lord Collins noted that comity implication was neglected in Grupo Mexicano. For him, the court should have been cautious in entertaining the application, given that the case involved a foreign debtor, and its business were centred and whole assets located outside the United States. While the English freezing jurisdiction has pragmatically evolved with an eye to the international practices, the US Supreme Court’s due-process jurisprudence focused on placing formal constraints on the state court’s expansive exercise of jurisdiction. It may well be that the English pragmatism did not translate easily to the American court’s formal approach to the procedural protection of the debtor-defendants.

Ultimately, the justices in Grupo Mexicano debated on a domestic procedural controversy. American commentators saw behind Scalia J.’s restrictive approach his motive to curb the judicial activism since the latter half of the 20th century. Likewise, Ginsburg J. and other dissenting justices have been supportive of the liberal reform led by the federal judiciary.

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133 Grupo Mexicano 527 US 308 (1999) at 312 (Scalia J.), 340 (Ginsburg J., dissenting). This was the prevailing approach in the lower court decisions and academic writings: Alliance Bond Fund 143 F.3d 688, 693 (2d Cir. 1998) at 696–97; Wasserman, “Equity Renewed” (1992) 67 Wash. L. Rev. 257, 286.
The contemporary relevance of obsolete materials

The US Supreme Court justices have been chided for relying on obsolete materials. As the justices shifted their attention away from the international context, the latest English decisions dealing with worldwide *Mareva* injunctions were no longer relevant.

The proposition that the federal equity jurisdiction is bound by the English Chancery practice in 1789 is sufficient to surprise foreign observers. The point where the justices disagreed was whether the federal court is bound by the specific practices and the remedies of that time, or only by the broad equitable principles that allow a degree of flexibility. In fact, this analytical framework forms the basis of the contemporary debate over equitable power of the federal judiciary. The opinion of Scalia J. also quoted from a book published in 1835–36 by Joseph Story (US Supreme Court Justice (1811–45)):

“If … a Court of Equity in England did possess the unbounded jurisdiction, … it would be … the most formidable instrument of arbitrary power that could well be devised.”

This passage not only represents Scalia J.’s antagonism to judicial activism but also reflect the persistent fear that many contemporary Americans share against the discretionary power concentrated on the judges. In other words, these apparently obsolete materials reflected sentiments that still retain contemporary relevance in America.

Looking towards the future

This article has attempted to explain how the underlying culture or values have shaped the course of procedural innovation. The focused specialist approach in England has been more conducive to devising and developing the freezing relief than the political approach in the United States. The American emphasis on the people’s access to power and check upon the powerful also affected the nature of pre-judgment attachments and the attitude towards English freezing injunctions.

This article is not, however, intended to draw any conclusion as to which approach is superior to the other. The contrasting approaches represent the dilemma that any democratic forms of civil procedure reform must face in the globalised world. On the one hand, civil procedure must serve the people. But, on the other hand, it must be sufficiently focused to respond to the shifting needs of the day. England and the United States have placed different degrees of emphasis on these conflicting imperatives.

This article is not to suggest that this contrast is absolute, either. Though the difference is likely to remain for the time being, nobody knows for how long. The English judiciary has been increasingly drawn into social and political controversies, not least by the introduction of the Human Rights Act 1998. Political pressures are mounting in England to bring about transparency and representation in the

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judiciary. On the other side of the Atlantic, some states have since 1990s begun to adopt particularised court procedures for commercial and corporate matters.\textsuperscript{139} Predicting how the gap will play out in the future is, however, beyond this article’s scope.